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The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples

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Introduction

There is a lot of discussion about access to genetic resources and benefit sharing (ABS) these days. Countries that historically have been robbed of their genetic resources by more powerful states are determined to establish level rules of engagement that allow them a fair share of the benefits arising from use of their resources. Countries relatively poor in biodiversity, a poverty sometimes exacerbated by destructive development practices, do not want to lose access to the genetic resources of those countries rich with biodiversity. The tension between the two sides, between states of the South and the North, has led to the articulation of "fair and equitable sharing of the benefits arising out of the utilization of genetic resources" as a primary objective of the 1992 Convention on Biological Diversity (CBD). Now, more than ten years later, the discussion at the CBD has arrived at the elaboration and negotiation of an international regime on access and benefit sharing.

Unfortunately, the CBD fails to recognize Indigenous peoples as owners of a vast amount of the world's genetic resources. In fact, the CBD only recognizes states as sovereigns over genetic resources and ignores the proprietary rights of Indigenous peoples in the same territories. In the international debates, discussions about Indigenous peoples' rights are recast in watered down or bracketed language. For example, the CBD refers to "indigenous and local communities" instead of "Indigenous peoples." (1) Thus, it ignores Indigenous peoples' status as rights holders and instead demotes Indigenous peoples to the status of "stakeholders," a category that includes corporations, academic institutions, non-governmental organizations, and just about any other non-state entity.

That said, what does benefit sharing mean for Indigenous peoples? What incentive do we have to participate in these agreements, particularly if our ownership rights are sidelined or marginalized? What are the implications of participating in benefit sharing arrangements for genetic resources? How do Indigenous peoples move beyond the narrow market-oriented models being presented to them? These are some of the questions to be discussed in this chapter.

I. Conflicting Sovereignties over Natural Resources

Indigenous peoples' struggle for self-determination is occurring on many fronts, globally, nationally and locally. The corporate hunt for genetic resources within our territories raises new difficulties for those maintaining permanent sovereignty over natural resources that have long been sought after by colonial governments. Intellectual property rights are being used to turn nature and life processes into private property. Once deemed private property, genetic material becomes alienable; that is, it can be bought and sold as a commodity. This, in the eyes of many Indigenous peoples, is an attempt to legalize thievery, a thievery that we recognize as "biocolonialism" -- the extension of colonization to the biological resources and knowledge of Indigenous peoples. (3) Below, we discuss Indigenous people's right to permanent sovereignty over genetic resources and the conflict raised by the CBD's proposal for an international regime on access to our resources and the sharing of benefits that may arise thereafter.

A. Indigenous Peoples Permanent Sovereignty over Genetic Resources

The International Covenant on Civil and Political Rights, Article 1(1), and the International Covenant on Economic, Social and Cultural Rights, Article 1 (1), both state, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." (4) United Nations Human Rights Special Rapporteur Miguel Alfonso Martinez states in his study on treaties that, "Indigenous peoples, like all peoples on Earth, are entitled to that inalienable right."(5) He further explains that the United Nations Charter itself "recognizes the importance of respect for 'the principle of equal rights and self-determination of peoples' (Art. 1.2), a simple, direct and unqualified way of saying all peoples, bar none." (6)

Despite the existence of these international human rights standards, it is widely recognized that States often deny or diminish the ability of Indigenous peoples to exercise the right of self-determination. Nevertheless, the right of self-determination is the fundamental premise upon which Indigenous peoples have asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and biological resources.

Although several international human rights instruments recognize the collective nature of Indigenous peoples' rights of self-determination, (7) the U.N. Draft Declaration on the Rights of Indigenous Peoples is the international instrument that is the most representative of Indigenous thought and participation,(8) and its standards constitutes the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world. (9) The U.N. Draft Declaration states, "Indigenous peoples have the right to own, develop, control and use the lands and territories…which they have traditionally owned or otherwise occupied or used." (10)

A fundamental part of the right of self-determination is a people's exercise of permanent sovereignty over the natural resources within its territories. The right of permanent sovereignty over natural resources embodies the principle that "peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation."(11) Furthermore,

"the principle was and continues to be an essential precondition to a people's realization of its right of self-determination and its right to development." (12)

In the final report of the UN Human Rights Special Rapporteur on Permanent Sovereignty of Indigenous Peoples over their Natural Resources, Erica-Irene Daes, finds that,

the developments during the past decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories. (13)

Special Rapporteur Daes further finds that genetic resources are among the natural resources belonging to Indigenous peoples. (14) In relation to the right of permanent sovereignty over natural resources of Indigenous peoples, Special Rapporteur Daes concludes, "[I]t is a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources."(15)

B. CBD and an International Regime on Access and Benefit Sharing

Indigenous peoples' rights to the natural resources within their territories have been marginalized by the CBD. It was not the right of nation states to make agreements that undermined the rights of Indigenous peoples, agreements such as were made in the CBD. (16) Under the CBD, states are the only recognized entities with sovereignty over natural resources. The right of Indigenous peoples to permanent sovereignty over natural resources is particularly threatened by Article 15.1 of the CBD, which states, "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." Furthermore, 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.

Thus far, the only link between Indigenous peoples and genetic resources that the Parties to the CBD have been willing to make is the recognition that Indigenous peoples may possess traditional knowledge about such resources. The Parties have yet to recognize Indigenous peoples as sovereign or proprietary owners of genetic resources within their territories. Article 8(j) of the CBD 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. (17)
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 the standard for approval in terms of prior informed consent, as it does IN the case of states and access to genetic resources.

A major step towards the development of an international regime on access and benefit sharing was taken at the sixth Conference of the Parties (COP VI) held in The Hague, in April 2002. At that meeting, 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 were "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 [were] intended to help them when establishing legislative, administrative or policy measures on access and benefit-sharing."(18)

It is important to note that the vast majority of Indigenous peoples represented at COP VI, viewing their participation in the development of the Guidelines as facilitating biopiracy of their own resources and knowledge, made a conscious decision not to actively participate in the discussions on the Guidelines, and therefore later rejected implementation of the Guidelines.

Consistent with Article 15 of the CBD, which recognizes the "sovereign right of States over their natural resources", the Bonn Guidelines suggest that access to genetic resources should be controlled by competent national authorities. Paragraph 26 states:

> The basic principles of a prior informed consent system should include: . . .
> 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:

> Respecting 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 makes evident that the Bonn Guidelines promote 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 see them as serving as some basis for

a future regime. (19)

A few months after COP VI adopted the Bonn Guidelines, 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." (20) Further, UN General Assembly resolution 57/260 , adopted at is fifty-seventh session, invited COP VII to take appropriate steps with regard to the commitment made at the WSSD. (21) Then, at the CBD's Inter-sessional 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. Subsequently, at its December meeting, the ABS Working Group prepared recommendations on the terms of reference for the negotiation of an international regime and submitted those recommendations to the Seventh Conference of the Parties (COP VII), scheduled to be held in February 2004, in Kuala Lumpur, Malaysia. (22)

At COP VII, the Parties engaged in extensive discussions about the mandate and the terms of reference of the ABS Working Group and decided that the Working Group would "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 is expected to 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." (23)

For Indigenous peoples, the preambular language of the COP VII decision relating to an international regime, wherein the COP reaffirmed "the sovereign rights of States over their natural resources and that the authority to determine access to genetic resources rests with the national Governments and is subject to national legislation, in accordance with Article 3 and Article 15, paragraph 1," (24) sets a dangerous stage for future negotiation of the ABS regime. The International Indigenous Forum on Biodiversity (IIFB), which was the full caucus of the Indigenous peoples present at the COP, made an intervention in Kuala Lumpur 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 be moved.

Although Indigenous peoples are only considered observers at the COP, we vehemently insisted that the parties must recognize our rights throughout the elaboration of the international regime. In the end, Canada and Australia blocked language that had gained the agreement of the other states and was proposed by the EU. That language had stated that the international regime shall recognize the rights of Indigenous peoples. In the end, the preambular language of the decision that was adopted merely stated that "the international regime should recognize and shall respect the rights of indigenous and local

communities."(25)

At the COP VII meeting, Indigenous peoples did successfully lobby for international human rights law, as set forth 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 included in a long list of other instruments and processes to be considered as possible elements in an international regime. Although such inclusion gives some foothold for lobbying at future meetings, there is no guarantee that the regime that emerges from negotiations will be consistent with international human rights law. At past CBD meetings, Indigenous peoples have pointed out that Article 22.1 of the Convention requires that the decisions of the COP must be consistent with other international conventions, including international human rights law. (26) Unfortunately, some parties (Canada, Australia, New Zealand) and some 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.

Prior to the end of the COP VII deliberations, several Indigenous organizations in attendance sent an alert to Indigenous peoples around the world, warning them about the impending international regime:

> 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…."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." (27)

II. Case Study: An Indigenous Critique of a Benefit Sharing Agreement

Because the CBD is remiss in recognizing Indigenous peoples as sovereigns over, owners of, or rights holders in the genetic resources within their territories, an ideal framework for nurturing biopiracy has been created. Therein, Indigenous peoples are seen only as traditional knowledge holders and not as territorial rights holders whose consent must be sought before accessing resources within their territories. The much-touted arrangement involving the San peoples of the Kalahari desert in southern Africa evidences the problems in such a framework for benefit sharing.

The traditional knowledge of the San peoples about the stem of a cactus called Hoodia led the UK-based pharmaceutical company Phytopharm to a potential anti-obesity drug. The San had traditionally used Hoodia to stave off hunger while hunting. Phytopharm claimed to have discovered a potential cure for obesity derived from the Hoodia plant. South Africa's Council for Scientific and Industrial Research (CSIR) sold the development rights for Hoodia to Phytopharm, which later patented P57, the appetite-suppressing ingredient in the Hoodia. Phytopharm later sold the rights to license the drug for $21 million to Pfizer, the U.S. pharmaceutical giant, without even notifying the San,

let alone getting their consent to such transaction. Phytopharm representatives later claimed they believed the San peoples who used Hoodia were extinct. In fact, the San number 100,000 across South Africa, Botswana, Namibia and Angola. (28)

Only after CSIR and Phytopharm were widely criticized for failing to get the consent of the San or recognize the role that San knowledge had played in identifying the Hoodia's ethnobotanical properties were the San offered a benefit sharing arrangement. The San's share in the arrangement amounted to less than 0.003% of net sales and that percentage was only to come out of CSIR's share in the deal; Phytopharm and Pfizer's earnings were to go untouched. (29) In fact, Phytopharm and Pfizer were exempted from sharing any benefits directly with the San and were specifically released from any further financial demands by the San. (30) In the benefit sharing contract, the San were rewarded on a one-time-only basis for their knowledge of Hoodia and, further, were explicitly prevented from using that knowledge in any other commercial application. (31) Effectively, Phytopharm and Pfizer purchased a perpetual monopoly on the San's traditional knowledge of the Hoodia.

It is important to note that the San were compensated for their traditional knowledge and not for any right they might have in the genetic resource itself. It was the CSIR, and not the San who consented to access to the genetic resource.

Article 28 of the Bonn Guidelines promote "competent national authorities" as the appropriate gatekeepers to in situ genetic resources. In matters of access relating to genetic resources within Indigenous territories or Indigenous knowledge associated with such resources, Article 31 of the Guidelines only refers to "established legal rights" and prior informed consent regarding such access as being subject to domestic laws. Therefore, what transpired with the Hoodia was totally consistent with the CBD and the Bonn Guidelines; That is, the CSIR acted as the South African national authority granting access to the Hoodia. The indigenous San peoples had no established legal right vis-à-vis Hoodia under South African law and so their consent was not required.

The San-CSIR deal has been hailed by many as a success story for the San who are among the most marginalized peoples in southern Africa. The story has been used to promote benefit sharing as a means of poverty alleviation. The monies derived from the agreement, we have been told, are to be held in the San Hoodia Benefit Trust, to be used for health care, infrastructure and social security. (32) Additionally, a report by the German Development Institute has asserted, because the arrangement includes various San communities across southern Africa, it "strengthens the cross-border identification of the San as an indigenous people of southern Africa and may do a great deal to improve the position of the San communities in some of the other countries." (33)

What such an analysis neglects to notice is that quality health care, education, and other essential services are among the basic human rights for all peoples. Access to these fundamental needs should not be tied to a requirement for an exchange of traditional knowledge or biological resources. Furthermore, it is outrageous to promote selling a monopoly on traditional knowledge to a Western corporation so that marginalized

communities can earn recognition as Indigenous peoples. The San do not even possess complete decision-making power over their minute share of the royalties, royalties to be deposited in "their" Trust. It is instructive to note that although "their" Trust includes representatives of various San communities, the CSIR and the Department of Science and Technology also sit there, apparently as paternalistic trustees. (34)

The intent here is not to criticize the San for their participation in the benefit sharing agreement. In hindsight, it is clear that the only option presented to the San was to accept a share in the deal, or get nothing at all. And had CSIR and Phytopharm not been "caught red-handed" with the appropriation of San knowledge, the San may have simply remained unknown victims of theft. We see the case as a recent, very instructive example of the power dynamics typical when Indigenous peoples are forced to contend with the actions of colonial states and multinational corporations. The San case also illustrates how the profit potential of genetic material tends to evoke unscrupulous practices.

Indigenous knowledge systems reflect the totality of the intellectual traditions of Indigenous peoples from whom they are derived. While Western knowledge systems tend to be compartmentalized and specialized, and are often times reductionist in nature, Indigenous knowledge systems are intricately interconnected with our rich cultural heritage and the territories from which they came. And in that sense, Indigenous knowledge cannot belong to a single individual or a single generation. Thus, how could anyone possibly claim a right to sell Indigenous intellectual traditions when those traditions are a gift from previous generations and the birthright of future generations? For many Indigenous peoples, traditional knowledge is not something their community can sell because it is priceless and its value cannot be calculated in terms of or in service to economic exploitation. Indigenous knowledge passed from generation to generation is an inherent and inalienable part of a peoples' collective heritage and patrimony. When such knowledge is subjected to a benefit sharing agreement, as illuminated by the San's experience, the knowledge becomes a commodity to be bought and sold on the market.

III. Some Considerations for Indigenous Peoples Before Entering into Benefit Sharing Agreements

For Indigenous peoples, who are often the most marginalized and economically poor peoples of the world, the promises of benefit sharing agreements may be alluring. By virtue of their right of self-determination, it is of course, the prerogative of Indigenous peoples to make their own decisions about benefit sharing agreements. Inevitably, some will decide to enter into such arrangements. Those who make such decisions, whether or not they recognize it, will be accepting western legal frameworks and concepts that do not respect Indigenous laws and customs, and which, in essence, may compromise their right of self-determination. In this next section, we discuss some of these conflicts and the potential difficulties that may arise in the context of such deal-making.

A. Patents

Before entering into a benefit sharing agreement, Indigenous peoples must understand that by entering such an agreement, they are submitting to a legal jurisdiction entirely foreign to their own systems of management and protection of natural resources and knowledge. Primarily, the difference involves patents. Those who agree to benefit sharing must accept that patent laws will govern the ownership of the products derived from their genetic resources. A patent is a necessary step in securing commercial control over a product derived from a genetic resource.

Patents are a Western intellectual property right originally meant to apply to inventions. The basic tenets of patents are quite foreign to Indigenous concepts. A patent covers a novel invention, not age-old traditions; a patent is issued to an individual, not to a collective peoples; and a patent lasts for a determinate amount of time (often 20 years), after which the information in the patent becomes part of the public domain – free and open for all the world to use without penalty.

Genetic researchers and the pharmaceutical, agricultural, and chemical corporations, and academic institutions for which they work claim that "engineered organisms or molecules are separated from nature through the concepts of 'isolation' and 'purification.'" (35) Thus, in response to numerous comments asserting that genes were nonpatentable products of nature, the United States Patent and Trademark Office asserted that "the inventor's discovery of a gene can be the basis for a patent of the genetic composition isolated from its natural state and processed through purifying steps that separate the gene from other molecules naturally associated with it." (36)

Many Indigenous peoples have strongly advocated against the patenting of life. For example, in 1999, Indigenous peoples steadfastly opposed the World Trade Organization (WTO) Trade-Related Aspects of Intellectual Property Agreement (TRIPs) in a statement entitled, "No to Patenting of Life." The statement, in part, proclaimed, "Nobody can own what exists in nature, except nature, itself. Humankind is part of Mother Nature. We have created nothing and so we can in no way claim to be owners of what does not belong to us." (37)

Further, the report of the “Workshop on Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples, " in summarizing the conclusions of the Indigenous rights experts at the workshop, noted that, “Patenting and commodification of life is against our fundamental values and beliefs regarding the sacredness of life and life processes and the reciprocal relationship which we maintain with all creation.” (38)

Those words remembered, it becomes important for Indigenous peoples to evaluate whether the patenting of life, which will necessarily occur in a benefit sharing arrangement concerning genetic resources, is consistent with their fundamental values.

B. Some pitfalls in benefit sharing agreements

Indigenous peoples may be asked to establish contractual arrangements with intermediaries such as academic institutions or governments, who in turn have direct contractual arrangements with the commercializing companies. For example, the San's contractual agreement was with the CSIR; the San have no legally enforceable agreement with Phytopharm in the commercialization of the Hoodia plant. A similar arrangement was established by the University of the South Pacific (USP). The USP first entered into a bioprospecting agreement for coral reef biological resources with the Strathclyde Institute of Drug Research (SIDR) of Glascow, Scotland. (39) Then the University established a separate agreement with the villages that were regarded as the traditional owners of the reef areas. Thus, USP became the effective dispenser of the coral reef resources.

Such arrangements are obviously paternalistic, and violate the basic tenets of self-determination. These kinds of agreements treat Indigenous peoples as interested third parties and not as principals in benefit sharing agreements. In these types of arrangements, Indigenous peoples can be left with no legal means of enforcement, and their rights as owners of the knowledge and resources can be subverted. Indigenous peoples thus can be perceived as "worthy" participants in the benefit sharing discussions not because the other parties recognize their rights, but because the other parties consider Indigenous peoples a part of the trickledown system of beneficiaries that they themselves, as "principal" parties, have construed.

Another pitfall of benefit sharing agreements is that they often simply compensate Indigenous peoples for use of their associated traditional knowledge, and not for use of the actual biological resources. The only remedy for this is for Indigenous peoples themselves to be proactive in asserting their propriety rights over both their knowledge and their resources.

The interests of the Indigenous peoples involved must be reflected in any legal agreements about their traditional knowledge and resources. Otherwise, the hoped-for outcomes will never happen and never be enforceable. On the part of Indigenous peoples, this requires strong skills in negotiation as well as a comprehensive understanding of what rights and interests must be protected in the agreement. Further, Indigenous peoples must remember that even the most brilliant agreement will be a challenge to monitor and enforce on a global scale. Resources for litigation costs will be greatly outmatched by corporate/institutional opponents in the courtroom and the patent office.

It is difficult to see how benefit sharing agreements that allow for the monopolization and alienation of traditional knowledge and genetic resources under the veil of intellectual property protection can be of any meaningful benefit to Indigenous peoples. Certainly, there will be a promise of some potential income, an income that could make a difference in the lives of those terribly lacking in resources. But, at what cost? In the end, the benefits that come to Indigenous peoples are likely to be quite insignificant compared to those reaped by the pharmaceutical, agricultural or chemical companies and academic institutions with which they are dealing.

C. Culturally-based Decision-making

The potential income or other benefits derived from benefit sharing agreements may entice Indigenous peoples to commercialize their knowledge and resources, often in violation of their own cultural principles and values. The profit potential may loom large while other critical factors may remain hidden or even undisclosed.

Indigenous peoples would be wise to utilize their own frameworks for evaluating the usefulness, potential, and appropriateness of ventures that affect their knowledge, resources, and culture. One such framework, a five point test utilizing a tikanga Maori framework, has been articulated by Hirini Moko Mead (Ngati Awa, Ngati Tuwharetoa, Tuourangi) of Aotearoa (New Zealand). The tikanga framework facilitates decision-making on contemporary issues based upon the ethics inherent in Maori principles and philosophies.

Mead takes "the position that tikanga is the set of beliefs associated with practices and procedures to be followed in conducting the affairs of a group or an individual. These procedures are established by precedents through time, are held to be ritually correct, are validated by usually more than one generation and are always subject to what a group or an individual is able to do."(40) He further explains that, "They help us to differentiate between right and wrong, in everything we do and in all of the activities that we engage in. There is a right and proper way to conduct one's self." (41)

Thus, critical questions are filtered through a five-point test. If an issue fails to withstand this kind of evaluation, then it is determined that the question at hand violates the tikanga or the cultural, ethical standards of Maori.

All Indigenous peoples have their own cultural frameworks and worldviews to draw upon in making such judgments. For example, Lopeti Senituli, former director of the Tongan Human Rights and Democracy Movement, articulated the Tongan concept of "NGEIA," which means "awe inspiring, inspiring fear or wonder by its size or magnificence" and "dignity." NGEIA was central to the Tongan people's opposition to an Australian company's proposal to collect tissue samples and health data from individual consenting Tongans in the hope of identifying genes that cause diseases such as diabetes. (42) In exchange for the samples, the company, Autogen Ltd., had offered a benefit sharing arrangement that would have provided annual research funding to Tonga's Ministry of Health, paid royalties on revenues generated from any discoveries that might later be commercialized, and given whatever new therapies might be developed from the research to the Tongans free of charge. (43) As a result of the Tongan community's opposition to Autogen's proposal - an opposition based on the community's understanding of NGEIA and corresponding belief that "the human person should not be treated as a commodity" - the project did not proceed. (44)

Mead says, "A culture that sets aside its pool of tikanga is depriving itself of a valuable segment of knowledge and is limiting its cultural options."(45)

Conclusion

Nearly every aspect of what we value as Indigenous peoples – our technologies, our knowledge, the seeds that produce our foods, and our medicines – is at risk of appropriation. Indigenous peoples, and particularly our leadership, must be active in the discussions related to Indigenous knowledge and genetic resources. There is no shortage of non-Indigenous peoples engaging in these debates in various international fora, allegedly on our behalf. Indigenous peoples must remain vigilant in order to protect their peoples and territories from acts of biocolonialism. Most importantly, Indigenous peoples must be proactive in asserting their rights, particularly those based on long-established international human rights standards. We are referring to the right to free prior informed consent concerning any access to or disposition of our knowledge and resources, the right to deny access to our knowledge and resources, and the right to manage our knowledge and resources based on our own customary laws, to mention a few examples. Legal historian, Steve Newcomb (Shawnee/Lenape) reminds us that, "We have to make the case that they have to respect our systems of law. There isn't 'the law' - there's our law and their law. We have to articulate what our law is as far as the protection of our genetic materials, and make that case, and resist their system and their law with every fiber of our being." (46)

Endnotes

1. See Convention on Biological Diversity, Article 8(j). Online at <http://www.biodiv.org>.

2. See Decision VI/24: Access and benefit-sharing as related to genetic resources, UNEP/CBD/COP/6/6, para. 56 ("The involvement of relevant stakeholders, in particular, indigenous and local communities, in the various stages of development and implementation of access and benefit-sharing arrangements can play an important role in facilitating the monitoring of compliance.").

3. For more discussion on "biocolonialism," see Harry, D. et al, Indigenous Peoples, Genes and Genetics: What Indigenous People Should Know About Biocolonialism., 2000. Online at <http://www.ipcb.org>.

4. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, adopted Dec. 19, 1966, entered into force Jan. 3, 1976, 999 U.N.T.S. 3.

5. Martinez, M.A., Study on treaties, agreements and other constructive arrangements between States and indigenous populations, Final Report of the Special Rapporteur, E/CN.4/Sub.2/1999/20, para. 256.

6. Ibid., para. 210.

7. See Convention 169 Indigenous and Tribal Peoples Convention, 1989, of the International Labor Organization available at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169, and The Draft of the American Declaration on the Rights of Indigenous Peoples of the Organization of American States, draft approved by the IACHR at the 1278 session held on 18 September 1995. For latest revisions, see online at: http://www.oas.org/consejo/CAJP/Indigenous%20documents.asp.

8. Venne, S.H., Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights, Theytus Books Ltd: Canada,1998, p.137.

9. Ibid.

10. United Nations Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994 (Article 26).

11. Daes, E.-I. A., Indigenous Peoples' Permanent Sovereignty Over Natural Resources, Final Report of the Special Rapporteur, E/CN.4/Sub.2/2004/30, para. 6, July 13, 2004.

12. Ibid.

13. Ibid., para. 39

14. Ibid., para. 42

15. Ibid., para. 40

16. For a compilation of relevant legal standards concerning Indigenous lands and resources, see Daes, E.-I. A.,Indigenous Peoples and Their Relationship to Land, Final Working Paper Prepared by the Special Rapporteur, E/CN.4/Sub.2/2001/21, Annex. For a summary about the recognition of Indigenous peoples' sovereignty, see Daes,E.-I.A., work cited in note (11), para. 20-30.

17. The text of Article 8(j) states that, "Each Contracting Party shall, as far as possible and as appropriate: . . . 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".

18. Secretariat of the Convention on Biological Diversity, Access to Genetic Resources and Benefit-sharing: Bonn Guidelines. Webpage available at <http://www.biodiv.org/programmes/socio-eco/benefit/bonn.asp>. Viewed December,

2004.

19. Ibid.

20. United Nations, Plan of Implementation of the World Summit on Sustainable Development, para. 44(o). In United Nations, Report of the World Summit on Sustainable Development, A/CONF.199/20*, 35. Âvailable online at <http://www.johannesburgsummit.org>.

21. United Nations General Assembly Resolution 57/260, 20 Dec. 2002, para. 8 , Available online at <http://www.un.org/Depts/dhl/resguide/r57.htm>.

22. Report of the Ad Hoc Open-ended Working Group on Access and Benefit Sharing on the Work its second Meeting, 10 December 2003, UNEP/CBD/COP/7/6.

23. International Regime on Access to Genetic Resources and Benefit-Sharing, UNEP/CBD/COP/7/21, Decision VII/19 D., p. 300.

24. Ibid., p. 299.

25. Ibid., p. 300.

26. 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."

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