

Reflecting on Reflections

Has anything been achieved at the fifth meeting of the Working Group on Access and Benefit Sharing? With a co-chair's reflection and compendium consisting of compiled proposals, many of us are wondering what, if any progress has there really been? During opening statements by the Executive Secretary and the Working Group's

Co-Chairs, they each stressed that the Working Group's time was ticking with only 10 working days left to fulfill its COP8 mandate prior to COP9. Although the Working Group galloped through the various agenda items, appearing to cover a lot of ground, it all seems like it was a lot of talk and not much action. The Like Minded Mega-diverse Countries and the African Group made every attempt to lift some of the numerous brackets from the Granada annex as a starting point of negotiations towards developing legally binding elements of an international regime. We all know that the (over)developed states do not want to negotiate any legally binding regime, and certainly not in the CBD. For example, Australian proposals on compliance focused on leaving all dispute resolution to the "flexibility" of contract law, and Japan and others promote WIPO and the WTO as the appropriate forums for any discussions that impact on patent law.

Today's ECO

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**ECO and the CBD Alliance
thank Swedbio, CIDA, and
Hivos/ Oxfam Novib
Biodiversity Fund for their
on-going support!**

With all the political games between North and South, the only thing that has become clearer to me is that the winners continue to be the biotech industry, and the real losers in this whole regime, whatever it turns out to be, will be Indigenous peoples. On one hand, you've got the Canadian government denouncing the United Nations Declaration on the Rights of Indigenous Peoples and maintaining that Article 31 recognizing our rights over our territories, lands and resources, including genetic resources, will not serve as a minimum standard for Indigenous peoples' rights in any international regime on ABS. And on the other hand, you've got "convergence" that traditional knowledge protection should be "subject to national legislation," which leaves most Indigenous peoples and local communities unprotected. In addition, there is the South's intensive push for an internationally recognized certificate of origin/source/legal provenance/compliance with national law, which seems to find security in barcoding genetic material as an anti-biopiracy measure. I find myself wondering whether stamping genes with unique identification numbers will really solve any of our problems, and furthermore how would you barcode something intangible like traditional knowledge?

Two points become clearer and clearer after each ABS meeting that I attend:

- 1) As long as the international regime hinges on national sovereignty of states over genetic resources, without recognizing Indigenous peoples' right to control access to their own territories and traditional knowledge, this proposed regime will only legitimize biopiracy; and
- 2) No matter what rights Indigenous peoples are "granted" in an international regime or national ABS legislation, the commodification of life and traditional knowledge will continue, the only thing that will change is that we will be invited to participate as full partners in selling our own cultural heritage, all under the banner of self-determination.



Bioprospecting in Hawai`i

Malia Nobrega - Na Koa Ikaika o ka Lahui Hawaii

Hawai`i's most valuable resource is our biodiversity. Of more than 22,000 known species that inhabit our islands, 8,850 are found nowhere else in the world. These resources come from the many levels of our *lewa lani*, our highest points, to the many depths of our ocean. Our biodiversity is the basic building blocks for who we are as a people and are very critical components to our culture. Biogenetic resources are not just tools to Native Hawaiians. Our natural resources are cultural resources as well as genealogical links to our creation. Hawai`i can't have one resource without the other.

The Association of Hawaiian Civic Clubs (AOHCC) is a confederation of fifty-two (52) Hawaiian Civic Clubs and is the oldest community based grass roots Hawaiian organization in Hawai`i, having been formed in 1918 by the then non-voting Delegate to the United States Congress Prince Jonah Kuhio Kalaniana`ole.

The AOHCC has adopted three resolutions originating from Waikiki Hawaiian Civic Club, relating to research at the University of Hawai`i (UH) and the collective intellectual property rights of Native Hawaiians. One resolution adopted in 2002 calling for regulation of bioprospecting spawned bills introduced to the Hawai`i State Legislature. Two other resolutions passed in 2003 related to the collective intellectual property rights of Native Hawaiians as well as a proposed Hawaiian Genome Project at the UH Medical School. Collectively, these three Civic Club resolutions and the Paoakalani Declaration evidence a strong conviction of the Hawaiian community to protect Hawai`i's biological resources and our related rights. The resolutions and

the Declaration also indicate our concern regarding activities of the University and its researchers to undermine our rights.

In 2002, the Hawaiian community became very concerned about a bioprospecting contract between the University of Hawai`i's Marine Bioproducts Engineering Center (MarBEC) and Diversa Corporation, a San Diego-based biotechnology company. The contract gave Diversa exclusive rights to discover genes from existing material collections and from environmental samples collected by MarBEC researchers in and around Hawai`i. This activity by the University goes unregulated by State law, although the researchers they purport to transfer are State resources. With regard to marine resources, all of which are resources of submerged lands, the University's action constitutes the sale of public trust assets from the Ceded Lands Trust.

In the Diversa contract, the University "represents and warrants that it has the rights to provide such Material to Diversa without the violation of any applicable statute, regulation, agency rule, administrative or judicial order or contract." Under Hawai`i law, native Hawaiians and the general public are the beneficiaries of the Ceded Lands Trust and natural resources thereon. This Land Trust compromises about a quarter of the total land mass of the Hawaiian Islands, which prior to United States' military invasion in 1893 was under the sole jurisdiction of the independent Kingdom of Hawai`i, the sovereign government of the Hawaiian peoples.

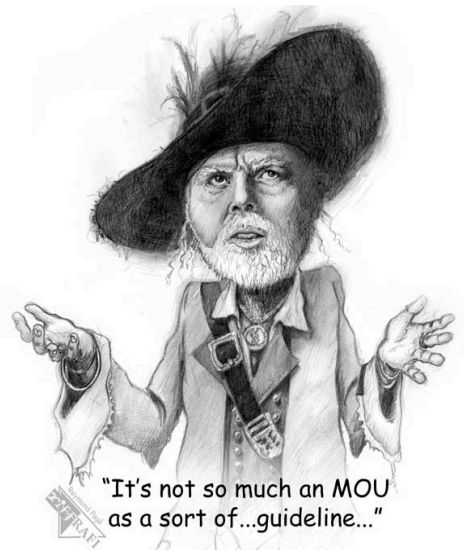
In 2005, the Hawai`i State Legislature passed a resolution

requesting the Legislative Reference Bureau (LRB) to conduct a study of the multiple issues related to Bioprospecting and make recommendations to the Legislature regarding the development of public policy, stating specifically that the study shall include:

(1) *Identification and development of issues and policies for:*

- a. the conservation and sustainable use of biological diversity
- b. the responsible regulation of bioprospecting and biotechnology
- c. the rights of traditional, indigenous knowledge holders
- d. the fair and equitable sharing of benefits arising from research, indigenous knowledge, intellectual property, or application of biological resources; and
- e. the meaningful participation of these processes by traditional, indigenous knowledge holders.

(2) *Reviews policies, laws, litigation and outcomes and models of other jurisdictions,*
(continued p. 4)



Artist: Reymond Pagé
From www.etcgroup.org

Wai 262, and the Bio-piracy regime: Reality right now for New Zealand Maori

Sandy Gauntlett – Pacific Indigenous Peoples Environment Coalition

As Parties debate the form of a potential Access and Benefit Sharing regime, perhaps it is time to consider the reality right now for one of the Indigenous Peoples with a lot to lose from the wrong decisions. Maori are the indigenous peoples of Aotearoa, a country known better by its colonial name of New Zealand. We are one of the few indigenous peoples in the world that have a single treaty of colonization in our history. On the face of it, you would think that would put us in a powerful position in relation to recognition of our rights and for many years, our country and its peoples were held up to the world as an example of how a successful race relations regime would operate. Of course those of us living and working in our communities experienced first hand that things were not quite the perfect picture held up for the world to see; although it is probably fair to say that many of us thought we were more fortunate than many of our brothers and sisters living under the yoke of colonialism in other countries. Recent events in our country have shaken that sense of comfort with our situation and have united Maori like never before.

To get a better picture of the demographics and reality of our country here are some of the statistics. New Zealand is a country roughly the size of the United Kingdom. The total population of the country is around 4.4 million people; with about 17% of that being Maori. There are also sizable Pacific Islands and Asian populations. The Maori population is divided into literally dozens of tribes and subtribes with large concentrations within the major

cities of the North Island in terms of residency

About 15 or 20 years ago when the decline in our forests, fisheries, bird species and shellfish could no longer be tolerated, several tribal groupings got together and registered a claim to the indigenous flora and fauna of New Zealand because we believed that the short sighted policies of successive governments had placed our biodiversity under severe threat. That claim eventually became registered on behalf of all tribes under the Waitangi Tribunal (the NZ land claims settlements process) and was given the claim number of Wai 262. Over the last year or so final hearings have been held on the claim and a decision is pending from the tribunal. Should the claim be successful (and we are optimistic), it will change the face of biodiversity conservation in New Zealand (and possibly the world) forever because the indigenous peoples will again be managers of our genetic resources.

Over recent months the New Zealand Government has been holding a series of regional consultations on what form a national regime on bio-prospecting should take. Many Maori believe that not only is this a premature move in light of the pending decision from the tribunal, it is a conscious attempt to pre-empt that decision. The passage of the foreshore and seabed act some 3 years ago had considerably increased the level of distrust amongst Maori communities of Governmental processes. The level of anger that generated amongst Maori has resulted in the formation of the Maori party and its

capture of four out of seven Maori seats (running a close second in the other three)

Even if the current consultations on a national regime were not related to the Wai 262 claim, the discussions before ABS-5 pose grave dangers to the sovereignty of Maori in that they might well result in an international regime that entrenches the NZ Government as manager of biodiversity, even though they may not fully own those resources once the Waitangi Tribunal renders its decision!

Maori distrust of the NZ government has also increased after it was one of only four governments that actively voted against the declaration on indigenous rights. Could I be wrong? Of course. And to be honest I hope I am; I would like to spend the last years of my life without feeling like I have to check every last little detail of government policies for a hidden agenda. But the history of colonization in my country has often not been either open or kind and for me colonial processes can be a little like domestic violence: the abuser always says the wrongs are in the past and that they have learned their lesson and unfortunately too often we forgive them because we have convinced ourselves that we love them (or other platitudes we use to convince ourselves they might be right).

The NZ government should postpone its discussions of a national regime on bioprospecting until after the Tribunal delivers its' results.

ECO NOTES

Hawai'i bioprospecting Continued from p. 2

(3) Preparation of a report addressing the issues of (1) and (2) and appropriate legislative proposals

(4) Compilation of an inventory of current bioprospecting research projects and activities that are public

In 2006, a resolution was adopted requesting the establishment of a temporary advisory commission on bioprospecting. This resolution does the following:

(a) request the commission to make recommendations for policy development in the area of-

- prior informed consent
- equitable benefit sharing

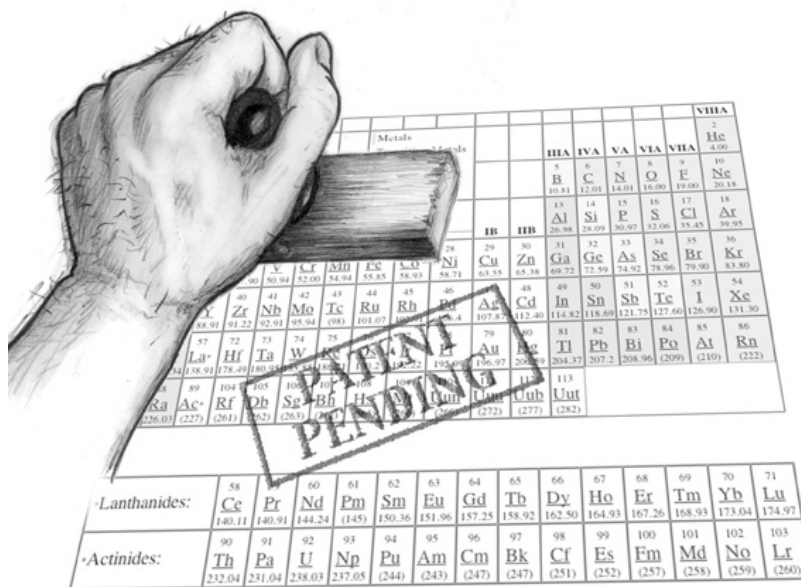
- bio-safety protocols
- a permitting and licensing process
- cultural rights for the use of Hawai'i's biodiversity

(b) members represent various rights-holders and stakeholders

- Chair of Board of Trustees of the Office of Hawaiian Affairs or designee
- President of the University of Hawai'i or designee
- Director of the Department of Business and Economic Development or designee
- Chair of the Board of Land and Natural Resources or designee
- 5 members of native Hawaiian community residing in the state of Hawai'i

- 2 reps from the biotech industry

The Commission continues to meet and Native Hawaiians continue to advocate for their rights throughout the process. We continue to remind the State that indigenous peoples are the owners of their genetic resources and associated traditional knowledge. We also affirm that both traditional knowledge and genetic resources are closely interrelated and cannot be separated. Without recognition of our rights, there can be no access.



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ECO has been published by the NGO (non-governmental organisation) community at most Conferences of Parties to International Environmental Conventions. It is currently being published at the Fifth Open Ended Working Group on Access and Benefit Sharing to the Convention on Biological Diversity in Montreal, Canada coordinated by the CBD Alliance. The opinions, commentaries, and articles printed in ECO are the sole opinion of the individual authors or organisations, unless otherwise expressed.

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