

A/Prof Daniel Robinson (UNSW), and Dr Margaret Raven (Macquarie University)

Customary laws and community protocols in the Pacific: Next steps under the Nagoya Protocol

A binding international regulatory regime over biodiversity-related Indigenous knowledge (IK) was established through The Nagoya Protocol to the Convention on Biodiversity (CBD), which entered into force in October 2014. The Nagoya Protocol encourages the creation of Biocultural 'Community Protocols' (BCPs)(Article 12). However, the Nagoya Protocol does not assure regulatory improvements unless there is adequate implementation.

This paper considers the new impetus under the Nagoya Protocol to the Convention on Biological Diversity¹, to encourage recognition of customary laws and community protocols relating to genetic resources and associated traditional knowledge. In the Pacific there are several countries that have signed and/or ratified the Nagoya Protocol. Given the prevalence and relative strength of customary systems there is considerably opportunity for the documentation and recognition of customary law, compared to some other regions/countries. This paper considers efforts being made under the *Custom Land Management Act No.33 of 2013*² for codification of custom in Vanuatu, which has led to codification of custom in some provinces. It also considers new laws such as the *Traditional Knowledge Act* in the Cook Islands and its relevance for recognising custom owners of TK. Given that we are in the early stages of two research projects in the Pacific, we provide a basic framework for analysis and potential next steps for relevant work and research in these countries.

Patent Landscape Mapping: identification of 'species of interest'

Patent landscape mapping, by Robinson and Raven³, of 321 Australian native 'economic plants' with known Indigenous use uncovered over 1300 patents and applications. This mapping process, undertaken with the additional use of ethnobotanical texts to identify further misappropriation, assists in identifying 'species of interest' which can form the basis of case studies to explore the implementation of the Nagoya Protocol.

The initial mapping, for example, highlighted the existence of an Australian patent over *Pittosporum angustifolium* (traditionally known as gumbi gumbi) in relation to processes and extracts of the plant. The patent itself directly cites Indigenous knowledge and broadly relates to treatment of sicknesses. It also found patents over *Alphitonia excels* (Soap Tree or Red Ash) and *Nymphaea gigantea* (Giant Waterlily or Blue Waterlily) which was also used for ailments. Through research we found extensive literature for these species, which published Indigenous knowledge to which the patents relate. More information on initial findings of these 'species of interest' case study and patent mapping can be found our publications⁴.

The ARC Discovery Project will undertake further analysis of patents that have been lodged over species across the Pacific, with specific focus on species in Vanuatu and the Cook Islands. Thousands of patents have been identified relating to plants found in the Pacific that have traditional knowledge associated with them, particularly as medicinal plants. Many of these plants are found across the region and so there are varying customs and different uses of the plants. Further detailed analysis of traditional uses and of the patent claims in underway now.

Nagoya Protocol and Pacific Islands Implementation

Two articles of the Nagoya Protocol provide particular impetus for future research. Article 7 of the Nagoya Protocol directs Parties to take measures to ensure that TK associated with genetic resources held by Indigenous and local communities is 'accessed with the prior and informed consent or approval and involvement of these' communities and that 'mutually agreed terms have been established'⁵. Additionally, Article 12 of the Nagoya Protocol directs Parties to take into consideration Indigenous and local communities customary laws, community protocols and procedures with respect to TK associated with genetic resources⁶.

Vanuatu ratified the Nagoya Protocol in 2014 and is now seeking to implement it. And while the Cook Islands are yet to sign the Nagoya Protocol; it has some of the legal foundations for implementing this provision.

In Vanuatu the *Custom Land Management Act* formalises the recognition of customary institutions, the 'nakamals' and 'custom area land tribunals', whereby 'final decisions reached by these customary institutions, when appropriately recorded, become recorded interests in land which are binding in law and are not subject to appeal, or judicial review, by, any Court of law'⁷. The Act has as dispute resolution provision and has been undergoing some revisions. The Act is relevant for ABS because it will help define more clearly who has 'established rights to provide access to genetic resources' and associated TK.

Additionally, the Cook Islands *Traditional Knowledge Act* No. 7 of 2013 gives 'legal recognition to rights in traditional knowledge of the traditional communities of the Cook Islands' and 'help those communities, and holders of those rights, to protect those rights for the benefit of the people of the Cook Islands'. Despite being in force for a few years, there are not yet implementing regulations for the Act and so it is only partially implemented.

The approaches taken by both Pacific Island States include the use of national legislation to recognise customary laws and practices. Both of these can assist with forming part of a network of mechanisms to implement the Nagoya Protocol.

Future work

The ARC Discovery Project *Indigenous Knowledge Futures: Protecting and Promoting Indigenous Knowledge* seeks, over the next five years, to:

- understand the commercial uses and misappropriations of Indigenous knowledge to help inform the implementation of the Nagoya Protocol;
- understand Indigenous perspectives and customary laws surrounding 'species of interest' in Australia, Vanuatu, and the Cook Islands where companies are researching and developing products for commercialisation, and which have associated IK; and
- explore the advantages and disadvantages of using community protocols and other tools for IK regulation, the risks they entail, whether they achieve their desired outcomes, and to identify the circumstances that facilitate or hinder real benefits for Indigenous peoples.

As part of this we are in the initial engagement stages of the research in Vanuatu, the Cook Islands and communities across the north of Australia. This has included seeking research

permits, visiting communities in these locations, and engaging in discussions about the research.

Funders and Partners

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- The ABS Capacity Development Initiative
- SPREP (Secretariat of the Pacific Regional Environment Programme)
- UN Environment
- Department of Environmental Protection and Conservation, Vanuatu
- Vanuatu Cultural Centre
- Cook Islands partners to be confirmed.

¹ Secretariat of the Convention on Biological Diversity, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, (2011)

² This includes amendments as set out in *Custom Land Management Act (Amendment)(No.12 of 2014)*

³ Robinson, D.F. and Raven, M. Identifying and Preventing Biopiracy in Australia: Patent trends for Plants with Aboriginal uses,' (2017) *Australian Geographer*, 48(3): 311-331. (2016)

⁴ Robinson, D; Raven, M; and Hunter, J The Limits of ABS laws: Why gumbi gumbi and other bush foods and medicines need specific indigenous knowledge protections, (2018) in Lawson, C. and Adhikari, K (eds) *Biodiversity, Genetic Resources and Intellectual Property: Developments in Access and Benefit Sharing*, pp: 185-207.

⁵ Secretariat of the Convention on Biological Diversity, above no 1, pg 7.

⁶ Secretariat of the Convention on Biological Diversity, above no 1, pg 9.

⁷ *Custom Land Management Act No.33 of 2013*, pg 4.