

Evolving Benefit Sharing Regimes – A Way Forward

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New Zealand Context

Aotearoa has been contemplating options regarding bioprospecting and benefit sharing for some time since the early 2000s, and in 2002 the Ministry of Economic Development produced a discussion document: *Bioprospecting in New Zealand – discussing the options*.¹ When considering the ratification of Nagoya Protocol,² the New Zealand Government decided that it needed flexibility to meet its Treaty of Waitangi obligations, especially after the *Ko Aotearoa Tēnei* (WAI262) report.³

As biodiscovery continues at pace, there has been renewed interest in ensuring benefit sharing from biodiscovery and any potential gains from it. This is particularly important for Māori when there is biodiscovery of taonga species. Furthermore, there has been increasing uptake in the usage of mātauranga Māori for commercial purposes with kaitiaki receiving little benefit in return. Interest is growing in ensuring that Aotearoa meets its national and international commitments.

International Context

The Convention on Biological Diversity (CBD) is currently negotiating a multilateral benefit sharing system for the use of Digital Sequence Information (DSI). The aspects of the mechanism which are

currently being discussed are: the governance of the multilateral fund, interoperability across different systems, international agreements and conventions, incentives to participate in the fund, the kinds of benefit sharing the mechanism should support, modalities and priorities for fund disbursement, who should host the fund, trigger points for contributions to the fund, and monitoring of benefit sharing outcomes from the fund. The fund discussions are currently deliberating on the need to prioritise the interests of Indigenous Peoples and Local Communities (IPLC), in recognition of their special relationship with biodiversity conservation, through direct funding.

The recent World Intellectual Property Organization (WIPO) Diplomatic Conference on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (GRATK) has discussed the need for a multinational treaty on disclosure of the use of GRATK within patents. The discussions held have covered whether a disclosure requirement for the IPLC origin of the GRATK within patent applications is necessary, and whether an information system to operationalise the exchange of data on GRATK among patent offices will be useful.

The discussions also considered whether DSI would be covered under genetic resources (GR) for the purposes of the treaty. The Final Act, a precursor to ratifying the new WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge (the Treaty), was signed on the 24th of May 2024. It confirmed the need for a disclosure requirement of country of origin for the use of GR, and where there is Associated Traditional Knowledge (ATK) disclosure of the relevant IPLC who provided the TK is also necessary. DSI has not been specifically mentioned in the Treaty due to the difference of opinions between the Parties.

Below is an example of how Brazil has implemented their international obligations, such as those discussed above, into domestic law. In developing a biodiscovery regime, Aotearoa can draw on the experiences of other nations. Each country has particular needs and requirements for legal and policy regimes, so Aotearoa can forge its own path in a unique way, while ensuring compliance with its international obligations, and forming a biodiscovery and benefit sharing regime.

Example: Brazilian government legislation on access to biodiversity

In 2015 the Brazilian Federal Government introduced legislation to address the protection of its biodiversity and genetic resources. Brazil is home to over 20% of the world's biodiversity and is one of the most biodiverse countries on the planet. The Law addresses the protection of genetic heritage in Brazil, which includes 'Associated Traditional Knowledge' (ATK), encompassing all "information or practice of indigenous population, traditional community, or traditional farmers on the properties or direct or indirect uses associated with genetic heritage".⁴ ATK is characterized in two ways: of identifiable origin – in which it is possible to link its origin to at least one indigenous population, traditional community, or traditional farmer; and of unidentifiable origin – when this linkage is not possible. In the case of ATK with identifiable origin, no research can be initiated before obtaining prior informed consent.⁴

The National Fund for Benefit Sharing (FNRB) was established to receive the money from benefit

sharing and fines and aims to support actions and activities that acknowledge the value of genetic heritage and associated traditional knowledge, and promote its use in a sustainable way.⁵ When benefit sharing comes from genetic heritage or ATK with unidentifiable origin, the Federal Government is indicated as the recipient of the benefit sharing to be deposited in the FNRB, which is set at 1% of annual net revenue obtained from the use of the TK resource. When the economic exploitation comes from ATK of identifiable origin, the deposit in the FNRB will be 0.5% of the annual net revenue, in addition to the amount negotiated directly with the user.⁵

In addition to the Monetary Benefit Sharing, the legislation also provides for Non-Monetary Benefit Sharing, which can be done by implementing projects for conservation or sustainable use of biodiversity or for protection and maintenance of associated traditional knowledge; technology transfer; distribution of the product in the public domain; training of human resources and free distribution of products in social interest programs.⁵

Principles for Benefit Sharing

In moving towards such a regime, these following principles should inform its development:

1. Support the sustainability of taonga

Fund should support biodiversity and/or mātauranga

2. Make visible relationships with taonga

Provenance information for iwi, hapū and kaitiaki should be recorded

3. Promote direct relationships with iwi, hapū, whānau, and/or kaitiaki

Bilateral agreements should be used as much as possible

4. Recognise monetary and non-monetary benefits

Benefits should be shared with first movers and the broader kaitiaki community

5. Recognise multiple interests

Benefits shared with first movers as well as the broader kaitiaki community

6. Ensuring benefit-sharing from use of taonga

Develop multilateral mechanisms – ensure a pathway for benefits for challenging contexts (multiple stakeholders)

7. Recognise rangatiratanga and rights to taonga

Māori governance of multilateral mechanism

8. Moving up the benefit chain

Create opportunities for Māori to benefit across all parts of the value chain

Using a hybrid approach, it is possible to harness the benefits of access and benefit sharing (ABS) systems within the Nagoya Protocol and also the proposed multilateral mechanism for Digital Sequence Information (DSI) in the CBD.⁶

Figure 1 outlines this hybrid approach which allows for both direct benefit to mātauranga holders through bilateral agreements, and also for a multilateral mechanism that provides a ‘*Kaitiaki fund*’, which is accessible to the wider Māori population.

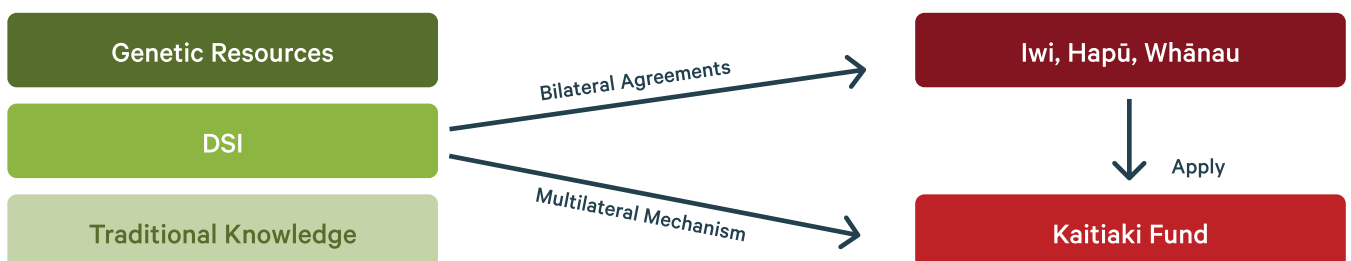


Figure 1: Hybrid Approach to Benefit Sharing

Table 1 provides an example of what financial benefits might look like and financial benefits that could be shared with kaitiaki, and whānau, hapū,

and iwi. Note, the amounts are double that which is required by the Brazilian legislation.

Agreement Type	Possible Bilateral NZ	Possible Multilateral NZ	Proposed Multilateral CBD	Actual Multilateral Brazil	Actual VariantBio
Genetic Resources	1.5%	2.0%	1.0%	1.0%	4.0%
Digital Sequence Information	1.5%	2.0%	1.0%	1.0%	4.0%
Traditional Knowledge	Direct Negotiation	1.0%	TBC	0.5%	N/A

Table 1: Benefits resulting from bi-/multilateral agreements mechanisms

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