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Toward Global Justice through Benefit-Sharing

By ROGER CHENNELLS

Biopiracy” is a critical term coined to describe the practice of “bioprospecting,” which falls short of today’s ethical and legal standards. While bioprospecting is the age-old search for natural chemical products, biopiracy conjures up lurid images of ruthless perpetrators, ill-gotten riches, and plundered victims. These terms have emerged since the Convention for Biological Diversity was approved in 1994 by 191 countries. The CBD aims to conserve biological diversity, to sustainably use its components, and to equitably share “benefits arising out of the use of genetic resources.”

Conventions state shared principles but do not themselves provide protection. That depends on legislation enabling the components of a coherent international access and benefit-sharing regime. Right now, only a handful of countries in Africa and Asia are pursuing this kind of legislation. Joseph Millum endeavors in this issue to resolve one of the thorny questions in the negotiation of this regime—namely, “How should the benefits of bioprospecting be shared?”

Current good practice holds that benefit-sharing agreements be negotiated with the local community in a process that ensures “prior informed consent,” and that benefits be shared in return for access to both genetic resources and use of the community’s associated traditional knowledge. Millum focuses on the moral justification for this practice, in light of doubts over communities’ formal ownership of organisms and the fact that much traditional knowledge is both in the public domain and the result of past, not current, individual effort. Using idealized cases, he seeks to defend the practice of benefit-sharing from within a Western understanding of property and justice—and in my view, succeeds admirably.

After concluding that an indigenous community holds rights in biodiversity as “common” (as opposed to private or collective) property, he ponders who may decide to grant access, for what price, and how and with whom the benefits are to be shared. He notes that the national government “might not represent fully the interests of such communities,” which understates the harsh reality that most indigenous peoples are politically powerless. Their interests are seldom served by their states, which under Article 15 of the CBD have sov-

eign rights over biological resources. Millum also acknowledges that identifying “legitimate decision-makers” in indigenous communities is a practical concern and that indigenous governance is often unclear or in flux. But unanimous consent is possible with indigenous peoples if companies work with organized communities, not individuals or small groups.

Millum’s simplified economic model of bioprospecting is useful but conflates the economic implications of access to resources with sharing traditional knowledge. It also does not encompass the entrepreneurial reality of commercial bioprospecting. In practice, access to resources requires governmental permission to take samples from a region. Traditional knowledge, however, is a crucial ingredient in bioprospecting, having the power to expedite both research cycles and the identification of potential products. Granting or denying access to it is also more clearly within a community’s power, which should influence the way negotiations around the quantification of future benefits are structured. The gathering of biological materials, if associated with applying traditional knowledge, feeds into a research process that might isolate a mere handful of potential products, all of which require further work (patenting) before any realistic quantification of future benefits can be made. Bearing these delays in mind, initial “*ex ante*” payments (as Millum calls them) should provide access to resources, with further negotiations if and when specific products emerge. Benefit-sharing agreements along these lines would assume the nature of joint ventures, rather than one highly charged negotiating contest.

Millum makes useful suggestions about other conundra, such as the inconveniently overlapping political and geographic boundaries of biodiversity. But in discussing community rights over land, he questions them: “Merely occupying land does not give someone property rights over it.” Indigenous peoples will object to this notion, redolent as it is of the colonial theory of “*res nullius*” that justified centuries of dispossession of land that indigenous peoples had occupied for millennia according to their own customs.

Moral issues are central to achieving the equity and fairness advocated by the CBD. Benefit-sharing is not only consistent with Western notions of property, as Millum shows; it also improves resource distribution in the world, and thus contributes to global justice.

Roger Chennells is a human rights lawyer with the firm Chennells Albertyn in South Africa. He represents the San peoples in the Hoodia case.