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Dr Ruth Adler
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By email:

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Dear Dr Adler,

Ratifying the Nagoya Protocol

The Environmental Defender's Office NSW ('EDO') welcomes this opportunity to express its strong support for Australia ratifying and becoming a party to the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation* ('the Protocol') of the Convention on Biological Diversity. We note the Protocol opened for signature on 2nd February 2011.

General comments

The Protocol is the culmination of six years of negotiations surrounding the third and final objective of the Convention on Biological Diversity ('CBD'), that is, 'the fair and equitable sharing of the benefits of arising out of the utilisation of genetic resources'.¹ A failure by Parties to the Convention to effectively implement this third objective has been addressed through a number of measures and mechanisms since the adoption of the CBD, including a Panel of Experts on Access and Benefit-sharing, an Ad Hoc Open-ended Working Group on Access and Benefit-sharing, and in 2002, the adoption of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*.²

The introduction of each of these mechanisms highlighted the need for a more robust and legally-binding regime for Access and Benefit-sharing ('ABS') under the Convention. For this reason, the EDO affirms the legal certainty and clarity brought by the Protocol and views this as the primary advantage of a decision by the Australian Government to ratify the Protocol.

Subsequently, the Protocol secures a number of rights for indigenous peoples that previously relied upon voluntary action by Parties to the Convention. In particular, the EDO draws attention to the adoption within the Protocol of rights secured for indigenous peoples under the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), such as the right to

¹ See *Convention on Biological Diversity* website, 'About the Convention' page, at <http://www.cbd.int/convention/about.shtml> (as at 13 April 2011).

² See *Convention on Biological Diversity* website, 'Nagoya Protocol: Background' page, at <http://www.cbd.int/abs/background/> (as at 13 April 2011).



maintain, protect and develop their cultures,³ the right to participate in decision-making,⁴ the requirement that States consult and cooperate in good faith with indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them,⁵ and the right to maintain control and protect traditional knowledge.⁶ Considering the previous declaration by the Australian Government of its support for UNDRIP, a failure to ratify the Protocol would appear to undermine this public commitment to uphold the rights of Indigenous peoples in Australia.

With specific reference to ABS, the Protocol includes provisions for indigenous people and affirms indigenous rights over biological resources, and over the traditional knowledge ('TK') associated with the utilization of those resources. The Protocol obliges Parties to take action to recognise and protect indigenous rights and interests and make policies based on the principles of prior informed consent ('PIC') and access to resources and TK upon mutually agreed terms ('MAT'). Parties are also obliged to consult and work in partnership with Aboriginal people as relevant laws and policies are developed. The EDO upholds these elements of the legally-binding ABS regime as crucial to rectifying the failures of the existing regime and achieving the third objective of the CBD.

The EDO also takes this opportunity to emphasise the urgency with which the Australian Government should act in signing and ratifying the Protocol, and notes that signature does not result in any positive legal obligation but merely indicates the Party's 'intention to take steps to express its consent to be bound at a later date'.⁷ The Protocol plays a crucial role in the advancement of the Convention's third objective and 'will create incentives to conserve biodiversity, sustainably use its components and further enhance the contribution of biological diversity to sustainable development and human well-being'.⁸ Until the Protocol comes into force, these benefits cannot be realised, and the effectiveness of the CBD as an international framework for the protection and conservation of biological diversity is impaired.

For these reasons, and acknowledging that the Australian Government has recognised the need for a binding international ABS regime and expressed its commitment to accept the outcome of the Nagoya negotiations, the EDO urges the Government to refrain from any further delay in signing and ratifying the Protocol. This action will similarly demonstrate Australia's willingness to take a leadership role in implementing and enforcing international legal frameworks for the recognition of the rights of indigenous people.

Weaknesses within the existing Australian regime for ABS

The Australian Government's response to the need for a national regime for ABS under the CBD prior to the Protocol, has been in the form of legislative and policy arrangements, primarily through the intergovernmental agreement, the *Nationally consistent approach for access to and the utilisation of Australia's native genetic and biochemical resources* ('Nationally Consistent Approach'). Under the agreement, it has been the responsibility of the state and territory governments to ensure the general principles established by the Nationally Consistent Approach are implemented.

³ See *United Nations Declaration on the Rights of Indigenous Peoples* 2007 Article 11.

⁴ Article 18.

⁵ Article 19.

⁶ Article 31.

⁷ See the *Convention on Biological Diversity: Nagoya Protocol* website, 'Becoming a party' page, at <http://www.cbd.int/abs/becoming-party/> (as at 13 April 2011).

⁸ As above.



Previous policy work undertaken by the EDO indicates that the Nationally Consistent Approach has been relatively ineffective and unsuccessful in achieving a truly uniform and equitable ABS regime in Australia. There has been limited implementation of the Nationally Consistent Approach coupled with a limited uptake of the model ABS agreements developed by the Federal Government.

Only two Australian jurisdictions have implemented ABS legislation, in the form of the Queensland *Biodiversity Act* (2004) and the Northern Territory *Biological Resources Act* (2006). Whilst the latter contains some positive mechanisms for ensuring access to biological resources takes place by means of an ABS agreement, recognising Aboriginal land holders as ‘resource providers’, and ensuring protection for, recognition of and valuing of indigenous knowledge associated with those resources, the former does not require benefit-sharing as of right with Aboriginal and Torres Strait Islanders and does not provide for recognition of TK associated with biological resources.

Both Western Australia and South Australia are considering introducing legislation, and other states and territories have begun public consultation on the matter.⁹ Whilst elements of the Nationally Consistent Approach are reflected in each jurisdiction, there remains significant variation between jurisdictions, particularly in terms of who may enter into a benefit sharing agreement and whether the consent of indigenous custodians is required. The Australian Government’s *Fourth National Report to the United Nations Convention on Biological Diversity* similarly provides that ‘at a national level, some Indigenous Australians believe progress [in relation to preserving and maintaining traditional knowledge] is hindered by the different policies and programs that operate in different jurisdictions.’¹⁰

In addition to this, the EDO has identified a general lack of knowledge and understanding of what constitutes an appropriate legislative and policy approach to ABS within each jurisdiction. State and territory authorities and agencies charged with ABS responsibilities under the Nationally Consistent Approach have demonstrated an absence of oversight over ABS agreements and arrangements between access and provider parties within their jurisdiction.

The EDO’s concern in response to this finding has been previously expressed as the unequal levels of bargaining power that exist between negotiating parties to an ABS agreement, where one of those parties is indigenous. The varying degrees of awareness and capacity to negotiate, as well as complex cultural matters such as cross-cultural communication in the user-provider relationship, means that holders of traditional knowledge may be liable to exploitation and inequitable benefit-sharing arrangements.¹¹

This unequal level of bargaining power has been further exacerbated by a general lack of available and accessible information for indigenous parties seeking to secure benefits from the utilisation of resources on Aboriginal land, or the use of TK associated with those resources. The EDO has observed that even where Indigenous parties are eligible for benefits to accrue under state or territory legislation for the use of resources or TK associated with resources, often they lack the crucial information enabling them to consider their options and effectively engage in negotiations for an ABS agreement.

⁹ See Invest Australia, at <http://www.investaustralia.gov.au/index.cfm?menuid=986547A8-D0B7-180C-167755465D938D59> (Invest Australia is an Australian Government Agency for inward investment).

¹⁰ *Australia’s Fourth National Report to the United Nations Convention on Biological Diversity*, available at <http://www.cbd.int/doc/world/au/au-nr-04-en.pdf>, p27.

¹¹ EDO NSW Submission to Department of Foreign Affairs and Trade on the international regime for Access and Benefit Sharing under the Convention on Biological Diversity (25 June 2010), p 10, available at http://www.edo.org.au/edonsw/site/pdf/subs/100625abs_submission.pdf.



The final weakness noted in the operation of the existing ABS regime in Australia is the lack of enforceability for Indigenous land owners or knowledge holders where an ABS agreement is breached. Under variations amongst the Commonwealth and state and territory statutory frameworks for ABS, issues identified by the EDO include that access to TK associated with resources is not given equal protection to requirements for access to the resources themselves, not all frameworks ensure PIC and MAT can be secured by indigenous parties to an ABS agreement, and frameworks currently do not provide for dispute resolution to occur in accordance with customary laws and principles. Due to the structure of the current regime within Australia, where the state and territory governments are largely responsible for implementing the Nationally Consistent Approach, there is no national authority or Indigenous representative body that is able to provide advice to Indigenous ABS participants or seek redress on their behalf where they feel an ABS agreement has been breached.

Improvements under the Nagoya Protocol

The Nagoya Protocol has addressed the weaknesses identified above in various ways and through a number of mechanisms, providing a strong rationale for its ratification by the Australian Government. Most importantly, the Protocol provides legal certainty that access to genetic resources and TK associated with those resources, is established and enforced based on the principles of PIC and MAT.¹² Similarly, under the Protocol, it is now established that the onus is upon the Party within whose jurisdiction the resources have been accessed to ensure that access has been in accordance with PIC and on MAT.¹³

The requirement under the Protocol that Parties take legislative, administrative or policy measures to give effect to the rights and principles regarding ABS provided in the Protocol will undoubtedly create greater legal certainty and a more robust regime for ABS in Australia, helping to address key failures of the Nationally Consistent Approach. All states and territories will be required to establish a regime for ABS that enshrines the same rights and principles provided in the Protocol.

Considering the unequal levels of bargaining power between Indigenous and non-Indigenous parties, where Indigenous parties seek to obtain benefits from resources and/or TK associated with those resources on their land, and identified as a primary obstacle in the effectiveness of existing ABS regimes, the Protocol's ability to deliver legal certainty as to the minimum standards upon which an ABS agreement must be formed is strongly supported by the EDO.

The provision under the Protocol for a national focal point,¹⁴ designated checkpoints¹⁵ and a competent national authority¹⁶ addresses difficulties under the current regime regarding a lack of oversight of ABS arrangements and the availability and dissemination of information to potential parties under the existing regime. The responsibilities of each of these national authorities and institutions under the Protocol provides for a number of important mechanisms which the EDO believes play an important role in the effectiveness of Australia's subsequent ABS regime. Mechanisms such as the provision of information to access parties regarding correct procedures for obtaining PIC and establishing MAT, information on relevant indigenous and local communities and stakeholders, issuing of written evidence that access requirements have been

¹² See the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity*, adopted 29 October 2010, Articles 6 and 2.

¹³ Article 15.

¹⁴ Article 13.

¹⁵ Article 17.

¹⁶ Article 13.



met and advice on the requirements for PIC and MAT, will assist to achieve greater oversight and availability of information regarding the operation of Australia's ABS regime.

The lack of enforceability of ABS agreements, or the difficulties with which indigenous participants are able to secure compliance with ABS agreements, has been addressed by the Protocol primarily through articles 15 to 18, which force the Party providing access to take legislative, administrative and policy measures to deal with situations of non-compliance, where the Party has sought to ensure access to resources or associated TK within its jurisdiction has been undertaken in accordance with PIC and MAT. Article 17 also provides for minimum informational requirements for a certificate of compliance issued by the competent national authority, whilst article 18 provides for dispute resolution mechanisms to be implemented as part of the mutually agreed terms established by the parties to an ABS agreement.

Whilst the existing Commonwealth legislative regime (primarily the *Environment Protection and Biodiversity Conservation Regulations*, clause 8A) provides an offence for failure to comply with the requirement that a permit is obtained for access to biological resources on Commonwealth land, this clause has limited application. Similarly, the Northern Territory is the only Australian jurisdiction where penalty mechanisms exist for breaches of a benefit-sharing agreement for access to biological resources, or where access is obtained without a permit (Part 6, *Biological Resources Act 2006*). The certainty provided by the Protocol, in directly providing for compliance mechanisms to be implemented by signatories, is strongly supported by the EDO as further securing the rights of Indigenous peoples in Australia, and is seen as a major advantage in the Government ratifying the Protocol.

Conclusion

The Nagoya Protocol serves to address a number of the weaknesses identified in the existing ABS regime within Australia. Most importantly, the Protocol delivers greater legal certainty for Indigenous peoples in Australia regarding the conditions under which biological resources and TK associated with those resources on their land can be accessed. The Protocol ensures the implementation of a more robust regime under which PIC and MAT form the basis of ABS agreements, and where these principles can be properly enforced. Finally, the Protocol furthers the rights of indigenous peoples in line with the UNDRIP, which the Australian Government has already indicated its strong support for. For these reasons, and in the context of the pledge by the CoP of the CBD for Parties to act urgently and ratify the Protocol prior to the eleventh meeting of the CoP in 2012, the EDO urges the Australian Government to refrain from further delay and sign onto the Nagoya Protocol.

If you require any further information, please contact neva.collings@edo.org.au.

Yours sincerely

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