

Protecting Traditional Knowledge: A framework based on Customary Laws and Bio-Cultural Heritage

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Paper for the International Conference on Endogenous Development and Bio-Cultural Diversity, 3-5 October 2006, Geneva

Abstract

This paper is based on the work of IIED and research and indigenous partners in Peru, Panama, India, Kenya and China¹. It is a collective contribution from the project “Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices”², and draws in particular on the work of the NGO ANDES in Peru. Through participatory action-research the project is exploring the customary laws and practices of indigenous communities to inform the development of appropriate policies and mechanisms for the protection of traditional knowledge and bio-genetic resources at local, national and international level. We seek to shift the dominant paradigms of access and benefit-sharing (ABS) and intellectual property rights (IPRs), which reflect ‘western’ laws and models, towards one based on respect for indigenous customary laws and worldviews and human rights. In this way, we also seek to strengthen the institutional basis for endogenous development.

A key element of our approach is the recognition of the indigenous worldview that traditional knowledge, biodiversity, landscapes, cultural values and customary laws are inextricably linked elements of indigenous ‘bio-cultural heritage’. This paper explores the concept of ‘Collective Bio-Cultural Heritage’ and its application as a means to protect traditional knowledge, biodiversity and livelihoods. It also identifies policy challenges and recommendations for promoting the protection of ‘Bio-cultural Heritage’ on a wider scale.

The Privatisation of Community Knowledge

Many indigenous and local communities are concerned about the privatisation of their traditional knowledge and bio-resources, alienation of their rights and unfair exploitation of these resources, without permission or respect of customary laws. IPR regimes – such as patents and plant variety protection (PVP) – are becoming increasingly strong and ubiquitous as a result of trade agreements of the WTO and the proliferation of bilateral Free Trade Agreements. This is accelerating the commercial use and privatisation of indigenous knowledge and resources.

There is a growing recognition of the need to ensure that the rights of indigenous and local communities over their traditional knowledge are respected and protected, and a number of international and national policy initiatives are seeking to respond to this

¹ Asociación ANDES (Peru), Fundación Dobbo Yala (Panama), University of Panama, Ecoserve (India), Centre for Indigenous Farming Systems (India), Herbal and Folklore Research Centre (India), Centre for Chinese Agricultural Policy (China), Southern Environmental & Agricultural Policy Research Institute, Kenya Forestry Research Institute.

² The project is funded by IDRC, The Christensen Fund and others. For more information see http://www.iied.org/NR/agbioliv/bio_liv_projects/protecting.html

challenge. Many people agree that existing intellectual property rights – such as patents, PVP, copyrights etc – are not suitable for protecting traditional knowledge and that alternative ‘sui generis’³ systems are needed. IPRs are designed to protect commercial inventions and mostly grant individual and exclusive rights; whereas traditional knowledge of communities is first and foremost for subsistence and is largely held collectively, as ancestral heritage.

However, some people (eg. industrialised country patent offices) argue that sui generis systems should be consistent with existing IPR standards. Parties to the Biodiversity Convention (CBD) see sui generis systems as mechanisms for sharing benefits with communities from the commercial use of TK, including use of IPRs. Many indigenous organisations, on the other hand, feel that a completely different approach is needed, which responds to the distinct customary laws and worldviews of traditional knowledge holders. For them, the spread of IPRs is a significant concern because they clash with indigenous values of ancestral heritage and free sharing/open access which sustain livelihoods and biodiversity; and because they undermine local control over resources and development pathways. There is a fear that IPRs will eventually replace these ‘commons’ values with private property values. If the less industrialised countries and communities are forced to accept IPRs from which they can derive little benefit, it seems only fair that industrialised countries should accept mechanisms to protect traditional knowledge based on customary laws.

Despite these divergent perspectives, there is some acceptance in international policy fora of the need to recognise customary laws and practices as part of measures to protect traditional knowledge. There is however little understanding of what this means in practice.

An Action- Research Approach using an Indigenous Framework

Our research with indigenous communities aims to: improve understanding of customary laws and practices for the protection of traditional knowledge and bio-resources; strengthen the capacity of communities to defend their traditional resource rights; develop local tools for TK protection, such as community knowledge registers, community protocols, and an inter-community agreement for equitable benefit-sharing; and inform relevant national and international policy processes.

The emphasis of TK and ABS policies is largely on protecting only the intangible or intellectual aspect of TK systems, abstracted from the cultural, biological and customary law context which sustains them. Customary laws are rarely recognised by governments or reflected in policy and law, and need to be strengthened in the face of growing threats to culture, biodiversity and traditional economic systems. Not only do customary laws promote ecological sustainability and social equity, but they provide the basis for development which is endogenous, rather than externally driven, and is therefore more appropriate, effective and sustainable in the long term. Customary laws are also fundamental to indigenous self-governance and self-determination.

Customary laws are usually orally held rather than written down or codified, which is important to maintain flexibility. But in order to be recognised externally some elements of customary law may have to be written down. Furthermore, customary

³ Meaning unique or ‘of its own kind’

laws and practices may not exist for a particular purpose e.g. regulating external access to bio-resources, which means that derivatives may need to be identified to apply to a new situation, which reflect broader underlying customary values.

The project is taking a highly participatory research approach. Through this process, we aim to strengthen customary laws and institutions for collective natural resource management and self-governance. In Peru for example, the research is being coordinated by the NGO Andes which is steered by a committee composed largely of representatives of Quechua communities. The research is designed and conducted by technicians from Quechua communities, with Andes staff only providing technical support. All the studies are applying the Code of Ethics of the International Society of Ethnobiology, which includes principles of PIC etc (see www.iied.org.)

The protection of traditional knowledge is being explored in a holistic manner, in accordance with the concept of “Collective Bio-Cultural Heritage”. Particular emphasis is being placed on the need to protect not only traditional knowledge, but knowledge systems as a whole, including biodiversity, landscapes, spiritual values and customary laws. All of these elements play a critical role in maintaining traditional knowledge, innovations and practices (as required by CBD Article 8(j)). This broader focus recognises the holistic worldview of indigenous and local communities, where tangible and intangible elements cannot be separated. It also responds to the fact that many national and international policy processes separate rights over genetic resources, traditional knowledge, culture and landscapes⁴.

The project has developed the following definition of ‘Collective Bio-Cultural Heritage’: “Knowledge, innovations and practices of indigenous and local communities which are collectively held and inextricably linked to traditional resources and territories, local economies, the diversity of genes, varieties, species and ecosystems, cultural and spiritual values, and customary laws shaped within the socio-ecological context of communities.” We are using this concept to provide both a common framework for the research and as the basis for policy engagement. As a mixed group of indigenous and non-indigenous researchers (including natural scientists and lawyers), using an indigenous vision to guide the research has led to significant ‘internal’ capacity building within the group.

The definition of Collective Bio-Cultural Heritage was developed at a project planning workshop in Cusco Peru, May 2005⁵. However, the concept builds on a whole body of work - by communities such as Quechua farmers in the Andean Potato Park; anthropologists such as Darrell Posey’s work on Traditional Resource Rights; and various indigenous fora, such as the Guidelines for the protection of indigenous heritage developed by Erica Daes of the UN-Working Group on Indigenous Populations. Thus, it is not a new concept, but represents a renewed effort to promote holistic approaches for the protection of indigenous peoples’ heritage, by the project

⁴ See “Towards a Holistic Approach to Indigenous Knowledge Protection: UN Activities, ‘Collective Bio-Cultural Heritage’ and the UNPFIP”. IIED, Andes (Peru) and Call of the Earth. Fifth Session of the UN Permanent Forum on Indigenous Issues, 15-26 May 2006, New York. www.iied.org

⁵ Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices. Research Planning Workshop, Cusco, Peru, 20-25 May 2005.
http://www.iied.org/NR/agbioliv/bio_liv_projects/protecting.html

partners and other indigenous organisations such as Call of the Earth /Llamado de la Tierra⁶.

Comparing ABS, IPR and Customary law models

Over eleven UN agencies are carrying out activities on the protection, preservation and promotion of traditional knowledge, within their particular mandates and spheres of competency. While many valuable activities are underway, it is evident that there are also gaps in their alignment with indigenous peoples' perspectives, needs and aspirations. Most of the UN processes - with the exception of indigenous and human rights fora - address traditional knowledge separately from traditional resources and territories and customary laws, deal with TK issues within a paradigm of property, and marginalize the ancestral rights-holders from decision-making.

The Biodiversity Convention's ABS framework recognises the sovereign rights of states over natural resources and the authority of states to decide over the use of genetic resources. Although the principle of national sovereignty is important in promoting equitable benefit-sharing between countries, it is generally interpreted as government *ownership*, with the rights of other actors, notably indigenous and local communities, often unclear or unrecognised. The CBD only requires the Prior Informed Consent (PIC) of State Parties for access to genetic resources, and not of indigenous and local communities. Thus, it separates rights over natural and genetic resources, which are 'owned' by the state, and rights to traditional knowledge which are 'owned' by indigenous and local communities.

Although some national ABS laws require PIC of communities for access to TK, few require their PIC for access to bio-genetic resources, thereby undermining the rights of local custodians, particularly given the obligation on States to facilitate access to genetic resources. The ABS framework effectively facilitates access by outsiders to community resources, as opposed to facilitating access by communities to ex-situ resources, many of which originate from their traditional territories. Addressing customary laws and traditional resource rights in this framework would imply a requirement for PIC of indigenous communities for use of bio-genetic resources collected from their territories, a reciprocal or two-way access framework which also facilitates access by communities, and an emphasis on safeguarding access to resources for customary use by communities.

The FAO Treaty on Plant Genetic Resources for Food and Agriculture has also adopted the CBD's ABS framework. As with the CBD, it separates genetic resources from the customary laws of indigenous communities that govern their access and use, and ensure continued access to these resources for food security, health, poverty reduction and cultural and spiritual life.

WIPO – the World Intellectual Property Organisation – has developed useful guiding principles for developing policies for the Protection of Traditional Knowledge⁷ (could you cite which you mean giving a source?). However, being situated within an IPR

⁶ See Aroha Te Pareake Mead, paper for UNPFII Workshop in Panama, September 2005: "Emerging Issues in Maori Traditional Knowledge: Can these be addressed by United Nations Agencies?"

⁷ Revised Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles, WIPO/GRTKF/IC/9/5
http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html

body, and composed mainly of representatives from national patent offices, its work has a distinct leaning towards IPR models. Essentially, it promotes intellectual property solutions, which separate traditional knowledge from the cultural and spiritual values that establish its collective ownership. Even though the recognition of customary laws is amongst the issues being discussed, a number of parties continue to emphasise the need for protection of traditional knowledge to be consistent with IPR standards.

Our research has highlighted some fundamental differences between ABS and IPR regimes, and customary laws relating to the protection of TK and bio-resources. Rather than being commercially-oriented, customary laws often have a strong spiritual character, being closely interlinked with belief systems associated with natural resources and landscapes. They are often based on fundamental values of respect for nature or Mother Earth, social equity and harmony, and serving the common good. Traditional knowledge and resources are seen as collective ancestral heritage which no individual can own as they are believed to come from God.

Three key Andean customary principles or values were identified which were found to be very similar for all the other studies:

- *Reciprocity*: what is received has to be given back in equal measure. It encompasses the principle of equity, and provides the basis for exchanges between humans, and with Mother Earth;
- *Duality*: everything has an opposite which complements it; behaviour cannot be individualistic⁸;
- *Equilibrium*: refers to balance and harmony, in both nature and society - e.g. respect for the nature, and resolving conflicts. Equilibrium needs to be observed in applying customary laws, all of which are essentially derived from this principle.

‘Collective Bio-Cultural heritage’ as the basis for TK protection

Having emerged from a community context, the concept of collective bio-cultural heritage reflects the holistic worldview of indigenous peoples. It addresses biodiversity and culture together, rather than separating them; recognises collective as opposed to individual rights; and places them in the framework of ‘heritage’ as opposed to ‘property’. It explicitly recognises that the heritage of indigenous peoples includes biological resources and traditional territories, and not only TK and culture.

The concept emphasises the need to protect rights not only to traditional knowledge itself, but to all the inter-linked components of traditional knowledge systems – including bio-genetic resources, landscapes, cultural and spiritual values, and customary laws and institutions. It therefore sets out a framework to develop mechanisms to protect traditional knowledge which are holistic and based on human rights, including rights to land and natural resources, and the right to self-determination. The concept also emphasises the need for the restitution of rights over indigenous heritage which has been taken away.

Collective Bio-Cultural Heritage offers much potential for addressing the gaps in existing initiatives on TK protection at international, national and local levels. It

⁸ This Andean understanding of duality views two parts (eg. male and female, mind and matter), as part of a unified whole; whereas in western science, duality means two separate parts

identifies core elements, which could provide the basis for a common international policy, while allowing flexibility for approaches to be adapted to diverse local needs and contexts.

At local level, the establishment of indigenous-controlled Community Conserved Area – or ‘Indigenous Bio-Cultural Heritage Areas’ - offer a means to protect indigenous knowledge in situ, as part of indigenous culture and territories. Using this model, the protection of indigenous knowledge is achieved through: the recognition of collective land rights; the strengthening of community based management of natural resources, biodiversity and knowledge; strengthening of cultural and spiritual values; strengthening of customary laws and institutions; and strengthening local economies and poverty reduction. Thus, protection of CBCH provides a means of preventing the loss of TK as well as protecting indigenous rights, under a system of community stewardship. It establishes not only rights, but also the *responsibility* of indigenous peoples to conserve their heritage and transmit it to future generations. Furthermore, it emphasises development processes that are based on local knowledge and leadership, and are endogenous as opposed to externally driven.

Andes (Peru) together with Quechua farmers are using this concept as a guiding framework to shape a range of responses for TK protection. These include the establishment of an Andean Potato Park as an Indigenous Bio-Cultural Heritage Area; development of a web-based multimedia community bio-cultural register (using an open-source software); application of collective trademarks to bio-cultural products; an agreement for repatriation of, and reciprocal access to, potato varieties with a gene bank (the International Potato Centre); and an inter-community agreement for equitable benefit-sharing based on customary laws.⁹ These two agreements are legal contracts are therefore provide a mechanism for the recognition of customary law in formal/dominant law. Furthermore, the return of lost varieties will restore associated cultural practices and beliefs (e.g. traditional recipes, rituals and knowledge).

By engaging the six communities of the park to develop responses for the park as a whole, the research process is helping to strengthen collective organisation and hence the capacity of communities to keep control of their own development and maintain their bio-cultural heritage in the face of multiple external threats. Customary laws and the search for legal pluralism are at the heart of this endeavour. They are being used to guide all the activities in the Park so that the communities can defend their resource rights and take advantage of development opportunities without losing their cultural values that sustain biodiversity and livelihoods.

Conclusions and Recommendations for Protection of Indigenous Knowledge

1. The need for an entirely new approach. Sui generis systems for protecting the knowledge, innovations and practices of indigenous and local community should not be consistent with existing IP models which protect individual rights and whose objectives are exclusively commercial. Instead, they should be tailored to the distinct characteristics of traditional knowledge and innovation processes. Even if new

⁹ For more information, see Graham Dutfield forthcoming: “The Potato Park as a Sui generis system for the protection of traditional knowledge”. See also reports from the project ‘Protecting Community Rights over Traditional Knowledge’ <http://www.iied.org/NR/agbioliv/index.html>

elements are incorporated into IP systems, the continuation, dynamic and adequate protection of TK cannot be guaranteed, since structurally many traditional societies do not respond to the western system, but have their own methods of economic, political, social and cultural articulation. Systems of free sharing and exchange of resources, collective custodianship and spiritual beliefs, which underpin traditional livelihoods and customary laws, are at odds with systems which protect commercial interests and thereby commodify TK. However, ‘soft’ IPRs which recognise collective rights (eg. collective trademarks, copyright and Geographical Indications) may be useful to provide additional protection.

2. Sui generis systems should **recognise the holistic character** of traditional knowledge – i.e. its close linkages with biodiversity, traditional territories, cultural values and customary law, all of which are vital for maintaining TK. They should therefore protect the rights of indigenous and local communities *to all these components* of TK systems – or to “**Collective Bio-Cultural Heritage**”.

3. While the CBD recognises national sovereignty over natural resources and the authority of states to decide over genetic resources, indigenous and human rights instruments recognise the rights of indigenous and local communities to own and decide over these resources. International human rights law recognises the right of all peoples to freely dispose of their natural resources. ILO Convention 169 recognises the rights of indigenous and tribal peoples to their natural resources and territories. Sui generis systems should therefore be **consistent with indigenous and human rights** instruments, and not only with the CBD and ABS regimes, so that the rights of indigenous and local communities over their bio-genetic resources are also recognised.

4. Active participation and **leadership of indigenous and local communities is crucial**. Sui generis systems, ABS Regimes and other tools (e.g. biodiversity registers) at local, national and international levels should be developed and administered by and with indigenous and local communities.

5. **Local sui generis systems are needed**. The best way for communities to protect their rights over their knowledge and resources is at local level – where they can control and safeguard their resources. Community based natural resource management, together with secure land tenure, provides a means to strengthen governance and control of natural resources, maintain traditional knowledge, conserve biodiversity and improve livelihoods. For example, through the establishment of community-controlled ‘Indigenous Bio-Cultural Heritage Areas’.

6. **Reversing the ABS paradigm**. ABS systems should not only focus on facilitating access to community resources, but also on facilitating access by communities to resources in ex-situ collections. Vast collections of traditional varieties were made in the 1950s and 60s, and are now held by universities, companies etc, yet communities are rarely allowed access. With genetic erosion caused by modern agriculture, development etc, many communities need to restore diversity to cope with changing conditions, eg. climate change.

7. **Recognising customary laws and authorities** of indigenous and local communities, including in determining rights over resources, procedures for PIC and

equitable benefit-sharing. While customary laws vary considerably between different communities, there are strong commonalities in underlying customary principles or values – such as Equilibrium, Duality and Reciprocity. Such principles should form the basis for sui generis systems at all levels. Given that TK and genetic resources are often shared freely between communities, even across borders, the need for collective rights, collective decision-making and benefit-sharing amongst neighbouring communities should be recognised.

8. The **international instrument on Access and Benefit-Sharing** should fully recognise and protect the rights of indigenous and local communities to their knowledge, genetic resources and territories, and be developed and administered in close collaboration with them, rather than being a government-centric framework where communities loose out. The current process needs to be broadened to enable **representatives of indigenous and local communities to participate fully** in the decision-making process.

9. **More supportive policy frameworks** are also needed across a range of ‘sectors’ – conservation, agriculture, health, education, economic sectors, trade and IPRs. Currently these sectors largely undermine TK and bio-culturally diverse production systems.

10. The **UNPFII is uniquely placed to take a leading role** in developing a global system for the protection of collective bio-cultural heritage. The Forum aims to promote the well-being of indigenous peoples and advise UN agencies on indigenous issues, with the active participation of indigenous peoples.