

Protecting traditional knowledge: A framework based on customary laws and bio-cultural heritage

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Introduction

This chapter is based on the work of the International Institute of Environment and Development (IIED) and research and indigenous partners in Peru, Panama, India, Kenya and China.⁵⁹ It is a collective contribution from the project 'Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices',⁶⁰ 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 levels. 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, 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 chapter 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 privatization of community knowledge

Many indigenous and local communities are concerned about the privatization 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

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⁶⁰ 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.

proliferation of bilateral free trade Agreements. This is accelerating the commercial use and privatization 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 challenge. Many people agree that existing IPRs – such as patents, PVP and copyrights – are not suitable for protecting traditional knowledge and that alternative *sui generis*⁶¹ 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 (for example, industrialized country patent officers) 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 traditional knowledge, including use of IPRs. By contrast, many indigenous organizations 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 industrialized countries and communities are forced to accept IPRs from which they can derive little benefit, it seems only fair that industrialized 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 recognize 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 traditional knowledge 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 traditional knowledge and ABS policies is largely on protecting only the intangible or intellectual aspect of traditional knowledge systems, abstracted from the cultural, biological and customary law context that sustains them. Customary

⁶¹ Meaning unique or 'of its own kind'.

laws are rarely recognized 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 that 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 recognized externally some elements of customary law may have to be written down. Furthermore, customary laws and practices may not exist for a particular purpose, for example, 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 providing only technical support. All the studies are applying the Code of Ethics of the International Society of Ethnobiology, which includes principles of prior informed consent (PIC) (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 recognizes 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 landscapes (IIED et al, 2006).

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 in May 2005 (IIED, 2005). 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 partners and other indigenous organizations such as Call of the Earth/Llamado de la Tierra (Mead, 2005).

Comparing ABS, IPR and customary law models

Over 11 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 traditional knowledge issues within a paradigm of property, and marginalize the ancestral rights-holders from decision-making.

The Biodiversity Convention's ABS framework recognizes 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 unrecognized. The CBD only requires the 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 traditional knowledge, 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 that 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 knowledge

(WIPO, 2006). However, being situated within an IPR 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 among the issues being discussed, a number of parties continue to emphasize 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 that 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 individualistic;
- *Equilibrium*: refers to balance and harmony, in both nature and society – for example, respect for 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 traditional knowledge 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; recognizes collective as opposed to individual rights; and places them in the framework of ‘heritage’ as opposed to ‘property’. It explicitly recognizes that the heritage of indigenous peoples includes biological resources and traditional territories, and not only traditional knowledge and culture.

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

Collective bio-cultural heritage offers much potential for addressing the gaps in existing initiatives on traditional knowledge protection at international, national and local levels. It 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 areas – or ‘indigenous bio-cultural heritage areas’ – offers 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 collective bio-cultural heritage provides a means of preventing the loss of traditional knowledge, 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 emphasizes 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 traditional knowledge 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 intercommunity agreement for equitable benefit sharing based on customary laws (Dutfield, forthcoming). These two agreements are legal contracts and 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 (for example, 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 organization 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 the 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 communities should

not be consistent with existing intellectual property models that 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 elements are incorporated into intellectual property systems, the continuation, dynamic and adequate protection of traditional knowledge 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 that protect commercial interests and thereby commodify traditional knowledge. However, 'soft' IPRs that recognize collective rights (for example, collective trademarks, copyright and geographical indications) may be useful to provide additional protection.

2. *Sui generis* systems should recognize the holistic character of traditional knowledge, that is, its close linkages with biodiversity, traditional territories, cultural values and customary law, all of which are vital for maintaining traditional knowledge. They should therefore protect the rights of indigenous and local communities *to all these components* of traditional knowledge systems – or to collective bio-cultural heritage.
3. While the CBD recognizes national sovereignty over natural resources and the authority of states to decide over genetic resources, indigenous and human rights instruments recognize the rights of indigenous and local communities to own and decide over these resources. International human rights law recognizes the right of all peoples to freely dispose of their natural resources. ILO Convention 169 recognizes 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 biogenetic resources are also recognized.
4. Active participation and leadership of indigenous and local communities is crucial. *Sui generis* systems, ABS regimes and other tools (for example, 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, provide 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 1960s, and are now held by universities and companies, yet communities are rarely allowed access. With genetic erosion caused by modern agriculture and development, many communities need to

restore diversity to cope with changing conditions, for example, resulting from climate change.

7. Recognizing 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 traditional knowledge and genetic resources are often shared freely between communities, even across borders, the need for collective rights, collective decision-making and benefit sharing among neighbouring communities should be recognized.
8. The international instrument on access and benefit sharing should fully recognize 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 lose 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 traditional knowledge and bio-culturally diverse production systems.
10. The UN Permanent Forum on Indigenous Issues (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.

References

- Dutfield, G. (forthcoming) ‘The Potato Park as a *Sui generis* system for the protection of traditional knowledge’.
- IIED (2005) Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices. Research Planning Workshop, Cusco, Peru, 20–25 May, www.iied.org/NR/agbioliv/bio_liv_projects/protecting.html
- IIED, ANDES (Peru) and Call of the Earth (2006) *Towards a Holistic Approach to Indigenous Knowledge Protection: UN Activities, ‘Collective Bio-Cultural Heritage’ and the UNPFII*, Fifth Session of the UN Permanent Forum on Indigenous Issues, 15–26 May, New York, www.iied.org
- Mead, Te Pareake A. (2005) *Emerging Issues in Maori Traditional Knowledge: Can These be Addressed by United Nations Agencies?*, paper presented at the UNPFII Workshop, Panama, September 2005.
- WIPO (2006) *Revised Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles*, WIPO/GRTKF/IC/9/5, www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html, WIPO, Geneva.