

SECTION 3: TRADITIONAL KNOWLEDGE IN AN INTERNATIONAL REGIME

Case Study 12

Towards legal protection of traditional knowledge: Lessons from Peru

Brendan Tobin¹⁵

Status of traditional knowledge

There are a number of fundamental conflicts between the current intellectual property rights (IPR) system and indigenous peoples' rights over their traditional knowledge (TK), in particular knowledge related to biological resources. The root of such conflicts may, in part, arise from divergent views regarding the nature of natural resources and rights over them. Non-indigenous peoples from the developed world tend to perceive anything that can be commercially exploited as a resource that must be exploited to the full, and in doing they seek to establish property rights over these resources. Indigenous people tend to view all resources as a gift from Mother Earth, to be cared for by today's generation who hold them in trust for future generations, and that as such they cannot be owned.

In this world of differing values, numerous internal and external forces are changing the lives and societies of local communities and threatening traditional knowledge. External threats include: biopiracy; development policies that promote exclusively non-indigenous education, health, agriculture and fisheries extension programmes; market forces; and intolerant religious organisations. Internal threats include: lack of use and renewal of traditional cultures; loss of control, notably over education; cultural disintegration or isolation; and territorial impacts. Responding to these multiple challenges requires innovative action by states as well as a concerted effort by indigenous peoples to revive their fading knowledge systems.

Protecting traditional knowledge in Peru

A comprehensive legal regime to protect the collective knowledge of indigenous peoples was adopted by Peru in August 2002. This law, the first of its kind, is based upon a number of key underlying concepts:

- Rights over TK stem from the existence of the knowledge and not from any act of government. The role of the law is therefore declaratory in nature;

- TK is the cultural patrimony of indigenous peoples and should, therefore, be used for the benefit of present and future generations;
- Access to TK for commercial purposes requires the prior informed consent of indigenous peoples;
- Indigenous peoples are entitled to share the benefits derived from use for their TK, whether or not it is in the public domain;
- TK may be seen as a form of trade secret and the state may act to prevent unapproved use; and
- Registers may play a role in protection of TK, and can be set up as open or confidential and may also be held by local communities.

The process for development of this law brought to light a number of conflicts, including:

- Conflicts of *cultural perception* regarding the nature of traditional knowledge;
- Conflicts of *legal vision* with regard to the nature of rights to be granted over knowledge as cultural patrimony, the role of customary law, the application of the principle of the public domain, over the definition of objectives, and the role of registration in the protection of TK; and
- Conflicts between the *rights* of indigenous peoples over their knowledge and the *interests* of those interested in accessing and using TK. This should not be seen as a balancing act as protection of rights must precede consideration of interests.

An international regime to protect traditional knowledge

To date there exists no comprehensive international regime to recognise and protect rights over traditional knowledge. Work is ongoing, within the framework of the Convention on Biological Diversity (CBD) and at the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC), to explore possible mechanisms for the protection of TK. These processes face the task of try-

15. Institute of Advanced Studies, United Nations University, Yokohama, Japan. Email: tobin@ias.unu.edu

ing to develop a global system for protection that responds to a multiplicity of national legal systems, and an even wider range of customary law and practice of indigenous peoples.

The Peruvian experience provides clear evidence of the importance of ensuring the participation of indigenous peoples from the outset in any process for development of TK law¹⁶. As customary laws are as numerous as indigenous peoples any international regime will have to be based on flexibility. A global regime may include: customary law; access and benefit sharing law; *sui generis* regimes to protect traditional knowledge and strengthen traditional knowledge and innovation systems¹⁷; international umbrella regulations; an ombudsman's office; measures in user/recipient countries; and users' codes of conduct. Such a regime will need to be developed with due attention given to international human rights law and policy, in particular that relating to indigenous peoples.

Lessons learned and recommendations

- The role of States in the development of *sui generis* legislation must be that of facilitator and not arbiter of rights. Any *sui generis* regime must be developed in close cooperation with, and reflect the aspirations, interests and rights of indigenous peoples.
- Access to, and use of, TK should conform to the customary law of indigenous peoples.
- Any process for development of a regime to protect traditional knowledge must be guided by international human rights law, including "soft" law (e.g. conventions and agreements that do not include penalties).
- The scope of any regime should include traditional knowledge within the public domain, unless otherwise decided by indigenous peoples.
- Any functional regime will require regulatory frameworks in both provider/source and user/recipient countries coupled with international enforcement procedures.

Case Study 13

The role of customary law and practice in international ABS and TK governance

Brendan Tobin¹⁸

Traditional resource management is increasingly recognised as a key tool for sustainable management of natural resources. This is particularly the case with fragile marine ecosystems, where time honoured practices have ensured that over-harvesting or environmental damage is controlled in the interests of long-term community survival. The three pillars of traditional resource management illustrated below are: traditional land and marine tenure (which defines the area of protection); traditional knowledge (which defines why and how resources are to be protected); and customary law (which ensures the application of traditional knowledge for the benefit of conservation). National legal systems are typically superimposed over customary laws, frequently undermining chiefly power and traditional decision making practices. As interest in reviving traditional natural resource management practices increases so too does interest in reviewing the role of customary law and practice, and its application to new resource management issues such as access to genetic resources and traditional knowledge.

International governance of access to genetic resources and benefit-sharing (ABS) is primarily regulated by the Convention on Biological Diversity (CBD). The CBD recognises sovereign rights over genetic resources. This is frequently misinterpreted as granting ownership rights to states over genetic resources. Parties to CBD commit to facilitating access to and adopting legal, administrative and or policy measures that address fair and equitable benefit sharing and technology transfer (TT), including by the public sector and of biotechnologies arising from the use of genetic resources. Indigenous and local communities are to be consulted regarding use of TK and intellectual property rights are to support and not run counter the CBD's objectives. More than 50 countries have adopted or are working on ABS laws, policies and contracts; developed countries have tended to focus more on policy initiatives than legislation processes, but even here actions are fairly limited. No evidence has been shown of action by developed countries to adopt specific legislation on technology transfer. During

16. See Tobin B. and Swiderska K. Speaking in tongues: Indigenous participation in the development of a *sui generis* regime to protect traditional knowledge in Peru, IIED, London, 2001, available online at <http://www.iied.org>

17. See Tobin B. Redefining perspectives in the search for protection of traditional knowledge: A case study from Peru, RECIEL 10(1) 2001, ISSN 0962 8797

18. Institute of Advanced Studies, United Nations University, Yokohama, Japan. Email: tobin@ias.unu.edu