

Eighth Meeting of the CBD Working Group on Access and Benefit-sharing, Montreal, 9-15 November 2009

Information and Views

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Introduction

This submission is based on research on customary laws and practices related to traditional knowledge and genetic resources and their implications for access and benefit-sharing¹, which began in January 2005. It entailed participatory studies with indigenous and local communities in areas of important biological diversity. It focused on both medicinal plants and agro-biodiversity and related traditional knowledge in different ecosystems (mountain, dryland, semi-arid savannah and coastal forests). The project involved different ethnic communities ranging from quite traditional to more mixed/integrated: Mijikenda and Maasai, Kenya; Quechua, Andes, Peru; Kuna and Embera-Wounaan, Panama; Lepchas and Limbus, E. Himalayas, India; Yanadi Tribals, Andhra Pradesh, India; indigenous Adhivasi, Chattisgarh, India; and Zhuang and Yao farmers, Guangxi, S.W. China.

See also:

- Information and views submitted by IIED and partners to the CBD Expert Group on Traditional Knowledge associated with genetic resources, Hyderabad, 16-19 June 2009 (see <http://www.cbd.int/abs/absgtle-03/submission/>.)
- Protecting Community Rights over traditional knowledge: Research Partners' Workshop, 27-30 July 2009, Burnham Beeches, UK (<http://www.iied.org/natural-resources/home>)

The International Regime:

IV. Nature (Annex I, Decision IX/12)

In order to improve implementation of the CBD's third objective on Access and Benefit-sharing (ABS), the International Regime should be a legally binding instrument. Experience suggests that this objective is not being effectively implemented. Fifteen years after the CBD entered into force, the number of countries that have received benefits and the number of ABS agreements remains fairly limited. Although many developing countries (providers) have introduced national legislation on ABS, very few user countries have done so. A legally

¹ This action-research project 'Protecting Community Rights over Traditional Knowledge: Implications of customary laws and practices' is funded by IDRC Canada and The Christensen Fund. For more information see <http://www.iied.org/natural-resources/key-issues/biodiversity-and-conservation/protecting-community-rights-traditional-knowledge>

binding international regime is needed to ensure that the CBD's third objective is also actively implemented in user countries. Otherwise, commercial users of genetic resources can access genetic resources that have already been transferred to their countries, or gain access through other institutions sourcing the materials in-country, with no obligation to implement these objectives. This means that the onus to comply with ABS regulations falls on intermediary organisations in developing countries, which cannot afford the extra costs. Thus, a legally binding international regime is needed to ensure that the commercial end-users in industrialised countries that generate the benefits also comply with ABS regulations.

The ABS objective underpins the whole CBD – at the Rio Earth Summit, biodiversity-rich but resource-poor countries agreed to protect the biodiversity in their countries and forego economic opportunities in return for a share of the benefits from the use of genetic resources. The 2002 World Summit on Sustainable Development (WSSD) Plan of Implementation called on governments to improve implementation of the CBD's ABS objective by negotiating an international ABS regime. The CBD COP Decision VII/19 mandated the ABS Working Group to develop an international regime “with the aim of *adopting an instrument/instruments to effectively implement* the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention” (emphasis added). This language strongly implies that the regime should be legally binding. A non-binding regime would add little value – we already have the widely respected voluntary Bonn Guidelines on ABS. Thus, we urge the governments of industrialised countries in particular to take their commitments seriously and join other CBD Parties in developing a legally binding ABS regime, with an effective enforcement mechanism that can ensure compliance by all Parties, in order to effectively implement all three objectives of the CBD.

III. D. Traditional knowledge associated with genetic resources (Annex I, Decision IX/12)

1. Components to be further elaborated with the aim of incorporating them in the international regime

The elaboration of effective and appropriate components relating to traditional knowledge to be incorporated in the International Regime requires the close involvement of traditional knowledge holders. As our research has shown, indigenous and local communities often have their own customary systems for maintaining and protecting traditional knowledge relating to biodiversity which need to be respected and supported in order to promote biodiversity conservation and sustainable use. Article 8(j) requires Parties to respect, preserve and maintain this knowledge and promote its wider application “with the approval and involvement” of TK holders. Attending meetings of the ABS Working Group as observers does not allow indigenous and local communities to participate in shaping the discussion and its outcomes. The UN Declaration on the Rights of Indigenous People (approved by 144 countries most or all of which are CBD Parties) recognises the rights of indigenous people to participate in decision-making in matters which affect them (Articles 18 and 19).

Thus, mechanisms are urgently required to enable the active participation of indigenous and local community representatives in the Working Group on ABS, just as they exist in the Working Group on Article 8(j), which is jointly mandated to elaborate the International Regime. Furthermore, in its work on incorporating TK into the International Regime, the ABS Working Group should build on the work already conducted by the 8(j) Working Group on access and benefit-sharing relating to TK, customary procedures, PIC etc – in particular the development of Elements of sui generis regimes for protection of traditional knowledge, and Elements of a code of ethical conduct to ensure respect for the intellectual and cultural heritage of indigenous and local communities.

1) Measures to ensure the fair and equitable sharing with traditional-knowledge holders of benefits arising out of the utilization of traditional knowledge in accordance with Article 8(j) of the Convention on Biological Diversity

i) Recognizing the rights of indigenous and local communities over traditional knowledge:

To ensure equitable benefit-sharing with TK holders, the International Regime should recognize the rights of indigenous and local communities over their traditional knowledge, ensure its use is subject to their PIC, and require that they receive equitable benefits from its use. This is also important for meeting the other two objectives of the CBD, given the important role of indigenous and local communities in biodiversity conservation, and the continued loss of biodiversity in many areas. The CBD recognizes the importance of traditional knowledge, innovations and practices, and of customary use (article 10 (c)), for the conservation and sustainable use of biodiversity. It also recognizes the need for incentive measures. Our project and other research (eg. the Millennium Ecosystem Assessment) has shown that providing incentives to local people living amongst biodiversity is necessary for its conservation. The WSSD Plan of Implementation also emphasised the importance of local benefits to provide incentives for conservation and to implement the MDGs.

The International Regime should include all traditional knowledge used to identify genetic resources with potential properties, because it adds value to genetic resources even if the knowledge is not used in the final product. It should include general traditional knowledge relating to biological resources and ecosystem management since this knowledge promotes biological diversity and thus genetic diversity, as well as more specific knowledge relating to genetic resources (as recommended by the Expert Group on TK in Hyderabad, UNEP/CBD/WG-ABS/8/2). Knowledge about the particular properties of biological resources necessarily relates to the genetic resources that produce these properties, even if communities are unaware of the existence of genes as understood in modern science. Furthermore, traditional farmers have for millennia selectively bred plants and animals to improve their genetic characteristics, or traits, thus they do have traditional knowledge relating specifically to genetic resources.

ii) Recognising customary rights over genetic resources associated with TK

Recognizing state sovereignty over genetic resources enables provider countries to regulate access to the resources in their jurisdiction and secure benefits. However ‘state sovereignty’ does not mean ‘government ownership’. In order to ensure fair and equitable benefit-sharing with traditional knowledge holders, and support the objectives of the CBD, the International Regime should also recognize the rights of indigenous and local communities over genetic resources that are associated with traditional knowledge. Most traditional knowledge is associated with biological and genetic resources, and users of TK often use the associated genetic resources together with the TK. As our research found, for traditional knowledge holders, traditional knowledge and genetic resources are one and the same – they are used, conserved and exchanged together. Many experts at the Hyderabad meeting agreed that TK and genetic resources are inseparable; and that ‘most traditional knowledge is intrinsically linked to genetic resources’ (UNEP/CBD/WG-ABS/8/2). The existence of traditional knowledge associated with bio-genetic resources usually means that these resources form part of the livelihoods, culture and heritage of indigenous and local communities, who need to maintain control over them in order to sustain traditional lifestyles that conserve biodiversity.

Given its intrinsic links with genetic resources, traditional knowledge should be addressed throughout the international regime, and not restricted to a single chapter.

iii) Recognising customary rights over landraces (traditional innovations)

Indigenous and local communities have developed an enormous diversity of landraces using their own knowledge – traditional varieties of plants and animals, many of which still form part of their cultural heritage and identity and are vital for survival in harsh environments and

for adaptation to climate change. Traditional knowledge is embedded in these varieties, which are themselves traditional innovations. The CBD article 8(j) commits Parties to respect, preserve and maintain knowledge, *innovations* and practices of indigenous and local communities (emphasis added). The FAO Treaty on PGRFA has recently incorporated the collection of traditional community-managed Andean Potato Park into the Multilateral System, thus effectively recognizing customary rights over traditional potato varieties and the landscape as a gene bank.

iv) *Recognising customary rights over bio-genetic resources under customary management*

CBD Parties have recognised the importance of traditional knowledge, innovations and practices and customary use for biodiversity conservation – but their existence depends on the continued stewardship of biological and genetic resources by indigenous and local communities. Local management of biodiversity and ABS decisions should not be separated. ABS decisions can affect local management and livelihoods, for example if traditional bio-resources are subjected IPRs which limit customary use. Furthermore, to continue to make a living from biodiversity conservation and customary use, local resource managers need all the benefits and incentives possible, including from the use of genetic resources.

Indigenous communities see themselves as custodians of all the natural resources on the territories, lands and waters traditionally owned, occupied or otherwise used by them. They have ancestral rights or ‘Traditional Resource Rights’ over their Traditional Resources of economic, spiritual, cultural or aesthetic value, and a responsibility to maintain them for future generations². The UN Declaration on the Rights of Indigenous People recognizes the rights of indigenous communities over their traditional knowledge and over the lands, territories and resources traditionally owned, occupied or used by them, including genetic resources (Articles 26 and 31). It was adopted by the UN General Assembly by a majority of 144 states in favour, most (or all) of which are also CBD Parties. Given their important role, respecting the rights of indigenous peoples is as important for conservation as it is for human rights.

Our research has shown that traditional knowledge is closely inter-connected with and inter-dependent on bio-genetic resources, landscapes, cultural values and customary laws. Hence the preservation and maintenance of traditional knowledge, innovations and practices depends on safeguarding community rights to all these components of TK systems. As the CBD Expert Group on TK in Hyderabad noted, biological and cultural systems are co-evolving bio-cultural systems.

So governments wishing to effectively implement the CBD should rethink their interpretation of ‘state sovereignty’ of genetic resources to ensure that customary rights are also recognised. CBD Parties should as a priority, discuss and clarify the relationship between state sovereignty and customary rights over genetic resources, and recognize shared ownership over these (as also recommended by the Vienna Workshop, UNEP/CBD/ABS/GTLE/3/INF/2).

v) *Recognising customary rights over ex situ traditional knowledge*

To ensure equitable benefit-sharing with traditional knowledge holders, the International Regime should also cover traditional knowledge which is available *ex situ* in databases, publications etc. Much traditional knowledge has already been documented and is freely available. However, this does not mean that communities have given their consent for it to be used commercially. As our research has shown, communities still have ancestral rights over their knowledge and a responsibility to ensure its proper use, even if they have shared it with others. The Expert Group on TK in Hyderabad stated that public availability is not the same

² See ‘Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous and Local Communities’, by the late Dr. Darrell Posey, Anthropologist. IUCN (1996)

as 'public domain'. Thus, PIC and equitable benefit-sharing of traditional knowledge holders should also be required for the use of *ex situ* traditional knowledge and related genetic resources. Unless this knowledge is also included in the International Regime, the potential for benefit-sharing with TK-holders and for generating local incentives for customary use and conservation will remain limited.

vi) Promoting reciprocal access to genetic resources

While much traditional knowledge and related bio-resources have left communities and are available to others *ex situ*, communities are rarely allowed access to the resources held *ex situ* in gene banks etc even if they were collected from their communities. The customary principle of Reciprocity – or equal exchange- underpins many traditional societies, and is particularly strong in relation to seeds. For example, Quechua economic systems are founded on this principle, which provides an essential mechanism for survival outside the monetary economy. When communities provide access to knowledge and resources to third parties they expect to receive knowledge and resources in equal measure. Thus, *the International Regime should require users and ex situ collectors to provide reciprocal access to knowledge, technology and bio-genetic resources, in return for access provided by communities*. This can be as or more important than monetary benefits. Many communities need better access to genetic resources for food and medicine and adaptation to climate change. The International Potato Centre in Lima, for example, has established an agreement for repatriation and reciprocal access to potato varieties with the communities of the Andean Potato Park, Peru.

2) Measures to ensure that access to traditional knowledge takes place in accordance with community level procedures

In order to ensure community level procedures are respected, those seeking access need to obtain the PIC of the community through the appropriate and recognised community structures and institutions, eg. traditional authorities or elders, as identified by the community. Since knowledge is held collectively within and between communities, the PIC and benefit-sharing process should also involve the appropriate and recognised structures and institutions of neighbouring communities. Seeking PIC of a single individual or community would undermine collective custodianship and customary modes of knowledge use and transmission, in favour of individual rights. Furthermore, if neighbouring communities which hold the same knowledge are left out of the access and benefit-sharing process, conflicts may arise between communities, which could delay or obstruct the process.

While specific rules and procedures may vary, many communities share underlying customary values or principles that guide all aspects of life, including decisions on access and benefit-sharing. Our research identified three key customary principles: Reciprocity (in exchanges between humans and with the earth), Duality (existence/use of complementary elements) and Equilibrium (social and environmental harmony). However, different norms apply to different types of knowledge – common knowledge/bio-resources for everyday use are openly shared; specialised knowledge (eg. medicinal) is restricted access to kin/healers and must be used for community healthcare; and sacred knowledge is kept secret. These rules also apply to third parties.

In most cases, the community PIC process will take some time, requiring collective PIC of a number of communities, and individual PIC; and entailing an information and awareness raising process, and debate about how to respond to a new situation (ie. a request for external access). Thus, at least six months should be allowed for community PIC (though it may take less time in some cases). For further information, see the Information Submission by IIED for the Hyderabad Expert Group meeting on TK.

3) Measures to address the use of traditional knowledge in the context of benefit-sharing arrangements – See below

4) Identification of best practices to ensure respect for traditional knowledge in ABS related research

The following provide best practice guidance for ethnobiology research and for respecting traditional knowledge:

- International Society for Ethnobiology Code of Ethics (see http://ise.arts.ubc.ca/global_coalition/ethics.php)
- CBD Working Group on Article 8(j) – Draft Ethical Code of Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities

5) Incorporation of traditional knowledge in development of model clauses for material transfer agreements.

MTAs should recognize the rights of indigenous and local communities over their traditional knowledge and related genetic resources, and prevent any IPRs being taken on these. They should also recognise collective ownership of TK and related genetic resources; ensure collective PIC and benefit sharing amongst neighbouring communities; and recognize customary authorities, laws and procedures (eg. for conflict resolution), since these underpin customary use and conservation practices. Customary laws are very different to western laws – they support very different cultural values and economic systems. The challenge is to identify relevant customary laws and principles to be included in MTAs. Customary laws are usually orally held, which is important for adaptability. Derivatives of customary laws can be identified to be included in contracts so that customary laws themselves are not ‘frozen’ in time. Participatory processes at community level are needed to enable communities to identify customary laws to be reflected in MTAs, as well as elements of formal indigenous law which they find useful. Appropriate intermediaries are also needed to act in the interest of the traditional knowledge holders and promote negotiation on an equal footing.

6) Identification of individual or authority to grant access in accordance with community level procedures

Since knowledge is perceived as the cultural heritage of an indigenous or ethnic group, PIC should first be sought from the highest level of representation for that ethnic group in a particular territory or geographical area, provided it is legitimate (ie. recognised as representative by the communities). In the absence of such supra-community representation, it may be necessary to facilitate a meeting bringing together the elders of neighbouring communities.

It should be noted that while some indigenous authorities are strong and obvious, in many cases they have been weakened by state laws and authorities, and their existence may therefore not be immediately obvious. However, our research has shown that traditional authorities are often still operating and deciding on many natural resource issues, including agriculture, water, seeds, medicinal plants and conflict resolution, alongside local governments (eg. government panchayats in India). These less obvious customary structures should also be recognised by governments as the community authority for granting PIC, so that they are strengthened through the process, in order to support CBD article 10 (c) which requires parties to protect and encourage customary use in accordance with traditional practices.

7) Access with approval of traditional-knowledge holders 8) No engineered or coerced access to traditional knowledge

The International Regime should recognize that indigenous and local communities have the right to deny access following a PIC process, and to inform the national Competent Authority that they do not wish to be involved in ABS arrangements (eg. if they do not wish to participate in a process which could result in the patenting of part of their heritage and private ownership of life forms).

2. Components for further consideration

1) Prior informed consent of, and mutually agreed terms with, holders of traditional knowledge, including indigenous and local communities, when traditional knowledge is accessed

2) Internationally developed guidelines to assist Parties in the development of their domestic legislation and policies

3) Declaration to be made on the internationally recognized certificate as to whether there is any associated traditional knowledge and who owners of traditional knowledge are

4) Community-level distribution of benefits arising out of traditional knowledge

As mentioned above, most traditional knowledge is shared within and between villages, and this sharing ensures that it is maintained and renewed. PIC and benefit-sharing with an individual or single community will start to undermine the sharing values and practices that sustain TK and biodiversity. For this reason and to promote equity, avoid conflicts and spread conservation incentives, benefits need to be shared as widely as possible amongst communities in a geographical area (eg. the Andes). For example, Quechua communities of the Potato Park (a Community Conserved Area in Peru) have received traditional varieties and monetary benefits from their past use under a repatriation agreement with the International Potato Centre. These benefits have been distributed according to the extent to which people participate in the park activities – those that participate the most in sustaining TK and bio-resources receive the most benefits. In addition, according to customary practices of reciprocal seed exchange, the returned seeds have also been shared with neighbouring communities outside the park to ensure maximum horizontal benefits for the local economy. At the same time, priority has been given to those people most in need inside the Park – widows, orphans etc, in line with the principle of Solidarity. Receipt of benefits is also conditional on adherence to customary principles of social and environmental equilibrium.

While traditional varieties are fast declining in many cases, they have increased in the Potato Park, which now has about 1300 different native varieties – over 800 are local varieties, over 400 are from the International Potato Centre and the rest are from exchanges with neighbouring communities.