

# Interlinkages between Biodiversity and Customary Law

Biodiversity, intellectual property, customary law, and traditional knowledge





# Table of contents

Executive summary	03
List of acronyms	03
Definitions	04
Introduction	05
1. Policy and regulatory background: the dynamic role of the Convention on Biological Diversity	06
2. The complex connections between traditional knowledge, customary law, intellectual property and genetic resources	10
3. Responses from indigenous peoples	14
3.1 Rights to the land and territories	15
3.2 Moratoria on bioprospecting	15
3.3 Sui generis systems for the protection of traditional knowledge	16
3.4 Customary law and biodiversity	16
3.5 Bio-cultural protocols	17
3.6 Protocols and prior informed consent (PIC)	18
4. Customary law in the international and national context: an analysis of processes, policies and legislation	19
4.1 The United Nations Declaration on the Rights of Indigenous Peoples (2006)	20
4.2 Convention 169 of the International Labor Organization concerning Indigenous and Tribal Peoples in Independent Countries (1989)	21
4.3 The CBD: Nagoya Protocol (2010)	22
4.4 The WIPO Intergovernmental Committee and its negotiation process (2001 – to date)	22
4.5 The WTO process and TRIPS Council	23
4.6 Farmers' Rights in the FAO International Treaty (2001)	23
4.7 The intangible patrimony under UNESCO	24
4.8 National legislation in some countries	24
5. What is the role of bio-cultural and/or community protocols?	26
6. Conclusions and recommendations	28
References	30







## Executive summary

This paper provides an overview analysis of some of the complex inter-linkages between biodiversity, intellectual property, customary law and traditional knowledge. It also includes an analysis of how bio-cultural and/or community protocols have integrated and expressed some of these linkages into their own development process and content. Over the past few years, and especially as part of debates triggered by the Convention on Biological Diversity and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, the creation of policies and legal frameworks on genetic resources and traditional knowledge, recognize more and more the importance of customary law in defining indigenous peoples expectation and rights over their resources and knowledge. Thus, there is the need to explore how and under what policy and legal context, customary law principles can be effectively invoked and applied. Newly conceived bio-cultural and/or community protocols offer one possible instrument through which this may be effectively achieved, bridging the gap between formal, national policy and legal frameworks and indigenous peoples interests and rights. The paper also identifies key issues and areas which may require further analysis, including the role of intellectual property as a cross-cutting issue and bio-cultural and community protocols as a tool to integrate different rights and expectations.

## List of acronyms

<b>ABS</b>	Access to genetic resources and the Fair and Equitable Sharing of Benefits
<b>TRIPS</b>	Agreement Trade Related Aspects of Intellectual Property
<b>CBD</b>	Convention on Biological Diversity
<b>IGC</b>	Intergovernmental Committee on Intellectual Property and Genetic Resources, Knowledge and Folklore
<b>IP</b>	Intellectual Property
<b>ILO</b>	International Labor Organization
<b>TK</b>	Traditional Knowledge
<b>UNESCO</b>	United Nations Education, Science and Culture Organization
<b>FAO</b>	United Nations Food and Agriculture Organization
<b>WIPO</b>	World Intellectual Property Organization
<b>WTO</b>	World Trade Organization



# Definitions

**Bio-cultural/Community Protocol:** A non binding legal instrument, which defines policy principles, social conducts and management practices of indigenous peoples in regards to their lands and territories and natural resources. They also define their relation to the state (which may or may not recognize a protocol mandatory and binding instrument, depending on State laws and regulations) and third parties. A protocol is a flexible and adaptive instrument which may include references to expectations of indigenous peoples; self interpretations of existing legal frameworks; proposals regarding prior informed consent (PIC), consultation procedures, land and territorial management; calls for balanced and equitable interaction with the State; proposals on benefit sharing schemes; guidance on how to access and use traditional knowledge, among others. These may be expressed in formal terms (i.e. through sections, articles, provisions, etc) or as simple explanatory text. The Nagoya Protocol refers to “community protocols”, however, many existing protocols are called “Bio Cultural Protocols” or even “Community Bio Cultural Protocols.”

**Traditional Knowledge:** A wide range of knowledge, not limited to any particular field, including knowledge about medical treatments, about agriculture and about caring for the environment. What sets it apart from other knowledge and makes it “traditional” is the way it is associated with a particular local or indigenous community. Traditional knowledge is created, preserved, shared and protected within a traditional context, where it is passed on from generation to generation and maintained collectively by indigenous peoples and communities (See document, WIPO/GRTKF/IC/5/5).

**Customary law (of indigenous peoples):** A legal system that regulates social relations within indigenous peoples and communities, based on particular cultural, social, religious and ethical practices. Customary law is generally reflected in non-coded norms and principles, generally understood and respected among the respective indigenous peoples and communities, and developed to regulate social conducts within the community and sometimes between communities and third parties.

**Intellectual property rights:** A system of rights that protects creativity and innovations in all fields of human activity (arts, sciences, technology, trade). The granting of a title (for example, patents, trademarks, copy right), enables the creator or innovator to maintain exclusive rights over the use of his/her creation for a certain period of time. Intellectual property rights serve as an incentive to creativity, establishing a balance between private rights and social needs and the common good.

**Genetic resources:** Genetic material of actual or potential value (CBD, Article 2).



# Introduction

If something can be said about the inter-linkages between intellectual property (IP), biodiversity, customary law, traditional knowledge (TK) and bio-cultural and/or community protocols, it is that they are very complex, albeit not necessarily as complicated as they may seem at first.

The objective of this research paper is to offer analysis, insights and reflections, to better understand how these different but at the same time related elements, interact with each other, and to help identify where positive synergies occur at a policy and legal level in particular, and how they can be enhanced.

Section one provides a description of how the Convention on Biological Diversity (CBD) has created an appropriate and enabling “environment” to streamline TK and biodiversity, including genetic resources, into policy agendas, and by extension, incorporating intellectual property (IP), TK and customary law into the equation. This section presents a brief description of how articles 15 and 8(j) of the CBD have triggered different types of policy and legal processes, projects and initiatives aimed at the protection of TK of indigenous peoples. By doing so, the CBD has also highlighted and acknowledged the importance of and role IP and customary law play in this regard.

Section two describes the historical context which precedes the existing connections between TK, customary law, intellectual property and genetic resources. Understanding this scenario is a very good way of reflecting on why, in 2011, the world, and a wide range of social actors (i.e. NGOs, governments, indigenous organizations, international institutions), are looking at how to effectively protect TK, regulate access to genetic resources, revitalize customary law and consolidate a balanced and equitable IP system – all at the same time, and in often parallel fora.

Section three describes some of the different proposals regarding these issues which have been made by indigenous peoples and their representative bodies over time. There is clear evidence of a very proactive agenda on the part of indigenous peoples, which extends well beyond these issues, the CBD and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization (WIPO). Indigenous peoples have been especially vocal in regards to their lands, territories and self-determination rights, especially in United Nations fora. With more visibility during some periods (i.e. the nineties), the indigenous agenda regarding TK protection and land rights has been especially coherent and persistent over time.

Section four is an overview of some ongoing processes affirming and recognizing customary law – sometimes very explicitly – and its role in organizing social relations of indigenous peoples and the management of natural resources, biodiversity and TK, from the specific perspective of indigenous peoples.

Section five raises the question of the role of bio-cultural and/or community protocols in the formal and written expression of customary law. These protocols have been designed to allow, among other things, to make more visible, systematize and organize the expectations and interests of indigenous peoples, and serve to ensure balanced interactions with third parties, interested in their resources and TK. But protocols are relatively new tools and are only just beginning to receive broader attention and recognition.

Finally, some recommendations are made on how to advance the process of integrating customary law development, through the generation and implementation of bio-cultural and/or community protocols.



# 1. Policy and regulatory background: the dynamic role of the Convention on Biological Diversity





It is no mystery that the adoption of the CBD in 1992, sparked, among others things, a very intensive and extended in time, debate regarding the rights over and control of biodiversity components (namely genetic resources) and TK of indigenous peoples. As a cross cutting issue, IP has contributed to the polarization of positions between countries (the North and South basically) and, at the same time, dynamic policy-making processes at different levels. These are most clearly reflected in, for example, calls for disclosure and defensive protection mechanisms<sup>1</sup> and *sui generis* legislation<sup>2</sup>, banning the patenting of life forms<sup>3</sup>, ensuring equitable benefit sharing from access to and use of biodiversity and TK.

Intellectual property, mainly patents, invoked over and applied to innovations derived from biodiversity components (genetic resources for example), and expanding their scope directly or indirectly to TK, has generated an understandable reaction, particularly from countries in the South, non- governmental organizations and representatives of indigenous peoples, in as much as they legitimize the appropriation of genetic resources (and biodiversity components) and TK of these countries and communities.

These reactions have been diverse; they include requests to prohibit these patents altogether and calls for reviewing the patent system and patentability conditions (novelty, inventiveness and industrial application), plus including disclosure or origin and legal provenance as requisites in the Agreement Trade Related Aspects of Intellectual Property (TRIPS) of the World Trade Organization (WTO), to name but the most relevant.

<sup>1</sup> Defensive protection is basically using the IP system and the patent regime in particular (and even UPOV frameworks), to ensure that ABS and TK protection regulations and laws have been complied with by users of these resources and knowledge. The idea is that the granting of IP rights is conditioned to compliance with ABS and TK legislation in place (i.e. when biodiversity or biotechnological related patents are sought, the applicant will need to present evidence that appropriate permits and/or contracts regarding access to and use of genetic resources and TK have been obtained). Extensive literature is available on the matter. For a recent and very comprehensive document addressing IP and defensive protection, see, Werth, Alexander, Reyes-Knoche, Susanne. Editors. Triggering the Synergies Between Intellectual Property Rights and Biodiversity. GTZ, Federal Ministry for Economic Cooperation and Development. Eschborn, Germany. October, 2010.

<sup>2</sup> *Sui generis* legislation is, in simple terms, legislation “of its own kind”, specifically designed to safeguard certain features of TK which are not present, for example, in modern innovations. These features include: the collective nature of TK, the often non systematic manner in which TK is coded and revealed, the cultural/religious variable often present in indigenous peoples creative and innovation processes, among others. *Sui generis* legislation in this context should not be confused with the calls for the development of *sui generis* legislation for the protection of new plant varieties as enshrined in article 27.3.b of the TRIPS Agreement and related to “UPOV-like” seed protection regimes. Article 27.3.b establishes that: 3. *Members may also exclude from patentability:*

(b) *plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.*

<sup>3</sup> See for example, initial campaigns and declarations by indigenous peoples during CBD discussions in the early and mid nineties which were reflected in phrases such as “No Patents on Life Forms.” The Cancun Declaration of Indigenous Peoples (during the 5<sup>th</sup> Ministerial WTO Conference, 2003), explicitly declared the the need to ban and prohibit patents over life forms. The Mataatua Declaration (1993), the Maori Congress (1993), the World Congress of Indigenous Peoples (1993), the Guaymi Congress (1994), and so forth, have all expressly and very strongly condemned patents over life forms and biodiversity.



Amid this, the role of human rights<sup>4</sup>, the connections between IP and development<sup>5</sup>, the protection of TK and defensive protection, among others, has generated important advances in the generation of different public policies, norms and initiatives, to try and consistently address and find positive synergies between these different but related issues.

It is now widely accepted –with some resistance from industrialized countries– that IP regimes and their strengthening, should take into account the development status of countries, their capacity to generate innovation, benefit from IP instruments and their capacity to implement and enforce these rights. Social and economic variables also need to be considered.<sup>6</sup>

Article 15 of the CBD (on access to genetic resources), served as the trigger arguably of a series of dynamics and processes concerning the implementation of benefit sharing, prior informed consent, mutually agreed terms and the development of TK protection proposals.<sup>7</sup>

On the other hand, article 8(j) of the CBD<sup>8</sup> has also had the effect of being the true promoter and trigger of ideas, policy positions, projects and initiatives aimed towards the consolidation of indigenous people interests concerning their TK. Not only this, it has also helped to pinpoint critical and central issues in the debates, such as natural resources and indigenous land and territories, making them much more visible in international and national agendas.

Two peak moments associated with the CBD and Article 8(j) were the beginning of the process of the IGC within the WIPO (2001) and the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (2006).<sup>9</sup> The Declaration was in fact part of a much more comprehensive endeavor being promoted through different bodies of the United Nations system.

<sup>4</sup> Every person is entitled and has the right to the protection of their creativity and inventiveness. This is a fundamental human right, recognized in the United Nations Charter on Human Rights (1945). Thus, protecting TK as an expression of creativity is indeed a human right. How and through what type of instrument this right is protected, is where policy and legal processes are at this moment in time. Figuring out the best (*sui generis*) option or the best possible tool available to safeguard these rights of indigenous peoples.

<sup>5</sup> The WIPO (World Intellectual Property Organization) Development Agenda (adopted by the General Assembly in 2007) is the clearest example of the need to generate mutual supportiveness between IP and the development dimension – through 45 recommendations. Available at, <http://www.wipo.int>

<sup>6</sup> The book, Wong, Tzen, Dutfield, Graham. Editors. 2011. *Intellectual Property and Human Development. Current Trends and Future Scenarios*. PIIPA. Cambridge, United Kingdom, offers a set of very interesting articles addressing the connection between IP and development in the field of human health, the arts and innovation, food security, education, traditional knowledge, among others.

<sup>7</sup> With no exception every single existing law and draft proposal concerning ABS, includes specific calls for “the need to protect TK as it relates to biodiversity and genetic resources”. Decision 391 of the Andean Community (1996) and Executive Order 247 of the Philippines (1996), often quoted as the triggers for ABS processes worldwide, were the first to incorporate TK into their actual content, albeit in broad terms. Decision 391 even called for the development of an Andean Regime for the Protection of TK.

<sup>8</sup> Article 8(j) establishes that each Contracting Party shall, as far as possible and as appropriate: “...subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices”.

<sup>9</sup> Article 31.1 of the Declaration specifically refers to TK protection when it establishes that: *Indigenous peoples have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*



As these processes have been moving forward and with the adoption of different instruments that recognize the rights of indigenous peoples, there has been more appreciation for the fundamental role played by traditions, customs, ancestral practices and, ultimately, customary law as the integrator of indigenous society in general – plus their invaluable contribution to biodiversity conservation.

There is consensus among many countries, that customary law is important and it has a role to play in the protection of TK and other indigenous people interests.<sup>10</sup> However, its recognition in State law depends on very widely differing political, constitutional and legal options, adopted by states. Furthermore, how customary law “fits” exactly in legal TK frameworks and appropriately reflects indigenous peoples’ needs and interests, is still a matter of discussion.

Ultimately, the recognition of customary law is only a first step in the road of supporting the fundamental principles and social contracts which ensure maintenance and culturally sound evolution of indigenous livelihoods over time. It is also a first, albeit important step, in building balance (and bridges) between the state and indigenous peoples’ interests.

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<sup>10</sup> National Constitutions of Bolivia, Ecuador, Colombia and legislation in Peru, Brazil, Panama, among other countries, recognize cultural diversity and customary practices and cultural rights of indigenous peoples.



## 2. The complex connections between traditional knowledge, customary law, intellectual property and genetic resources





The connections between TK, IP, biodiversity and genetic resources can be understood, in simple terms, by asking the questions: how are control and rights over these elements expressed? In other words, under which conditions can biodiversity and genetic resources and TK be accessed and used and what role does IP play in this process.

The historical context underlying these questions helps considerably to understand how these interrelations have been created and developed over time. Since the 15<sup>th</sup> century, when the first great expeditions from Europe were sent to “discover” and conquer new worlds,<sup>11</sup> there has been a continuous flow of biodiversity components (for example, plants, seeds, animal species, fruits, species) from the discovered and conquered lands towards Europe and later on North America, and certainly vice versa as well.<sup>12</sup>

Often accompanying this natural, tangible richness, there was also a South-North flow of knowledge, innovations and practices of indigenous peoples on the uses and applications of this biodiversity and its components, which have been widely acknowledged and disseminated in ethno-botanical papers and scientific research. Furthermore, museum and botanical gardens collections, specialized libraries, mostly located in Europe and the US, also hold very important collections of southern biodiversity and literature. The mega-diversity and natural richness of the new lands, always contrasted with the comparably lesser biodiversity in the Old World and North America.<sup>13</sup>

With the formation of the United States of America and the industrialization process in the 18<sup>th</sup> Century, Northern Hemisphere countries became developed – with a few others gradually appearing in Asia, and later still Australia. The technological advances of these countries rendered the transformation of biodiversity components into highly elaborated products possible, in the field of food, pharmaceuticals, personal care and hygiene, and most recently, in new fields such as bio-remediation, nutraceuticals, among others.<sup>14</sup>

While this was happening throughout the 18<sup>th</sup>-20<sup>th</sup> centuries, another process became apparent: the formation of the international IP system, particularly the development of the patent regime. Patents have become, arguably, the most important tool to compensate innovators for their creativity. The US has led the consolidation of IP to the point that it now allows the granting of rights on inventions derived from biodiversity. This also includes isolated biodiversity components (e.g. genes, gene sequences, biochemicals), which some consider simple discoveries from nature.<sup>15</sup>

<sup>11</sup> See, Hobbhouse, Henry. *Seeds of Change: 1985. Five Plants that Changed Mankind*. Sidwick & Jackson. London.

<sup>12</sup> This is not a one way flow. Particularly in regards to agricultural genetic resources, continents have increasingly shared their richness and nowadays, no country is self sufficient in genetic resources for food and agriculture. There is what some call “interdependence” among countries. However, it is still fair to say that the biodiversity South has contributed considerably more over time to the “global biodiversity pot”. See, Moore, Gerald, Tymowski, Tymold. *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*. IUCN Environmental Law and Policy Paper No. 57, Gland, Cambridge, 2005.

<sup>13</sup> The megadiverse countries concentrate on their land 80% of the planets biodiversity, including a diversity of ecosystems, wild and cultivated species and genetic diversity. They are countries with a high presence of indigenous peoples, on whose land and territories this diversity is found. Some of these countries include: Bolivia, Brazil, India, Colombia, Peru, China, Venezuela, Mexico, Indonesia, Malaysia, Philippines, Kenya, South Africa, Ecuador, Costa Rica and Madagascar. There are other megadiverse countries, but those above are part of the Group of Like-Minded Megadiverse Countries, formed in Cancun, Mexico in 2002 as a political bloc to confront international negotiations (in CBD, FAO, WIPO and other settings).

<sup>14</sup> Ten Kate, Kerry, Laird, Sarah. 1999. *The Commercial Use of Biodiversity. Access and Benefit Sharing*. Earthscan Publications.

<sup>15</sup> The universal patentability criteria are that an innovation needs to be novel, inventive and industrially applicable to be worthy of patent protection. In the US, inventiveness and novelty have been historically interpreted very loosely by the US Patent and Trademark Office (USPTO) to the point that patents have been granted over whole plants, isolated genes,



Technology, specifically biotechnology developed explosively in the 1980's (and is still doing so), from the incentives created by patents and other stimuli provided by the US Government, including facilities to integrate university research with private investment, through the famous Bayh-Dole Patent and Trademark Amendment Act (1980). This Act, among other things, enabled private capital to be invested in public university research programs, thus often blurring the distinction between publicly generated and funded goods and private interests which required patent protection to recuperate investment in research. The former open and available to society as "public goods" and the former privatized through IP.

The gradual expansion of intellectual property at the global level was quite a natural consequence. Intellectual property became incorporated into the negotiation process of the General Agreement on Tariffs and Trade (GATT) during the 80s and 90s. The approval of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that establishes minimum universal standards for patentability, including the possibility to protect innovations in the field of biodiversity and natural products, many times associated to TK and biodiversity traditionally used by indigenous peoples around the world, is the highlight and groundbreaking milestone in this short history of the genetic resources and IP policy movement.<sup>16</sup>

These developments increased the control through IP Rights of southern countries' biodiversity. The limited technological capacities of countries in the South to transform biodiversity through cutting edge technology, made it very difficult to undertake R&D and benefit from biodiversity derived products. Furthermore, southern countries are de facto, excluded from the patent market and far removed from their operations and possibilities.<sup>17</sup>

While this was happening, countries and their indigenous peoples who are traditionally the providers of this biodiversity began to realize the perverse effect of patents and literally "see" the appropriation of their resources and knowledge. They consistently began to question these terms of exchange through the coining of the term "biopiracy".<sup>18</sup>

Some of the better known cases of biopiracy include patents granted (then revoked – after years of costly legal battles) over *Banisteriopsis caapi* (Ayahuasca),<sup>19</sup> *Azadirachta indica* (Neem)<sup>20</sup> and *Lepidium meyenii* (Maca).<sup>21</sup>

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gene sequences, proteins and other material existing (as such) albeit isolated from nature. This tendency however, has been gradually receding, especially after a landmark decision by the US Supreme Court in *KSR v. Teleflex* (2006) and, more recently, *Perfect Web Technologies, Inc. v. InfoUSA, Inc.* (2009), where novelty and non obviousness of certain asserted claims have been put into question.

<sup>16</sup> Pistorious, Robin. *Scientists, plants and politics. The history of the plant genetic resources movement*. IPGRI, Rome, 1997.

<sup>17</sup> During the last decade or so, Brazil, India and China have become important players in the world of biotechnological development, and their participation in markets, reflected on the number of patents requested, has increased dramatically.

<sup>18</sup> The best-known policy concept created to express these concerns is "biopiracy". Law 28216 in Peru, offers the one and only legal definition of the biopiracy phenomenon to date. Biopiracy is described as the illegal or unlawful access to and use of biodiversity components and related traditional knowledge, either through physical appropriation or through the use of intellectual property instruments, especially patents. By "illegal" or "unlawful" the law basically refers to not complying with existing ABS and TK protection legislation: Decision 391 and Supreme Decree 003-2009-MINAM, and Law 27811, respectively.

<sup>19</sup> For a detailed review of the case: <http://www.ciel.org/Biodiversity/ptorejection.htm>

<sup>20</sup> See a detailed review of the case at <http://www.twinside.org.sg/title/pir-ch.htm>

<sup>21</sup> See, Landon, Amanda J. Bioprospecting and Biopiracy in Latin America: the Case of Maca in Peru. In: *Nebraska Anthropologist*. Digital Commons@University of Nebraska. Lincoln. II-2007. Available at: <http://digitalcommons.unl.edu/nebanthro/32>



These and many other cases have in common that they refer to inventions based on biodiversity and TK obtained from developing countries in the South, they have very questionable claims in terms of their novelty and inventiveness and they have been challenged through campaigns and legal support involving mostly NGOs and governments acting in support of indigenous peoples and communities.<sup>22</sup>

In the midst this, customary law was long sidelined in terms of its more formal recognition as a means to regulate the social relations of indigenous peoples and their communities, and between these and their natural resources and biodiversity.<sup>23</sup>

Paradoxically, indigenous claims related to their land and territories, subject to different pressures “from development”, found within the United Nations, and the Working Group on Indigenous Populations, an ideal scenario to question the inequitable and uneven treatment given by States to custom and culturally based forms of social organization, equally legitimate and valid in the eyes and the collective of indigenous people.

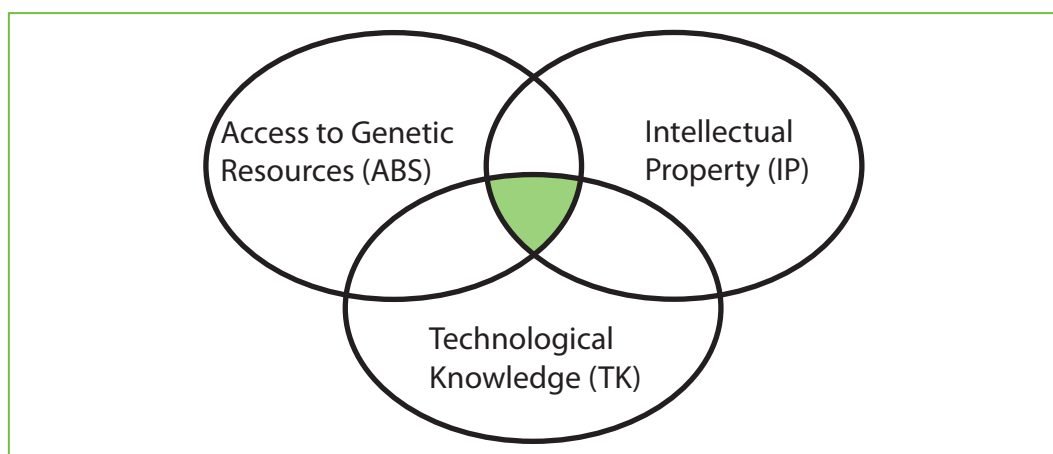


Figure 1. The relationship between intellectual property, traditional knowledge, customary law and genetic resources

The shaded sector in this graph indicates where ABS, IP and TK intersect. Some of the relations in this sector imply that TK is “privatized” through IP Rights. But at the same time, certain IP instruments (such as marks or geographical indications) may enable its legal protection. At the same time, it shows that IP (and the patent system in particular) may be related to ABS when it incorporates provisions regarding disclosure of origin or legal provenance of genetic resources or TK that may be part of an invention. Lastly but not less important, it also shows how ABS and TK may relate when genetic resources are accessed based on the use of TK.

Source: Ruiz, 2011.

<sup>22</sup> For further information on biopiracy and its implications see the following web site: <http://www.etcgroup.org>, <http://www.grain.org>, <http://www.biopirateria.org>, <http://www.biopirateria.gob.pe>. In the case of the latter, this web site pertains to the National Biopiracy Prevention Commission of Peru – probably the only existing example of a State led, permanent institution whose responsibility is monitoring, analyzing and undertaking action against cases where resources and TK of Peruvian origin are being used and claimed as part of inventions which are being subject to patents.

<sup>23</sup> In social sciences (sociology and especially anthropology), the critical value of customs and tradition in indigenous peoples livelihoods has been a basic premise of these disciplines. Law however, has been less receptive and has had considerable difficulties in recognition of customs and traditions – expressed in customary principles and frameworks. Except for rather general recognitions, some judicial decisions in countries such as Australia and the US, plus its expression in a few constitutional texts (i.e. Ecuador, Bolivia), it is still difficult to reconcile two very different forms of legal systems, one based on the unity of the Nation State and a hierarchical pyramid, another claiming for autonomy in its development and its mandatory nature even in light of conflicting national legislation.



### 3. Responses from indigenous peoples





Indigenous peoples have taken a very firm, coherent and consistent stance in regards to the issues mentioned in point 2 above. Particularly since the signing of the CBD, they have succeeded in developing and putting forward strong and consistent positions, especially in regards to the need for full respect of their lands and territories, recognition of their right to self-determination and respect to their customary law and practices.

### 3.1 Rights to the land and territories

In practice, this is the main demand of indigenous peoples, and is expressed in almost all UN and non related for a, including the CBD, the FAO IT, WIPO's IGC, UNESCO, etc. In simple terms, without land or territories, indigenous peoples have no possibility for future, self made development.

The land and territory they occupy, often not clearly demarked, superseded by concessions and other rights, are the main asset on which productive activities, culture, knowledge and ancestral technologies, and life itself, thrive and evolve.

In this regard, to lose land or a territory would unequivocally imply losing the livelihoods of indigenous peoples. More and more, market forces (including the use of money, intensification of agriculture, young indigenous peoples leaving communities in search of remunerated labor, etc.) are impacting and changing indigenous livelihoods altogether. In some cases, these forces are basically and very rapidly decimating traditional cultures.<sup>24</sup>

### 3.2 Moratoria on bioprospecting

Particularly during the first years of the CBD and the debate on ABS and TK, indigenous peoples stated the need to establish moratoria on bioprospecting and access to their land and territories, until regimes on ABS and the protection of their TK were in place, according to their needs, expectations, practices and customary rights.

In general terms, this position has subdued to some extent and their demands have shifted slightly to requiring not only the development of ABS/TK regimes, but the effective implementation of existing frameworks (see Box No. 1).

<sup>24</sup> In the recent book, Linden, Eugene. 2011. *The Ragged Edge of the World: Encounters at the Frontier where Modernity, Wildlands and Indigenous Peoples Meet*. Viking, New York, the author looks at some very interesting examples on how "development" and "progress" are slowly but very perversely, undermining and affecting culture and livelihoods of some of the most isolated indigenous peoples in the world, in Papua New Guinea, Indonesia, the Amazon, among other regions of the world.



### 3.3 Sui generis systems for the protection of traditional knowledge

Without exception, proposals and norms on the protection of TK are all sui generis frameworks that incorporate and adapt legal instruments to the needs and interests expressly established by indigenous peoples.<sup>25</sup> Calls for sui generis protection regimes have been especially visible in the CBD and WIPO IGC processes.

It is important to mention that the concept of “protection” is often very loosely used, something which affects how protection may serve a positive purpose. Protection may refer to ensuring a degree of control over TK by indigenous peoples or exercising some form of exclusive right; supporting distributive or compensatory purposes (share and equitable benefit sharing); supporting maintenance and preservation of TK over time; ensuring wider dissemination of TK for wider sharing and use over time (within or among communities and third parties); among other possible objectives.

Given these objectives, sui generis frameworks tend to integrate different tools and instruments (i.e. contracts or licenses, registers or databases, funds, positive and defensive protection mechanisms, classic intellectual property instruments -mainly trademarks, trade secrets and “soft” IP) which are aligned and built to safeguard the interests of indigenous peoples.<sup>26</sup>

### 3.4 Customary law and biodiversity

Since the mid 1990’s and in the search to implement Article 8.j and 10.c of the CBD, demands for respect of indigenous rights and customary law, have become an important part of the debates – in all international fora.<sup>27</sup>

In brief, indigenous peoples through their representatives, claim that any use or exploitation of biodiversity (in their lands or territories) and associated TK, should be undertaken taking into account and in accordance to ancestral practices and internal customary law, that define relations within communities and with third parties.<sup>28</sup>

<sup>25</sup> Arguably, the best known examples of TK *sui generis* frameworks include: Law 20 of Panama for the Protection of Indigenous Peoples Rights (1998); and Law 27811 of Peru for the Protection of the Collective Knowledge of Indigenous Peoples Related to Biodiversity (2001). Both these laws make use of a series of legal tools (i.e. contracts, registers) to protect indigenous peoples’ creativity. In the case of Panama, the law is a broad, wide ranging instrument which covers innovations, crafts, arts, etc. The Peruvian law focuses on TK as it relates to the use of biodiversity, as a source of medicinal plants, seeds, etc.

<sup>26</sup> For a series of examples in South America, see Ruiz, Manuel. 2005. *The Protection of Traditional Knowledge: Policy and Legal Advances in Latin America*. SPDA, BMZ, Lima, Peru.

<sup>27</sup> Article 10.c of the CBD establishes that, Parties, as far as possible and appropriate, shall, (c) *Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.*

<sup>28</sup> In many Decisions of COP (CBD), in the Nagoya Protocol on ABS and as part of the negotiation process of the international regime governing TK under the framework of WIPO IGC, the fundamental role of customary practices and law and tradition have been recognized and highlighted as key in defining the nature of indigenous peoples’ participation in a wide range of activities that involve relations and interaction with external actors – researchers, companies and even the State.



The key point here is to what extent formal State law and actions take into account these ancestral practices and internal customary law. Does customary law prevail in case of conflict? Does formal law or State action need to abide, invariably, to decisions made through customary law? These are legal but also political questions which many countries prefer to defer to an unknown future.

This establishes and inevitably calls for national and constitutional and/or legal frameworks to allow for, at least, the coexistence and supportiveness between State and customary regimes provisions and principles.<sup>29</sup> What is interesting, is that when carefully dissecting and reducing customary law to its core conceptual elements, these reflect expectations for compensation, preservation, and the exclusion of unauthorized third parties, all at the same time. This is especially true in the context of access to lands and territories and the use of indigenous peoples biodiversity and TK.

One distinct feature resulting from this method is that most of the time, it is the interest and expectations of communities, clans, indigenous nations, or whatever form of organization they take (i.e. the collective as a whole), for which benefits are being sought.<sup>30</sup> Indigenous peoples are in fact seeking some form of control over their lands and resources, including TK, whatever language, expression or codified form customs and practices which define this are expressed in.

### 3.5 Bio-cultural protocols.

Bio-cultural (or community) protocols are expressly recognized in the Nagoya Protocol on ABS. In article 12(1), the Nagoya Protocol provides that to comply with its provisions,

“...parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge...”

Likewise, article 12(3)(a) establishes that Parties shall endeavor to support as appropriate, the development of,

“...community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits...” by indigenous and local communities (among others),

Bio-cultural or community protocols raise the possibility of undertaking consultation and participatory processes (led by indigenous peoples) that use and conform to principles of customary law and ancestral practices – i.e. traditional consultation processes.

<sup>29</sup> Various Political Constitutions recognize either directly or indirectly, the importance and status of custom, and the ancestral practices and traditional lifestyles of indigenous peoples. These include the Constitutions of Peru (1993), Colombia (1998), Ecuador (2003) and Bolivia (2008). Through not referring to customary law *per se*, they do indicate the need to respect and acknowledge cultural diversity and indigenous livelihoods.

<sup>30</sup> Though not part of this paper, some would argue that this approach obviates recognition to the often very visible and evident intellectual effort made by socially recognized and privileged *individuals*, within communities, clans, etc. However, the United Nations Declaration on the Right of Indigenous Peoples recognizes that this is something which indigenous peoples should address based on their internal practices and customs.



Secondly, the content of these protocols should reflect and be based on conditions and principles under which indigenous peoples organize their relationships and express their expectations and interests regarding their land, natural resources (including biodiversity and its components) and their intellectual heritage (including their TK).

To date, actual application and implementation of bio-cultural or community protocols has been limited, mainly because they are very new and recent instruments. They have not been tested in specific circumstances. Nevertheless, interest in them is increasing because of the effect they can have in organizing communities, promoting a reflection and indigenous/local led process and, ultimately, empowering communities.

### 3.6 Protocols and prior informed consent (PIC)

Existing examples of protocols (see footnote 43) all specify –to some degree– processes by which consent – for a wide range of purposes involving access and use of resources on indigenous and communities lands– is given according to a series of prior phases of discussion, reflection, decision making and commitments. These prior informed consent processes are part of protocol formalities but are not necessarily recognized specifically in national, State laws and regulations. Nevertheless, even if PIC exist as a general principle in law (or the Nagoya Protocol), the fact that a bio-cultural or community protocol regulates its features is an advance in relation to implementing the principle.<sup>31</sup>

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<sup>31</sup> Some countries in the Andean region –including Peru– have developed strong consultation legal frameworks (especially as a result of ILO 169 obligations), which give indigenous peoples the right to be consulted prior to decisions being made and projects implemented on their lands. One important question which will be answered as protocols become implemented, is how do these tools relate and can complement measures and specific obligations determined in consultation frameworks. PIC for example, is an element of a consultation process phase.



## 4. Customary law in the international and national context: processes, policies and legislation





Though the concept of “indigenous customary law” per se is not often cited in legal instrument and provisions as such, there are continued and very explicit and clear references to the need to respect customary practice, traditions, values, etc.<sup>32</sup>

Indigenous peoples’ customary law is a mega conceptual category which can be defined as:

“...practices and conducts amongst indigenous peoples which have developed over time from accepted moral norms in indigenous societies, and which regulate human behavior, mandate specific sanctions for non-compliance, and connect people with both each other and the land through a system of relationships. Customary laws are passed on by word of mouth and are not codified (nor can they be easily codified). In addition, they are not singular – different indigenous groups have different concepts of customary law, and what applies within one group or region cannot be assumed to be universal.”<sup>33</sup>

The following provides an overview and analysis of existing international frameworks which address customary law – expressly or implicitly.

#### 4.1 The United Nations Declaration on the Rights of Indigenous Peoples (2006)

This “soft law” instrument was adopted by the General Assembly of the United Nations through General Assembly Resolution 61/295 in 2007. It is the most recent and arguably important recognition of the rights of indigenous peoples, including customary law, referring not only to biodiversity and TK, but also to a wide range of indigenous peoples’ livelihoods, including matters regarding their land, property, working relations, self-determination, cultural affirmation, etc.

The Declaration recognizes a series of relevant rights to indigenous peoples, including:

- The right to practice and revitalize their cultural traditions and customs (article 11.1),
- The right to participate in decision making in matters that may affect their rights, through their duly elected representatives, as well as to develop and maintain their own decision making institutions (article 18),
- The right to interact, consult and cooperate with the state (who must act in good faith), in order for to obtain their free, prior and informed consent before adopting and implementing measures and decisions which may affect them (article 19).

In the specific context of customary law, article 34 of the Declaration establishes that,

“Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.”

Also very important is how the Declaration addresses the issue of TK and intellectual creativity of indigenous peoples in general. Article 31.1 establishes that,

<sup>32</sup> Customary law is sometimes better understood in the context of International Public Law and is, quite simply, defined as: “...those aspects of international law that derive from custom. Along with general principles of law and treaties, custom is considered by the International Court of Justice, jurists, the United Nations, and its member states to be among the primary sources of international law.” A key element of customary law is the passing of time and a general recognition of its mandatory nature once codified and reflected in positive law or in judicial resolutions.

<sup>33</sup> This definition is constructed and adapted from the definition given by Wikipedia to Customary Law in Australia.



“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

The Declaration is unequivocal in the need for indigenous peoples to protect their TK – whether through self made mechanisms and instruments (i.e. local biodiversity registers, bio-cultural protocols), or in the context of national State and international processes (i.e. Law 27811 in Peru or the WIPO IGC process).

It should be noted that all rights (including those recognized in article 31.1. and 34 of the Declaration) must be interpreted in accordance with international human rights, most noticeably the United Nations Declaration on Human Rights (1948). These universal rights are the basis upon which all other rights and manifestations should be measured.<sup>34</sup>

## 4.2 Convention 169 of the International Labor Organization concerning Indigenous and Tribal Peoples in Independent Countries (1989)

ILO Convention 169, maybe more so than the United Nations Declaration (above), has some very explicit references to customs and indigenous peoples. In contrast with previous declarations by ILO, Convention 169 considerably changes the perspective regarding almost inevitable assimilation of indigenous peoples to wider, Western, society. This Convention recognizes cultural diversity and indigenous peoples' rights to customs, land and territories, etc.<sup>35</sup>

As in the case of the Declaration (see above), this binding international instrument contains a very broad range of references to indigenous peoples rights regarding customs, land, and knowledge. These include, for example, the need for Parties to:

- Respect and protect the social, cultural, religious and spiritual values and practices of indigenous (and tribal) peoples – article 5),
- Respect and protect the values, practices and traditional of indigenous peoples (article 5),
- Respect cultural and spiritual significance of the relationship indigenous (and tribal) peoples hold to the land and territories they occupy or otherwise use (article 13.1),
- Give due regard to indigenous peoples' customs and customary law (article 8),
- Respect the right of indigenous peoples to retain and develop their own customs and institutions and define their own development priorities (article 7 and 8.2).

<sup>34</sup> The Preamble of the Declaration acknowledges that “... *indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.*”

<sup>35</sup> For a detailed analysis of how customary law of indigenous peoples has developed in a broad range of international instruments, see, Thornberry, Peter. 2002. *Indigenous Peoples and Human Rights*. Melland Schill Studies in International Law. Juris Publishing. Manchester, UK.



One very important right recognized by ILO 169 is the right to consultation, as a basic right indigenous peoples have, especially in the context of public and private interests in regards to infrastructure and extractive projects which affect indigenous peoples lands and territories.<sup>36</sup>

Indigenous peoples, especially but not only in South America, have continuously invoked this basic right as a critical step in ensuring a balanced relation between the state and private entrepreneurs and indigenous peoples.<sup>37</sup>

### 4.3 The CBD: Nagoya Protocol (2010)

The Nagoya Protocol on ABS includes very specific references to the protection of TK, PIC, benefit sharing – and customary law as such. The Protocol establishes that:

- According to national legislation, Parties will take into account customary law, protocols and community procedures with regards to TK (article 12.1),
- Parties should, as appropriate, support indigenous peoples in the development of community protocols in regards to TK and benefit sharing, mutually agreed terms and model contractual clauses (article 12.3).

The Nagoya Protocol, though advancing in specifying the CBD principles, is still –at least in regards to TK protection- a programmatic instrument in the sense that it offers indigenous peoples and Parties rather broad and general guidance subject additionally to series of qualifiers. In practice, it will be countries, at the national level, which will give content to these principles and guidance and define what exactly principles such as consultation and prior (free) informed consent actually entail.

### 4.4 The WIPO Intergovernmental Committee and its negotiation process (2001 –to date)

The most recent draft of the international regime governing the protection of TK, produced by IGC (for the meeting in July 2011), includes proposals referring to the use of TK in accordance with traditions, cultural practices and the administration of rights conferred by the regime in accordance with protocols, traditional practices and customary law, among others.

<sup>36</sup> Article 15.2 of ILO Convention establishes that, “In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

<sup>37</sup> As an example: recently (September 2011), the Peruvian Congress approved the Law of Prior Consultation with Indigenous Peoples, which regulates how and under what conditions consultation processes with indigenous peoples should take place in the case of projects and policies affecting their rights – in territories and land in particular.



The IGC draft for an international regime for the protection of TK is the most advanced instrument (still to be approved by a Ministerial Conference of WIPO is Parties so decide) to date regulating how and under which conditions TK can be accessed and protected.

The draft seeks to carefully balance internal interests and needs of indigenous peoples with the roles and responsibilities of the state and governments in protecting TK. As in the case of classic IP, the draft offers protection from unauthorized use of TK, albeit at an international level, thus making its principles and norms universal and binding (when approved and ratified) upon Parties.

#### 4.5 The WTO process and TRIPS Council

Customary law is not formally part of the WTO or TRIPS debate, although discussions on biodiversity, genetic resources and TK have permeated the TRIPS Council and Trade and Environment Committee discussions. Nevertheless it should be noted, that even in TRIPS there is an area which may have a bearing on customary law and thus create a connection between itself and IP.

According to TRIPS, patents will not be granted over inventions which affect morality or the public order. It could be argued that some of the cultural, spiritual and social elements of customary law may enter into conflict with TRIPS if patents are awarded over inventions derived from indigenous peoples' biodiversity and TK.

In fact, many of the most notorious cases of "biopiracy" are based not only on the argument that inventions are neither novel nor inventive enough, but that cultural and spiritual beliefs of indigenous peoples and communities are being affected when monopoly rights are granted over "their" biodiversity and TK.<sup>38</sup>

#### 4.6 Farmers' Rights in the FAO International Treaty (2001)

Since the 1980s, and as part of the International Undertaking on Plant Genetic Resources (1983) and its different resolutions, FAO has repeatedly recognized the intellectual contributions and efforts by small farmers in centers of origin and diversification (in many cases indigenous), in conservation and biodiversity development, in this case with regard to crops and seeds.

<sup>38</sup> Article 27.2 of the TRIPS Agreement allows certain exclusions from patentability of inventions the commercial exploitation of which is necessary to protect ordre public or morality. The European Commission established the scope for the legal protection of biotechnological inventions in Europe in Directive 98/44 of the European Parliament. The Directive authorizes EC member States to exclude biotechnological inventions from patentability where their commercial exploitation conflicts with „ordre public“ and morality. It includes a list of inventions excluded from patentability, such as interventions in the human germ line, cloning of human beings and the processes referred to or the use of human embryos for industrial or commercial purposes. Many other IP laws and frameworks have morality as a criteria to exclude from patentability certain inventions.



This determines the need to, among other things, compensate in some way for these conservation and intellectual efforts. The FAO International Treaty, Multilateral System and its specific Farmers Rights provisions (to be implemented at the national level),<sup>39</sup> offers a series of mechanisms to facilitate this compensation for the use of TK.<sup>40</sup>

#### 4.7 The intangible patrimony under UNESCO

The Convention for the Safeguarding of the Intangible Cultural Heritage (2003) protects, among others, the cultural expressions of indigenous peoples and their TK.

Although it does not include references to customary law per se, a system of lists and national and international registers seek to revalue, invigorate and make this patrimony and heritage visible and recognizable both at the national and international levels.

These procedures of lists and registers may involve consideration of customary practices of indigenous peoples, for example, as a condition to consent to a determined registration of cultural patrimony or expression or TK.

#### 4.8 National legislation in some countries

Various countries in the world, mainly in Latin America legally recognize their pluri-cultural nature, as well as the existence of indigenous peoples and ancestral traditions and practices. Although there are few explicit references to customary law per se, this is inferred in a direct and evident manner from constitutional texts and legal provisions.

<sup>39</sup> For an analysis of Farmers Rights and its policy, social, cultural, legal and economic implications, see The Farmers Rights Project (<http://www.thefarmersrightproject.org>), coordinated by the Fridtj Nansen Institute. For specific implementation of Farmers Rights in Peru see Ruiz, Manuel. 2006. *Peru National Case Study on the Implementation of Farmers Rights*. Fridtj Nansen Institute. Available at <http://www.thefarmersrightproject.org>

<sup>40</sup> According to article 9 of the FAO International Treaty, Farmers Rights are to be implemented at the national level by the State, and may include measures such as: the protection of TK relevant to plant genetic resources for food and agriculture; the right to participate in the benefits generated by these resources; the right to participate and intervene in decision making processes which address these issues; and the right to save seeds on farm for further cultivation (taking into account existing IP rights if these are in place). For an analysis of the FAO IT see, Cooper, David. *The International Treaty on Plant Genetic Resources for Food and Agriculture*. In: RECIEL 11 (1) 2002.



Box No. 1. Responses to some of these issues by selected countries

Country (or regional group)	Theme	Policy, normative response or process
Brazil	TK	Recognition in ABS regulation (Provisional Measure 2.186)
Andean Community	TK	Recognition of the rights of indigenous peoples to decide in respect to their TK (Decision 391)
Costa Rica	TK	Recognition of intellectual <i>sui generis</i> rights of indigenous peoples over their TK (Law 7788)
Ecuador	TK	The “sumac kawsay” or good living/living well has been recognized in the Political Constitution of 2008 as a basic leading principle in the life of indigenous peoples. <sup>41</sup>
Phillipines	TK	Recognition of the importance of TK and the need to share benefits (Executive Order 247)
Panama	TK and customary law	Recognition of customary law and ancestral practices related to indigenous intangible heritage (Law 20)
Peru	TK and customary law	Recognition to customary law in decision making processes undertaken by indigenous peoples in regards to their TK (Law 27811)
ARIPO *	TK and customary law	Recognition of customary law and rules and principles for the protection of TK through a <i>sui generis</i> type system
African Union	TK and customary law	Recognition of indigenous peoples and local communities TK related to biodiversity (African Union Model Law)

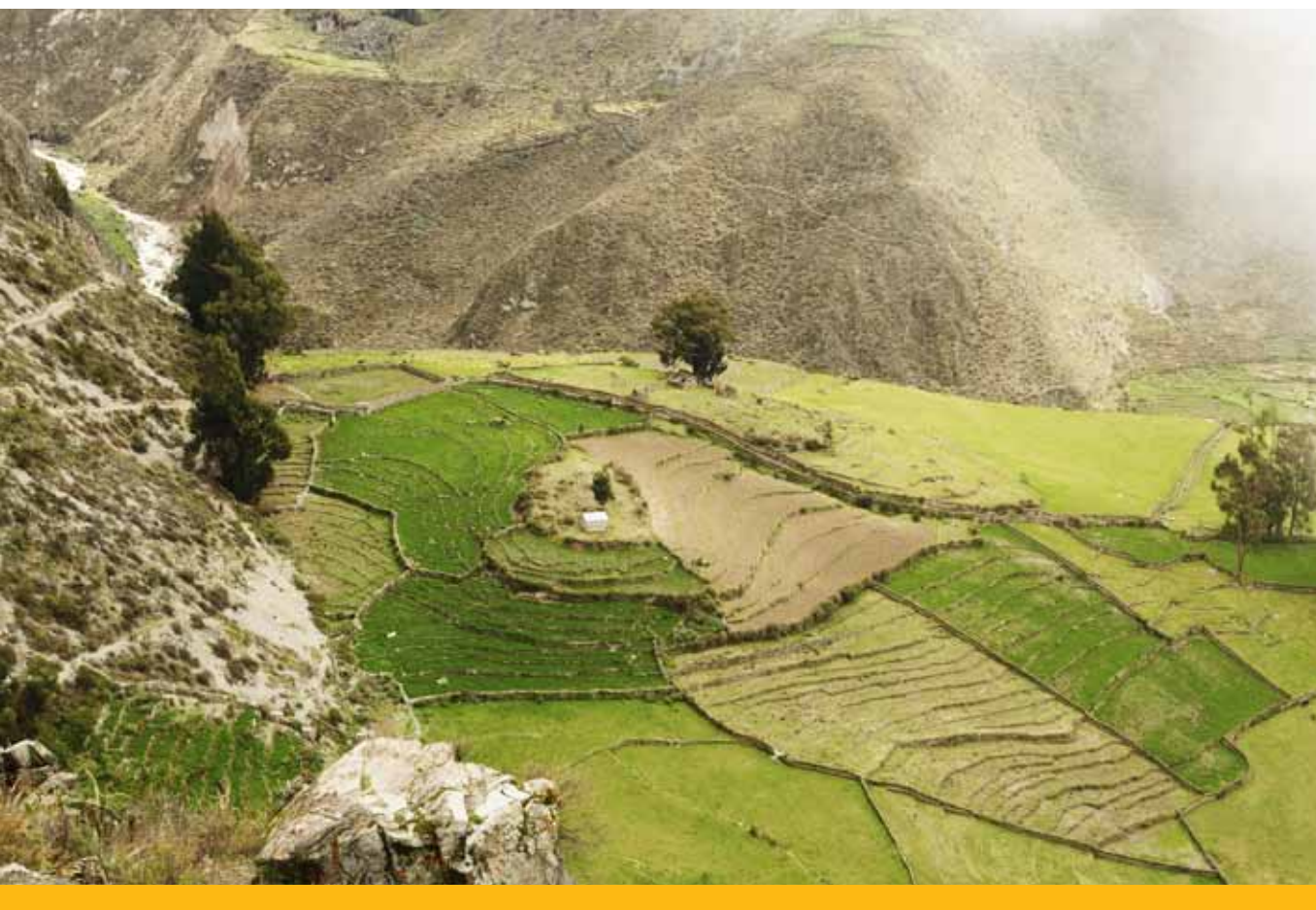
Source: Ruiz, 2011.

\* African Regional Intellectual Property Organization (ARIPO) –  
Swakopmund Protocol on the Protection of TK and Expressions of Folklore (2010)

<sup>41</sup> For further reading on the content of the “sumac kawsay” concept, see Huanacuni, Fernando. 2010. Vivir Bien/Buen Vivir. Filosofías, Políticas, Estrategias y Experiencias Regionales. Coordinadora Andina de Organizaciones Indígenas. Bolivia. Bolivia.



## 5. What is the role of bio-cultural and/or community protocols?



Bio-cultural and/or community protocols are tools or instruments,<sup>42</sup> a type of “constitution” that organizes and systematizes –based on customs, practices and procedures- the pretensions, expectations, demands, interests and desires of indigenous peoples. They are created in indigenous peoples territories and using their self-organization traditions.

<sup>42</sup> There is no consensus nor preference in regards to the actual denomination of “bio-cultural” or “community protocol”. For the purpose of this analysis they basically mean exactly the same.



Protocols also socially organizes and visibly affirms the rights of indigenous peoples and communities, in regards to certain issues, most often related to land, natural resources, biodiversity and TK.<sup>43</sup> They are a means of empowering indigenous peoples through a valuable, transparent, negotiating tool.<sup>44</sup>

Apart from this, they are an effective way to sensitize and build (and define) positions within indigenous peoples and communities in regards to some of these issues. This is especially so as protocols are truly built and developed “bottom up”, using indigenous and local social dynamics, forces and leaders to develop their form and content. As a result, they are in practice being developed within the framework of tacit or explicit customary law and principles.

Their written form facilitates their maintenance over time in a tangible form. At a minimum, these protocols should have a version in indigenous and local language, if these exist in a written, coded form, and an additional version in Spanish, English or the prevailing regional or national language. This enables third parties to value and clearly understand indigenous peoples and communities expectations and interests, in cases where there may be the intention to undertake ventures on indigenous lands, in regards to their natural resources, including biodiversity, and TK.

Maybe one of the most important functions of a bio-cultural and/or community protocol is that it allows the visibility of customs and practices on the basis of how their content has been constructed and defined. Customary law and its social, religious, economic dimensions can be reflected in a tangible manner through these protocols and understood or at least better understood.

As a result, customary law is no longer a distant, ethereal, dark, elusive system of rights, but rather, rules that can be appreciated and valued in a simpler and direct manner, given their written expression.

Likewise, the construction of these protocols allows indigenous peoples, in equitable and symmetrical conditions, to expressly define their rights and interests in a document specifically designed to satisfy their demands in terms of time, space, participation, ideas, reflection and communal decision making.

Protocols also offer one way to harmonize and complement formal State legal regimes that respond to wholly different conceptions, logics and fundamentals, but between which, commonalities can be found – in content and form.

Ultimately, they are a practical way to materialize customary law and practices in a formal and legal instrument – whether binding or not – depending on specific circumstances. As a result there is the possibility for better legal certainty among potential partners subject to protocol and national regulations – indigenous peoples and external third parties (companies, researchers, the state, etc.).

<sup>43</sup> Current existing examples of protocols – Bio-cultural Community Protocol of the Gunis and Medicinal Plant Conservation Farmers in Mewar (India), the Bio-cultural Community Protocol of Bushbuckridge Traditional Health Practitioners (South Africa), the Bio-cultural Community Protocol of the Traditional Healers of the Malayali Tribes (India), and the Bio-cultural Protocol of the Samburu Indigenous Livestock Breeds and their Rights to their Genetic Resources and Role in Global Biodiversity Management (Kenya) – clearly show a wide range of indigenous interests (and approaches) in regards to their lands, territories, customs, practices and traditional knowledge.

The organization Natural Justice from South Africa has undertaken important research and protocol development work in a series of countries. See document, Natural Justice. *Bio-cultural Community Protocols. A Community Approach to Ensuring the Integrity of Environmental Law and Policy*. UNEP, Natural Justice. South Africa, October, 2009.

Available at <http://www.naturaljustice.org/images/naturaljustice/bcp%20book%20-%20compress.pdf>

<sup>44</sup> For a more detailed report on the role, form and content of bio-cultural and/or community protocols see report from the Regional Workshop on Biocultural and Community Protocols, held in Lima on August 8-9, and sponsored by Natural Justice, GIZ, SPDA and Compass. Available at, <http://www.spda.org.pe>



## 6. Conclusions and recommendations

1. Bio-cultural or community protocols are, to date, one of the few legal instruments and tools which may be able to fully express customs and practices (and customary principles per se), apart from declarations made by indigenous peoples' fora now and then over time.

Except for a few examples where courts in Australia, New Zealand, the US, have reflected on and expressed customary law principles in their decisions, and even where Constitutions and legislation make references to it, making this set of principles and mandates obligatory, is still a challenge for the State and communities. Protocols may contribute to this recognition.

2. The development of bio-cultural and/or community protocols, as a result of the initiative and will of indigenous peoples (with or without the support of other actors such as NGOs), needs to be fully based on traditional practices and customary principles, in order to give them full legitimacy (in form and content).

Subsequently, their specific content must also respond to customary law, both in terms of defining and expressing the social relations inside and within communities and in regards to possible linkages with third parties interested in their resources, biodiversity, TK, etc. At the very least, if indigenous and local languages have a written form, these languages should be used – and subsequently translated for further understanding by third, external parties.

3. Current trends in existing bio-cultural and community protocols indicate that these tools are being developed to incorporate TK and benefit sharing principles, but also broader issues related to land rights, natural resources and biodiversity rights, self determination, among others.

In their development, support should be directed at providing legal and technical advice with regards to indigenous rights and expectations, as a means for existing policy and legal frameworks to be reconciled and harmonized. This will help to balance State and customary law principles.

4. It is important for a national or international regime on the protection of TK to incorporate customary law principles into and inform their development process and substantial content. It is therefore necessary to understand and recognize and express the relationship between formal law (State) and customary law.

Questions need to be raised and answers provided in regards to issues such as: Does the National Constitution recognize indigenous peoples? How and in what terms are they recognized? What is the legal status of customary law in the Constitution or legal framework? What are indigenous peoples' specific rights?

5. Occasionally, there is a tendency to try and force linkages that either do not exist between issues or elements, or that are so simple that they are overlooked. In the case of the relationship between



Customary Law – Bio-cultural Protocols-Biodiversity-Traditional Knowledge, the key element to consider is how national constitutional and legal frameworks recognize Customary Law and whether or not protocols (which are based on customs and traditions) can be used effectively as a legal tool to safeguards indigenous peoples' interests.

6. Customary law, maybe more importantly, can ensure a balanced, equitable and better informed relation between indigenous peoples and communities and external actors, based on pre defined and explicit conditions applicable to actions, activities and projects which involve entering into indigenous territories, consulting with communities, seeking partnerships for natural resources use, undertaking bio-prospecting activities, etc.
7. Although the codes and the manifestation of customary law respond to very specific characteristics (for example, oral transmission, relative systematization, association with rites and ceremonies, forms of enforcement and application, etc.), it tends to express very clearly expectations regarding control, exclusion, participation, inclusion, recognition, among others, that are very much in accordance with the principles and rights derived from the State-Nation, even if expressed in traditional forms. In this regard, harmonization passes through a process of adequate interpretation and what some call "inter-cultural" dialogue, where formal, State frameworks positively interact with indigenous and communities systems of law and practices.
8. One possible manner to understand the role of bio-cultural protocols (in regards to TK) is to consider the following: if TK needs to be protected (preserved, enhanced, promoted), intellectual property dimensions (classic tools) may offer some useful responses, especially in the context of "soft" instruments such as copyright, trade secrets, geographical indications and collective marks.

Bio-cultural and community protocols may serve as a means to enable indigenous peoples and communities to internalize the potential of these instruments and expressly recognize them as part of one of various options available for TK protection.

Customary practices and law on the other hand, may also serve to place these classic instruments in an indigenous and local context and assess them based on their possible results and implications – in terms of, for example, oral traditions, codification, local innovation processes, among others. But customary practices and law could also help to develop, place and understand other tools and instruments (for example, sui generis regimes), within local contexts and build their effectiveness as part of bottom up, fully informed, processes.

9. The minimum considerations and elements a bio-cultural or community protocol should take into account are the following:
  - An internally led, customs based process for protocol development
  - Clear definitions in regards to indigenous peoples interests and expectations in regards to their lands and natural resources (including biodiversity and TK)
  - Clear definition of the protocols objective (s) and full understanding of what a protocol may and may not achieve (including through analysis of existing legal frameworks which may enhance and/or limit protocols effectiveness)
  - Commitments to respecting and complying with the protocols content and principles
  - Careful reflection on the potential impacts (transaction costs) protocols may impose in regards to investment, research and project activities on indigenous and local communities lands



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Published by  
Deutsche Gesellschaft für  
Internationale Zusammenarbeit (GIZ) GmbH

Sector Project Trade Policy, Trade and Investment Promotion

Registered offices  
Bonn and Eschborn, Germany

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As at  
November 2012

GIZ is responsible for the content of this publication.

On behalf of  
Federal Ministry for Economic Cooperation and Development (BMZ),  
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