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Benefit-sharing and traditional knowledge: the need for international guidance

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— Photo by Laura Elizabeth Pohl/Bread for the World

by Elisa Morgera and Elsa Tsioumani

July 2014: Several international processes currently point to the need to develop international guidance to ensure that the benefits arising from the use of traditional knowledge of indigenous peoples and local communities are shared equitably and fairly with these peoples or communities. This blog post focuses on recent discussions under the Convention on Biological Diversity ([CBD](#)), and connects them

with other international processes that have highlighted further open questions in this regard.

Traditional knowledge and benefit-sharing

Traditional knowledge has not received an international definition. It is generally understood to cover a wide range of fields, including for instance environmental knowledge, agricultural practices, medical treatments, literary and artistic expressions and cultural practices. The CBD refers to a specific part of traditional knowledge: the knowledge, innovations and practices of indigenous peoples and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biodiversity. In other words, it is the knowledge built through generations by a group living in an intimate connection with nature. It is a living form of knowledge that is part and parcel of the identity, cultural and/or spiritual practices and natural resource management of indigenous peoples and local communities. In addition, it is a body of knowledge that is protected, preserved and shared according to the customary rules of the indigenous peoples or local communities holding it.

Traditional knowledge has for some time been seen as a unique and precious source of information to develop new pharmaceutical, cosmetic or other products derived from natural ingredients. In addition, traditional knowledge is increasingly seen from a broader perspective as a form of knowledge that should be considered on the same level as modern/western science, and that can provide unique approaches to global environmental challenges, such as nature conservation, sustainable use and adaptation to climate change.

Traditional knowledge is, however, inextricably linked to indigenous peoples' culture and own governance systems. As a result, it has been threatened and eroded in the past by colonization and mandatory assimilation, and more recently by relocation policies and globalization forces that marginalize indigenous peoples and local communities and deprive them in various ways of tenure over lands, territories and natural resources that they have traditionally owned, occupied and/or used. In addition, traditional lifestyles are rapidly disappearing, as the younger members of the communities are reluctant to continue with traditional practices. Furthermore, (ab)use of the IPR system has resulted in a series of [famous biopiracy cases](#) involving misappropriation of traditional knowledge.

The CBD requires its Parties to respect, preserve and maintain traditional knowledge. It also requires that Parties promote its wider application with the approval and involvement of the holders of traditional knowledge. Finally, it requires its Parties to encourage benefit-sharing from the use of traditional knowledge with indigenous peoples and local communities. It can thus be inferred that a dual, bidirectional relationship is sought which can be expressed in benefit-sharing terms: applying traditional knowledge, with the approval of its holders, and thus sharing its benefits with society at large; and sharing the benefits arising from the utilization of such

knowledge by the government, private sector or research institutions, with the original holders of this knowledge.

A plethora of soft-law instruments developed in the context of the CBD have spelled out – to some extent – how governments are supposed to collaborate with indigenous peoples and local communities in the protection, preservation and maintenance of traditional knowledge, including through the use of [environmental and socio-cultural impact assessments](#) and a [code of ethical conduct](#). In addition, mandatory international obligations were established under the CBD in 2010 with specific regard to traditional knowledge associated with genetic resources (that is, traditional knowledge that may spark research and development interest in certain living organisms to develop pharmaceutical, cosmetic or other products). The [Nagoya Protocol on Access and Benefit-sharing to the CBD](#) has made it mandatory for governments to obtain the prior informed consent (or approval and involvement) of indigenous peoples and local communities and to ensure benefit-sharing from the use of their traditional knowledge.

Need for international guidelines

Notwithstanding these legal developments, however, CBD Parties have recently come to the conclusion that more international guidance is needed on how to ensure benefit-sharing from the use of traditional knowledge. In [October 2013](#), the CBD Working Group on traditional knowledge noted the lack of a “centralized mechanism for indigenous and local communities to report unauthorized access to their traditional knowledge” and recommended that work begin on developing international guidelines for the development of “mechanisms, legislation or other appropriate initiatives” to ensure that: private and public institutions interested in using traditional knowledge obtain the “prior informed approval” of indigenous and local communities; these communities obtain a fair and equitable share of benefits arising from the use and application of their knowledge; and unlawful appropriation of traditional knowledge is reported and prevented ([Recommendation 8/4](#)). The recommendation now needs to be endorsed by the governing body of the CBD, its [Conference of the Parties that will meet in October 2014](#) in South Korea. One point is worth highlighting in this recommendation: future international guidelines on benefit-sharing will focus not only on traditional knowledge associated with genetic resources (which is addressed in the Nagoya Protocol), but also on other traditional knowledge associated with ecosystems and biological resources.

Since the recommendation is quite short, it is also useful to highlight the preparatory documentation that led to these discussions under the CBD Working Group. Both a [consultants' report](#) and the [Secretariat official document](#) provide useful food for thought on the challenges ahead. First of all, both documents underscored that the key challenge in the protection of traditional knowledge is related to the need to protect the communal way of life that develops and maintains, and basically *embodies*, traditional knowledge.

Second, both documents outlined the difficulties for protecting traditional knowledge through the existing system of intellectual property rights (IPRs). If indigenous peoples and local communities choose to commercialize traditional cultural expressions, such as textile designs, tradition-based crafts, sound recordings and traditional food products, the use of certain intellectual property tools including trademarks, copyright and geographical indications may prove to be useful. Trademarks and geographical indications may be especially suitable to protect such expressions of traditional knowledge due to the possibility for collective ownership and indefinite extension of protection. However, their use can only prevent the unauthorized use of the protected mark or indication; it does not protect the knowledge as such. In addition, most biodiversity-related traditional knowledge is not only intangible but also particularly dynamic and adapted to a specific environment. Therefore, it does not lend itself to nor satisfy the protection requirements of conventional intellectual property systems, such as those governing copyrights, patents, trademarks and designs. The documents explain that:

- traditional knowledge is collectively held by communities and in many cases widely shared, thereby making it difficult to identify exclusive owners;
- traditional knowledge is often not ‘owned’ in the conventional sense, but collectively held, developed and shared in accordance with customary norms and laws; in many instances it is holistic and develops organically thereby making it difficult to distinguish between ‘new’ and ‘old’ knowledge;
- traditional knowledge is integrally connected to a way of life – its development is not motivated by the possibility of personal reward but on the contrary develops in response to the needs of the community;
- the sharing and exchange of traditional knowledge builds and binds the community and the rules that govern its use are not based on ‘ownership rights’ but on ‘stewardship duties or obligations’;
- indigenous and local communities regard their rights to their knowledge as inalienable and held in perpetuity for future generations; and
- traditional knowledge is often transferred between generations to recipients, who earn the right to acquire the knowledge [in a social context, according to accompanying] obligations.

Third, it is quite remarkable that neither the consultants’ report nor the Secretariat document could identify many sources for inspiration to guide the development of international guidance on benefit-sharing from the use of traditional knowledge. On the one hand, some national laws have provided for direct payments to indigenous and local communities or payments to trust funds kept on behalf of indigenous and local communities. On the other hand, the only source identified as providing “elements of good process” was a 1999 report by the Swedish Scientific Council, which suggested that the definition of “fair and equitable benefit-sharing” is non-exhaustive and inclusive, and should encompass certain minimum conditions, namely it:

- should contribute to strengthening the situation of the less powerful party/parties at all levels in the sharing relation, including by enabling equal access to information, effective participation by all relevant stakeholders, capacity-building and privileged access to new technology and products;
- should contribute toward, or as a minimum not counteract, the two other objectives of the CBD: conservation of biological diversity and the sustainable use of its components;
- must not interfere with existing forms of fair and equitable benefit-sharing, including customary benefit-sharing mechanisms;
- must respect basic human rights;
- must respect value and legal systems across cultural borders, including customary law and indigenous intellectual property systems;
- must allow democratic and meaningful participation in policy decisions and contract negotiation by all stakeholders, including stakeholders at the local level;
- must be transparent enough that all parties understand the process equally well, especially local and indigenous communities, and have time and opportunity to make informed decisions (effective PIC);
- must not unnecessarily restrict access to non-rival goods and resources;
- must, if contractual relations are involved, include provisions for independent third party review to ensure that all transactions are on mutually agreed terms (MAT) and preceded by effective PIC;
- must, if contractual relations are involved, provide for identification of the origin of genetic resources and related knowledge; and
- must, if contractual relations are involved, make information about agreed terms publicly available.

Connections

It remains to be seen how, if at all, this scarcity of sources will affect the future development of international guidelines on benefit-sharing from the use of traditional knowledge. Another key consideration is that several other international processes will also look at connected questions in parallel. These processes include the Nagoya Protocol, under which questions related to traditional knowledge shared by different indigenous peoples and local communities may be explored in the context of the possible development of a global multilateral benefit-sharing mechanism ([ICNP recommendation 3/3](#)).

In addition, the CBD Working Group on Traditional Knowledge at its October 2013 meeting has also identified relevant ongoing work by other international bodies. This is the case of the World Intellectual Property Organization and its [Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore](#), under which a definition of traditional knowledge and the identification of the beneficiaries of protection are being negotiated in the context of an effort to

protect traditional knowledge within the IP system ([Draft articles on the protection of traditional knowledge, June 2014](#)). It is also the case of the United Nations Permanent Forum on Indigenous Issues and other UN processes focusing on indigenous peoples' rights supporting the implementation of the UN Declaration on the Rights of Indigenous Peoples. Furthermore, under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, the [2013 Chengdu Recommendation](#) acknowledges "the central role that knowledge and practices concerning nature and the universe play in maintaining sustainable ecosystems and biodiversity and in helping communities to ensure food security and health" and states that commercial use of intangible cultural heritage "must never threaten the viability of the heritage and should benefit first and foremost the communities concerned." Finally, relevant work is undertaken under the International Treaty on Plant Genetic Resources for Food and Agriculture, with emphasis on [farmers' rights](#).

With regard to applying traditional knowledge for the benefit of society at large, an interesting parallel process that was not identified by the CBD Working Group is the work of the [UN Special Rapporteur in the field of cultural rights](#) concerning [the right to share the benefits of science](#). Farida Shaheed, UN Special Rapporteur in the field of cultural rights, published in 2012 her report on the "Right to enjoy the benefits of scientific progress and its applications," where she noted the need for further discussion on modalities and conditions under which it is possible to benefit from accumulated traditional knowledge, including the agrobiodiversity-related knowledge of local farmers. In particular, she pointed on the one hand to the need to allow further development and dissemination of such knowledge as a common public good, and on the other, to the need to safeguard the moral and material interests of the individual or collective actors that create, maintain and transmit such knowledge. As the right to benefit-sharing from science needs conceptual clarity, she suggested that a General Comment on Article 15 of the UN Covenant on Economic, Social and Cultural Rights may be developed to that end ([A/HRC/20/26, paras. 64-65 and 75](#)). It remains to be seen whether this may lead to a new international process that may clarify how to ensure that the benefits of traditional knowledge reach society at large, including by empowering the original holders to continue creating such knowledge through recognition of the rights that constitute the basis of their knowledge creation.

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