

Access and benefit sharing in the Pacific: What makes it unique?

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The 14 Pacific island countries (PICs) of the Pacific region have high species endemism (80 per cent or more on some islands) and globally significant biodiversity but relatively low species diversity. There are about 2,000 different types of ecosystems throughout the Pacific. The huge expanse of ocean supports the most extensive and diverse coral reefs in the world, the largest tuna fishery, and the healthiest and in some cases, largest remaining populations of many rare species including whales, sea turtles, dugongs and saltwater crocodiles.

Ownership of genetic resources

In crafting an international access and benefit sharing regime that is relevant to PICs, property rights systems operating in the Pacific must be taken into account. Land held according to custom is by far the dominant form of land holding. The constitutions of many PICs prevent the sale of such land. Customary land is 'owned' by a group, usually consisting of blood relatives. Although a customary landowner does not truly 'own' the land, ownership usually extends to all fauna and flora on the land. Given that a clan or extended family ultimately controls customary lands, a potentially large number of individuals would have the right to intervene in the negotiation of a 'bio-prospecting' scheme. Under customary law in the Pacific, land is perceived to also include water, sea areas, reefs and shelves and the principles of marine tenure differ little from those of land tenure. Nevertheless, in most PICs today ownership of land below the high water mark now vests in the State. Few coastal village dwellers, however, are actually aware of this.

Regionalism

Many biological resources are common to most PICs. It may be necessary therefore for several countries to be consulted, to provide prior informed consent (PIC), and to decide upon mutually agreed terms (MAT) for access and benefit sharing. Regional co-operation is a well-established mode of operation in the Pacific. For example, a scheme for benefit sharing of a regional resource already exists for the Pacific's tuna fishery. States have 'sovereign rights' (but not 'sovereignty') over the exploration and exploitation of living resources in their exclusive economic zones (EEZs).

Deep sea genetic resources

Deep sea environments represent a significant reservoir of biodiversity on earth, with a multitude of unique ecosystems and species found nowhere else. A number of people believe that the genetic resources needed to combat incurable diseases or produce new foods for future generations lie at the bottom of the sea. Yet, human impact on deep and little known waters, primarily through fishing, has already caused severe damage and many species may be lost before they are even discovered. Recent developments in deep sea mining technology for manganese nodules and other mineral resources heighten this concern.

Most deep sea environments are located outside the limits of national jurisdiction and therefore fall outside the jurisdictional scope of the CBD. The waters of the Pacific islands region are unique, however, in that most deep sea habitats fall within the national jurisdiction of PICs. Absent in the Pacific are the broad, shallow shelves that are characteristic of most countries' continental margins, and of other major island archipelagos in Southeast Asia and the Caribbean. Instead, it is not uncommon to find depths of 3,000 metres within two kilometres of shore. *continued on p. 4*

Today's ECO

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Photo credit: Le'a Kanehe

Quaker Book Useful for Indigenous Peoples, Activists

Maurice Malanes – Tebtebba Foundation

A new book by the Quaker International Affairs Program seeks to guide "small players" like indigenous peoples, activists and even diplomats of poor countries involved in international negotiations on biodiversity, intellectual property and food security.

"We hope this book helps disadvantaged sectors who have to deal with powerful, big delegations such as the US who come to international negotiations with 500 lawyers and other 'experts'," Tasmin Rajotte of the Quaker International Affairs Programme or QIAP said in an interview.

Rajotte is one of the authors and editors of *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*, published by Earthscan and supported by the International Development Research Centre of Canada.

Authors of the book, which was launched at a side event on Monday, are alarmed that even biodiversity and food are being subject to the intellectual property system or IPR. "IPR requires patents and patents mean exclusions, and these are ways by which large industries from the US and the European Union can have monopoly control not only over pharmaceuticals but also over food," said Geoff Tansey, another editor-author of the book and consultant to QIAP.

Rajotte similarly noted that the trade sector from the developed world has been driving the agenda in various international negotiations. This is because the small players such as ordinary farmers and indigenous peoples or even diplomats of developing countries have hardly any access to sufficient information about the negotiations and to the meetings because of logistical problems, she said.

Tansey said the real issues behind all these international negotiations are "transparency and access" to information. He thus stressed the need for mechanisms to ensure these. Through the book, the authors seek to uncover the real issues, which, they say, have often been shrouded by the political and legal spin of lawyers.

As a guide, the book seeks "to elicit an interest in and inform about something that matters," Tansey writes in a concluding chapter. "Food matters. Yet it is an area where globally we are failing to meet humanity's current needs and are in danger of meeting future needs."

He also hopes that the book helps "make the discussion and rule-making about intellectual property, biodiversity and food security more informed and lead to fairer outcomes for all."

Community Rights over Traditional Knowledge: Implications of Customary Laws & Practices

A report from Research Partners' Workshop in Panama, 19-23 November 2007 organised by Fundacion Dobbo Yala and IIED, Kuna Territory, Community of Wichub Wala/ Porvenir

The five day workshop brought together researchers and indigenous organisations from India, China, Peru and Panama working with indigenous communities to develop tools for protecting community rights to knowledge, genetic resources and biocultural heritage. Its purpose was to share action- research findings and methods and identify common findings for policy-makers and communities.

Rather than focusing narrowly on TK, the project is focusing on protecting TK systems or biocultural heritage as a whole, including the web of interlinked elements that sustain TK: genetic resources, traditional territories, local economies, cultural and spiritual values and customary laws. This concept reflects the holistic indigenous worldview where tangible and intangible elements cannot be separated, and addresses the need to protect TK from loss (for customary use), as well as misappropriation.

'Collective Biocultural Heritage' has provided a very useful conceptual framework for action-research. It has enabled better understanding of complex TK systems at local level and how the different elements interact; and a focus beyond 'customary laws' in the strict sense to include cultural and spiritual values and practices/norms not bound by law.

It has also been useful for guiding the development of local tools for TK protection – eg. community registers which reflect all the elements of BCH and strengthen their linkages; 'soft IPRs' such as collective trademarks, which link culture and economy, but help to maintain a traditional value framework; an inter-community benefit-sharing agreement which ensures benefits received strengthen BCH and minimise conflict; and a Kuna access protocol which is based on the community vision and values. The concept has facilitated communication and collaboration with indigenous communities and authorities; and communication of the community perspective (eg. genetic resources as heritage to share) to policy makers.

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Derivatives: Views of Indigenous Peoples in Geneva

Collated and written by Malia Talakai of Pacific Indigenous Peoples Environmental Coalition

This article focuses on the issue of “derivatives” as it relates to the broader issue of scope in the discussion of an International Regime on ABS. The views expressed in this article are not necessarily those of the author but rather they reflect the views of some Indigenous Peoples who are currently in Geneva attending ABS 6. Indigenous Peoples’ views were obtained and their consent voluntarily provided for their use in this article.

It is no doubt a clear message coming from Indigenous Peoples that elements of any international regime on ABS must be developed and implemented in accordance with Article 8(j) and its related provisions in the Convention on Biological Diversity. This also should mean respecting the preservation and maintenance of traditional knowledge associated with genetic resources and where there is support and promotion for the equitable sharing of benefits arising from the use of such knowledge. This also includes derivatives from genetic resources associated with traditional knowledge. Derivatives and products as it relate to the issue of scope forms an integral part of the discussion of an international regime. Accordingly, the delegate from Malaysia on behalf of the Mega-Diverse group (during the plenary discussion on scope) noted that “genetic resources, derivatives and their products form an integral part of a regime”, but caution was also in the air as the delegate from Thailand noted that their government could agree only as long as derivatives are clearly defined.



The search for a definition of derivatives is highlighted in the so-called “Granada text.” One definition suggests that it is something extracted from biological and genetic resources while another defines it as a product also including information, developed or extracted from biological or genetic resources. While one definition reflects a limiting language, suggesting that a derivative is something that must be extracted from; the other reflects a more inclusive language that includes anything that is developed from genetic resources. Moreover, the term derivatives also appears in the Bonn Guidelines with no clear indication to what they are and their

place in the actual guidelines. However, while the search for a definition and meaning for derivatives remains uncertain, there are some common understandings among indigenous peoples on derivatives and its significance to them and why they should also included in any regime on access and benefit sharing.

Based on my interviews with Indigenous peoples during this week, I’d like to highlight the following passages relating to the issue of derivatives as it relates to the scope of an international regime:

“Derivatives...both in-situ and ex-situ...are very important for indigenous peoples and it is where we lose out as because we may supply the raw material and get some benefits from it but what happens afterwards...that’s the experience at the moment, is that we supply raw material and no benefit comes after...”

“Derivatives...both in-situ and ex-situ...highlights how we as indigenous peoples should also benefit from outcomes, products derived not just from raw materials...in order to have fair and equitable benefit sharing, there must be a guarantee that the rights of indigenous peoples are protected and have support for future negotiations”

“Derivatives, is very important because it is where the benefit really comes from, rather than the actual raw material itself...they are the end product of traditional knowledge and the most valuable commercially ...including derivatives in the regime

can avoid industries from manipulating elements of traditional knowledge and genetic resources in such a way that it will disadvantage indigenous peoples”.

Indigenous Peoples’ views provided in this article clearly summed up the significance of derivatives. Clearly to have any equitable form of benefit sharing, derivatives must be an integral part of any regime as they concern the most commercially valuable aspects of any genetic resources associated with traditional knowledge. This enables genetic resources associated with traditional knowledge to maintain its fluidity by allowing indigenous peoples to benefit from their future commercial development.

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ECO NOTES

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In developing options and tools for access and benefit sharing in the international regime, issues unique to the Pacific region, such as land and marine tenure systems; the regional scope of genetic resource location and the little known deep seabed ecosystems will need to be considered.

Traditional knowledge and genetic resources

A model law for the protection of traditional ecological knowledge, innovations and practices has been developed for the Pacific islands region. This model law provides a *sui generis* system for the protection of traditional knowledge that is associated with

- living things, their constituent parts, their life cycles, behaviour and functions, their effects on and interactions with other living things (including humans) and with their physical environment;
- the physical environment including water, soils, corals, weather, solar and lunar effects, processes and cycles;
- the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life.

The model law encompasses not only knowledge, but also products (i.e., innovations) and practices based on that knowledge; and it distinguishes between commercial and non-commercial use. The model law requires the prior informed consent (PIC) of the 'owners' of traditional knowledge, innovations and practices. One of the stated objectives of the law is to ensure the equitable sharing of benefits derived from the use of such knowledge, innovations and practices, and can and should be implemented in conjunction with arrangements for access to genetic resources and benefit sharing.

The terms of reference (TORs) for the international regime provide for the inclusion of traditional knowledge, innovations and practices in accordance with CBD Article 8(j). The TORs also task the Working Group to consider relevant elements of existing regional instruments. It would appear necessary, therefore, to develop an international regime that provides for the protection of traditional knowledge.

innovations and practices and is complementary to the model law.

Can an international access and benefit sharing regime be structured to address the unique ABS issues facing the Pacific? Should it be able to? At the very least any framework developed for future ABS negotiations should not only be comprehensive but flexible enough to provide for the special case of Pacific Island countries.

****Panel Discussion****

Disclosure of Origin at the CBD, WIPO and the WTO: Conflict, Coherence or Complementarity?

**Thursday, Jan 24
1.15-3.45**

**Palais Des Nations, Room No.
XXII (Level 1, Building E)
Light lunch provided**

Workshop on customary rights continued from page 2.

Other key messages from the workshop can be summarised as follows:

- TK systems are complex, as they are influenced by different interacting elements, and by external conditions and changes (eg. economic development), which affect their 'internal' dynamics.
- Protecting TK requires the use of markets, databases, strengthening NRM systems/commons – not just policy and law. Linking TK/BCH and economy (eg. through value addition) is critical to generate incentives for conserving it. A new tool, which combines Geographical Indicators and Certificate of Origin, could be useful for protecting indigenous names.
- TK, GRs and BCH are community 'commons'—international policy & law (eg. on ABS and IPRs) need to support the commons and sharing amongst communities, as these processes created diversity. Even where cultural values are less strong, the core idea of customary law is *sharing*. ABS promotes the flow of GRs from communities to research institutions and companies, rather than sharing of GRs with/amongst communities.

- 'ABS' has not worked as countries and communities have received few benefits. For centuries, explorers, botanists have been taking GRs from communities, which openly share resources, and since 1992, the CBD facilitates this because GRs flow one way only. 'Reciprocity' means that genetic resources also need to flow back to communities to complete the circle.
- The best use of customary laws is to develop local tools and practical mechanisms to protect TK, because customary laws are associated with practices and are dynamic. When written down, customary laws lose adaptability and meaning.
- Formal systems should recognise the validity/importance of TK systems - eg. the role of traditional healers in healthcare, and of farmers in plant breeding. Benefit-sharing needs to be promoted from all external use of community GRs and TK (not just use by foreign companies).

The workshop also stressed the importance of strengthening BCH and TK for adaptation to climate change – adaptation depends not only on local genetic diversity, but on strengthening traditional knowledge and practices that enhance diversity and enable communities to cope with environmental stress.

As a follow-up to the workshop, IIED's press release calls on governments negotiating the international ABS regime to ensure that indigenous and local communities can also access genetic resources – many genetic resources held *ex situ* originate from community lands but communities are rarely allowed access. Much genetic diversity has been lost and communities need to enhance local diversity to adapt to rapid climate change and combat poverty (malnutrition, poor health, lack of income). The international regime must recognise the customary rights of indigenous and local communities over their genetic resources as well as over related traditional knowledge, and promote reciprocal access to genetic resources as a form of benefit-sharing with communities. The agreement between the International Potato Centre and the six Quechua communities of the Andean Potato Park provides an important precedent for repatriation of genetic resources.