

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

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

Lessons learned and recommendations

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

Case Study 13

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

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

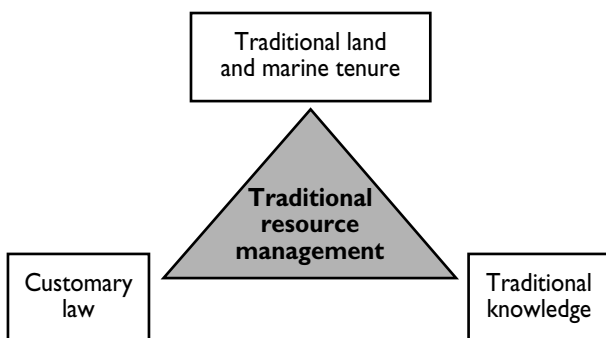
International governance of access to genetic resources and benefit-sharing (ABS) is primarily regulated by the Convention on Biological Diversity (CBD). The CBD recognises sovereign rights over genetic resources. This is frequently misinterpreted as granting ownership rights to states over genetic resources.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

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

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

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Conference of Parties (COP) VI meeting of the CBD, there was an attempt to bring balance to the ABS governance through the Bonn Guidelines on access to genetic resources and benefit-sharing (<http://www.biodiv.org/programmes/socio-eco/benefit/bonn.asp>). It is hoped that implementation of the Bonn Guidelines on ABS will lead to an increase in action by those countries exploiting resources¹⁹ to develop relevant ABS law and policy compatible with equity for supplying countries.



Towards an international ABS regime

The World Summit on Sustainable Development (WSSD) in 2002 called for negotiation of an international regime on benefit sharing relating to genetic resources within the framework of the CBD, bearing in mind the Bonn Guidelines. One of the key questions by this process has been whether these measures be legally binding or voluntary? This is a debate that polarises countries, but unnecessarily so. The existing international regime of ABS governance includes “hard law” (legally binding law) such as: the CBD itself; trade-related aspects of intellectual property rights (TRIPS); the World Intellectual Property Organization (WIPO) Treaties; the International Treaty on Plant Genetic Resources for Food and Agriculture; phytosanitary standards; regional and national ABS and IPR laws; and customary law and practice of indigenous peoples where recognised by national and/or international law. It also includes soft law such as: the Bonn Guidelines; regional ABS Policies; and national biodiversity strategies and action plans (NBSAPS). It is thus evident that any new regime will have both binding and non-binding elements.

Despite a period of 10 years to adopt measures to implement the CBD, there has until recently been only limited action by developed countries to adopt measures to comply with obligations such as technology transfer and benefit sharing. There is also a perception that IPR regimes are becoming ever more pervasive and threatening to the objectives of the CBD. This has led to questions regarding the utility of the voluntary Bonn Guidelines as a tool to bring about equitable governance of ABS. It is noteworthy that in response to pressures for negotiation of an international regime, there has been a significant move by developed countries stress implementation of user measures, and of ABS capacity building programmes.

The terms of reference for negotiation of an international regime on ABS adopted at CBD COP VII do not specify any objectives. Negotiators may wish to include objectives from both the CBD and WSSD, including those that: seek to ensure fair and equitable benefit sharing; secure transfer of technologies; facilitate access, strengthen traditional knowledge and innovation systems and protection of rights over TK; and alleviate poverty.

Development of ABS and TK regimes will need to be dealt with in parallel. Customary law plays an important role for protection of TK and regulating access to genetic resources within a local community or indigenous peoples’ jurisdiction, but its power to regulate use outside this jurisdiction is normally quite limited. Customary law may in some instances conflict with human rights. There is a need for greater analysis of opportunities and challenges to the development of mechanisms to bridge the gaps between national and international law and policy and customary law and practice, in order to develop culturally sensitive and functional ABS and TK regimes.

Lessons learned and recommendations

Equity was developed as an extra judicial remedy to overcome the injustice caused by strict application of the law. An international body of equity for ABS should be developed through consideration of multiple sources of law and equity, including customary law and practice.

19. For discussion of user measures see Barber C., Johnston S. and Tobin B. 2003. UNU-IAS Report: User measures: Options for developing measures in user countries to implement the access and benefit-sharing provisions of the Convention on Biological Diversity – 2nd Edition. UNU-IAS, Tokyo, available online at <http://www.ias.unu.edu>