

Ethical Protocol for the Protection and Use of Traditional Indigenous Knowledge

Introduction

The Facilitative Working Group (FWG) of the Local Communities and Indigenous Peoples Platform (LCIPP) is mandated to provide Indigenous and Traditional Knowledge to the Subsidiary Body for Science and Technological Advice (SBSTA) in areas of Adaptation and Mitigation. A deliverable of Activity 1: Annual Knowledge Holder's Gathering – *Compilation of information on existing rights of indigenous peoples related to the exchange and safeguarding of traditional knowledge* (Version 11 June 2021) lays the foundation for establishing Indigenous rights as the basis for the need for what we call Traditional Indigenous Knowledge (TIK) and for how it is to be protected and used. This brief proposal is to build upon that foundation to create an institutionalised Ethical Protocol for the Protection and Use of Traditional Indigenous Knowledge in the UNFCCC processes.

Ethics and Indigenous Peoples

The need for institutional processes to safeguard and protect what is generally called Indigenous Knowledge has become common place for many academic institutions. It basically involves the creation of Ethical Principles and Rules that those engaged with research involving Indigenous Peoples have to follow. An Indigenous Ethics Review board will consider research proposals and require changes if the proposal does not meet the Ethical Principles and Rules. The basic concepts of this can be found in *The First Nations Principles of OCAP* (“OCAP® is a registered trademark of the First Nations Information Governance Centre (FNIGC (<https://fnigc.ca/ocap-training/>)). The basic principles are Ownership, Control, Access and Possession. The summary states:

The First Nations principles of OCAP® establish how First Nations' data and information will be collected, protected, used, or shared. Standing for ownership, control, access and possession, OCAP® is a tool to support strong information governance on the path to First Nations data sovereignty. Given the diversity within and across Nations, the principles will be expressed and asserted in line with a Nation's respective world view, traditional knowledge, and protocols.

In relation to the work of the Facilitative Working Group (FWG), the issue is one of how the Indigenous Knowledge that the FWG is to procure is protected and used. For example, at the 9th FWG meeting convened in Bonn Germany two guests presented: Harry Vreuls, Chair of the Subsidiary Body for Scientific and Technology Advice (SBSTA) and the other was Stephen Menas, member of the Technology Executive Committee (TEC). Both spoke of how important Indigenous Knowledge was in their respective roles, but both clearly did not accept Indigenous Knowledge in its own equitable position in relation to Eurocentric science. The SBSTA Chair talked about how the SBSTA would “use your knowledge.” The TEC member talked about how they would “harness Indigenous technology.” It is important to note here that although the SBSTA is a conduit for constituted entities such as the FWG and TEC, neither the SBSTA or the TEC have built in process regarding Indigenous Peoples. The exception to this is the participation of Indigenous Peoples through the Indigenous Peoples Constituency, one of nine constituencies.

The perspectives expressed are not surprising but they are concerning. The notion is that while Indigenous Knowledge is important, and there was no evidence to question their sincerity on this, it also remains subject to the determination of non-Indigenous people as to what is and is not relevant. The problem with the current definitions of the terms relating to Indigenous Knowledge used in the United Nations systems is that they are framed for a non-Indigenous audience to serve non-Indigenous frameworks and objectives. The discussions carve out a niche for Indigenous Peoples thoughts, philosophies and ways of knowing to be acknowledged and respected as an alternative and subset to Eurocentric knowledge. Once accommodation is reached, there is no need for further consideration. The pervasive use of the term Traditional Ecological Knowledge (TEK) is symptomatic of this. TEK is a part of Indigenous Knowledge that is teased out to enhance Eurocentric science's understanding of ecology and ecological relationships. It is not used in an equitable manner (being of the same status) and most importantly, is not used in an Indigenous context, nor respecting Indigenous protocols. Indigenous Knowledge does not exist in compartments, where anyone can identify a particular issue and tease out a specific aspect of Indigenous Knowledge to apply. Indigenous Knowledge is inherently intertwined with a number of issues simultaneously. As such, when looking at ecological issues, for example, it is not just the physically observable aspects of an ecosystem, with all its inter-relationships over seasons, years, decades and centuries but also the inherent relationship aspects to things like spirituality, language, law, identity and subsistence. Incorporated into this is an understanding that these relationships are not human centric. A TEK approach in Eurocentric understandings does not only lack the capacity to incorporate all of this in a meaningful way, but by using a TEK approach without all of the non-ecological aspects of Indigenous Knowledge, renders the TEK without contextual meaning, and little more than a quaint and tokenistic cultural add on.

To move away from this approach, and assert Traditional Indigenous Knowledge in an appropriate and equitable manner it will be necessary to create an Ethical Protocol for the Protection and Use of Traditional Indigenous Knowledge that is institutionalized with the LCIP and the UNFCCC. What this means pragmatically is for the FWG to actually establish a working group of some kind that would undertake the review TIK that has been garnered to ascertain that it is;

- 1) Representative of the Peoples it comes from;
- 2) Its use has been permitted by the Peoples it comes from;
- 3) That its intended use is expressed;
- 4) That it is recognized as belonging to those that contributed it;
- 5) That its use is determined by those contributing it;
- 6) That it is not merely used or harnessed, but rather viewed as contributions in their own right and context in a manner equitable to Eurocentric science.

A suggested format would be to have two sitting FWG members and two representatives from the International Indigenous Peoples Forum on Climate Change (IIPFCC), or Indigenous Peoples caucus, regularly review Traditional Indigenous Knowledge contributions and ensure that the Ethical Guidelines are followed during the implementation of the next three three-third-workplan, and to ensure that other constituted bodies and the SBSTA accept the Ethical Protocol as well as involve greater Indigenous input into their processes.

This existence of Traditional Indigenous Knowledge as well as Indigenous legal systems and law, in their own right, highlights the need to have a uniquely Indigenous Peoples set of

definitions and norms. This perspective is highlighted by a report written by Michael Dodson in 2007 for the Permanent Forum on Indigenous Issues. The concluding comment states:

61. Despite being an issue of international attention for many years, Indigenous traditional knowledge is still vulnerable to misappropriation. It is time to recognise that Indigenous traditional knowledge is not simply an intellectual property issue. Likewise, it is not simply a human rights issue, a trade issue nor an amalgamation of these issues. The proper protection of Indigenous traditional knowledge is an Indigenous issue and Indigenous Peoples should be central to this process.¹

The following points should be considered in advancing the development of an Ethical Protocol for the Protection and Use of Traditional Indigenous Knowledge:

- 1) Indigenous Knowledge needs to be recognized and defined as exclusively within the domain of Indigenous Peoples. Efforts to define it within a non-Indigenous context only leads to appropriation of Indigenous Knowledge within the context of non-Indigenous frameworks. We are advocating that the United Nations definitions of terms, such as Indigenous Knowledge and Traditional Knowledge, are not used in a non-Indigenous property framework. Indigenous Peoples have the right to use their Traditional Indigenous Knowledge in two contexts: i) their specific Indigenous context without subsuming to the UN process, based on their cultural protocols, or ii) the non-Indigenous context, using those terms and contexts defined by the United Nations. It is their right to choose, while ensuring they take in account other Indigenous Peoples
- 2) Many of the issues involving Indigenous Peoples and the present definitions relating to development and climate change are attempts to find solutions to tensions between Indigenous Peoples and non-Indigenous Peoples to foster development. It is our position that the solutions should not come from a non-Indigenous framework accommodating Indigenous Peoples, but rather from an Indigenous Peoples framework existing alongside the non-Indigenous framework in an equitable manner.
- 3) Customary law as it relates to Indigenous Peoples is uniquely belonging to Indigenous Peoples polities and is a reflection of the inherent traditional Indigenous Knowledge. Efforts to frame Indigenous Customary Law in a way that is accommodating to property concepts in Eurocentric legal thinking are problematical, because by doing so removes it from a Traditional Indigenous Knowledge context. Indigenous Peoples have not only the right, but also the responsibility, to act in their own best interests. This includes the option of either using the hybrid definitions currently being discussed in various United Nations organs, forums, working groups and such, or using a Traditional Indigenous Knowledge definition that comes from an exclusively Indigenous Peoples framework.
- 4) Although Indigenous Peoples led efforts to create space/niches for Traditional Indigenous Knowledge, including Indigenous Peoples cultural and intellectual

¹ https://www.un.org/esa/socdev/unpfii/documents/6_session_dodson.pdf

property, has initially met with resistance, it has now been acknowledged and 'welcomed' within the UNFCCC. This has included references to compensation. The acknowledgement of Indigenous Knowledge within the UNFCCC is still subsumed with the prevailing definition of 'property': a concept that is inherently Eurocentric. This is contradictory to those knowledge frameworks defined by Indigenous Peoples. The framing of all that is non-human as an exploitable resource that can be bought and sold is not compatible with an exclusively Traditional Indigenous Knowledge framework.

- 5) It is essential that Indigenous Peoples not only have the right to Free Prior and Informed Consent to engage with development projects, but also to define their respective Indigenous Knowledge and Customary Law in their own respective contexts as well, and not have any compensation or settlement regarding actions of States serve as a way of extinguishing inherent rights in exchange for delegated rights from the State. The nation-states have tended to move away from outright genocide against Indigenous Peoples, into more refined ways of creating certainty for corporations engaged in what is termed natural resource development and extraction. This can be starkly seen in the actions of the CANZUS alliance of Australia, Canada, New Zealand and the United States in their joint public policy stance toward Indigenous Peoples and Nations. This stance involves agreements and such whereby Indigenous political entities give up their inherent rights and responsibilities in exchange for some money and adoption of a corporate or municipal government identity. The form these entities take resembles the form that Indian nations that were terminated under the US Termination policy from the 1950s were forced to take. It can be looked at as a Termination Agenda. Efforts to define Indigenous Knowledge and Traditional Knowledge into a development context might serve to facilitate this Termination Agenda.
- 6) Ultimately, it is one thing to advocate against certain actions, but it is absolutely essential that there is advocacy for certain actions that are framed by Traditional Indigenous Knowledge. This applies to all areas of Indigenous reality, from language revitalization, governmental structures, community-based planning, education, economic development, etc. To achieve this, a process needs to be undertaken to make the transitions necessary. Creating this Ethical Protocol for the Protection and Use of Traditional Indigenous Knowledge and formalising, it is an essential starting point.