This is the published version

Antons, Christoph 2009, Traditional knowledge in Asia: global agendas and local subjects, in Regulation in Asia: pushing back on globalization, Routledge, London, England, pp.64-84

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Global agendas and local subjects

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Introduction: traditional knowledge and local, national, and global agendas

Over almost two decades, but especially since the 1990s, traditional knowledge and its relationship with intellectual property rights has been one of the topics at the forefront of interest for academics, social activists, and non-governmental organizations (NGOs) critical of globalization. It has been a hotly contested issue between developing and industrialized countries, especially in intellectual property debates and debates about sustainable development and the environment, but also in discussions concerning agricultural practices, medicine and public health, and the human rights of indigenous peoples and local minority groups. So what precisely is "traditional knowledge," how did it gain such prominence among social activists and policymakers, and how does it relate to the "global scripts" referred to in the introductory chapter in this volume?

At first glance, the topic of traditional knowledge is somewhat different from the business regulation topics covered in the other chapters in this volume. With traditional knowledge, social actors who seem of only marginal relevance to debates about the globalization of business laws, take center stage. For example, when Carruthers and Halliday speak of the "truly local," they mean "corporations, judges, lawyers, workers, and banks who are spread across the mainly urban centers of the country." However, according to statistics, in countries such as Thailand and India, 80.2 percent and 72.3 percent of the population, respectively, do not live in such urban centers. As large as this rural population may be, it does not normally come much into contact with the norms and regulations of international business and, as a consequence, it is often disregarded in studies about law and globalization. Yet, rural, traditionally living, and indigenous people do matter for national governments and, to a more limited extent, also to international businesses. First, they are voters, and national governments would be foolish to ignore them. The recent events in Thailand provide an excellent example. Former Prime Minister Thaksin was unpopular with the urban elite, but sections of the rural population, especially in the northeast and northwest of the country, have been vehemently supporting him. These votes were crucial in bringing the People Power Party, which has vowed to continue his policies, into power. Second, sustained rural opposition can become problematic for
development projects in rural areas that are backed by international businesses. Third, multinational corporations are eager to be seen as good corporate citizens with ethically principled approaches to the conduct of their businesses. Projects extending into rural areas that lead to human rights violations or to abuse and destruction of local resources would tarnish such carefully acquired reputations.

Traditional knowledge is an example of an area of originally local interest that has repercussions at national and international level. Local groups defend it and use it for bargaining at the national and international level, often assisted by NGOs, by stressing ethnic identity or the economic development of regions, provinces, or districts. National governments use it for nation building and the formation of a national identity as well as for national economic development in bargaining with foreign parties. Multinational corporations interested in pharmaceuticals or biotechnology have discovered that local traditional knowledge can provide substantial insights into the medical application of local plants or their suitability for improved food crops. Finally, global institutions such as the World Intellectual Property Organization (WIPO), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Environment Programme (UNEP), United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), and the UN Human Rights Council are attempting to smooth and to some extent harmonize the many different interests and approaches that have emerged in the debate.

This chapter therefore attempts to heed John Gillespie’s call for an account that canvasses the “myriad” local positions. It does not regard all local interests or positions as identical, or regard the “local” as identical to or exclusively represented by central state actors. The chapter will demonstrate how local and national interests interact with international and regional institutions, foreign governments, and multinational corporations and their demands for internationally harmonized regulation. “Local” in this chapter refers, therefore, largely to the subnational level and it is understood as “locality” linking territory with certain population groups rather than as “local business people, networks, etc.” The chapter attempts to go beyond the frequently analyzed dichotomies of North versus South and industrialized versus developing countries. All protagonists in the traditional knowledge debate use aspects of globalization and globalized legal regimes, at times to their advantage, while perhaps opposing other aspects at other times. However, the occasionally paradoxical use of homogenizing globalized legal regimes to defend local cultural identity may ultimately lead to the partial destruction and disappearance of precisely those forms of local traditions that their proponents want to uphold.

Traditional knowledge and its beneficiaries: definitions in global scripts and local implementation

In the introduction to a collection of papers from a workshop in 1997 at the University of Kent, anthropologists Ellen, Parkes, and Bicker noted at least nine different terms that had been used for the topic over the years, including indigenous knowledge,
indigenous technical knowledge, ethnoecology, local knowledge, folk knowledge, traditional knowledge, traditional environmental or ecological knowledge, people's science, or rural people's knowledge. And these are only the terms limited to what the authors call "local environmental knowledge with practical implications" rather than more wide-ranging definitions based on the holistic worldview of indigenous people. In the view of many indigenous groups, however, it is incorrect to distinguish between technical and practical knowledge and artistic forms and expressions, which are often used to transmit the material over generations. Thus, the knowledge can be expressed and transmitted within a community, for example, in the form of a song, a poem, a mystical story, or in a painting. Often, the knowledge is transmitted only within a restricted circle of initiated community members, and it is often connected to religious rituals, ancestor mythologies, and/or particular stretches of land. Because of the secret and sacred character of this material, indigenous groups have often asserted that it is impossible to separate the technical knowledge from the particular form of its expression. The holistic understanding of the material becomes visible from the definition of "indigenous cultural and intellectual property" used by Australian Aboriginal lawyer Terri Janke to assert rights to the material on behalf of communities in the report "Our Culture, Our Future," which was submitted to the Australian Aboriginal and Torres Straits Islander Commission in 1998. The term "indigenous cultural and intellectual property" includes not only scientific, agricultural, technical, and ecological knowledge, but also literary, performing, and artistic works, movable cultural property, human remains and tissues, immovable cultural property such as sacred sites and burial grounds, and documentation of indigenous heritage in archives, films, photographs, video and audiotape, and other forms of media.

When the World Intellectual Property Organization (WIPO) began working on traditional knowledge issues in the late 1990s, it sent fact-finding missions to many developing countries, especially in Asia and the South Pacific. The result was a report, published in 2001, which used the following working definition of "traditional knowledge": "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields." WIPO at this stage seemed heavily influenced by the holistic understanding of the issue, which had been explained to the fact-finding missions in countries such as Australia. WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore to work on the establishment of appropriate forms of protection. Soon, however, it became clear that the holistic forms of traditional knowledge advocated by indigenous groups did not fit the traditional categories of intellectual property rights. More recently, therefore, WIPO has returned to an intellectual property-inspired distinction between copyright-related folklore or traditional cultural expressions and patent or industrial property-related "technical traditional knowledge." Thus, at the current stage, the debate focuses mainly on the following forms of traditional knowledge: folklore or traditional cultural expressions, biodiversity-related traditional knowledge, agricultural traditional knowledge,
and medicinal traditional knowledge. WIPO currently recognizes that many rights holders take an “overall holistic approach” to traditional knowledge, but it has nevertheless divided the topic under several headings using the terms traditional cultural expressions/expressions of folklore, traditional knowledge, and genetic resources.

As a starting point, it is important therefore to notice the strong role that Aboriginal advocacy in countries such as Australia, New Zealand, the US, and Canada has played in shaping the terms of the debate. The reasons for this are simple. First, the discussions in the countries just mentioned are lively and go back for several decades. In Australia, for example, a working party to examine the issue of folklore protection was formed as early as 1974. Its report was published by the Department of Home Affairs and Environment in 1981 and recommended the adoption of an Aboriginal Folklore Act and the establishment of a Folklore Commission. Aboriginal communities have taken their cases to the courts both individually and collectively and, perhaps most importantly, all this precedent and government material is not only easily available, but also published in English. Not surprisingly, Australian and Canadian examples in particular are frequently used at an international level as case studies to illustrate the problems in linking intellectual property and traditional knowledge. But can the interpretation of “traditional knowledge” as it has evolved in Aboriginal communities in English-speaking countries be easily transferred into the context of Asia?

Before I answer this question, I would like to outline the international context of the debate, the international agreements and “global scripts” that have been written in this field. An examination of the history of the debate in an international context helps to explain further why, at the end of the twentieth century, some of the most ancient forms of knowledge are suddenly being combined with some of the most advanced forms of intellectual property.

The story of those global scripts really begins with the counterculture popular in industrialized countries in the 1960s. This was the time when Jimi Hendrix, dressed in colorful Indian or African outfits, was playing “Voodoo Child” at Woodstock, and the Beatles and other pop and rock stars were going on pilgrimages to Indian gurus. During the modernization frenzy of the 1950s and early 1960s, non-Western knowledge was still regarded as superstitious and primitive and as something to be replaced by scientific knowledge. In countries such as Australia, such thinking was often supported by a generation of anthropologists, who justified their research and the urgency for funding with the argument that they were documenting vanishing cultures virtually at the last moment. As the 1960s progressed, a counterculture emerged with a curious blend of Marxist believers in the ultimate progress of mankind and New Age skeptics distrustful of notions such as progress or development. It was the latter element rather than the former that influenced the “hippie” movement and suddenly everything “non-Western” was in vogue. Middle-class children in industrialized countries began to dress in Asian or African Batik, read Carlos Castaneda’s explorations of drug use among Mexican Indians, and listen to Ravi Shankar’s Indian sitar music. This newly found interest in expressions of cultures from developing countries was part of a popular movement and, as such, superficial and romantic rather than analytical and interested in deeper engagement. For some
developing countries, there were some positive effects in the form of greater interest in so-called Third World cultures; a few Asian, African, and Latin American artists became internationally famous. However, with the popular attraction of the “exotic” material came the first cases in which Western artists were accused of appropriating cultural material from developing countries. “The Lion Sleeps Tonight” was an early example of an African song that became a hit record in the early 1960s, but for many years was not attributed to its South African composer. A few years later, Simon and Garfunkel had a world hit record with “El Condor Pasa,” a song written by a Peruvian composer and based on a traditional Andean folk song. It was perhaps a first sign of the regional significance of such cultural expressions that it was the Bolivian and not the Peruvian government that raised concern about what was from now on regarded as “appropriation” of Latin American folk songs by US American pop musicians. The debate led ultimately to the inclusion of folklore in the WIPO- and UNESCO-sponsored Tunis Model Law for the Protection of Folklore of 1976 and to further WIPO/UNESCO-drafted “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions,” published in 1985.

At the same time, improved transport and communication technologies becoming available meant that previously isolated and remote living communities from all over the world came into contact with each other. In 1982, the UN Working Group on Indigenous Populations was formed within the UN Economic and Social Council. An international movement of indigenous people with similar problems slowly became transformed into a movement of marginalized minorities, when minorities from many Asian and African countries became involved. As a consequence, the meaning of the term “indigenous” was stretched to accommodate the new membership to a point where, as the anthropologist Jeffrey Sisson has critically remarked, it became possible “for almost any people with a subsistence based culture to claim membership in international indigenous forums.” Coates reports that, after the formation of a Working Group to draft a Universal Declaration on the Rights of Indigenous Peoples, white Afrikaners from post-apartheid South Africa attended the meetings. He believes, nevertheless, that the strong focus on the activities of European colonial powers “ignores equally disruptive and authoritarian invasions of indigenous territories by Asian, African, and other societies and skips over the experience of indigenous societies separate from their contact with and conquest by outsiders.” Kingsbury, however, sees in the broadening of the definition “a significant risk for the indigenous peoples’ movement that the existing and highly functional international political distinction between ‘indigenous peoples’ and ethnic and other minorities will erode, galvanizing opposition to claims of ‘indigenous peoples’.”

Apart from the widening of the concept “indigenous,” the 1980s also saw a further broadening of the traditional knowledge debate, where cultural expressions of folklore were now joined by agricultural and biodiversity-related knowledge. The concept of farmers’ rights was introduced in Resolution 4/89 of the United Nations Food and Agriculture Organization (FAO) and further defined in FAO Resolution 5/89 as “Rights arising from the past, present, and future contribution of farmers
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in conserving, improving, and making available Plant Genetic Resources, particularly those in the centers of origin/diversity. These rights are vested in the International Community as trustees for present and future generations of farmers, for the purpose of ensuring full benefits of farmers and supporting the continuation of their contributions...” In 1992, the Convention on Biological Diversity (CBD) brought even broader concepts of indigenous and local knowledge and community participation. Parties to the Convention were required to “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.” Thus, within a few decades, the understanding of indigenous and local rural communities had been transformed from that of ignorant subsistence farmers whose unscientific practices were harmful to the environment to custodians of the forests and the environment. However, if read carefully, such “eco-indigenism” (as Sissons has termed it) entails not just rights but also the “moral responsibility to care for the threatened environment and to defend it against the destructive forces of western progress and global capitalism.”

The CBD also included detailed provisions on access with prior informed consent and equitable sharing of the “results of research and development and the benefits arising from the commercial and other utilization of genetic resources.” It foresaw a quid pro quo deal, in which biodiversity-rich countries would provide access to their resources in return for access to technology created on the basis of the resources by technologically advanced users of the system (Article 15(2), (6), and 16). While indigenous and local groups play an important role in the convention as the bearers and presumably ultimate beneficiaries of their traditional knowledge, it is the nation-state as party to the convention that mediates between the local and the global and assumes a paternalistic role in encouraging local communities to play their roles as custodians of the environment and preservers of the ecosystem. Of great concern from the viewpoint of indigenous and local communities is the changing status of plant genetic resources. The CBD has declared that plant genetic resources, which had previously been regarded as the common heritage of mankind, are now within the nation-states’ “sovereign right to exploit their own resources pursuant to their own environmental policies” (Article 3). Equally, the CBD made it perfectly clear that “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation” (Article 15(1)).

The latest turn in the setting of global standards and obligations in this field occurs with the adoption in September 2007 of the United Nations Declaration on the Rights of Indigenous Peoples. This non-binding, soft law document repeats in the preamble the current paradigm that respect for indigenous knowledge, cultures, and traditional practices contributes to sustainable and equitable development and proper management of the environment. The Declaration contains various provisions, which
aim to safeguard aspects of traditional knowledge. Perhaps the most relevant of these is Article 31(1), which speaks of indigenous peoples' "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." There is a separate explicit provision safeguarding the right to traditional medicines and health practices, including the conservation of vital medicinal plants, animals, and minerals (Article 24). There is a right "to participate in decision-making" in matters concerning indigenous peoples' rights (Article 18), and states have "to consult and cooperate" with indigenous people to obtain free, prior, and informed consent on any legislative or administrative measures (Article 19).

How did Asian governments and local communities turn the new global paradigms into national legislation and into policies at the grassroots level? One major problem in accepting the international principles has been the reluctance of most Asian governments to accept the concept of "indigenous people." Asian governments are concerned about equities and imbalances that affirmative action in favor of particular ethnic groups may create in their multiethnic states. They also believe that it is in many cases not historically accurate to speak of indigenous people in nation-states where population movements go back for many centuries and where cultures have intermingled. Difficulties can be observed in particular in Indonesia, where the Indonesian word for native (asli) was used for many years to distinguish all indigenous Indonesians from what the Dutch sociologist Wertheim termed "trading minorities," the latter term meant to refer to people with Indonesian citizenship, whose ancestors had migrated during the colonial period from countries such as China and India or from the Arabian Peninsula. Another example is India, which in many international meetings has opposed the undifferentiated application of the "indigenous" concept to post-colonial Asia. During WIPO deliberations, the delegations of these two countries repeatedly raised concern about this terminology. They also pointed out that traditional knowledge in Asia can often reside in society at large and that it would be inappropriate to attribute it exclusively to relatively small minority groups. Indonesia instead professed a preference for the term "society or community bound by customary law," which is the term currently used in the Indonesian constitution to describe local communities (masyarakat adat).

It seems indeed that Asian governments are raising an important point here, because the delineation of communities of custodians and beneficiaries in accordance with who came earlier to a country is clearly more difficult in many parts of Asia than in the post-colonial settler societies of North America, Latin America, or Australia. Especially in South China and Indochina, historical upheavals leading to war and replacement have created migration patterns that can make it very difficult to determine which particular ethnic group arrived somewhere before
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others. As a further difference compared with Aboriginal populations in settler societies, many written sources of traditional knowledge exist in Asia. These written sources were used by entire regions and later by entire nations or even by several nations. Such materials include, for example, the written traditions of Chinese traditional medicine or Indian Ayurvedic medicine, which were spread across the region by traders and religious teachers. Thus, the form, transmission, and spread of this knowledge make it very different from the much more vulnerable unwritten traditions of tribal people, with such traditions coming under the more narrowly defined term “indigenous” and which were transmitted via rituals and forms of art and protected by secrecy. In the Asian understanding, traditional knowledge is often the knowledge of a dominating majority of the population. From majority knowledge, it is only a small step for it to become national knowledge, which is to be exploited and defended by the nation-state and the national government against unauthorized users from the industrialized world, but also against competitors from other developing countries, who claim the same or a similar kind of knowledge, where such knowledge has traveled across borders. In other words, the distinction between “indigenous,” “local,” and “national” becomes blurred.

Given this history of a widespread reluctance in Asia to accept the notion of “indigenous people,” it comes perhaps as a surprise that all East and Southeast Asian countries and all South Asian countries with the exceptions of Bhutan and Bangladesh voted in favor of the recently adopted UN Declaration on the Rights of Indigenous Peoples. However, the declarations made and statements given by various national representatives in explanation of their votes quickly reveal that the old attitudes have not really changed. Bangladesh, for example, criticized the lack of definition of “indigenous people” in its decision to vote against the Declaration. India, on the other hand, voted in favor, but provided its own definition, drawn from earlier conventions: “indigenous rights pertained to peoples in independent countries who were regarded as indigenous on account of their descent from the populations which inhabited the country … at the time of conquest or colonization or the establishment of present State boundaries and who … retained some or all of their socio-economic, cultural, and political institutions.” This interpretation makes the entire population of India with roots going back to pre-colonial times indigenous at the time of the departure of the colonial power. “Indigenous” is, therefore, interpreted as “indigenous Indian” as opposed to foreign elements introduced during colonial rule. Equally, the representative of Indonesia said that “given the fact that Indonesia’s entire population at the time of colonization remained unchanged, the rights in the Declaration accorded exclusively to indigenous people and did not apply in the context of Indonesia.”

The major exception to the general adverse attitude toward the “indigenous people” terminology in Asia is the Philippines. In the Philippines, both Spanish and US American colonial powers had applied concepts that they were familiar with in their dealings with native Americans in Latin America and North America respectively. The Philippines reacted swiftly to the Convention on Biological Diversity and the Global Agenda 21. In 1995, it was one of the first countries to introduce a regulatory framework for the protection of biological and genetic resources taking
into account the requirements of prior informed consent from indigenous and local communities. In 1997, it introduced the Indigenous Peoples Rights Act (IPRA), which covered issues such as traditional resource rights and what the Act defined as community intellectual rights, which in turn extended to indigenous knowledge systems and practices. Nevertheless, in voting for the UN Declaration on the Rights of Indigenous Peoples, the representative of the Philippines stressed his understanding that land ownership and natural resources were vested in the state. In the interest of getting as many countries as possible to agree to the Declaration, territorial integrity and political unity are in fact explicitly guaranteed in Article 46(1).

Traditional cultural expressions as “cultural property”: global scripts, local communities, and the nation-state in Indonesia

At this stage, it is useful to examine a few case studies of the implementation, or lack of it, of traditional knowledge concepts and the various conflicting interests associated with it. My first example comes from Indonesia and relates to what WIPO refers to as traditional cultural expressions or expressions of folklore. Earlier in this chapter, I discussed how, during the 1970s and 1980s, international institutions such as WIPO and UNESCO drafted model provisions for the protection of folklore after receiving complaints from developing country governments about “cultural appropriation” of folkloristic material by the entertainment industry of industrialized countries such as the US and the UK. The argument from developing countries was basically that they regarded it as inequitable that their citizens were expected to pay copyright royalties for every use of copyrighted material from the industrialized world, while artists and composers from industrialized countries helped themselves freely to material drawn from the rich repertoire of folklore and traditional cultural expressions in so-called Third World countries. While the WIPO/UNESCO model provisions of 1985 foresaw royalty collection by a “competent authority” of the state or by the “community concerned,” many developing countries had by that time already adopted the relevant provisions from the Tunis Model Copyright Law for Developing Countries of 1976, which did not provide a similar choice but left the administration of the remuneration exclusively in the hands of a “competent authority” at the national level.

The national-level solution suited many developing countries in their relationship with local communities. The state could exercise the copyright and collect royalties on their behalf. Not only would this satisfy the aim of getting some returns from the rich consumers in the developed world in a practical manner, it would also be in accordance with other pressing needs. First of all, it would stress national culture as opposed to regional and locally dispersed cultural expressions and, thereby, help to consolidate young nation-states. Second, it would actually assist multiethnic, multicultural, young nation-states in forging a national culture by turning originally local cultural expressions into national heritage.

Indonesia adopted this approach when it enacted its first national Copyright Act, which replaced the Dutch colonial law in 1982. Article 10 of the earlier Copyright Act has been transferred with only small amendments into the current Copyright
Act of 2002, and is included in a part bearing the heading "Copyright to works whose authors are not known." It provides in Article 10(1) that the state holds the copyright to pre-historical and archaeological "works" and to other objects of national culture. According to Article 10(2), the state equally holds the copyright to folklore and to "products of popular culture which become common property such as stories, tales, fairy tales, legends, chronicles, songs, handicrafts, choreographies, dances, calligraphies, and other works of art." According to Article 10(3), non-Indonesians have to obtain approval from a "relevant agency" if they want to publish or multiply such "works." Finally, as is often the case in Indonesia, the details for these arrangements were to be worked out in a further Government Regulation on the basis of Article 10(4). Since the introduction of this provision in its original form in 1982, this Government Regulation has never been issued, and the details of the scheme, including the important appointment of the "relevant agency," have not been further elaborated. In practice, therefore, the envisaged protection of national folklore remains so far unimplemented.

Several points can be made about this part of the Indonesian Copyright Act. First, Article 10(1) relates largely to material in the public domain and is not actually a matter for copyright but for heritage conservation. However, in a "catch all" phrase, the provision also declares the Indonesian state as copyright holder in general to "objects of national culture" (benda budaya nasional). Article 10(2) provides examples of a whole range of folkloristic expressions, some of which seem less traditional than others and not necessarily of a collective nature (e.g., choreography, calligraphy). The fact that the state is the copyright holder and grants licenses to foreigners means that it is likely that even quite individual expressions of regional identity would be treated as national property. It would, for example, disentitle a regional artist, who changes citizenship, from drawing on regional symbols that express his/her personal identity. The basis of the scheme is, therefore, a concept of national identity. The state has chosen to adopt an international script that puts state agencies in charge and has further strengthened the role of the national government vis-à-vis agencies and potential centers of power in the regions.

As the scheme has not really been implemented thus far, there has been relatively little public debate about it. When it was first introduced in draft form by the Suharto government, some regional communities expressed concern about restrictions to their own use of their folklore and cultural expressions. Apparently as a compromise and to clarify that the provision was not meant to disown local communities, the government then restricted its exercise of the copyright to "foreign countries." This has meanwhile been transferred into the new Copyright Act as a licensing requirement for foreigners. However, the current Article 10(2) has also made it unmistakably clear that the state indeed claims the copyright to folkloristic expressions, whereas the previous version merely provided that such material was "taken care of and protected by the state."

While the legal implementation of these schemes is still lacking, over the past few years, various government departments and agencies have started to compile databases of Indonesia's traditional knowledge, where little attention is often paid to the distinction between folklore and cultural expressions and other forms of
traditional knowledge, a distinction made by WIPO. Further, claims have appeared in the Indonesian media about foreigners appropriating Indonesian cultural heritage and claiming intellectual property for it abroad. Perhaps not surprisingly in view of the cultural nature of the claims and regional exchange and similarities in culture, such claims have recently been directed against Malaysia. In 2007, Indonesians disputed claims that had appeared on Malaysian Internet sites that Angklung, a musical instrument made from bamboo, and Angklung music was Malaysian, locating its origins instead in the Indonesian province of West Java. In the same year, the use of the folk song “Rasa Sayang” for a tourism campaign by the Malaysian government almost sparked a diplomatic row between the two countries. The Indonesian Tourism and Cultural Minister wanted to investigate whether Indonesia could claim copyright for the song, while a member of the House of Representatives thought that Indonesia should sue over the use of the song in the tourism campaign, while alleging that there were other cases of appropriation of Indonesian cultural heritage, such as Batik and the shadow puppet theatre wayang. The Malaysian Tourism Minister responded that he regarded the song as the heritage of Kepulauan Nusantara (the Malay archipelago), which also included Malaysia, while the Malaysian press pointed out that Rasa Sayang was widely sung throughout the archipelago, although the song was believed to have originated in Maluku (the Moluccan islands). The dispute shows how difficult such claims to “cultural property” can be in a part of the world where populations have been migrating, trading, and intermingling for centuries.

“Biopiracy,” the patenting of traditional knowledge, and claims over genetic resources

In the more technical field of traditional knowledge related to biodiversity and the question of access to genetic resources, the global scripts show very diverse influences. Earlier in this chapter, I explained how much of the international debate about the knowledge of indigenous people was influenced by case studies and debates from Anglo-American settler colonies, because of the widespread use of the English language and the prominence and visibility of indigenous communities from those countries in the international movement of indigenous people. When these discussions were picked up and developed further by United Nations agencies during the 1980s, these agencies were often focusing on quite diverse issues. In the debate on traditional knowledge and access to genetic resources, currently the most important forums are the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of WIPO, and the Working Group on Article 8(j) of the Convention on Biological Diversity, which is administered by the UN Environmental Programme. Both have produced guidelines and model provisions aimed at, in the case of WIPO, preventing misappropriation of traditional knowledge and, in the case of the CBD, facilitating benefit sharing and ensuring prior informed consent.

The debate in this area draws on relatively new paradigms in development studies and environmental studies, which aim to empower stakeholders and decentralize
responsibilities and custodianship for the environment, while at the same time envisaging new forms of property to act as incentives to local people to protect the environment.\textsuperscript{61} The use of genetic resources by people from outside the community is no longer regarded as an issue of access to natural resources only, but also as an intellectual property issue. Developing country governments and provincial and local councils have high hopes for some kind of green trade triggered by the interest of multinational biotechnology and pharmaceutical companies in their resources. Intellectual property protection seems more useful here, at least in the short term, because of the potential of strong international protection. As a consequence, the governments of many developing countries have been pushing the issue at the negotiating table of the World Trade Organization (WTO). Echoing the term “piracy” commonly used by the copyright industry for the copying of their products without paying royalties, developing countries, political activists, and NGOs now frequently use the term “biopiracy” to refer to the acquisition of intellectual property rights for plant material obtained from the developing world without free and prior informed consent. The terminology in both cases is emotionally charged. In fact, it is often the case that piracy activities of any kind take place in a legal vacuum and in an environment where legal protection is simply lacking. As for intellectual property, the WTO Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement to some extent ensures certain protection standards around the globe. For genetic resources and the traditional knowledge that such resources represent, similar global standards are currently under negotiation, especially within the working group on Article 8(j) of the CBD.\textsuperscript{62} Many developing countries argue that, in view of the principles enshrined in the CBD, it needs to be harmonized with the extended intellectual property rights granted by the TRIPS Agreement. A particular focus here is on the so-called “biotechnology clause” of Article 27.3(b) of the TRIPS Agreement. The provision allows member states to exclude plants and animals and essentially biological processes for the production of plants and animals from patenting, but requires the availability of patents for micro-organisms and non-biological and microbiological processes. It is important to note in this context, however, that the term “essentially biological processes” has been interpreted as not including biotechnological inventions, which would be patentable on the basis of their “technical intervention.”\textsuperscript{63} Article 27.3(b) of the TRIPS Agreement further requires that “Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.”

Perhaps not surprisingly, the call for harmonization of the principles of TRIPS and CBD from developing countries is often taken up by environmental and human rights lawyers, whereas intellectual property lawyers tend to fear for the consistency of the patent system and the value of patents, if they can be challenged for reasons that lie outside the patent system. The current discussion about the introduction of a requirement for compulsory disclosure of the origin of genetic material in patent applications and the obligation for the genetic material to have been obtained with free and prior informed consent demonstrates these different views.\textsuperscript{64} Whatever the outcomes of these debates, those companies accused of
“biopiracy” exploit a lack of coordination in the international patent system and a time lag in gaining knowledge of what is in the public domain and constitutes, in patent parlance, prior art elsewhere. Discussions are currently under way to remedy these shortcomings of the system.

In the following section, I will present three examples of how these various debates about the globalization of intellectual property rights play out at the national and local level and how various governments in Asia translate these principles into national law. My first example comes again from Indonesia. In line with many other developing countries, Indonesia had to revise its Patents Act after acceding to the TRIPS Agreement and broaden the scope for patents with regard to biotechnological inventions. As for the plant variety protection required by TRIPS, it decided, again in line with many other developing countries, on *sui generis* protection via a Plant Variety Protection Act modeled after the International Convention for the Protection of new Varieties of Plants, which is better known under the French acronym for its administering international organization as UPOV. To safeguard local interests, the Indonesian Act attempts to integrate protection for local and traditional varieties into the legislation. However, the approach chosen is similar to that in the Copyright Act for folkloristic expression. Articles 7(1) and (2) of the Plant Variety Protection Act No. 29 of 2000 make it unmistakably clear that “local varieties owned by communities are controlled by the State,” and that such control is exercised by the government. The term used to describe ownership (*milik masyarakat*) is in fact somewhat ambiguous and can refer to “community ownership” or simply “public ownership.” However, the explanatory memorandum to Article 7(4) makes it clear that there shall be economic compensation for the communities that own a local variety. Such a regulation of compensation as well as other details regarding the naming of such varieties, their registration and further use will have to await an implementing Government Regulation referred to in Article 7(4). Thus, as in the Copyright Act, the scheme authorizes the government to administer the rights. However, as in the Copyright Act, such administration is not currently taking place because of a lack of implementation provisions.

As mentioned earlier in this chapter, the Philippines is an exceptional case in Asia with its explicit recognition of the rights of indigenous communities in the Indigenous Peoples Rights Act (IPRA) of 1997. While IPRA guarantees so-called “community intellectual rights” for biological material, the relevant provisions have to be read in conjunction with environmental conservation laws and regulations. On the regulation of access, the various laws sometimes overlap, as in areas designated as national parks, which are under national environmental laws, but often also inhabited by indigenous people. Because of its recognition of ancestral domain title, the Philippine version of native title, IPRA has been unsuccessfully challenged in the Supreme Court of the Philippines, and its implementation was delayed for years pending the decision of the court. The legislation continues to clash with other interests in the Philippine economy, most importantly with the powerful mining industry. Because of the overlaps and contradictions between IPRA and the environmental laws and regulations, the powerful National Commission on Indigenous Peoples
(NCIP) and the Department of Environment and Natural Resources harmonized the various laws in a joint memorandum in 2003. This was followed by a joint administrative order of 2005 with new Guidelines for Bioprospecting Activities in the Philippines. The harmonized approach foresees an important role for the NCIP in documenting free and prior informed consent and in negotiating the benefits on behalf of indigenous communities and the use of fees collected within ancestral domains in accordance with the aims of the Indigenous Peoples Rights Act.

In view of US heritage in policies toward indigenous people in the Philippines, it is not surprising that the policies and solutions adopted for traditional knowledge also show similarities to those in Anglo-American settler colonies. They show an attempt at integrating traditional knowledge and related customary laws into the national legal framework and provide scope for negotiations between local communities and national and international parties with commercial interests. The national government stands, as elsewhere, at the intersection of such negotiations, but in the Philippines it attempts to remain largely in the role of arbitrator and mediator.

My final example comes from India. In view of their large rural population, commentators in India have been particularly critical of the aspects of the TRIPS Agreement related to the patenting of forms of life. India also made headlines when, via its Council of Scientific and Industrial Research, it successfully challenged patents granted for *turmeric* and *neem*. Apart from biotechnological inventions, a main area of conflict with industrialized countries concerns patent protection for pharmaceuticals. Exclusion provisions in the Indian Patents Act until recently ensured that methods of agriculture and horticulture and various forms of treatment for animals or human beings did not qualify for patent protection. Patents only for processes but not products were available for food, medicine, and drug-related inventions. The absence of product patent protection in this field allowed India to become a leading manufacturing country for generic medicines and a major supplier for the rest of the developing world. Judicial interpretation of "manner of manufacture" in the Act as exclusively related to processes resulting in non-living, tangible products was an additional obstacle to biotechnological inventions.

As elsewhere, things began to change with India's accession to the WTO TRIPS Agreement. The exclusion provision of the Indian Patents Act was amended providing patent protection from that point for micro-organisms and biotechnological processes that require substantial human intervention. However, the Indian government newly included several provisions meant to safeguard local interests and to prevent patenting of local knowledge. Controversial grounds for opposition to and revocation of patents were added, where "the complete specification does not disclose or wrongly mentions the source of geographical origin of biological material used for the invention" and where "the invention ... was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere." Excluded from patent protection was "an invention which, in effect, is traditional knowledge or which is an aggregate or duplication of known properties of traditionally known component or
components." The further extension of patent protection remained controversial and did not entirely satisfy foreign pharmaceutical manufacturers, who mounted an unsuccessful challenge to the constitutionality and TRIPS compatibility of those aspects of the Indian Patents Act.

Aspects of traditional knowledge protection have also been included in the appropriately worded Protection of Plant Varieties and Farmers' Rights Act (PPVFRA) of 2001 and in the Biological Diversity Act (BDA) of 2002. The PPVFRA foresees registration of traditional varieties under certain conditions and puts a Protection of Plant Varieties and Farmers' Rights Authority in charge of the administration of the legislation and of a National Gene Fund set up to compensate farmers for their contribution to the development of commercially used varieties. The BDA creates similar mechanisms, a National Biodiversity Authority and a National Biodiversity Fund, for biological resources more generally and not confined to farming. It treats the access applications of Indian citizens and corporations more leniently than those of foreigners, and overlaps in its benefit-sharing mechanisms with the PPVFRA. This, and the weak position of communities, has been criticized and prompted a commentator to conclude that the provisions "even seem to encourage commercial exploitation rather than giving impetus to the conservation of biodiversity or to benefit-sharing with the local communities."

The example from India shows that in some countries the courts may play a significant role in modifying the application of international norms in the interest of local parties. Indian social and political activists have also been successful in public interest litigation. The Indian government has further been eager to safeguard local and traditional knowledge against misappropriation by foreigners. Critics have argued, however, that there is much less protection for local communities against misappropriation by Indian parties and that the entire system of traditional knowledge protection is perhaps too state centered and bureaucratic to appeal to people at the grassroots level.

Conclusion

In sum, development and environment protection paradigms, as well as attitudes toward the commercial use of folkloristic expressions, have changed and there are now continuing negotiations between the new local stakeholders, government agencies, NGOs, international agencies, and domestic and foreign industries. In the process, cultural heritage is reinterpreted as national, regional, local, or as fitting the international criteria of international conventions. Competition between biological and cultural resource providers is tough, however, and the financial benefits are at this stage still far from certain. Rather than generally pushing against globalization, it seems that the various parties involved in the debate all make use of aspects of it in one way or another for their respective purposes by using new telecommunication and networking facilities and/or by trying to fit the criteria to benefit under international conventions and agreements. Ronald Niezen, in a chapter entitled "(Anti)Globalization from Below," has pointed to some of the contradictions in the current movements of indigenous people in particular:
... there is a central ambiguity associated with this global strategy of mobilization, an ambiguity that can be more generally seen as a central feature of the current era of globalization: the defense of distinct societies relies on political forces that exert pressures of global conformity ... At the very least, legally based defenses of tradition require the formation of a new elite that meets two new criteria for leadership: skilled literacy and sophisticated familiarity with the workings of bureaucracy. In short, there is a trade-off between global strategies of cultural preservation and the strategic necessity of wearing a one-size-fits-all transnational identity.79

To some extent, these contradicting pressures also apply to local communities in Asia, whether indigenous or not, who are overall struggling to see their particular interests recognized by nation-states. Of the various modes for local "pushing against globalization" noted by John Gillespie in his chapter, it seems that the harnessing of global governance and the drawing of international attention to local issues are regarded as particularly promising by local communities. In some countries, social activists have also successfully turned to the courts. Self-regulation by non-state actors in the form of customary law is widely recognized throughout the region, but clearly subordinated to the normative frameworks of the national legal system and of the economic development goals of governments. Finally, democratization and decentralization are making inroads into the formerly exclusive domains of bureaucratic government authority, but there is also much frustration with some aspects of the reform processes, as for example with decentralization in Indonesia,80 which among other concerns has been criticized as business unfriendly.81

Yet, for relatively young, post-colonial nation-states, it remains of paramount importance to defend national unity and to accelerate the processes of economic and social development. Thus, the internal struggle between the perceived developmentalist needs of governments and reformist pressures exerted by internal and external forces82 will continue for the foreseeable future. The outcome of this struggle is by no means certain.

Notes


7 John Gillespie, Chapter 2 in this volume.


11 John Gillespie, see note 7 above.


14 Ibid., p. 1, note 1.


23 Christoph Antons, ‘Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia’, supra, note 20, p. 44.


30 Ken S. Coates, supra, note 22, p. 9.

31 Ibid., p. 8.


33 As cited in Carlos M. Correa, Options for the Implementation of Farmers’ Rights at the National Level, Trade-Related Agenda, Development and Equity (TRADE), Working Papers No. 8, December 2000, p. 4.

34 Article 8(j) of the Convention on Biological Diversity.


36 Jeffrey Sissons, supra, note 29, p. 23.

37 See Article 15(4), (5) and (6) of the CBD.

38 For a complete text of the declaration in the Resolution of the General Assembly 61/295 as well as the various explanations of countries as to their positions, see General

39 Benedict Kingsbury, supra, note 32.
43 Christoph Antons, ‘Traditional Knowledge, Biological Resources and Intellectual Property Rights in Asia: The Example of the Philippines’, supra, note 3, pp. 5–6.
44 Christoph Antons, ‘Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia’, supra, note 20, p. 50.
45 General Assembly GA/10612, 13 September 2007, supra, note 38, p. 11.
50 Article 46(1) of the United Nations Declaration on the Rights of Indigenous Peoples: “Nothing in this Declaration may be interpreted as implying for any State, people, group, or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.”
53 The word “folklore” has been added to the protected material in Article 10(2), and a licensing requirement for foreigners to use such material, which was implied in the previous version of the law, is now explicitly included in Article 10(3).
57 See Article 10(2) b. of the previous Copyright Act of 1982: “The state holds the copyright to the works mentioned in subsection (2) a. with regards to foreign countries.”

59 ‘Malaysia urges Indonesia to drop plans to sue over folk song’, *Jakarta Post*, 8 October 2007.

60 ‘Rasa Sayang belongs to all’, *The Star Online*, 3 October 2007; Marc Lourdes, ‘Rasa Sayang ‘ours too … we have the right to sing it’’, *nstonline*, 22 November 2007.


69 Joint Administrative Order No. 1 Series of 2005 of the Department of Environment and Natural Resources (DENR), the Department of Agriculture (DA), the Palawan Council for Sustainable Development (PCSD), and the National Commission on Indigenous Peoples (NCIP).


72 Christoph Antons, ‘Sui Generis Protection for Plant Varieties and Traditional Agricultural Knowledge: The Example of India’, *supra*, note 4, pp. 480–81.


75 Christoph Antons, ‘Sui Generis Protection for Plant Varieties and Traditional Agricultural Knowledge: The Example of India’, supra, note 4, pp. 481–82.
79 Ronald Niezen, supra, note 12.
82 Christoph Antons, ‘Law Reform in the “Developmental States” of East and Southeast Asia: From the Asian Crisis to September 11, 2001 and Beyond’, supra, note 54.