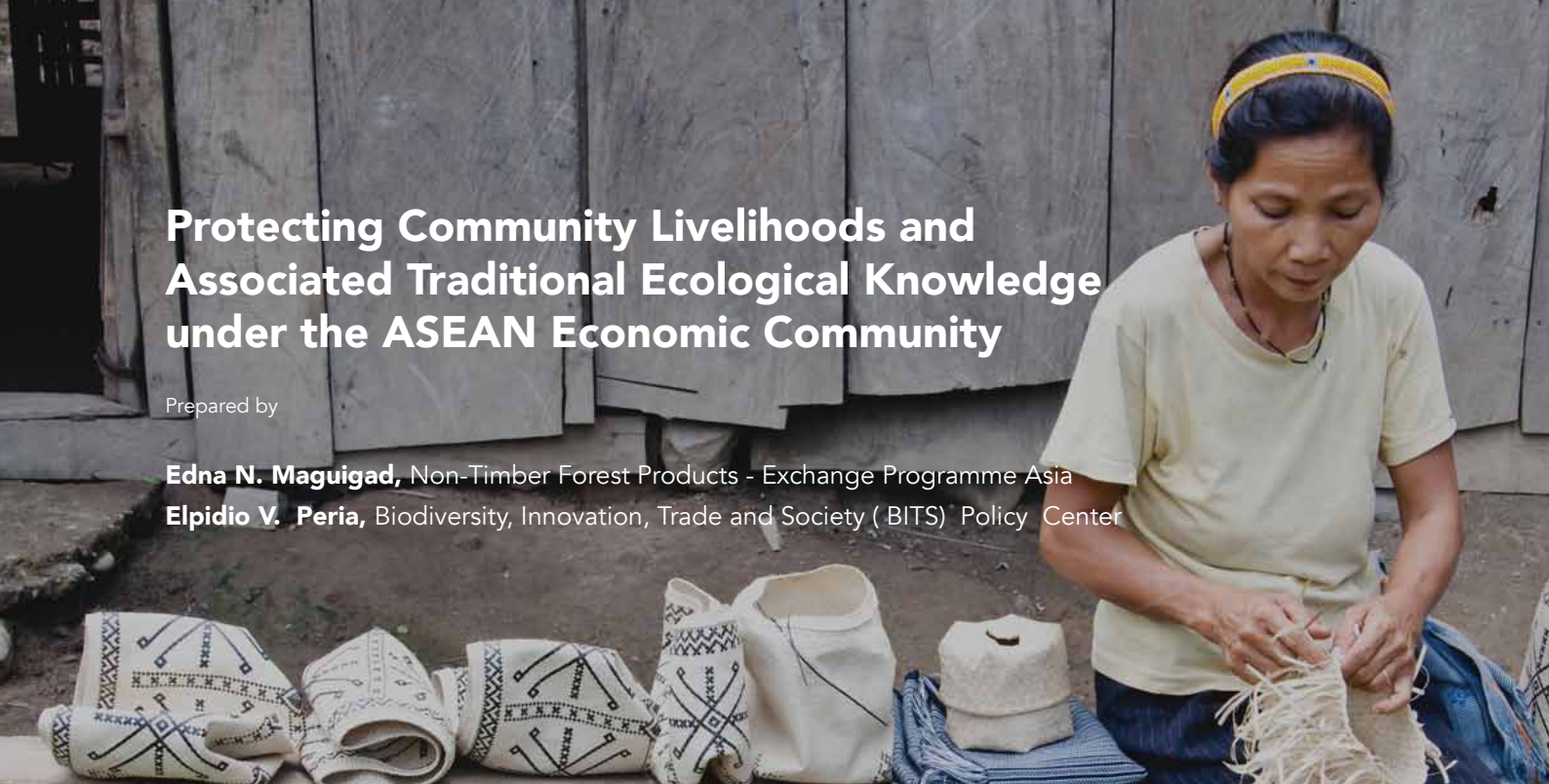


Protecting Community Livelihoods and Associated Traditional Ecological Knowledge under the ASEAN Economic Community

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The ASEAN Economic Community in 2015 is characterized by a single market and production base, a region that is highly competitive economically and fully integrated into the global economy and region of equitable economic development. The envisioned single market and production base includes two important components, namely, the priority integration sectors, and food, agriculture and forestry.

Considering the scale and range of actors in the forestry sector within each ASEAN member state as well as in regional level, appropriate approaches and mechanisms should be laid down for community forest enterprises to truly benefit from the AEC and ensure that economic integration will not increase existing inequalities for forest dependent communities but usher in sustained economic benefits within the context of cultural and environmental integrity.

Intellectual Property Rights is an important aspect of the economic integration to protect and promote creativity of ASEAN nationals while promoting trade within and outside the region. In the past years, ASEAN through the ASEAN Working Group on Intellectual Property Cooperation (AWGIPC) has been working towards the development of the Intellectual Property system within the region and on increasing capacity of the Member States to respond to Intellectual Property issues. As part of the AEC Blueprint, the AWGIPC prepared an ASEAN Intellectual Property Rights Action Plan for 2011-2015. Under this priority action plan is the establishment of national and regional database on Traditional Knowledge (TK), Genetic Resources (GR) and Traditional Cultural Expressions (TCE) targeted in 2015 and led by Indonesia, Cambodia and Lao PDR.



Protecting Traditional Knowledge (TK) used in Community Livelihoods

The importance of protecting and preserving indigenous traditional knowledge has been recognized in several international instruments, including the Universal Declaration of Human Rights, the Convention of Biological Diversity (CBD) and the United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP) and ILO 168. As far back as Earth Summit in 1992 with the Rio Declaration and CBD emphasize the need for governments to “*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities*” and *encourage the right of traditional communities to share in the economic and social benefits arising from the utilization of such knowledge, innovations and practices.*¹

The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is responsible for various activities promoting the protection of indigenous intellectual property worldwide. Negotiations are currently underway in the IGC towards the development of an international legal instrument for the effective protection of TK and TCEs and to address the Intellectual Property aspects of access to and benefit sharing of genetic resources. Genetic resources include forest resources such as Non-Timber Forest Products (NTFPs).

The present model being implemented and developed in ASEAN has limitations in protecting Traditional Knowledge (TK) and Traditional Cultural Experience (TCE). In the development of NTFPs, the value of the creation of the product goes beyond the resource but also extends to the cultural and sometimes spiritual knowledge, amongst others, used for creating the product, these know how is commonly referred to as traditional knowledge.

In the current debate concerning the protection of TK and TCEs, the role of the customary laws, practices and protocols comes to mind. The Conference of Parties of the Convention of Biological Diversity has indicated that protection of TK should be “based on a combination of appropriate approaches *Including the use of exiting intellectual property mechanisms, sui generis systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice*”.² In the documents under the work of the IGC, a comprehensive approach to addressing TK and TCE includes a wide array of options for protecting TK and TCE, among which are “existing Intellectual Property systems (including an array of Intellectual Property rights and the law of unfair competition), adapted IP systems with sui generis elements, and new, stand-alone sui generis systems, as well as non- Intellectual Property options, such as trade practices and labeling laws, liability rules, use of contracts, customary and indigenous laws and protocols, regulation of access to genetic resources, and remedies based on such torts as unjust enrichment, rights of publicity, and blasphemy”.³

1 Convention of Biological Diversity.1992

2 CBD COP Decision VI/10A, para 33 as quoted in Customary Law, Traditional Knowledge And Intellectual Property: An Outline Of The Issues. WIPO. 2013

3 Customary Law, Traditional Knowledge And Intellectual Property: An Outline Of The Issues. WIPO. 2013



ASFN Strategic Priority Actions Related to Intellectual Property Rights

Under the AEC, the interplay of traditional knowledge with intellectual property rights for creations from community-based enterprises should be further explored pursuant to the **ASFN adopted Strategic Priority Action on Community Livelihoods and Economy** as endorsed by the 8th ASFN Meeting in May 2014 in Sabah Malaysia and the 17th ASOF Meeting in June 2014 in Siem Reap, Cambodia. The strategic priority Actions on Community Economy & Livelihood related to the Intellectual Property are as follows:

1. Establish a regional process to protect intellectual property rights (IPR) over local products and knowledge (including copyright protocol, registries) consistent with UNDRIP and other international agreements;
2. Include the Creative Industry (cultural products, arts) as a priority sector for ASEAN economic integration.
3. Support marketing and consumer campaigns to promoting intra-ASEAN trade in creative/cultural economy products, while ensuring IPR and chain of custody traceability.
4. Provide incentives to SF-based SMEs and communities.

These priority actions will be supported by the establishment of ASEAN wide Working Group on Community Economy and Livelihood and a platform within ASEAN to exchange new technology, NTFPs /forest products development and marketing innovations in relation to Social Forestry, among others. These mechanisms can host in-depth discussions and later a work program on IP and non-IP approaches on protecting community rights from products and creation from community-based enterprises and associated traditional knowledge, taking into consideration the following questions:

- How are community rights in NTFP development and transfer being protected under existing intellectual property framework in ASEAN countries?
- What are the activities in the product development and technology related to forest (like NTFP) development that needs protection?
- What has been the extent of use of traditional knowledge in the development of NTFPs? Are there examples that are documented? What has been the role of customary law in the NTFP development?
- For the holders of Traditional knowledge they, what is the preferred role/s of customary laws and protocols?
 - As a basis for sustainable community-based development?
 - To strengthened community identity, and promotion of cultural diversity?
 - As a condition of access to TK and TCEs?
 - Or as continuing guidance for use of resources in the community, use of TK in the development of these resources and setting conditions in the use of third party.
- What forms of relationship between customary law and Intellectual Property law have been encountered in practice in the ASEAN? What models could be explored?

Existing Approaches and Instruments to Protect Community Based Products and associated Traditional Knowledge

In the meantime, there already protection measures, under the Intellectual Property (IP) system and outside, called non- IP options which can be explored to assist communities in getting benefits from their creations, increase their bargaining power and protect them from less principled middlemen.

These various approaches and instruments further enhance the commercial prospects of their initiatives to promote and develop products from their traditional cultural heritage, while maintaining the integrity of the diverse cultures and natural ecosystems on which these products and cultural heritage are so intertwined and maintaining respect for the cultures and customary norms of communities from which these products originate.

Contracts are agreements among the product originator or the supplier and the concessionaire or the buyer. The agreements deal with what the parties may agree on the manner of delivery for the products at what time and condition with an agreed price. Who shoulders contingent expenses when something happens on the road on the way to delivery? Or when some products are not sold. In this contractual approach, there are varieties of instruments to put into effect the agreement of the parties. One set of instrument is a simple undertaking, whereby the buyer commits to take on all of the products at an agreed rate and commits to pay up at an agreed time and date. There are more instruments available under this like benefit-sharing arrangements or trust receipt arrangements.

Intellectual property is recognition of the intellectual content in the product, which content will have value and such value is the subject of the transaction between the buyer and the seller. The instrument of intellectual property is as many as the kinds of products that may be subjected to commercialization. Two instruments of intellectual property that is of relevance to social forestry will be **Copyright and Trademark**.

These intellectual property instruments will have their unique characteristics suited to the nature of the product. If the artistic element of the product and its emphasis on the recognition of the creator or originator of the product is important, then **Copyright** may be the instrument of choice. But if the aim is just to ensure that the product has a mark indicating the origin or the maker of such product, then what may be useful is a **Trademark**, but trademark has to be used at all times but not too many times as it may become generic and may lose its distinctiveness that is so useful in indicating where the product may be from.

However, there are considerations in these instruments is the limited time period of protection and the costs of enforcement. All these intellectual property instruments will have limited time periods and they are secured by applying at the government agencies issuing such instruments, the intellectual property offices of a state. There are also costs when such instruments need to be enforced against those who use rights instruments without permission from the originating community.

Traditional or customary means of protection uses the community's own mechanisms and institutions to designate the origin of their products and mark their distinctiveness from other non-traditional products.

In the Philippines, the presence of a law, the Indigenous Peoples' Rights Act, which gives the indigenous communities recourse to some instruments rooted in the ways and cultures of the community, give the communities some leeway to apply these instruments to their products. This relates to community intellectual rights instruments, a tool to enforce the rights of indigenous communities to the products of their cultural heritage.

For ASEAN countries, which do not have legislation recognizing the primacy of customary law and rights of Indigenous Peoples, mechanisms such as the community protocol and community, marks can use. These mark off certain products of cultural heritage and recognize the community where such products originated these marks applied on products of cultural heritage