

# **“Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices”**

## **Report of the Planning Workshop, organised by IIED and IDRC, London, 4-5 May 2004**

This project will examine customary laws and practices relating to traditional knowledge and biological resources, to assist the development of appropriate mechanisms to protect the rights of indigenous and local communities over traditional knowledge.

The two-day Planning Workshop brought together research teams from India, China, Peru, Panama and Kenya, as well as international researchers. Its main purpose was to develop a common vision and understanding of the project, and a coordinated approach. The workshop reviewed policy issues and challenges to be addressed, and different paradigms and approaches for TK protection.

### **Participant’s work and interests in TK protection**

The development of policies for TK protection has often been led by IPR experts, with limited participation of TK holders and attention to customary laws. In contrast, existing IPR laws have been developed in response to the demands of particular interest groups (plant breeders, biotechnology companies etc). Participants stressed the need to:

- develop alternative models for TK protection, shaped by the worldviews and demands of TK holders;
- ensure that TK protection is addressed holistically, together with associated resources, and *in-situ* preservation of TK systems, culture and biodiversity (both to support community needs and address the rapid loss of TK);
- link local realities and needs with national and international processes for TK protection;

The key concern for those working on *agricultural biodiversity* is to prevent misappropriation and transfer of control of resources from farmers to scientists, and recognise the contribution of farmers to plant breeding. Here, the emphasis is on safeguarding the sharing of knowledge and resources amongst farmers, and the ‘space’ in which this sharing occurs - including landscapes and their socio-cultural constructs. For those working on *traditional medicine*, the main concern is to promote traditional medicine to improve healthcare. Healers are increasingly reluctant to share their knowledge for fear of being unfairly exploited – hence the need to protect their rights to provide incentives to share knowledge. Here the emphasis is more on protecting individual rights over knowledge.

### **Policy issues and challenges**

*TRIPs and increasing biopiracy*: The WTO/TRIPs agreement requires global IPR protection for micro-organisms, micro-biological processes and plant varieties, but provides no protection for the ‘informal’ innovations of traditional communities. Patents are increasingly sought and granted for natural products and spurious ‘inventions’, while big life-science companies are becoming extremely powerful.

However, some of the terms in TRIPs and UPOV are not defined and this can be exploited to protect TK.

*CBD has some positive elements:* Article 8(j) emphasises the need to maintain knowledge systems *in-situ* - Parties are to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities”. Under Article 10(c) Parties are required to “protect and encourage the customary use of biological resources in accordance with traditional cultural practices”, which implies that the protection of associated TK should be in accordance with customary norms and practices.

However, participants noted that the CBD should not be seen as the basis for the project, rather that TK protection should be guided by indigenous and human rights law (eg. the UN Draft Declaration on Human Rights and ILO Convention 169).

*Problems with national sovereignty over genetic resources:* By recognising national sovereignty over genetic resources, the CBD separates rights between national governments and local communities. Most biodiversity laws are in practice about national ownership of biological resources rather than national sovereignty - many governments have become aggressive in asserting these rights. This is also a problem in international discussions on access to genetic resources and benefit-sharing (ABS) and the Bonn Guidelines, which are framed in the context of national sovereignty. However, sovereignty does not mean ownership – ownership of biological resources is still subject to other legal norms such as national constitutions.

### **Benefit-sharing or reclaiming the commons?**

Michel Pimbert (IIED) presented 3 different conceptual frameworks or paradigms for TK protection, from which stem different approaches to TK protection: compensation mechanisms; IPRs or *sui generis* systems which provide legal rights to resources and knowledge; and reclaiming the commons/self-determination, where rights to knowledge are linked to rights over land/resources and culture. In the latter, the emphasis is on protecting Indigenous Knowledge Systems, ie. the totality of indigenous information, practice, beliefs and philosophy. From this framework stems an approach based on empowering communities, care for the environment, and local control over the end uses of knowledge. This means the subject for protection is the indivisible whole of knowledge, rights and heritage, rather than component parts of culture (ie. knowledge or bits of knowledge). The different paradigms also have implications for the research approach, style and methodology.

Participants reinforced this third vision for TK protection, noting that:

- It is critical to protect the systems through which TK is developed and shared, and the space which allows continued sharing of resources. TK protection is not just about ownership rights but about conserving the space for sharing - hence a commons framework is needed.
- Each seed has a knowledge system and a food culture behind it; thus restoring seed diversity will regenerate knowledge systems – this means that a focus on seed rights and claiming rights to commons is more important than benefit-sharing from research.
- IPRs are meant to be part of knowledge systems – this is what they were originally intended to be, but have since become abstracted.

### **Recognising customary law:**

Customary law is part of legally binding law. However, even where customary law is recognised in formal law and national constitutions, it has a weak position relative to statutory law, or is not implemented at all.

Options for recognition of customary law range from: codification, with associated restriction of flexibility and risk of transferring decision making power; to recognition of elements of customary law (as in some existing sui generis models); to recognition of the authority and supremacy of customary law systems/authorities to decide over use of TK. Customary law for external use may not exist as such and may depend on the *application* of existing norms by customary authorities. Hence the recognition of customary law is as much about recognising institutions as it is about rules.

Brendan Tobin (IAS/UNU) highlighted the need for TK regimes to establish a bridge between customary and national law, and national and international law; the importance of the manner in which national law empowers customary law; and the need to identify best practices in developing an interface between customary and national law, which can then be incorporated into international law. A key challenge will be to provide sufficient flexibility to allow for different local customary law systems, whilst also having the legal strength needed for enforcement internationally.

It was also noted that there is an enormous diversity of customary law, and that not all customary law is 'good' – in terms equity etc. The challenge for the project is not to record the details of customary laws, but to identify basic principles and norms, and highlight those which are common to different communities/groups, as well as the diversity of customary law systems.

### **Project purpose and approach**

IIED presented its thinking behind the purpose of the project:

- to develop proposals for TK protection based on the perspectives, worldview, principles and objectives of TK holders;
- to demonstrate the existence/nature of rights over TK and associated resources, as enshrined in customary law;
- to ensure that decision-making over the use of TK is fully vested in TK holders, based on their decision-making authorities and practices;
- to ensure TK protection mechanisms support systems through which TK and biological resources are shared and maintained

Participants shared their perspectives on the purpose/value of the project:

- To provide TK protection where no appropriate mechanism is available (eg. for healers in Kenya), by 'talking to the people you are trying to help'.
- Where broad sui generis regimes are in place such as in Panama, the challenge is to explore how to make them work in practice.
- To re-activate customary law systems for resource management (eg. in Peru) by identifying a set of customary regulations which can be applied in resource management plans, management of biodiversity registers, community protocols and repatriation agreements (eg. for repatriation of potatoes from CIP, the International Potato Centre).

In the terms of the research approach, a number of issues were highlighted:

- In Peru, the research methodology will be adapted to the ecosystem level. A model first needs to be developed to sketch out the components of landscape, institutional norms etc.
- Empowerment needs to accompany legislation to ensure TK holders' rights are respected in practice. Establishing local learning groups, which enable community members to conduct and steer research is a very useful way of generating power from the bottom.
- 'Normal' policy fora are not necessarily the best means for channelling indigenous proposals – alternative fora can also be established, for example, citizen's juries and scenario workshops.
- The need for a political process in parallel with the research to build support for the resulting policy proposals. Creation of new rights requires a clear presentation of what society as a whole will gain.

### **Linking the project to international processes**

The importance tracking and informing international processes was emphasised – in particular:

- WIPO's work on traditional knowledge protection – its mandate has been extended for another 2 years, although no decision has yet been taken to develop an international regime.
- The CBD, particularly work on Article 8(j), and the negotiation of an international instrument on ABS and TK protection.
- Negotiations of the UN Draft Declaration on the Rights of Indigenous Peoples, which includes provisions on the recognition of customary law (see [www.sol-un.org](http://www.sol-un.org)).
- The WTO/TRIPs, eg. to provide an alternative paradigm for plant variety protection under both Article 27.3 (b) and UPOV, based on farmers' rights and recognition of customary law.

### **Country Study Presentations**

*Traditional medicine in Panama:* Indigenous peoples in Panama are asking for protection of their medicinal knowledge. The study will examine the knowledge systems of Embera and Kuna communities, to identify who are the 'owners' of knowledge and who should be compensated. The study will show how to obtain PIC in accordance with customary laws and practices. It also seeks to describe traditional medicine systems to promote legal recognition of their legitimacy.

*Traditional medicine in India:* HFRC seeks to revitalise traditional medicine through documentation and validation, and to register traditional medicines to obtain IPRs and market them. Healers where HFRC works are not concerned about IPRs, however the work of HFRC raises issues of recognition of rights over TK. It is also important to strengthen customary values in order to conserve bio-resources and related TK.

*Traditional medicine in Kenya:* The study aims to inform the traditional medicine law (which has not been very consultative), and help develop a system to protect the rights of healers. A consultative meeting with healers will be held at the start to define the questions to ask. Issues of ownership will be explored through questions on learning and transfer of TK and user rights, and protection issues will be explored drawing on previous interactions with researchers.

*Rice varieties in India:* The basic aim is to develop an alternative community rights protection system based on sharing. One sub-study will be in tribal areas in Sikkim and Darjeeling District in the Northeast to examine customary law systems relating to traditional rice varieties, strengthen farmers' understanding of external threats and laws, identify their solutions, and disseminate this information in a manual for communities. In Chattisgarh, scientific research institutes are trying to stop local processes of collecting and improving rice varieties, and are developing new rice varieties without sharing information with farmers. The study will examine customary law systems for traditional rice varieties in this centre of origin and discuss with communities how their rights over seeds should be protected.

*Maize varieties in China:* There are laws to protect plant breeder's rights, but not to recognise farmers' rights and their contribution to plant breeding. There is a need to ensure farmer's rights are addressed given the transition to a market economy, national reforms under TRIPs and the weak links between the grassroots and national levels. The study will examine customary laws to determine how to protect farmers rights and share benefits with them.

*Potato varieties in Peru:* There is no law to protect native crops despite the fact that Peru is a centre of origin of potato. The Andean Pact legislation does not address many issues of importance for indigenous peoples – land, genetic resources, spiritual values and cultural systems. The study will examine customary rules for managing and sharing innovations so that these can be applied to external users. It will examine the type of law used by communities (customary, indigenous, formal), and the variables that influence the choice of customary and national law, to understand the kinds of legal norms and systems needed to protect TK. Local Learning Groups comprising community members will take the lead in designing and conducting the research.

### **Bringing coherence to the diverse country studies**

While the diversity of studies is a strength of the project, it makes the task of pulling the results together all the more challenging. A common thread is needed to link the studies, but it is also important not to straight-jacket the studies so that national and local needs are addressed. It was therefore decided that the project should have a common international objective for all the studies to focus towards – along the lines of: “recognition of the supremacy of customary laws in the governance of indigenous knowledge systems and associated bio-cultural resources in international law (eg. WTO, WIPO, CBD, Human Rights law etc.)”.

### **Funding**

IDRC has identified the next phase of this project as a priority for funding – subject to approval of a proposal. However, IDRC can only provide part of the funds needed for the country studies, which means that co-funding needs to be found urgently. There is some concern about the risk associated with starting a project when only part of the funding has been secured. A number of participants also noted the critical importance of this project, the lack of existing research on customary law relating to TK and biological resources, and the need to start the work as soon as possible.

## **Next Steps**

*Submitting a proposal to IDRC:* The country teams agreed to revise their work-plans to include research outcomes and research questions, and budgets, and send these to IIED by around 20<sup>th</sup> May. IIED will revise the project concept note to reflect the workshop discussions, and submit this together with the country study plans to IDRC by early June.

*Communications:* IIED will explore options to enable easy sharing of information, workplans, references etc. between study partners (eg. setting up a listserv or website).

*References:* IIED will compile a list of useful reference material and an annotated bibliography, for the project partners.

*Co-funding:* IIED will try to secure the necessary co-funding for the project, both for the country studies, and for IIED's role (eg. coordination to provide a common thread, tracking/informing international policy processes, facilitating communications, pulling together the results).

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