

THINK GLOBAL, ACT LOCAL: PROTECTING THE TRADITIONAL KNOWLEDGE OF INDIGENOUS PEOPLES

SONIA SMALLACOMBE*

‘Most of the discussions around Traditional Knowledge at the international level remain elitist – only a few Indigenous individuals are able to participate and information regarding the discussions or outcomes is not extensively disseminated. There is a gap between the international debate and the local realities. Most Indigenous communities are faced with life-threatening issues that keep them from actively engaging in international policy advocacy work, and yet many of the issues that Indigenous people face on the ground are brought about by the implementation of policies crafted at the international level. Clearly there is a need to bridge this gap and bring more information to the people in our communities’¹

Indigenous people’s struggle to protect their biodiversity resources intensified in the 1990s, when multinational corporations began to exploit for profit Indigenous peoples’ Traditional Knowledge, genes and biodiversity resources. As a result, Indigenous people world wide became concerned about biopiracy. In most countries, biopiracy is practiced by large corporations and governments, under various pretexts, on biological and genetic resources found mostly on Indigenous peoples’ lands and communities. Not only is the material taken but the collective knowledge systems which have evolved over centuries and is uniquely bound up with the practices, customs, traditions, lands and resources is removed from Indigenous communities, genetically manipulated, patented, and thus privatised and commercialised.²

Once Traditional Knowledge is removed from Indigenous communities, the community loses control over the way that knowledge is used and the rights of these people are rarely recognised and protected. In addition, Indigenous people do not share, at least in a fair and equitable manner, benefits arising from the appropriation of their knowledge and its subsequent use in drug development.

* Sonia Smallacombe is a member of the Maramanindji people in the Daly River region of the Northern Territory, Australia. She was formerly Senior Lecturer and former Head of School at the School of Australian Indigenous Knowledge Systems, Charles Darwin University, Northern Territory. Sonia is currently working for the Secretariat of the United Nations Permanent forum on Indigenous Issues.

¹ M Lattimer, in M Bengwayan, “Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia”, *Minority Rights Group International*, (2003), 2.

² M Bengwayan, “Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia”, *Minority Rights Group International*, (2003), 22.

What is Traditional Knowledge?

According to the *Convention on Biological Diversity*:

‘Traditional Knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language and agricultural practices including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture and forestry’.³

Traditional Knowledge is not static. It is dynamic and continually evolving as diversity is created by the human need to create against new and ever changing forms of knowledge. Hence, it is this dynamism that is in need of preservation, as conditions need to be created so that Traditional Knowledge continues to evolve to enable Indigenous people to nurture, create and maintain our knowledge systems.⁴

It has been argued that as science and technology advances and natural resources dwindle, there is an increased interest in appropriating Indigenous Knowledge for scientific and commercial purposes. As previously stated, some research and pharmaceutical companies are patenting, or claiming ownership of traditional medicinal plants, even though Indigenous peoples have used such plants for generations. In many cases Indigenous peoples’ traditional ownership of such knowledge is not recognised and as a result Indigenous peoples are deprived of their fair share in the economic, medical or social benefit that accrue from their Traditional Knowledge and practices.

Indigenous people are alarmed that their knowledge concerning the nutritional use of Indigenous resources is being extensively documented. For example, there is a growing interest in ‘bush foods’, an industry guided by the Australian Native Bush Food Industry Committee, that draws heavily on Indigenous peoples’ knowledge about the uses and nutritional value of these foods.⁵

In other instances, Government conservation authorities, multinational companies and university researchers are collecting specimens and taking cuttings from plants from Indigenous lands as part of their programs to create inventories. The collected species are made available for research without reference to the owners from whom the species were collected.

At the same time, it could be argued that this existing knowledge base among Indigenous people can compliment scientific knowledge by providing

³ *Traditional Knowledge and the Convention on Biological Diversity*, Secretariat on the Convention on Biological Diversity.

⁴ R Coombe ‘Sixth Annual Tribal Sovereignty Symposium: The Recognition of Indigenous People’ and Community Traditional Knowledge in International Law, *St Thomas Law Review*, Winter, (2001), 4.

⁵ S Singh, ‘Traditional Knowledge under Commercial Blanket’ *Third World Network*, (1999)

decision-makers with more information on biological systems and can play a key role in assisting global actions to ensure sustainable use of biological resources. More importantly it can provide a basis for Indigenous communities to address issues of poverty and food security in this increasingly global society.

Protecting Indigenous traditional knowledge is complex and has many levels. I have identified at least three issues:

1. Is it possible to protect Traditional Knowledge in this increasingly technological and commercial world?
2. Is the role of Indigenous peoples' participation at the international level in conserving the Earth's biological diversity valued?
3. What measures are being taken to address the need for diverse Indigenous communities to discuss their concerns at the local community level?

Literature on the rights of Indigenous people makes the claim that these rights are either ill defined or entirely ignored by national and international law. This is no coincidence, as it is well known that land tenure systems of many countries facilitated the displacement of Indigenous people and alienation of them from their ancestral lands and natural resources. As a result, traditional knowledge has become vulnerable in the process as human rights are abused.⁶ At the international level, there are heated debates across the institutional terrain, from grassroots' debates on sustainable development to the World Trade Organization (WTO) negotiations. Some local communities are able to get their concerns heard at an international forum, often through international NGOs such as the Rural Advancement Foundation International (RAFI), GRAIN and the Third World Network and others. The World Intellectual Property Organization (WIPO) meetings in Geneva also consist of invited Indigenous participants, similar arrangements exist for Indigenous participation at the Conference of Parties (COP) meetings for the Convention on Biological Diversity (CBD) and its Articles that relate specifically to Indigenous people such as Articles 8j. However, there are still a number of Indigenous voices that do not get heard, or are unaware of the debates at the international level. There are a number of reasons for this, including the fact that these meetings are complex and the use of technical language is paramount. As a result, information is not translated into local languages or in layperson's terms for local communities.

Indigenous people, like all peoples, have a right to derive a means of existence from the sustainable use of biological resources found within our territorial borders according to our cultural practices. This right is based on the long and close association between Indigenous peoples and our traditional

⁶ J Mugabe, *Intellectual property protection and traditional knowledge: An exploration in international policy discourse*, (December 1998), WIPO, (1998), <www.wipo.int/tk/en/activitie/1998/humanrights/paper/index.html> 2.

biological resources developed and maintained over thousands of years. This interdependence has created the diversity of cultures we see today. It is no small coincidence that the majority of the world's remaining biodiversity reside in Indigenous peoples' territories.

Protecting Traditional Knowledge and the rights of Indigenous peoples has gained currency in recent years, especially on how conventional intellectual property rights laws can protect a system based on communal and oral traditions. A number of questions have emerged from the debate:

- What alternative forms of intellectual property protection provide economic benefits to holders of Traditional Knowledge that could be instituted at national and international levels?
- What legal measures, if any, are required to protect intellectual, economic, environmental, social and cultural rights of Indigenous peoples?

The differences in national application of intellectual property rights law are also at the centre of much of the debate on the rights of Indigenous people. The issues of adequacy and ethics are very much at the centre of these debates. There is however, an absence of consensus on whether, and how, to extend intellectual property protection to Traditional Knowledge and to date, it has revealed that issues of intellectual property protection of Traditional Knowledge are complex and controversial.

In his paper to the WIPO in 1998, John Mugabe from the African Centre for Technology Studies in Nairobi, Kenya pointed out that there was a lack of clarity of the two concepts of Traditional Knowledge and intellectual property and this was due to the lack of information available to those responsible for policy and law making at both national and international levels. He also pointed out that these issues are often debated in isolated United Nations organisations, the business sector and non-governmental organisations' conferences with each having its own distinct sectoral interest and focus in the subject. Mugabe presents a good example of how dialogue (ILO, and the United Nations Working Group on Indigenous Populations) on human rights of Indigenous peoples has seldom been mentioned in discussions on the protection of Traditional Knowledge. Also, the World Trade Organisation (WTO) regime has not confronted the implications of its TRIPs agreement on the protection and use of traditional knowledge.⁷

As previously stated there is acknowledgement of Indigenous peoples' role in protecting Traditional Knowledge by the *Convention on Biological Diversity* (CBD) and, to some degree, the World Intellectual Property Organisation (WIPO) and other United Nations agencies such as the United Nations Environment Program (UNEP), the United Nations Commission on Trade and Development (UNCTAD). Many Indigenous and environmental NGOs, including the CBD, have created a strong political foundation for

⁷ Ibid.

addressing these issues in a holistic manner. The CBD's holistic nature, and its large and diverse constituency open to NGOs, has provided, at least in the recent past, an intergovernmental forum where these issues are being debated with a certain measure of coherency.

According to Mugabe, the debate in the CBD and other forums now oscillates between two extremes:

- One position that advocates for extension of intellectual property protection to cover Traditional Knowledge, even including patenting of that knowledge; and
- Another position that promotes the *status quo* where such knowledge is treated as a public good.

Those who subscribe to, or promote, the first position often argue that extending intellectual property protection to Traditional Knowledge will in fact promote technological innovation as it would facilitate the dissemination and development of that knowledge in the modern economic space. Also, that recognition of intellectual property rights in Traditional Knowledge could generate incentives for Indigenous people to conserve the environment and manage biodiversity. At the core of these arguments is that industrialised countries have a moral obligation to ensure that Indigenous people receive a fair and equitable share of benefits arising from the use of their Traditional Knowledge and commercialisation of genetic resources. Proponents of this view further suggest that traditional knowledge should be validated.⁸

Mugabe makes the claim that those who oppose the extension of intellectual property protection to Traditional Knowledge have argued that such a move would destroy the social basis for generating and managing the knowledge. Traditional Knowledge is communal property, passed on from one generation to the next. If it is protected under intellectual property law it would be privatised, and this may deny future generations and industry access to such knowledge.⁹

It has to be remembered that the underlying purpose of Western IPR systems is to turn knowledge into a marketable commodity, not to conserve such knowledge in its most fitting cultural context. This goal necessarily translates into a focus on segregating and isolating information into identifiable and manageable pieces that can be protected by law as intellectual property. Mugabe makes the point that in contrast to the IPR system, knowledge of biological diversity and its related knowledge are by its very nature integrative, holistic, and synergistic. Biological resources are understood in relation to the ecological and cultural environments in which they have been grown, managed, and used by local residents. IPR systems depart from such traditions by valuing the discrete properties of plants that can most easily be taken out of their natural and cultural context and replicated through artificial selection in a

⁸ Ibid. 8.

⁹ Ibid.

laboratory or greenhouse. Given the legal premises upon which IPR are based, Mugabe argues it is unlikely that IPR will ever be a useful model for protecting biological resources.¹⁰

Mugabe argues that the pro and opponents of intellectual property rights in Traditional Knowledge express legitimate concerns. The problem is in the nature of intellectual property law as established and enforced on the basis of Western capitalistic models. An example that has been put forward by the Third World Network in relation to the adequacy of IPR systems protecting Traditional Knowledge is in the patents systems. They argue the patents systems are not able to protect Traditional Knowledge for the following reasons:

- It is impossible to identify an individual inventor due to the collective nature of Traditional Knowledge;
- Traditional Knowledge often can not be attributed to a particular geographical location;
- Ownership of varieties of plants is alien to many social and cultural beliefs
- The required criteria of ‘novelty’ and ‘inventive step’ are not always possible, particularly in cases where the Traditional Knowledge has been in existence over a long period of time; and
- The costs of applying for a patent and pursuing patent infringement cases are prohibitive.¹¹

Another dimension is that access and benefit sharing arrangements, the first step that many governments take to supposedly rectify imbalances, are being premised on IPRs, which may be unsuitable to biodiversity and related traditional knowledge.

Indigenous people are arguing that protecting Traditional Knowledge can only happen if, at the national level, Western intellectual property systems adopt principles of prior informed consent by recognising and utilising Indigenous customary legal systems. Indigenous peoples’ laws that govern the use and transmission of Traditional Knowledge need formal recognition as these internal regimes have been developed from repeated practices and are monitored and enforced by our elders, spiritual and community leaders.

The recognition of Indigenous customary laws has not been formally adopted by any international forum because the sovereignty of national governments takes precedence. For example, Article 8 (j) of the CBD, which recognises Indigenous involvement in decision-making, states that each signatory country will:

... subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional

¹⁰ Ibid.

¹¹ Traditional Knowledge of Biodiversity in Asia-Pacific: Problems of Piracy and Protection, *GRAIN and Kalparnlash*.

lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of 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.¹²

Article 8(j) highlights three issues:

- Respect for traditional systems;
- Seeking Indigenous peoples' consent for the wider use of these systems; and
- Ensuring that the resulting benefits are shared equitably with Indigenous peoples.

As previously stated, there are a number of limitations with Article 8(j). The Convention leaves the protection of the knowledge, innovations and practices of Indigenous communities to the discretion of national governments. Some governments that are signatory to the CBD may in fact invoke language of Article 8(j) not to undertake any measures that protect Indigenous knowledge, innovations and other rights. Language such as 'subject to national legislation' and 'as far as possible and as appropriate', was promoted during the negotiations for the CBD by governments that did not want to be committal about protection of Indigenous peoples and their rights. Also, Article 8(j) does not talk of protection of the knowledge, but merely calls on parties to 'respect, preserve and maintain' it. It does not guarantee Indigenous people any rights in Traditional Knowledge.

It is important, however, to state that there is recognition that the Convention does not contain adequate legal obligations to protect any property rights of Indigenous peoples' Traditional Knowledge. Discussions at the third Conference of Parties (COP3) and in the lead up to COP4 was the establishment of an *ad hoc* open-ended inter-sessional working group composed of Parties (countries), including Indigenous people, to:

... provide advice as a priority on the application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities¹³

As previously stated, Indigenous rights differ from Western IPR systems in a number of ways including:

- Indigenous rights are communal, often vested in clan, family or other socio-political groups;
- Indigenous communities do not have an identifiable individual creator, author or producer;

¹² *Traditional Knowledge and the Convention on Biological Diversity*, Secretariat on the Convention on Biological Diversity. <www.grain.org/briefings>.

¹³ Decisions adopted by COP 4, 1998. See: <www.biodiversity.org/decisions>.

- Traditional Knowledge is managed and owned in accordance with customary rules and codes of practice and are usually not sold or alienated in the same way as conventional IPR systems; and
- Traditional Knowledge systems are intangible and expressed through oral traditions so are not subject to the same requirements regarding material forms that pertain to conventional IPR systems.

Indigenous people argue that the accelerating loss of biological resources and related Traditional Knowledge represents a loss of our cultural inheritance and a loss of potential solutions to some of the problems identified at the Rio Earth Summit in 1992. To prevent this loss, Indigenous people require greater commitment from governments, NGOs and industry, research institutions and the general public to respect and embrace the values of Indigenous cultures in regard to Traditional Knowledge. Indigenous people believe a starting point for addressing the conservation and sustainable use of biodiversity might be the recognition and protection of Indigenous people's territories and self-determination. This will lead to partnerships with Indigenous people through capacity building activities that enable communities to make informed decisions as to whether they wish to protect our biological resources from commercialisation, exploitation and misuse and abuse. On the other hand, if we choose to commercialise, donate or share our biological resources, then our interests must be protected and we must be compensated where exploitation has occurred.

At the local level, there is so much to be done, including:

1. Dissemination about Intellectual Property systems and Protection of Traditional Knowledge

Training and education workshops are highly recommended. This leads to communities making informed decisions as to whether they want to share their knowledge and if so, on what basis.

2. Agreement making between Indigenous peoples and researchers

One major concern regarding agreement making is that there are no benchmarks or minimum principles for agreement making. For example, the Draft Declaration on the Rights of Indigenous People, which is still being argued in the United Nations, does set minimum standards on the rights of Indigenous people, but while it does cover the issue of protecting Indigenous heritage there is still a need for minimum principles for agreement making in regards to Traditional Knowledge.

Returning to my topic for this paper 'Think Global, Act Local', there are a lot of people who shun global lobbies and international conferences because of the technical nature of these meetings and the fact that there are diverse views among the participants. However, policies and declarations created in the global arena can have far-reaching affects. They do affect people like government Ministers who attend meetings such as those of the World Trade

Organisation. On the other hand, the focus on the international arena can actually distance organisations and Indigenous people from what is happening at the local level. So a marriage between the two is required. There are a number of international declarations and conventions that may assist Indigenous communities at the local level to develop protection mechanisms in regards to their Traditional Knowledge, and may also assist in any agreement making contracts.