

# Open Source Seeds and Breeds: customary law and the protection of farmers' and livestock keepers' rights

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# Why conserve local breeds

- Every region uses AnGR originating elsewhere, mainly north-south transfers
- 40% + of value of agricultural production comes from AnGR
- Hundreds of millions of poor people depend to some extent on livestock keeping
- 60+ breeds lost in first 6 yrs of this century
- 25-40% of breeds in danger of extinction
- Marginalization of traditional livestock production systems is a key cause of erosion

# Why conserve local seed

- Local PGR systems account for 60-90% of seed planted in developing countries
- Ex-situ collections need in-situ sources
- Cultural preference, Taste, Storage quality, Seed viability, Insurance against yield fluctuations, Prevention of soil erosion
- Failure to internalize costs leaves poor farmers and women in particular with the burden of conserving resources

# Farmer responses

- Seed Networks
  - Reciprocity – barter markets - Seed fairs
- Community conservation areas
  - Potato Park
- Biocultural Protocols
  - Community – Group – People wide
- Participatory plant breeding
  - Sale of cleaned registered landraces
- Farmer citizen juries
  - demand research on local landraces.

# Farmers' rights – ITPGRFA

- Art 9 (2)
  - protection of TK relevant to PGRFA
  - right to equitably participate in sharing benefits from the use of PGRFA, and
  - right to participate in decision-making on PGRFA
- Art 9.3
  - Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed

# Livestock keepers' rights Declaration 2008

- Make breeding decisions and breed the breeds they maintain
- Participate in policy formulation and implementation processes on AnGR for Food and agriculture
- Appropriate training and capacity building
- Participate in identification of research needs and design as mandated by principle of PIC
- Effectively access information on their breeds

# Indigenous Farmers' and livestock Keepers' human rights

- to Food, Health, Freedom From Hunger
- to Human dignity
- to culture – as a 'way of life' ICCPR, ICESCR
- to their lands, traditional territories and resources, - ILO 169, UNDRIP
- to their customs, laws and traditions
- to identify their own representatives
- to participate in decision making



# IP and Human rights

- Sub-Committee for the promotion of Human Rights of the UN Commission for H.Rts.
  - There exist apparent conflicts between intellectual property rights incorporated in the TRIPS agreement on the one side and international human rights on the other.
- Biopiracy – mainly PGR TK – potential AnGR
- Disclosure of Origin – A never ending story?
- New perspectives - HIV/AIDS medicines
- H. Rts. PIC, and customary law

# TRIPS objectives- Article 7 – SEC

- “(t)he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.

# Challenges of new technologies

- Over the first three years of adoption of transgenic cotton, early adopters in the US captured around one third of the added value
- those who had not yet adopted the technology lose the value of their plantings.
- prices are then driven down by increased yields, so late comers are no better off and may have increased costs associated with protected varieties.

# Report HCHR

- TRIPS links with the subject matter of human rights - the promotion of public health, nutrition, environment and development - are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement. A human rights approach, on the other hand, would explicitly place the promotion and protection of human rights, in particular those in ICESCR, at the heart of the objectives of intellectual property protection

# IPR and farmers seeds

- *intellectual property protection does carry the risk of restricting farmers' rights to reuse, exchange and sell seed,... practices which form the basis of their traditional role in conservation and development. (IPR Commission 2002)*
- Human rights treaty bodies have recommended that governments systematically consider human rights norms when negotiating IPRs and implementing them into national law, and that they undertake impact assessments before negotiating such agreements. (CRC 2004)

# H.Rts

- H. Rts – obligations to respect protect and fulfil – Major advances last 20 years has led to resurgence of Customary law
- Customary law, positive law and natural law - three historical pillars of legal system
- ILO 169
  - Recognises ights to institutional structures and customary law (Art 8)
  - Obligation to consult prior to grant of rights to exploit resources (Art 15.2)

# UNDRIP

- Art 3 - Right to self-determination – institutions, laws, customs and traditions.
- Art 27 – adjudication of land and resource rights requires due recognition of CL
- Art 28 – requires redress for land and resources taken without FPIC
- Art 31 - Rights to cultural heritage and intellectual property
- Art 40 access to justice – requires due consideration of customs, traditions and laws

# Int'l regulation of GR and TK

- Convention on Biological Diversity - Nagoya
  - PIC obligatory for access and use of GR and TK
  - Art 12 Nagoya - provider and user countries to take into consideration Customary law and protocols
- WIPO IGC – due regard should be given to customary law
- Courts due regard is more than a box ticking exercise



# National recognition of CL

- More than half the countries in the world give direct or indirect recognition to CL in their national constitutions – NB: cultural rights
- NGPRA – US – requires museums to repatriate human remains, sacred and funerary objects
- Customary law used to determine legitimacy of original transfers
- Proposals for modification of positive property law regimes to recognise customary law based concepts of stewardship

# Biocultural Protocols

- Establish the ground rules for dealing with indigenous peoples and local communities
- May be based on principles of customary law
- Identify authorities to negotiate PIC
- Need to be sensitive to shared rights
- Need a strategy where unanimity is not present among rights-holders
- Customary law may not have all the answers

# Protocols

- May act as a bridge between legal regimes
- Serve as a tool for indigenous empowerment
- Balance must be found between:
  - Achieving recognition of CL
  - securing actionable legal rights
  - Ensuring legal certainty for third parties
- Shifts the initiative on implementation of UNDRIP from states to Indigenous peoples
- To be useful must give clear guidelines

# Future Potential

- People wide and transfrontier BCPs
- Identify best practices for the establishment of functional interfaces between national and customary legal regimes and authorities;
- Analysis of user country responsibilities and readiness to take into consideration CL in implementation of the Nagoya Protocol.
- Move towards a Global Indigenous Statement of Law and Participatory Processes

# Global commons?

- Rio + 10 Treaty to Share the Genetic Commons
  - proposed that genes and the products they code for, in their natural, purified or synthesized form as well as chromosomes, cells, tissue, organs and organisms, including cloned, transgenic and chimeric organisms, will not be allowed to be claimed as commercially negotiable genetic information or intellectual property by governments, commercial enterprises, other institutions or individuals.
- Rio + 20 – \$% million -

# Commons and open source

- Oldham - majority of use is non-commercial - ABS commons to protect rights and facilitate access open source licences may work
- Kloppenburg Biolinux and GPLPG:
  - prevent patenting and biopiracy, prevent the use of farm-derived GR in proprietary breeding programs
  - Develop legal/institutional framework that recognizes farmers collective sovereignty over seeds and allows farmers to freely exchange, save, improve and sell seeds,
  - Develop farmer/science cooperation to develop new PGR that contributes to a sustainable food system
  - Develop a framework for marketing of seed that is not patented or restricted.

# Open Source licences

- Note: Open source does not mean free.
- Problem rights over GR are still unclear, i.e. are they all state owned, or are they subject to individual or collective rights.
- Without clear rights the system folds
- AnGR similar problems
- Rights to TK and Indigenous GR defined by CL
- In absence of national ABS law CL may be the only law defining rights.

# Compliance Gap

- CBD and Nagoya Protocol lack enforcement mechanism
- Certification of compliance is purely a monitoring system
- National courts and indigenous peoples cannot always sustain protracted legal actions
- If IGC adopts disclosure it will act as a strong incentive for users to obtain PIC
- It would also help prevent free riders and abuse of open source licensing system



# Enforcement

- Customary law based cases may be expensive, uncertain, protracted and burdensome
- Disclosure could act to reduce number of cases coming to the courts
- Need possibility of action for misappropriation
- Alternative Dispute resolution Forum required
- Ombudsman to help secure indigenous rights

# Disclosure – If not now when?

- Voluntary –
  - European Community
  - Denmark, - Belgium, Norway, Switzerland
- Binding –
  - Andean Community Decision 486
  - Peru, Costa Rica, Egypt, India, China
- National, Regional or international
  - Swiss proposal - Patent Cooperation Treaty
  - Brazil, India, Peru and majority of member states call for action at - WTO