Beyond ‘Protection’: Community Rights and Traditional Knowledge Promotion in Thailand.

Slide 1 – Personal Introduction:

My name is Daniel Robinson and I am a doctoral researcher from the University of New South Wales, Sydney. This is a presentation of independent views and ideas from my own research; however these organisations all deserve thanks for their support.

This paper provides some reflection and comment on the protection and promotion of local practice and associated biodiversity-related traditional knowledge, starting with the need to recognise the rights of local and indigenous communities. Given the current forum clutter on genetic resources (GRs) and traditional knowledge (TK), and the protracted delay and political sensitivities on indigenous rights in international fora, there needs to be greater international support for national initiatives that provide means to promote and respect TK. Empowering TK holders to assert their own rights and a greater degree of control over their own livelihoods is one primary means of achieving this. This paper discusses these options through an analysis of legal developments, relevant policy and initiatives in Thailand.

What I am also hoping to do is to act as an intermediary, informing you of relevant events and developments, and providing part of the feedback loop to stakeholders in Thailand when I return next week. Therefore I absolutely encourage your questions and thoughts.

Slide 2 – Roles of Traditional Knowledge

There is no one universally accepted definition of ‘traditional knowledge’ and it is a term that takes on many meanings for different people. The discussion paper I have distributed attempts to outline some general ‘criteria’ for understanding TK.

Traditional knowledge has been broadly recognised for playing the following important roles:
1. For sustaining or improving of the livelihoods of a vast array of local communities,
2. As part of the sustainable use and conservation of the environment,
3. For experimentation and provision of innovations that can be used to benefit society more broadly,
4. For its benefits to national economies.

Slide 3 – Framing of TK Protection

Today I wish to argue that international discussions on the legal treatment of traditional knowledge have been largely focused on the last two roles for the benefit of national economies and society more broadly, and are driven by the need to protect TK from ‘biopiracy’. These are important objectives; however a range of threats to TK and other conditions need to be considered. In the case of Thailand a policy model is being adopted that covers a broad range of modes or options for protection, promotion and respect for TK, including a push for a range of
relevant ‘community rights’. It is evident that support for broader measures such as these has yet to gain momentum in or between international fora, meaning these initiatives will likely for the near future remain national and local by nature.

**Slide 4 – International Fora**

Discussions in the WTO TRIPS Council have been dominated by a requirement for disclosure of the source and legal provenance of genetic resources and associated TK as part of the patent system, as well as provisions for access and benefit sharing and prior informed consent. These have three primary focuses respectively:
- the prevention of biopiracy;
- the fair and equitable sharing of benefits arising from the utilisation and commercialisation of GRs and/or TK with relevant stakeholders; and
- the respect of resource or knowledge providers, including local communities.

In most recent meetings, India and Brazil have attempted to push for negotiating language on these for the WTO Ministerial in Hong Kong. Although the discussions seem to be ‘maturing’ there is still considerable political difference between the Parties and the negotiating modalities remain unclear for now.

The World Intellectual Property Organisation (WIPO) and its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has also had a significant effect on the discourse of TK protection. It has provided a useful coordination point for dialogue, fact-finding missions, national case studies, the dissemination of such information and the articulation of the TK issue in a predominantly IP context. The mandate of the IGC has been extended and it has recently established a fund for indigenous representatives to attend and engage with the forum.

There has also been interaction between WIPO and the CBD Ad Hoc Working Group on ABS. Due to the limited mandate of the TRIPS Council and WIPO, the engagement of broader means for the promotion of traditional knowledge by Parties has been restricted.

The Article 8(j) working group has thus been primarily working in isolation on unique systems for TK promotion. The forum has recently been struggling with the broad scope a system would need to respect the broad range of customary laws in relation to local practices and TK.

Both through this forum and at a more grassroots level there have been some discussions and developments towards a community rights-based approach to TK promotion. Broadly, community rights can be defined as ‘group specific claims to a benefit that should be recognised and upheld by an authority, usually the State’. The 8(j) working group and CBD secretariat has however noted that it has had difficulty engaging with other forums such as the UN Human Rights Sub-Commissions on indigenous populations and human rights, and has therefore been acting in relative isolation.
Slide 5 – Biopiracy

In the next few slides I want to consider the threats to traditional knowledge. Firstly a number of ‘biopiracy’ episodes have triggered regulatory developments in Thailand.

The term biopiracy is applied broadly to refer to the use of biological resources and/or associated traditional knowledge without authorisation, and/or to patents which utilise such knowledge or resources without compensation or recognition. Biopiracy arguably does not directly erode TK, but rather has important secondary impacts causing disrespect, moral outrage, a sense of injustice and inequity.

The Jasmine rice cases are the best known and have received considerable NGO coverage. These cases struck the strongest chord with the Thai public, due to the cultural importance of rice in this still primarily rural-based country and its place as the largest rice exporter in the world.

As Dutfield notes, it is not always clear who the victims are, or indeed if there are any, particularly in cases where a resource is widely distributed and traditional knowledge applications are widely applied. This is not to play down the concerns of indigenous and local communities and indeed there have been numerous cases where extensive public outcry has occurred at the potential moral and economic implications of biopiracy. Rather it is to highlight that there are considerable differences in responses to biopiracy under a case by case analysis. For example the Jasmine rice cases caused considerable public outcry, whereas the marine fungi case was arguably a government reaction to potential lost revenue.

A curious result arising from biopiracy has been that TK and biological resources came to be recognised as having enormous value for the roles mentioned at the start of this presentation. Whilst TK has arguably been romanticised by various groups, there are many cases where it has also been proven to be the most appropriate means for local development, sustainable use and conservation of the environment, as is the case with the Karen people in Northern Thailand.

Slide 6 – Potential Threats to Local Community Customs, Practice and TK

There are a range of other direct threats to the local customs, lifestyle, language, environments culture and consequently the evolving and dynamic component of traditional knowledge. The following table illustrates some of the threats noted to local practices and traditional knowledge of the ethnic minority tribal groups in Northern Thailand. I don’t expect you to read it all but I want to at least draw your attention to the left column.

If we are serious about protecting TK for all of the roles discussed, and not just a static version of it that has been documented for the benefit of a few, then these day to day threats need to be addressed most urgently.

A first step in the promotion of their traditional knowledge has to include means for these communities to actively politically engage, and represent themselves on how their customs, practices and culture should continue and evolve. The provision of some basic rights to
communities, for example the right of traditional local and ethnic communities to access traditionally utilised forest lands, would be an instrumental step towards ensuring the continuity of these interlinked customs and knowledge systems.

It would be naïve to assume that this is a simple task. This clearly involves a considerable struggle for the assertion of various rights under complex conditions of minority and state power relations. However to simply focus on the static roles of TK for the benefit of society and for national economies, without a broader consideration of its other benefits would be highly hypocritical.

Civil society has forced the Thai government to try and target both the threat posed by biopiracy and more direct threats to the livelihoods, customs, practices and TK of local communities.

Slide 7 – Thai Laws and Responses

Due to the Jasmine rice controversies, Thailand has sought to pursue broader geographical indications protection. During FTA negotiations with the US they have indicated such preferences, with the US responding that Thailand should instead utilise trademark protection.

The PVP Act of Thailand has some relevant protections for local plant, wild and domestic varieties with some potential implications for TK. ABS mechanisms, and implicit PIC are required under the Act for use of such materials.

The Thai Tradition Medicines Act is probably of most interest to this audience. It has various means for the protection of the different forms of traditional medicinal knowledge including the protection of formulas and texts on Thai drugs – essentially linked to copyright protection; provisions allowing the patenting of medicines; and complicated provisions for the protection of herbs and associated traditional herbal knowledge. Conservation of these herbs may be established under a Controlled Herb Management plan via the Act, which requires PIC for access to such herbs and herbal knowledge, but controversially the Act also provides for potential exclusion of people, including locals, from herb conservation areas. A fund to be used in association with ABS mechanisms is yet to be developed.

These pieces of legislation provide coverage for the protection of biological resources and associated traditional knowledge, whether it is medicinal, agricultural or ecological. The Acts are still relatively untested but have generally been well received by most stakeholders. There have however been some comments from NGOs, academics and local farmers’ networks indicating that they are too focused on the business transaction aspects of benefit sharing and don’t go far enough to adequately respect and especially to promote traditional knowledge for its local social and environmental roles rather than potential commercial benefits.
Slide 8 – Targeting Legal Treatment of TK and GRs

An important point to note here is that there have been very few direct cases whereby bioprospectors have sought access to *in situ* genetic resources and associated knowledge in the past ten years in Thailand. Indeed most of the ‘biopiracy’ cases that have been clearly documented in Thailand came about through the use of biological materials and TK that was already passed to genebanks or research centres and some would argue, are already in the public domain. Thus we have to question to what extent the laws and related international provisions for disclosure and ABS are really adequately targeting and potentially benefiting local communities, at least economically.

Due to the lack of *in situ* bioprospecting being undertaken and with the more prevalent sourcing of GRs and/or TK from research institutes and government genebanks, PIC must necessarily be two-tiered. This means that consent must be sought from the national authority governing such resources as well as the original local custodians of the GRs and/or TK. Thai authorities have to date been struggling to articulate exactly how PIC mechanisms should operate.

Interestingly in Thailand, it appears that in the cases of the Jasmine Rice stepwise program, Kwao Krua and the marine fungi case, that some form of consent for the transfer of materials and knowledge may have actually been obtained, however it is likely that the intended use and potential patent application on the materials or knowledge was not adequately *informed*, or contracts were insufficiently clear or transparent. The PIC requirement, although seemingly useful for the respect of TK, is not necessarily easy to implement, at least in an international agreement as has been pursued in TRIPS and the CBD.

These comments on TK protection and promotion seem to be broadly consistent with the findings of a questionnaire on TK and folklore (FL). The questionnaire was given to experts, academics, government officials and representatives of local ethnic groups at a strategic TK-FL meeting in April 2005 in Bangkok. The survey found that TK-FL protection should be primarily aimed at preventing people from inappropriately taking advantage of TK-FL, followed by the ‘restoration and promotion of TK-FL’, and the ‘preservation of TK-FL for broader social benefits’. Economic reasons factored in further down the list. One would then assume that these experts and representatives were less concerned with mechanisms such as ABS and more concerned with disclosure requirements and means to promote TK-FL.

Slide 9 – Community Rights and TK

Thailand has been developing other initiatives that promote TK, the most important being in relation to community rights. In Thailand the assertion of community rights relating to traditional knowledge and biodiversity conservation are enshrined by the Constitution:

Section 46 has been regularly cited by local communities and supportive academics, NGOs and government officials as a source of protection of traditional knowledge and community rights. It provides an important and forceful means for greater involvement of communities in conservation and a whole range of other broader activities.
The Constitution does not provide a ready-made respect for community rights and people must struggle for its realisation. The concept of community rights has been discussed by Thai academics for some time and is still being articulated and considered for more effective realisation. In other countries and regions, community knowledge/intelligence and broader community rights are also being discussed for the means of protection of the knowledge systems and local practices that provide the framework for traditional local innovations and TK.

In Thailand, the Community Forests Bill (CFB) assumes the primary means through which the collective rights of communities may be recognised and put into practical daily implementation. The Bill represents an important opportunity for Thailand to balance desires for forest and watershed conservation areas, and the maintenance of the culture and livelihood of indigenous minority groups and local communities in situ. The primary emphasis of the CFB is on co-management of forest and agro-forest areas. It is an attempt to reconcile the differences between western scientific knowledge systems for conservation, and the traditional methods employed by local communities. Community forest areas of Thailand are typically hotspots for non-scientific experimentation, innovation and traditional knowledge generation and preservation. According to some of its original drafters, one of the main intentions of this Bill is to allow the continuation of local customs, rituals and practices that generate and preserve TK. The CFB in theory allows for communal land rights, the non-isolation of communities, co-management of natural resources with the state and appears to have also had a subsequent effect on the broader societal recognition of the importance of TK nationally and locally.

The Community Forests Bill, however, is still under deliberation in a joint-parliamentary Committee, with conflicting opinions over the conservation capacity of the communities, the over-romanticisation of TK, and the rights of individuals and communities that may have to be relocated for biodiversity conservation reasons. Many community groups have been developing forest management plans in collaboration with forestry department officials in the interim. Although there is potential for the CFB to be passed in the near future, the strength of community rights in Thailand still rests with the actions of communities to assert themselves as rightful custodians of their local environments, rather than through legislative means.

Thus articulating an argument for collective or community rights on the basis of inconsistencies between intellectual property and indigenous or human rights frameworks remain a challenge for those advocates in Thailand, the developing world, and indigenous communities. To date the most direct discursive link for the protection of local practices remains Article 8(j) of the CBD, and a PIC mechanism remains the primary ‘rights-based’ tool under consideration in IP and trade fora.

**Slide 10 – Thinking Strategically about TK**

In consideration of the erosion of TK and the ongoing threats posed, it would appear there needs to be a more concerted effort towards TK promotion, particularly at the national level. The provision of some basic rights, such as participation in the conservation and sustainable use of
natural resources, the ability to continue, conserve or restore customs and local knowledge, as well as rights to communal land tenure are a crucial part of this.

In Thailand the various Acts and initiatives provide the early stages of a framework to ensure traditional knowledge is respected, protected and promoted such that it endures. The potential importance of these initiatives is not to be understated because of the impact that they may have on continued traditional practices, innovation and experimentation, especially in ‘TK hot-spots’ such as agro-forestry areas.

Other instruments such as a disclosure requirement and an ABS mechanism also have important objectives. However these should be recognized as having a limited focus on the implications of biopiracy and/or are based on a discourse that indigenous and local communities will ultimately benefit from the commercialization of their knowledge and resources. This assumption is somewhat problematic, and despite a number of emerging case studies, there remains a vague definition of what exactly ‘biopiracy’ means, what exactly needs to be protected, and whether communities are indeed interested in allowing the commercialisation of their knowledge and resources. Thus countries such as Thailand need to consider a model with multiple modes entailing a broad range of options for TK protection, promotion and respect. Internationally, community rights are currently an undervalued or ill-considered option, potentially due to the lack of policy space in the various international fora, and likely due to a host of broader social, cultural and postcolonial factors at the national level. The role of academics and advocacy organisations is not to be understated here for their often uncritical focus on the pedantics of ‘sexier’ issues of disclosure and ABS in trade fora. PIC requirements should however be raised as a priority and judging by the host of voices representing indigenous and local groups, PIC is arguably the most important aspect for the respect of indigenous and local communities.