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PIC/PIA Part II

ICBG-Maya: A Case Study in Prior Informed Consent

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A recent project attempting to implement prior informed consent (PIC) as well as principles relating to benefits sharing is the International Collaborative Biodiversity Group - Drug Discovery and Biodiversity among the Maya in Mexico Project *(ICBG-Maya)*[2], operated by researchers at the University of Georgia in Maya communities in Chiapas, Mexico. This project has come under heavy attack by the Rural Advancement Foundation International (RAFI) (1999a, b; 2000a,b), the Consejo de Médicos y Parteras Indígenas Tradicionales de Chiapas (Council of Traditional Indigenous Doctors and Midwives from Chiapas)(COMPITCH).

This case is particularly informative because the investigators have made a concerted attempt to implement the provisions of the Convention on Biological Diversity (CBD). They have also attempted to implement the ethical guidelines developed by the International Society for Ethnobiology (ISE), guidelines developed with the participation of Indigenous representatives and which they were instrumental in helping to create, and which underwent a ten-year drafting and review process, implemented in Aotearoa in 1998. The ISE Code of Ethics recognizes the principle of PIC, and much of the dispute revolves around its implementation.

1. **Prior:** There is a dispute over the term prior. RAFI and COMPITCH claim that collections had taken place before signatures on consent forms had been obtained. ICBG-Maya has not directly responded - there is a statement that no samples have been collected for bioassays, and a separate statement on PIC which discusses consent agreements and the general process by which they were obtained. Resolving this issue requires sorting out which collection samples required consent from those that did not, when those samples requiring consent were obtained, and what the relevant national and international laws were in force at the time of the signatures (e.g. did Mexican law at the time require prior consent, or just consent, at the time of collection? The CBD rules on PIC did not officially come into effect until Decision 5/9 was issued in May, 2000). These kinds of issues will require a mechanism for monitoring and assessment in any future PIC regime.

2. **Informed:** The ICBG-Maya project made a determined effort to make the goals, benefits and potential costs of the project to the local communities. They created "biodiversity play," presenting the issues in Tzeltal, Tzotzil and Tojolabal, and made presentations in Spanish and Indigenous languages in assemblies and to community officials. They claim they were clear about the goals of the project, the potential benfits, and the potential lack of benefits of the project.

RAFI and COMPITCH have responded that they believe that there was a bias in presenting benefits and not potential costs; that the project only informed individuals and families, not traditional Community Assemblies to obtain consent; and that they failed to adequately inform the communities about the wider implications of the project. Genetic information, for example, held in confidentiality by one of the ICBG-Maya partners, could become the unregulated property of another company should the partner ever sell its assets (e.g. if it became insolvent, or merged with a larger corporation). Similarly, communities that switch to harvesting market products to supply pharmaceutical or herbal companies could neglect and take arable land from the production of subsistence crops. This could in turn lead to their local disappearance, foster market substitution for staples once self-produced, and leave them extremely vulnerable to food insecurity of herbal or other markets fluctuate or collapse, as has happened with coffee production in Chiapas.

Some of these are issues of fact. Others are issues of scope. The IGBG-Maya seemed to have a narrower view of what was sufficient for informed consent, concentrating on the issues within the proposed project itself, while RAFI and COMPITCH enlarged the issues to include regional and global impacts of bioprospecting/biopiracy projects in general. Other issues revolve around who, precisely, must be informed - IGBG-Maya claiming they presented to "Assemblies" and "community authorities," while RAFI and COMPITCH referred to "Community Assemblies."

3. **Consent:** There seems to be a somewhat confused set of claims made about consent in this case. As to the process, ICBG-Maya points to having received "written consent" and "invitations to collaborate" from nearly 50 communities. RAFI and COMPITCH challenge the authority of this consent on the basis of being insufficiently informed (see above) and having failed to go through the customary institution of the "community assembly."

At the same time, RAFI and COMPITCH make statements implying that individual communities, even if a project were to fulfill all of their criteria for PIC, still would not have the authority to give consent. For example, COMPITCH demands "an immediate moratorium on ALL bioprospecting projects in Mexico. The Moratorium should only be lifted once the indigenous people and Mexican society have had the opportunity to evaluate the impact of these projects, and once appropriate laws protecting genetic resources and traditional knowledge are in place."

[1] The views presented here are solely of the authour, and does not necessarily represent endorsement from any individual or organization.

[2] The details of the dispute will not be covered here, but can be found on the web sites of RAFI (www.rafi.org) and the UGA Laboratory of Ethnobiology (guallart.dac.uga.edu/ICBGreply.html and guallart.dac.uga.edu/ethics) (See Note 1).

RAFI further states that "[intermediaries such as ICBG-Maya] . . . is likely to benefit industry to the detriment of the local communities. While there may be some immediate gain for community participants, in the long run, the agents of bioprospecting pose enormous threats to the erosion of traditional cultures." The "alien" practices that threaten communities are: "the individual or community sale of public or collective resources; the patenting and privatization of resources and knowledge, and more generally, the integration of the communities into the market economy as suppliers of raw material and cheap labor force."

There is a complex interplay of the use of "customary" and "community" and "collective" going on here. Although it is claimed that only "customary law" should decide, and that non-customary "alien" practices are bad, it is also seen as unproblematic that there should be a pan-Mexican process involving civil society in general to regulate bioprospecting, although any process like this would go far beyond any customary process. "Community" sale of "collective" knowledge is equally problematic. Neither RAFI nor COMPITCH have presented that there is any evidence that the Maya communities involved in the dispute have customarily made the distinction between "community" and "collective" knowledge, or that there are traditional pan-Mayan rules covering inalienability, or precisely what can or cannot be alienated. It is also unclear that any distinctions made by the Maya would apply to other Indigenous groups. The Embera of Panama and Colombia, for example, have traditionally lived in very small and dispersed settlements, and issues are decided by consensus at the village level. No other form of political organization has traditionally been recognized. Should national laws, even if fully decided by Indigenous peoples, apply to such dispersed autonomous settlements? Is it consistent to argue that traditional forms of decision-making should be respected and that there needs a pan-Mexico indigenous process for establishing consent?

Again, this is not meant to be a judgement on any of the claims, but an analysis. The arguments over consent in this case are likely to be universal. Traditional institutions are appealed to at some point of the PIC process, but at another point in the argument there is usually some larger national, regional or international process that limits, or should limit, the decisions of individual communities. Regardless of the validity of the issues, the authority for imposing these limits are not necessarily based in customary law, and rely on new institutions. In the rush to establish group rights in national and international contexts, there is also a tendency to ignore to complex range of "intellectual property rights" holders of knowledge within communities, and the details of those rights.

Conclusions

Fleshing out the legal and ethical obligations of "prior informed consent/prior informed approval" will be difficult. There will certainly be no "one size fits all" approach because of the complexity of the issues involved. The application of the concept has mostly been initiated in places where there is a relatively homogeneous Indigenous population (e.g. among the Aboriginal and Torres Strait Islanders), or where there is a well-established regional Indigenous structure capable of sorting out conflicts among individual communities (e.g. the Kuna Congress or the Philippines).

In many cases, the diversity of political organization among local groups or the lack of strong regional or national Indigenous institutions will make the application of the concepts very problematic. Communities will likely have conflicts within and between themselves over strategies for disseminating their knowledge and the compensation they desire, and there may be no Indigenously controlled mechanisms for sorting out the conflicts. Government allocation process in the absence of such Indigenous institutions are suspect, since they should acquire their authority from the communities who give consent for the use of their knowledge.

Without large-scale Indigenous institutions, one is left with a community-by-community approach. The danger in this approach is that it can too easily circumvent questions of community, authority, or legitimacy. It is difficult to monitor independent agreements signed in numerous communities without reporting requirements to a higher body. This approach can also create great disharmony as communities compete for economic benefits for their knowledge. There could be great inequities created if, among communities sharing knowledge or biotic resources, some get lucrative intellectual property rights or harvest contracts while others get nothing. It can also create inequities if the decision of some communities to follow a decision to block patents by demonstrating prior art thereby destroys the ability of other communities to pursue an IPR remedy.

Creating new institutions or enlarging the domain of existing institutions are equally problematic. Indigenous peoples commonly have a history of regional ties and relations through war and annexation, trade, marriage, social exchange and so on. The customs surrounding such networks may not sufficiently cover the kinds of issues PIC invokes. The creation of new institutions, however, may conflict strongly with traditional institutions. In the Pacific Northwest of the USA, for example, the Northwest Indian Tribal Fisheries Commission, created under the Boldt Decision to allocate fishing quotas under rights gained in the decision, has created long-standing conflicts among tribes over allocations, and has diminished the power of the fish elders who traditionally regulated fishing seasons and quotas.

Some of the remaining major concerns are:

1. **Guarantees of security**: Corporate takeovers and the transfer of information to third parties. This problem is similar to the sale of customer databases by Internet dot.coms, and problems that have resulted when Internet companies have been sold to other companies. The pharmaceutical industry has a history of merger and incorporation, and the legal status of contracts previously assumed by purchased companies may be in doubt. Even if the legal status is clear, these kinds of purchases makes monitoring the use of Indigenous information much more difficult.

2. **Disclosure**: If a patent or copyrights protection is sought, the knowledge must currently be disclosed in order to receive the protection, and Indigenous knowledge does not fit well within trade secrets law. Disclosure may expose sacred knowledge, or knowledge that once made public would be very hard to police to ensure compliance.

3. **Choosing an IPR strategy**: The rapid push for the use of Indigenous knowledge is pushing Indigenous peoples into difficult choices over strategies without giving much time or resources to make these choices. Indigenous peoples must often choose between using an IPR-blocking strategy of establishing prior art and "common knowledge," or an IPR-enhancing strategy of trying to win communal intellectual property rights for their knowledge. Without sui generis legislation, opting for one strategy diminishes the other. When the knowledge is widely shared by many groups, the use of a disclosure strategy prevents other groups to pursues an IPR strategy.

4. **Upstream patents**: Patent-blocking only applies to certain forms of knowledge. Derived, technical knowledge (e.g. novel and non-obvious technique applied to the raw public Indigenous knowledge) are patentable. If Indigenous peoples pursue a patent blocking strategy by revealing prior art, what are guarantees for benefits sharing if a pharmaceutical company uses that knowledge as a lead to a non-obvious process or technique?

5. **Ability for Indigenous monitoring for compliance**: Indigenous peoples have little ability to monitor compliance to intellectual property rights, often having very limited access to corporate, government and researchers' databases, documents or other materials that contain information about their knowledge. Even with access, most tribes do not have the resources to effectively monitor the uses of their knowledge, or the human or financial resources to prosecute violators.

6. **Externalities**: Local decisions have wider social impacts. A community-by-community approach may ignore problems of scale and social interactions. Even if the rights of any one community to bargain over their knowledge and resources is established, their decisions may have impacts on other communities who were not directly involved in the decisions. The adoption of herbal harvesting by one group, for example, may lead to wide conflicts over harvesting rights and wage labor. The replacement of a local subsistence economy with a cash economy emphasizing marketable crops can also lead to widespread externalities, as has happened in Chiapas. In Chiapas, coffee production for money has often disrupted important ecosystem services and other benefits from traditional agroecosystems that has not been compensated by the wages earned from coffee production (e.g. the loss of arable land devoted to corn and bean production, the loss of forest cover and the resulting degradation in soils, water quality, etc.). The ecological impacts of widespread coffee production in Chiapas is not only felt by the coffee cultivators, but by all.

Finally, there is the question of the reason for all of this effort. PIC/PIA are not ends in themselves, but means to help communities control the sharing of their knowledge and resources, and to determine the nature of the benefits derived from sharing. PIC issues have languished for many years, and for many the hope rests on sui generis legislation. This legislation, and the Indigenous institutions capable of receiving the rights will be many years in coming, while Indigenous knowledge is being eroded at a rapid rate. The deaths of so many elders and the crisis of modernization which draws youth from traditional education makes the issue time-limited: danger that for many tribes, rights will be defined for worlds well gone. The principles have been established in the Convention on Biological Diversity - it's time to figure out what they mean.

Note 1. As a personal editorial, I would like to state that, as in many heated disputes over important issues, the truth here lies in a distant country. Readers who visit these websites should read the evidence carefully, and not accept anyone's definitions and representations at face value.

Some of the "facts" are almost certainly wrong: RAFI, for example, does not make a distinction between specimens taken for storage in collections (where they are sterilized to prevent specimen destroying diseases, and dried, to prevent decomposition) and specimens taken for bioassays (wet specimens, often stored in alcohol, and used in bioprospecting), and have also combined herbarium specimens collected over the past 20 years in Chiapas off indigenous lands with specimens collected from the project itself.

Other criticisms seem to be based on comments made in-passing, and people should be careful of interpreting any statement made out of context, or inferred positions and claims that are not based on a formal statement. Some of the RAFI criticisms are well founded, but really aren't criticisms about this particular project at all, but part of a general stance against any "bioprospecting", which they label as "biopiracy." ICBG-Maya, on the other hand, has not yet responded to the larger issues (pan-Maya, pan-Mexico and global Indigenous rights issues entangled with bioprospecting).

The sad thing here is that all the parties in the dispute are consciously working to improve the position of Indigenous peoples in the world, and have deep ethical commitments to cultural survival. The lack of a constructive dialogue in working out differences in a case where people have tried to work openly and a transparent manner is destructive. The real dangers are not in what you can see, but in what you cannot - for example the surreptitious experimentation on Indigenous tissues taken during routine medical procedures, the smuggling of biological materials from Indigenous territories, and the acquisition of important Indigenous cultural resources on unregulated lands off traditional territories or reservations.

Indigenous cultures are eroding at a rate at least an order of magnitude greater than the rate of species extinction, which in itself is considered to be in a state of unnatural mass extinction. If we wait to get all of the rights "right," we may end up defining rights that can't be implemented, because the object of the rights has disappeared. This is not meant to be a statement for or against the ICBG-Maya Project, or bioprospecting/biopiracy in general, or per se on any of the involved principles. I do mean to say that this process of issuing broadsides has gone on long enough, and it is time for commitment to a process of dialogue.

UPCOMING EVENTS*

DECEMBER 2000

4-7	**Workshop on Indigeneous Peoples and CBD. Santa Cruz de la Sierra, Bolivia**
4 - 9	**Intergovernmental Negotiating Committee for a Legally Binding Instrument for Implementing International Action on Certain Persistent Organic Pollutants (POPs). Johannesburg, South Africa**
11-22	**4th Conference of the Parties to the Convention to Combat Desertification. Bonn, Germany**
11-15	**1st Meeting of the Intergovernmental Committee on the Cartagena Protocol. Montpellier, France**
14 - 15	**4th Session of the ad hoc working group on "Biodiversity, Protected Areas and Related Issues." Innsbruck, Austria**
17-19	**Sustainability of Taste: Food in the life circle - Nutrition among biocultural diversity, ritual food and biotechnological developments. Rome, Italy**

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