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Across the Great Divide: A case study of complementarity and conflict between customary law and TK protection legislation in Peru

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Introduction

Indigenous peoples and local communities have developed an expansive body of traditional knowledge which plays a vital role in securing their cultural, spiritual, social, economic and environmental well-being. Protected, enhanced and transmitted over centuries, traditional knowledge forms part of and at the same time regulates and controls indigenous and local community knowledge systems as they serve present needs and respond to new challenges and opportunities.

All cultures, it has been said, possess systematic knowledge of the plants, animals and natural phenomena in their direct surroundings (Brush, 1996). Among indigenous peoples and local communities this knowledge forms an important part of their collective traditional knowledge. Knowledge which is increasingly seen as having an invaluable role to play in securing the health of the planet and capacity of the global community to respond to present and future challenges in food and health security, environmental quality and sustainable development. Its importance is now recognized by a wide range of actors including national governments eager to protect national and cultural patrimony; the scientific and commercial sectors desirous of finding new avenues for their research and development activities; international

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agencies such as Convention on Biological Diversity (CBD), Convention to Combat Desertification (CCD), Food and Agriculture Organization of the United Nations (FAO), United Nations Conference on Trade and Development (UNCTAD), United National, Educational, Scientific and Cultural Organization (UNESCO), United Nations Permanent Forum on Indigenous Issues (UNPFII), World Intellectual Property Organization (WIPO) and World Trade Organization (WTO) World Health Organization (WHO), and the World Bank, who now appreciate its importance for their programmatic and planning activities; as well as NGO's, aid agencies and others promoting sustainable development and protection of human rights.

As awareness of traditional knowledge's intrinsic, cultural, social, spiritual, environmental and economic value has grown, so too have concerns to develop necessary law and policy to protect rights over it. Efforts are now ongoing in various international forums to develop law and policy in this area, while at the regional and national level a range of measures have been adopted or are under development. Indigenous peoples and local communities have consistently argued that that their traditional knowledge should be protected in accordance with their own legal regimes, commonly referred to as their customary laws and practices. This position has received a fairly positive response at the national, regional and international levels. However, there is still a large gap in understanding the modalities and mechanism which will be necessary for securing its central role in regulation of traditional knowledge when it leaves the immediate control of its traditional custodians.

Peru has over the past decade been home to some of the most innovative and precedent- setting experiences in the development of measures to protect traditional knowledge. These have included local community initiatives to protect a diversity of traditional crop and medicinal plant species; customary law based contracts for repatriation of traditional crop varieties (Argumedo, n.d.); agreements for licensing traditional knowledge know-how for research and development of new pharmaceutical products (Lewis & Ramani, 2008); and adoption of national legislation on collective knowledge of indigenous peoples relating to biodiversity. In all cases, a desire to recognize and respect customary law has proved influential.

This paper draws upon the Peruvian experience in order to examine the current and potential role of customary law in national and international regulation of traditional knowledge. It is informed by analysis of international law relating to access and benefit-sharing(ABS), traditional knowledge and indigenous peoples human rights, as well as by in-depth case studies of measures taken by indigenous peoples in Peru to protect their knowledge and resource rights. Based on this background analysis the paper explores the complementarity and conflicts between national traditional knowledge legislation and customary governance practices and makes recommendations for future research and the adoption and implementation of measures to protect traditional knowledge at local, national and international levels.

The paper concludes that development of effective national, regional and international law and policy for protection of traditional knowledge will depend upon:

- The full and informed participation of indigenous peoples in the design, development, adoption, and implementation of traditional knowledge law and policy,
- Commitment to securing the realization by indigenous peoples of their human rights, and in particular their right to self-determination,
- Adoption of law and policy which respects, recognizes and builds upon customary law and practice,
- Establishment of functional interfaces between decision making authorities of indigenous peoples and local communities and the national judiciary and administrative bodies,
- Preparedness and capacity to provide access to justice including remedies for breaches of contract and misappropriation of traditional knowledge in national and foreign jurisdictions,
- Traditional or other legitimate decision-making authorities at the level of indigenous peoples and local communities with the capacity to secure the effective implementation of their own systems of customary law and practices, and
- Holistic protection of traditional knowledge grounded upon indigenous peoples' cosmovision, commitment to strengthening of traditional knowledge systems and development policies which nurture and promote continued use of traditional knowledge by indigenous peoples and local communities.

The paper is set out in six sections. Section I, provides an overview of traditional knowledge and customary law. Section II, examines the role of customary law in protection of traditional knowledge at the international level, with a focus on international human rights, and international regulation of ABS, traditional knowledge and intellectual property. Section III, analyses the status of customary law and its role in traditional knowledge protection in Peru. Section IV, presents the results of two case studies of indigenous peoples' efforts to protect their traditional knowledge rights. The first case study examines the negotiation, within the framework of the International Collaborative Biodiversity Group

(ICBG) Program,[1] of a bioprospecting agreement between organizations representing Aguaruna communities of the northern Peruvian Amazon, three US and Peruvian universities, Washington University, Universidad Peruano Cayetano Heredia and San Marcos Museo de Historia Natural, and a US pharmaceutical company, Searle & Co. The second case study, analyses customary governance of biological resources and traditional knowledge by a group of six local Andean communities in the establishment and management of a local community biocultural protected area (Potato Park); an agreement they entered into with the International Potato Centre; and their own internal community benefit sharing agreement. Section V, includes a comparative analysis of the case studies and their significance for analysis of complementarity and conflicts between Peru's national *sui generis* regulation and traditional governance of traditional knowledge. A final section VI, provides some conclusions and recommendations for future action on traditional knowledge protection.

[1] The International Collaborative Biodiversity Group Program (ICBG) was established as a joint program of the U.S. National Institute of Health, National Science Foundation and National Cancer Institute. For more information on the ICBG see, www.nih.gov/fic/programs/icbg.html

Section I: Traditional knowledge and customary law

Traditional knowledge relating to biological diversity, its management, protection and use, is extremely diverse, encompassing a wide range of areas including cultural expressions, such as song, dance and stories; spiritual, religious and other values and beliefs; conservation, development and management of ecosystems and of both wild and domesticated plant and animal diversity; as well as issues such as law, commerce, astronomy, etc. Often based upon experiences passed down over centuries, traditional knowledge is continually being adapted to meet current local subsistence, environmental, social and cultural needs as well as for the development and maintenance of local economies.

In recent years, there has been a growing recognition of the importance of traditional knowledge and associated biodiversity within the scientific, private sector and policy-making communities. It is now, for instance, widely recognized that traditional knowledge and biodiversity managed by indigenous peoples and local communities is crucial for securing global food security. Development of many modern commercial crops is dependent upon access to crop genetic specimens conserved, nurtured and developed by indigenous and local communities on the basis of their own traditional knowledge. It is similarly seen as a valuable source of resources and inspiration for development of products in the pharmaceutical, cosmetics, natural products and agro-industries. Furthermore, traditional knowledge is increasingly being incorporated as a vital component of planning processes seeking prevention and mitigation of the effects of climate change; desertification; destruction of fragile environments including forests, mountain ecosystems, coral reefs and wetlands; as well as for the conservation of biodiversity in general. Traditional knowledge systems are, therefore, invaluable repositories of information vital for the survival of indigenous and local communities and for the good of the earth's population as a whole (Tobin & Swiderska, 2001)

As awareness of the importance of traditional knowledge has grown, so too has awareness of the need to develop measures to protect rights over traditional knowledge and the systems within which it is developed, nurtured and maintained. Indigenous peoples have continually argued that any regime for the protection of traditional knowledge should be based upon their own customary laws and practices.

This section provides an overview of issues relating to protection of traditional knowledge and an introduction to customary law, its definition, nature, and principal characteristics and its relation to positive law (i.e. formal codified written law).

1.1 Protection of traditional knowledge

Perceptions of why and what traditional knowledge should be protected, and how this is to be achieved may vary widely according to its nature, scope and the value it is given. This will depend on the aims, interests and legal vision of those interested in regulating traditional knowledge, which may differ amongst and between indigenous peoples, local communities, governments, researchers, commercial interests, NGOs and others. Notwithstanding such differences, a number of basic steps will need to be addressed in development of any measures for protection. These include identification of threats facing traditional knowledge and traditional knowledge systems; definition of objectives; and consideration of existing and potential mechanisms which may be adopted or applied in order to meet the defined objectives.

At the international level there has been a tendency to focus primarily on threats to traditional knowledge posed by biopiracy, viewed as the unapproved and uncompensated use of traditional knowledge and biological and genetic resources for scientific and commercial purposes. However, it is important to note that traditional knowledge and traditional knowledge systems are threatened by a wide range of external and internal forces which must be addressed if there is to be long term protection of traditional knowledge and the knowledge systems upon which it depends for continuity and development.

External threats to traditional knowledge include expropriation of traditional lands and territories, destruction of resources, inappropriate education, health, agriculture, and forestry development policies (Tobin & Swiderska, 2001). Further threats exist where extractive industries such as mining, oil and gas and forestry, as well as colonization by large-scale farming interests and displaced peasant communities undermine traditional lifestyles. Traditional knowledge is also threatened where, as the result of intervention by organised religious groups, indigenous peoples and local communities no longer perform traditional rites, practices and worship of sacred sites, which are often closely related to transmission of traditional knowledge and maintenance of traditional resource and knowledge management strategies. Internal changes brought about by interaction with the external world, movement to market economies and disenchantment of youth with traditional lifestyles may undermine the place of traditional knowledge within indigenous and local community societies. Perhaps the most serious of threats to traditional knowledge, is the alarming rate at which languages are being lost around the world and the interruption of traditional methods of knowledge transmission. An in-depth analysis of all these issues is beyond the scope of the present paper; however, two

threats in particular deserve brief consideration at this time. These are threats to land and resource rights; and erosion of language, culture and traditional practices for the transmission of knowledge.

There is an inextricable link between traditional knowledge, traditional land and marine tenure and the resources found in these areas. The knowledge of indigenous peoples and local communities is usually specific to the environment in which they live. The extent of lands and resources they manage may range from a relatively enclosed ecosystem, as in sedentary farming communities, to very extensive territories where indigenous peoples rely on a nomadic hunter/gatherer existence to meet their food and other needs. In either case, traditional knowledge may include unique knowledge of endemic species, involve management practices to nurture wild crops and animals, and may lead to development of crop varieties and domesticated livestock with special characteristics.

Protection of indigenous peoples' and local communities' rights over their traditional territories (including relevant freshwater and marine ecosystems) is crucial for the maintenance and continuing development of traditional knowledge. It is not merely a question of land rights; it goes beyond that to the very spiritual and traditional lifestyles which underlie cultural integrity. Loss of control and/or access to traditional territories, and their sacred sites, traditional foods, medicinal plants, etc., attacks the very existence of indigenous peoples and local communities as distinct cultural groups. It undermines their subsistence and development strategies grounded in time-honoured practices governing the use of traditional territories and resources, which are enshrined in customary law. Traditional lands, territories and resources are at one and the same time the source of traditional knowledge and dependent upon traditional knowledge for their conservation and sustainable use. Failure to protect the rights of indigenous peoples and local communities over their lands, territories and resources attacks the foundations for protection of traditional knowledge, while failure to protect traditional knowledge threatens the long-term preservation of global biodiversity which is concentrated in lands and territories managed by indigenous peoples and local communities. Realization by indigenous peoples of their human rights to life, food, health, education, culture, housing, and development are all dependent upon the protection and realization of their rights to land, territories, resources and traditional knowledge. Realization of these collective and individual rights are inextricably linked to their most long sought and consistently denied right, the right to self-determination (Tobin, 2009a). These issues will be returned to in more detail below.

Protection of traditional lands and ecosystems by indigenous peoples and local communities has been achieved by the development of a highly intricate body of traditional resource management practices, developed over generations. These traditional resource management practices, which are the embodiment of traditional knowledge, have primarily been enforced by a complex system of customary law and practice which governs the use of land and resource within areas of traditional land and marine tenure. Customary law continues to serve as the primary basis for regulation of rights of indigenous people or local communities over their collective lands and resources and the traditional knowledge systems they embody. Customary law may therefore be seen as the third side of the triangle sustaining traditional resource management, where land rights define the area of jurisdiction, traditional knowledge describes local resource use and maintenance, and customary law regulates the application of that knowledge to the management of resources within the defined territory (Tobin, 2004). Protection of traditional knowledge is, therefore, reliant upon continuing access to traditional lands and the conservation of ecosystems in a manner which ensures the long term conservation of wild and cultivated local resources.

1.1.2 Language, culture and traditional transmission of traditional knowledge

As a dynamic body of ever evolving knowledge the viability of traditional knowledge to meet present and future needs of its custodians and the wider society is dependent upon its continued use and development by indigenous peoples and local communities. Protection of traditional knowledge is therefore dependent upon maintenance of the knowledge systems within which it is nurtured, developed and passed down from generation to generation. Traditional knowledge which has traditionally been maintained through oral transmission could rarely be managed by a single individual. Instead, specific knowledge may be held by family or tribal groups, with different knowledge being held by men, women, healers, shamans, curanderos, hunters, fisherfolk, or farmers. Although, sometimes held by individuals it is generally, though not always, considered to be the knowledge of all the community or people, and is held in trust for their collective benefit.

The process of knowledge transmission from generation to generation is central to sustaining the ability of indigenous peoples and local communities to meet present needs while sustaining the capacity of the environment to meet future needs. Methods for transmission may be oral or visual including stories, songs, dances, sacred and other culturally based rites, ceremonies and practices. Language is a key component of orally based knowledge systems. Loss of language severely disrupts the flow of knowledge between generations and, as many languages become extinct (it is estimated that up to ½ of the present 6,000 or so languages in the world will be extinct by the end of the century), so does the knowledge embedded in them. Loss of a language may be likened to the loss of a valuable library.

Women play a particularly important role in knowledge transmission to the young through recounting of stories, bringing children with them as they carry out their daily work. The role of women in transmission of knowledge is under particular threat as the use of dominant languages replaces the use of traditional languages among the youth. This can lead to alienation and marginalization of older women in particular, who frequently speak only their native language, and can interrupt the process of traditional knowledge transmission between generations. Bilingual education systems which incorporate a role for women and elders in knowledge transmission can help to overcome these trends, and build increased respect and recognition for the value of traditional knowledge in younger generations.

Traditional transmission of traditional knowledge is also based upon learning by seeing, which is at least as important as transmission of oral information. Observation and participation by seeing and doing is central to transmission of traditional medicinal knowledge, farming, fishing, hunting, house building, resource management and other skills. Access to traditional territories, lands and resources is crucial if these skills and knowledge are to be passed on. Understanding the modes of information transmission is vital to appreciation of the threats caused by loss of land or destruction of ecosystems and resources without which it is impossible for traditional knowledge transmission to occur.

In some cases, knowledge will only be passed on to those who have gone through often lengthy apprenticeships with shamans or curanderos, following completion of arduous periods and processes of cleansing and preparation. Youth influenced by dominant society and the need to obtain remunerative employment in order to survive in a monetized market society are less likely to undergo years of initiation in order to be prepared to receive traditional knowledge. Elders in turn, are reluctant to pass on traditional knowledge to the uninitiated thereby disrupting the follow of knowledge to new generations. This may often be due to concerns about placing potentially dangerous information regarding medicinal plants etc. into the hands of those who are not fully prepared to control them. Fears that traditional knowledge will be lost forever, with the death of elders, have led some indigenous peoples and local communities to seek out new means to promote traditional knowledge conservation and transmission for the benefit of future generations. This includes the documentation of traditional knowledge in written, audio, visual or other electronic formats. Ensuring this is done in a manner which secures both the knowledge and the information necessary for its safe and appropriate use is a challenge, which will require innovative responses by traditional knowledge custodians and a willingness to provide funding and technical support by national and international authorities.

1.1.3 Collective and individual responsibility for traditional knowledge protection

Responding to the multiple threats faced by traditional knowledge and traditional knowledge systems requires a systematic and coordinated multi-sector approach. This will be crucial to securing full and effective protection of rights over traditional knowledge and related resources and the way of life and cultures which are central to their maintenance in the long term. Development of such an approach will take time - time that some indigenous peoples and local communities do not have.

Waiting for development of national and/or international law should not prevent indigenous peoples and local communities themselves taking necessary action to protect traditional knowledge. This may be achieved through their own endeavours, identifying those threats which may be managed internally. Alliances with NGOs, academic institutions and in some cases the commercial sector, may provide means for securing protection of traditional knowledge where action by the community alone is insufficient. Government bodies may prove willing partners in promoting local initiatives to protect traditional knowledge. International organizations and aid agencies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Union for the Conservation of Nature (IUCN), United Nations University (UNU), Corporación Andina de Fomento (CAF), GTZ and others have already shown a willingness to provide economic and/or technical support for traditional knowledge protection. These actions may complement and help to inform processes to develop legal and other mechanisms for protection of traditional knowledge and should take into account lessons from existing experiences in traditional knowledge protection.

Efforts to develop mechanisms for protection of rights over traditional knowledge have included the establishment of community-protected areas (Argumedo, n.d.), use of new contractual models[2] (Laird, 2002), traditional knowledge databases and registers (Alexander et. al, 2003), benefit sharing trust funds[3], and the adoption of national and regional laws[4].

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[2] For discussion of contractual models see, Tobin B. (2002) Biodiversity prospecting contracts: the search for equitable agreements In: Laird, S. (ed.) (2002) *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice*, Earthscan Publications Ltd., London

[3] For discussion of trust funds see Guerin-MacManis, M., Nnadozie, K., and Laird, S. (2002) Sharing financial benefits: trust funds for biodiversity bioprospecting, In: Laird, S. (ed.) (2002) *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice*, Earthscan Publications Ltd., London

[4] For examples of national TK laws, see, Peruvian Law 27811, Protection of Indigenous Peoples' Collective Knowledge

These processes have been influenced by indigenous peoples' and local communities' customary laws and practices which, throughout the course of history, have guided local decision-making regarding the adaptation, preservation, use, exchange and innovation of genetic resources and traditional knowledge.

1.2 Customary law

Customary law has since time immemorial been part of the legal matrix which provides for the regulation and protection of the world's population. In fact, the majority of all legal regimes may be seen as having evolved from some form of customary law and practice. Its codification and formalisation came to form the basis of positive law, enshrined in dominant legal regimes such as the common and civil law systems.

In many countries colonial powers harnessed customary legal regimes as a tool to complement introduced legal regimes, often leading to modifications of the customary regimes themselves. In some cases, customary law is recognised in national constitutions, while in weak states unable to enforce national law throughout their territory, indigenous peoples and local communities may continue to administer their own affairs in accordance with their own systems of law. In almost all cases, customary law has been treated by national legal regimes as being at the bottom of the legal hierarchy of laws. This situation has in some cases marginalised customary law, while in others it has undermined implementation of national law where traditional authorities hold greater sway than national authorities.

1.2.1 Definition of customary law[5]

There is no universally recognized definition of customary law. In fact, the term itself is considered troublesome not only by legal positivists but also by many indigenous peoples and local communities who are concerned that it may wrongly be perceived as merely a collection of customs lacking the force of law. The truth of the matter is that, except for those indigenous peoples living in complete isolation from the outside world, the legal regimes of indigenous peoples and local communities have been influenced by contact with colonists, missionaries, national authorities, NGOs etc. This has led to the loss or modification of some aspects of customary law and the incorporation of external legal principles into what some have called 'indigenous law' (Argumedo, 2006) 'our laws' (Muyuy, 2006) or 'chthonic law' (Glenn, 2000). These terms are themselves limited in their capacity to identify the full breadth and diversity of regimes now functioning to govern the internal affairs of a vast diversity of indigenous peoples and local communities around the world.

Definition of customary law is not a new challenge. Sir William Blackstone in 1769 addressed the issue extensively in his *Commentaries on the Laws of England* which outlined the parameters of the common law (dictionarylaw.com, 2008). In doing so he set out seven criteria for determination of the validity of customary law, which needed to be immemorial, continuous, peaceable, reasonable, certain, compulsory and consistent (Callies, 2006). Perhaps the most challenging of these is the requirement that it be immemorial, which would have the effect of freezing customary law's evolution in some far distant past. This criterion has been loosened over time and while still seen as influential is not considered a determinant on the validity of customary law. A recent Asian study has proposed that customary law should be seen as a constantly evolving body of law in which new precedents are constantly being set. Some of which will eventually be forgotten while others may become "… part of the immemorial rules…' (Becker, 1989).

More recently, indigenous peoples participating in the preparation of a comparative study of their own customary law systems in China, India, Panama and Peru have defined customary law as "locally recognised principles, and more specific norms or rules, which are orally held and transmitted and applied by community institutions to internally govern or guide all aspects of life" (IIED, 2006). This study concluded that it may be possible to identify underlying principles which are common to customary law systems around the world, although the terminology utilised to define them may vary.[6]

At both CBD and WIPO-IGC, reliance has been laid upon *Black's Law Dictionary* which defines customary law as 'customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.' (Gamer, 1989). A paper on customary law issues prepared by WIPO, highlights potential ambiguities and difficulties, inherent in this definition, associated with identification of what "as if" means in the context of determining whether a customary practice has in fact become a law (Gamer, 1989).

Associated with Biological Resources, July 2002, Costa Rica – Law 7788 Biodiversity Law, 23 April 1998, Philippines Republic Act No. 8371,28 July 1997, Portugal's, Decree-Law No. 118/2002, April 20, 2002. Regional experiences include the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources and the South Pacific Draft Model Law For The Protection Of Traditional Ecological Knowledge, Innovations and Practices.

[5] For the purposes of this paper, customary law will be used to describe the legal regimes employed by indigenous peoples and local communities to govern their internal affairs, recognizing that these are dynamic and constantly evolving and often incorporate legal concepts and measures drawn from other legal systems.

[6] See footnote 8 below and associated text.

Whatever definition is taken, there will be a need to decide on a case-by-case basis whether customary law is applicable. For indigenous peoples and local communities this is less of a problem, as they are the holders and arbiters of the applicability of customary law. However, where customary law is to be applied to non community members or in national or foreign courts, lack of clarity in defining customary law may undermine or impede enforcement.

1.2.2 Nature and characteristics of customary law

A capacity for reflection and modification to meet new challenges and respond to changing spiritual, moral, cultural, social, economic and environmental conditions, is a trait required of all legal regimes which wish to maintain their legitimacy and effectiveness as tools for social regulation. This is as true for those grounded in positive law as it is for customary law regimes. Customary law regimes have been and continue to be flexible systems of local governance capable of adapting to changing needs and realities and, where necessary, incorporating elements of national law or foreign legal principles. Incorporation of measures drawing upon non-traditional sources or in response to external pressures do not of themselves signify a shift from a customary legal basis for community regulation towards a positivist or mixed customary/positivist regime. The inclusion of positivist elements within a customary law framework need not necessarily be seen as deformation of customary governance structures. Rather it connotes adaptability in the face of changing realities, without which the customary order may find itself overthrown or increasingly marginalised as a force for governance of community affairs

Customary law is generally not codified and there is significant opposition by indigenous peoples and local communities to any move towards codification. This it is felt would be the first step towards stagnation of their legal regimes, removing its flexibility and dynamism. However, even where elements of customary law have been written down, as for instance has occurred in development of community research protocols[7], this need not of itself signify a move to a positivist tradition. The distinction between positivist law and customary law lays not so much in the distinction between a written and oral legal tradition, as has often been assumed, as on their purpose, nature, underlying principles and the incentives for compliance. In a discussion on Mayan law for example, it is argued that:

> "Customary indigenous law aims to restore the harmony and balance in a community; it is essentially collective in nature, whereas the Western judicial system is based on individualism. Customary law is based on the principle that the wrongdoer must compensate his or her victim for the harm that has been done so that he or she can be reinserted into the community, whereas the Western system seeks punishment." (Guisela Mayén, 2006).

The force of customary law is dependent upon community buy in. The incorporation of elements of positivist law does not of itself signify a change of the nature of the overall regime as long the underlying principles governing community life are sustained. In the same vein, the exercise of traditional decision making authority does not of itself signify the existence and vitality of a truly customary legal regime. The legitimacy of traditional authorities and customary law will depend upon continued acquiescence of community members to be governed by them. Where community members turn to national authorities in the search for justice then the legitimacy of traditional authorities or others seeking to govern using customary law may be lost. Increasingly, customary law regimes work alongside national positivist regimes with national law applying in a limited number of cases while the majority of community affairs continue to be adjudged under customary law.

Preparedness to accept and import modifications to customary law regimes may, therefore, be seen more as a strategy of survival than as a break with the past. At what point the level of change signifies a loss of the necessary underlying principles to entitle a regime to be considered as based upon customary law, is unclear. One means of identifying the continuing validity of any traditional legal regime may be to identify the extent to which the underlying principles of community governance are based upon customary law.

Identification of underlying principles common to customary law regimes may have an important role to play in the development of national and international measures to respect and recognise customary law and practice. An IIED sponsored project identified three principles common to four local community/indigenous peoples groups in China, India, Panama and Peru. These included:

> *Reciprocity*: what is received has to be given back in equal measure. It encompasses the principle of equity, and provides the basis for negotiation and

[7] The term "community protocol" has been used to describe a variety of measures adopted to help enforce customary law provisions in dealings between indigenous peoples, local communities and outsiders. These include contracts based on or incorporating elements of customary law; terms and conditions for the carrying out of research on indigenous territories, traditional cultural expressions, TK or other elements of indigenous culture; and codes of conduct or community regulations governing prior informed consent procedures. In this paper, the term community protocol is used, unless otherwise specified, to refer to protocols setting out general terms and conditions relating to community processes for governing access to, and use of, biological and genetic resources and associated traditional knowledge.

exchange between humans, and also with mountain gods, animals, etc.

Duality: everything has an opposite which complements it; behaviour cannot be individualistic (for example, in the union between man and woman); and other systems can be accepted or other paradigms used.

Equilibrium (harmony): refers to balance and harmony, in both nature and society, e.g. respect for the Pacha Mama (Mother Earth) and mountain gods; resolution of conflicts. Equilibrium needs to be observed in applying customary laws, all of which are essentially derived from this principle.[8]

Where identified, such common principles may, together with principles of positive law, inform the development of national and international protection of traditional knowledge. Based upon concepts of legal pluralism, this blending of positive and customary law may be seen as part of an evolutionary process for the building of functional interfaces between disparate legal regimes in pluricultural societies (Tobin, 2009b). Care must be taken however to avoid any attempts at harmonising or codifying customary law, which despite any commonalities is local in nature and enriched by its diversity.

Amongst the principal attributes ascribed to customary law are its legitimacy, flexibility and adaptability. (See Box 1)

Box 1. Characteristics of Customary law

- Dynamic, Flexible, Adaptable
- Focuses on Peace, seeking to restore community relations rather than retribution
- It has legitimacy amongst communities
- It is culturally sensitive
- It is resource specific and environmentally specific
- It responds to the ecosystem approach to resource management

Source: Final report Townsville Workshop in Tobin 2008

1.2.3 The interrelationship between customary law and positive law

Discussion of customary law and its relation to positive law has tended to focus primarily on the distinctions between these two sources of law and their relative merits. This overlooks the historical interrelationship between customary law, positive law and natural law. An interrelationship which, whether formally recognised or not, continues to play an important part in the legal ordering of a majority of countries in the world as it has done since earliest times. In a recent compilation on the nature of customary law (Perreau-Saussine and Murphy 2007)) James Bernard Murphy states, that:

> "Philosophical jurisprudence, from Plato to Hans Kelsen, rests upon three fundamental concepts of order and three allied concepts of law: the order intrinsic to human nature grounds natural law, the order found in informal practices grounds customary law, and deliberately stipulated order grounds enacted law".[9]

Natural law has been described as a "universally accessible rational standard of morality" (Porter 2007). Customary law is that part of the law derived from conventions of society which become habitual (Murphy 2007) and are adhered to although not externally imposed. Positive law on the other hand is stipulated law which in many cases evolved as a means to clarify and harmonise customary practices (Murphy 2007). Within this triptych of legal sources customary law can be seen as standing 'in a mediating role between natural right in the most basic sense, and written law' (Porter 2007).

Although written or positive law will generally tend to supersede customary law, this is not always the case and in some cases customary law may prove more authoritative. Aristotle, for instance, argued that "customs (*ethe*) have more authority and concern more important matters than do written laws".[10](Murphy 2007) And the English courts have held that customary law can 'supersede the common law'.[11] Over time, however, the position of customary law has been steadily marginalised leading to fragmentation of the traditional legal order as positive law has imposed itself throughout the world. The result is a system of law that often serves short term political expediency rather than long term community well-being.

[8] International Institute for Environment and Development (IIED). (2006) *Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Interim Report. (2005-2006)*, Downloaded from http://www.iied.org/pubs/display.php?o=G01239

[9] Murphy, J. B. (2007) Habit and convention at the foundation of custom, In: Perreau-Saussine and J. B. Murphy, *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives.*

[10] Aristotle, Politics 1287b 5. Greek text: Oxford Classical Texts, ed. W. D. Ross, Oxford Clarendon Press, 1957, cited in Murphy J.B. (2007) at 64, where Murphy notes that Aristotle does not explain why custom is more authoritative and concerns more important matters than statutes. Perhaps he suggests "it is because custom rests upon ancient and widely shared norms while written laws often rest on more transient partisan regimes or because the very weighty matters of family life and divine worship are largely regulated by custom."

[11] Arthur v Bockenham, 11 Mod. 148 (1707) at 160-161, cited in Callies D. (2005) How custom becomes law in England, In: Orebech P., F. Bosselman, J. Bjarup, D. Callies, M. Chanock and H. Petersen, (2005) *The Role of Customary Law in Sustainable Development*, Cambridge University Press, Cambridge, UK

The current environmental and economic crises have shown the fragility of this new legal order as a basis for sound global governance. Recent work on the role of customary law for sustainable development (Orebech et al. 2005) and protection of TK (Alexander et. al. (2009) Taubman (2005) Tobin 2009a and 2009b) would seem to support an approach to recognition of customary law as part of a process towards restructuring the fragmented legal order, rather than one of merely building bridges between distinct legal systems - each of which are in themselves inadequate to achieve these ends. The fact that customary law plays a role, either formally or informally, in a majority of countries, makes the issue of any such restructuring less daunting than it might at first seem. Achieving such an end will, however, require significant increase in political will in both developed and developing countries.

Viewing customary law as component part of a wider integrated, if currently fragmented, legal order does not mean that the distinctions with positive law can or should be overlooked. Rather, it suggests that when examining such distinctions we do so with a view towards the identification of foundational principles drawn from among the combined sources of law in order to develop a coherent and lasting basis for equitable global TK governance.

1.2.4 Distinctions between customary law and positive law

Customary law of indigenous peoples and local communities and positive law display significant differences which will need to be addressed if international law is to ensure due recognition for customary law in ABS and traditional knowledge governance. Amongst the most significant differences, are the relationships among individuals and the natural and supernatural worlds; the nature and definition of transgressions and harms; and concepts of property.[12] For example, the concept of "property" as it is understood by western legal systems does not exist in the customary laws of many indigenous peoples and local communities. In western legal systems, property law is intrinsically patrimonial or economic, focusing on private rights including rights to use, exclude, sell, transfer, and encumber property (Tsosie 2007). In contrast, indigenous peoples property systems tend to emphasize the sacred, spiritual, and relational values of resources and their property systems are.

> "…commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community)…" (Tsosie 2007)

Another area where divergence of legal vision occurs is with regard to traditional knowledge sharing and the notion of the public domain. Strict customary laws with severe penalties for their breach exist among some indigenous peoples to protect against misuse or misappropriation of knowledge which has been shared according to traditional practices. This may apply to songs, stories, medicinal knowledge and other treasured elements of an indigenous peoples' or local communities' cultural heritage.

The concept of the public domain is primarily defined in relation to intellectual property law which excludes from protection information which has been published or disseminated by the mass media (i.e. press, television, documentaries, etc.) or has been subject of widespread commercial trade. Even where traditional knowledge was misappropriated or was published or disseminated without the prior informed consent (PIC) of its traditional custodians, it may be considered to be within the public domain thereby stripping indigenous peoples and local communities of any rights to control its subsequent use or even to share in the benefits derived from its use.

National authorities and regional bodies developing sui generis regimes for protection of traditional knowledge have struggled to try to find a way to resolve such conflicts with varying degrees of success. Peruvian legislation on the rights of indigenous peoples over their traditional knowledge, for instance, recognizes traditional knowledge to be the cultural patrimony of indigenous peoples and local communities; extends rights to benefit sharing over knowledge in the public domain; and, recognizes customary law's role in dispute resolution.[13] However, even while adopting certain innovative new measures the Peruvian law has placed them within a framework which constrains their impact and may create further strains on customary law and local governance of traditional knowledge. These issues will be considered in greater detail below.

In order to overcome the inherent tensions between customary and positive law regimes, it will be necessary to develop greater awareness of the distinctions between them, including their respective nature, objectives, principles and characteristics,[14] and

[12] Tsosie, R. (2007) Cultural challenges to biotechnology: Native American cultural resources and the concept of cultural harm. 36 *Journal of Law, Medicine & Ethics*, cited extensively in Alexander, M., P. Hardison P and M. Ahren (2009) Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law. Consultancy Paper. UNEP/CBD/ABS/GTLE/2/INF/3.

[13] Peru (2002) Law 27811 on the Protection of the Collective Rights of Indigenous Peoples over their Traditional Knowledge Relating to Biological Diversity

[14] Tomtavala suggests a number of characteristics distinguishing customary law from positive law. These include: that it is largely unwritten, informal, spontaneous, conservative, status

processes for development and modification of law. Developing measures which can overcome the conflicting nature of customary and positive law regimes, will be complex enough in countries where indigenous peoples and local communities reside. It is likely to be even more complex in foreign countries where the knowledge and resources are being utilised. In the short term, development of international alternative dispute resolution mechanisms help to ensure due recognition and enforcement of customary law. This however, can only be seen as a partial solution. The international community will need as part of the process towards the development of international law and policy on ABS and traditional knowledge, to examine these issues with a view to providing the framework within which national authorities and traditional knowledge custodians can work to develop the mechanisms necessary to overcome the tensions and conflicts between these disparate sources of law.

The effectiveness of national and international measures will depend in no small part on the robustness of customary law regimes at the local level. In many cases, these remain vibrant and provide the principal legal ordering for community life, while in other cases they have fallen into disuse or have disappeared altogether. Considering the multiplicity and diversity of customary law systems, and the wide differences of status they hold, it seems evident that harmonisation and adoption of a 'one size fits all' solution is both inappropriate and unworkable. This has been eloquently stated by the Four Directions Council a North American indigenous organisation, in a frequently cited quotation:

> "Indigenous peoples possess their own locally-specific system of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language. Rather than trying to establish a 'one size fits all' IP regime to protect traditional knowledge the Four Directions Council proposes that governments agree that traditional knowledge must be acquired and used in conformity with the customary laws of the people concerned."[15]

The challenge is, therefore, to develop a flexible legal framework which facilitates links between customary and positive law regimes and their respective decision-making and enforcement authorities. This will need to be done in a manner which empowers indigenous peoples and local communities and supports realization of their human rights. What is required is a system within which customary legal regimes can interface with the legal regimes in the countries in which indigenous peoples reside as well as with those of countries in which their knowledge is being used. International law will need to provide the framework within which such interfaces can be effectively developed

1.2.5 Building functional interfaces between legal regimes

National and traditional decision-making authorities and the legal regimes upon which they are based are in constant interaction. Effective recognition and application of customary law at the national and international level requires functional interfaces between indigenous peoples' and local communities' decision-making authorities and national and international legislative, administrative and judicial authorities. These interfaces will need to be maintained, developed and/or strengthened at the legislative, political, administrative, judicial, and enforcement levels. Examples of interaction between legal regimes may include recognition of customary law under constitutional and national law; formal and informal interactions between government and traditional chiefly authority; integrated and/or conflicting jurisdictional authority between a national court system and traditional dispute resolution processes; and enforcement of customary law-based decisions, sanctions and awards in national and foreign jurisdictions.

At the national level many countries already have established mechanisms which provide the basis for interaction between national and customary law and their respective decision making authorities. This includes constitutional recognition of customary law and indigenous peoples' and local communities' jurisdiction to apply their own laws within their territories and to their members. It may also include their representation in the national legislature[16]; establishment or recognition of community enforcement authorities; application of customary law in national courts; and, appointment of judges drawn

based, and reliant upon its own enforcement procedures; see Tomtavala Y. (2005) *Customary Laws in Pacific Island Countries & their Implications for the Access & Benefit Sharing Regime»* PowerPoint Presentation made at the Pacific Regional Workshop on Access and Benefit Sharing, Traditional Knowledge and Customary law, organised by UNU-IAS, 21-24 November 2005, Cairns, Copy with UNU-IAS.

[15] See G. Dutfield, 'Rights Resources and Responses' In: *Cultural and Spiritual Values of Biodiversity*, D. Posey (London, Intermediate Technology Publications, (1999), p. 4.

[16] In Peru, regulations require that 15% of candidates from political parties be drawn from campesinos communities or indigenous peoples. This does not however ensure their representation in the legislature and, with many political parties placing indigenous people in the lower rankings of their electoral list, they still remain grossly underrepresented in the national legislature.

from within the community to administer justice based upon a mixture of positive and customary law[17]. The effectiveness of such mechanisms will depend upon the level of recognition and autonomy given to traditional authorities and the extent to which application of customary law by national and traditional authorities conforms to the underlying principles of indigenous peoples' legal regimes and their cultural, spiritual and moral beliefs.

The interfaces between international and customary legal regimes are less well defined. In part, this may be seen as a logical consequence of underlying principles of international governance based on recognition of national sovereignty. International law has tended to place responsibility for recognition and respect of customary law on national authorities. However, it is increasingly clear that this must change in order to secure indigenous peoples' human rights, including rights to self-determination and to their traditional territories and resources, as well as to intellectual property and traditional knowledge. International law will, therefore, need to clearly recognise customary law as a source of law within the body of legal pluralism which makes up international law. This is not only a challenge for human rights bodies: ongoing processes at CBD, WIPO and WTO, relating to protection of traditional knowledge and regulation of ABS must all find mechanisms for ensuring recognition of customary law.

A recent study on the role of customary law in securing compliance with an ABS regime, prepared for the CBD argues that recognition of customary law can most effectively be realised at the point of access to knowledge or genetic resources (Alexander et al 2009). The study proposes a number of interrelated provisions to serve as the basis for empowering indigenous peoples and local communities to control use of their traditional knowledge in accordance with customary law, these include:

- Requiring PIC of indigenous peoples as a condition for access and use of traditional knowledge and genetic resources,
- A system of certification to serve as evidence of compliance with PIC obligations,
- Requirements for disclosure of evidence of PIC in procedures for processing applications for the grant of intellectual property and/or product approval,
- Classification of access and or use without PIC as misappropriation, and
- Establishment of alternative dispute resolution mechanisms with the capacity to resolve conflicts with due attention to customary law[18]

The proposal, based in large part on analysis of contract and public international law, provides a pragmatic solution to what has sometimes seemed an intractable challenge of how to secure a central role for customary law in regulation of traditional knowledge, without paralyzing progress towards development of an international ABS regime. The proposal reflects a balance between claims that customary law relating to traditional knowledge should be fully recognised and enforceable in national and foreign jurisdictions and counter claims that customary law should only (if ever) be recognised, if it is evidenced in writing and then only to the extent it does not conflict with existing national law. From the perspective of indigenous peoples and local communities, this proposal offers a non-intrusive means to secure a role for customary law in traditional knowledge governance - requiring disclosure of only those elements of customary law which are incorporated in access agreements. For States, it has the attraction of requiring only a bare minimum of legislation.

The study suggests that access to and use of traditional knowledge for which PIC has not been obtained should fall within the definition of misappropriation. The study also proposes the establishment of an international system of alternative dispute resolution and of an independent ABS ombudsman's office, which could help provide access to justice for custodians of traditional knowledge where misappropriation of their traditional knowledge occurs. Such a system should provide that in adjudication of disputes due regard be given to customary law, the nature of the knowledge involved, and the means by which it was misappropriated. Where sacred or secret knowledge and/or coercion, fraud, or breach of a fiduciary obligation are involved this might lead to specific remedies, mitigation measures and or penalties based on customary law.

Unfortunately, the study does not fully explore the challenges and modalities for securing the role of customary law in adjudication of decisions and enforcement of rights over traditional knowledge where misappropriation occurs. It is to be hoped that the CBD will follow up on its initiative to commission this initial study with a further study in this area. This will be necessary to fully inform the debate on an international ABS regime regarding the appropriateness and gaps in existing legislation in order to ensure that due recognition be given to customary law in cases involving misappropriation of traditional knowledge.

The study argues that to be effective, any international ABS regime must recognise customary law, if the Conventions goals were to be met and sets out a list of characteristics of customary law and proposals for how it may be incorporated into an international ABS regime. (See Box 2)

[17] In Peru a system of Jueces de Paz (or Peace Judges) drawn from among indigenous peoples and local communities serves as an adjunct to the national judiciary, with responsibility for administration of justice at the local level.

[18] Alexander et. al. (2009)

Box 2. The relation between customary law and international regulation of ABS

1. Customary law is a fully developed legal system with enduring aspects and dynamic features that adjust to new circumstances that are framed in terms of the more enduring customary legal principles;
2. It proceeds from a very different cosmovision (holistic worldview combining multiple dimensions of the world, including spiritual dimensions);
3. There are both practical (utilitarian) and political reasons (indigenous rights) to take customary law into account. Customary law has been adjusted to local circumstances, and is the context in which indigenous peoples make sense of and adaptive decisions about, the world around them, as well as the context, in which the fairness and equity of policies is judged;
4. Customary law should be respected at all stages of the development of ABS projects, from the procedures indigenous peoples use to accept, reject and negotiate agreements, to control over the uses of their GR and associated TK;
5. Regimes will need to involve dispute resolution procedures at and above the community level that are led by indigenous peoples and incorporate customary law;
6. If customary law is incorporated into any instrument related to ABS, such as contracts on mutually agreed terms, the regime should ensure that the terms are recognized and enforceable across all jurisdictions;
7. Customary law may make some uses of GR and associated TK more acceptable than others - such as normal plant breeding versus the development of Genetically Modified Organisms (GMO). Customary law issues surrounding medicinal plants may differ from those involving traditional crops. Some sectors may lend themselves to broad-scale approaches to benefit sharing that can benefit many indigenous peoples, to narrower contract-based approaches;
8. "Misappropriation" may refer, *inter alia*, to: any use [of genetic resources and TK] outside of the indigenous communities of origin; any biotechnological use; any commercialization; or to unjust enrichment without [prior informed consent and/or] compensation.
9. Respecting customary law in ABS regimes is the best way to promote the goals of the Convention, because lack of respect is likely to lead to intractable conflicts and the failure or limited success of ABS initiatives, and the failure to equitably exchange traditional knowledge, innovation and practices that could contribute to the security of nations and all peoples in meeting the challenges of a rapidly changing global environment;
10. Failure to respect customary law will contribute to the further erosion of traditional biodiversity management systems and traditional knowledge associated with biodiversity, and thus to barriers to meeting the goals of this Convention as well as the loss of global cultural diversity.

Source: Alexander et. al. (2009)

It has been suggested that development of functional systems to regulate ABS and protect traditional knowledge will require action on three levels (Noejovich 2006), including:

- At the local level, by local communities and indigenous peoples themselves to regulate, use, access, transmission and development of traditional knowledge.
- At the national level, to regulate its application to issues of access to traditional knowledge, biological and genetic resources within the land or territories of indigenous peoples and in relevant intellectual property norms,
- At the international level, to provide customary norms with necessary enforcement mechanisms beyond local and national jurisdiction[19]

[19] Noejovich F. (2006) *The Role of Indigenous Customary law in the Protection of Traditional Knowledge and its Recognition at the International Level*, in Ruiz (2006)

Ensuring coherency between local, national and international regulation of ABS and traditional knowledge will be crucial if the international ABS regime is to function effectively. The international community will need, therefore, to approach the process of regulating traditional knowledge with sensitivity and respect, and with a commitment to securing the full and effective participation of indigenous peoples' and local communities' representatives in decision-making on law and policy which will affect them.

Significant advances at both CBD and WIPO in securing indigenous participation in their respective processes are to be welcomed. They are not of themselves however, adequate to ensure the full and effective participation of indigenous peoples and local communities in the design of international TK law. More work will also need to be done to build the capacity of indigenous peoples and local communities to develop their own policies, community protocols and other regulatory measures as well as to manage

PIC processes and protect their interests in where entering into negotiations they are in a position to ensure that relevant customary law principles are reflected within them. Achieving these ends will require a significant increase in commitment to the promotion and funding of local consultations, capacity building, strengthening of customary law and development of community protocols. It will also require more formal recognition of indigenous peoples as peoples to be represented in international negotiation processes, something without which their right to consultation on legislation which will affect them, including international legislation is effectively denied. Adoption of such measures will be crucial for building confidence of indigenous peoples that recognition of customary law is intended to secure their rights and will not act to progressively undermine and dispossess them of their own legal regimes and the rights they uphold.

As awareness of the importance of traditional knowledge for the livelihoods and cultures of indigenous peoples has grown, there have been increasing calls for a human rights approach to it protection. Numerous declarations by indigenous peoples (Posey 1995) and more recent policy papers by indigenous legal experts have highlighted the links between traditional knowledge, customary law their rights to self-determination (Ahren 2007, Alexander et. al 2009). The relationship between customary law and human rights is a polemic one. On the one hand it is clearly a central tool through which indigenous peoples and local communities exercise autonomy. On the other hand, it has often served to deny basic human rights to certain sectors of the population, in particular women. This is a sensitive issue, but one which will need to be dealt with in order to ensure true fairness and equity of benefit sharing and protection of the rights of all sectors of indigenous peoples and local communities over traditional knowledge.

1.2.6 Customary law and gender equality and equity

Women play a central role in the conservation of biological diversity, its sustainable use and in the transmission of traditional knowledge to younger generations. Their role is crucial for ensuring family and community well-being. Women-led families have been identified as being the poorest among the poor; recognition and attendance to their needs and interests is, therefore, vital for meeting international human rights obligations and development objectives such as those set down in the Millennium Development Goals. However, opportunities for women to participate in the design and implementation of relevant law, policy and development projects are often minimal (Tobin & Aguilar, 2007).

Customary legal regimes in Andean and Amazonian indigenous peoples and local communities, play an important role in governing issues such as family relations, sexual honor, and domestic violence, regulation of property and resource rights, participation in decision making and sharing of benefits arising from development projects and economic activities. Increased interaction between indigenous peoples and local communities and the State in Peru has been a mixed blessing for women. While, in some cases, it has helped bring about greater awareness of women's human rights, in others it has further marginalized them and weakened their role in traditional decision making processes.

While each community is unique and dynamic, for the most part Andean cultural life is strongly "gendered" (Estremadoyro 2001). Most Quechua communities traditionally believe that men and women have complementary roles in society based on the Andean world vision of the conjugal pair (Estremadoyro 2001). Andean women, for instance have historically held important positions within traditional governance structures and participated equally in community meetings. These rights have become threatened, however, as decision making moves to more centralized and formalized settings severely limiting the opportunities for women's participation in official decision-making. This marginalisation may be seen in consultation processes in Peru, including those relating to resource exploitation, which are in the main carried out in Spanish - a language many indigenous women, in particular older women, do not speak (Estremadoyro 2001). Similarly, the shift from barter to monetized economies has led to increased concentration of economic power among men, and a significant diversion of resources away from women who carry a large share of the burden for sustaining families and communities.

The Peruvian Constitution prohibits discrimination on any ground including sex, and requires that indigenous peoples and local communities in the application of their customary laws must not infringe fundamental human rights. Nevertheless, studies in Peru have shown a general failure by both national law and customary law to protect women's human rights (Paredes-Pique 2004).

The failure of both the state and indigenous authorities to effectively protect their rights has led to the formation of grassroots organizations by indigenous women in the Andes and Amazon to represent their concerns and support the defence of their rights. One such Organization is the Federación de Mujeres Aguarunas del Alto Marañon (FEMAAM) established in 1998 which has as one of its principal objectives the empowerment of Aguaruna women in all aspects of their personal and social life, in conditions of equality (Paredes Pique 2004). Organizations such as FEMAAM are helping to reshape gender relations in Amazonia and the Andes and a majority of national and regional organisations representing indigenous peoples in Peru now include a representative for women's issues. The election in recent years of a Quechua indigenous woman to a seat in the Peruvian parliament

marked a positive step forward in the struggle to secure a place for indigenous women in national affairs.

Although customary law is at times in conflict with realization of women's human rights, this does not mean that all customary law regimes are in whole or part discriminatory. Discrimination tends to reflect discrimination in other sectors of society with youths, the poor, ethnic minorities and women most likely to be under-represented and/or discriminated against in customary decision making (Drzewieniecki 1995). However, due to the constantly evolving and flexible nature of customary law the gender dynamics of indigenous peoples and local communities cannot be generalized and must be analyzed on a case by case basis. Changes in customary legal regimes may be brought about by changes in demography, economics, ecology, politics or culture (Drzewieniecki 1995). Such changes are noticeable in debates in Peru and internationally on ABS and traditional knowledge issues, where women have played an active role. The issue of gender has, notably, appeared more frequently in the work of the Working Group on Article 8 (j) of CBD than in almost any other area of the Convention's work, demonstrating the concern of indigenous peoples and local communities for the recognition and protection of women's interests in this area (Tobin & Aguilar 2007).

The relationship between recognition of the rights of indigenous peoples and local communities to regulate their affairs in accordance with customary law and securing universal human rights needs to be examined with care. Based, as they are, upon differing cultural, spiritual, social, political and economic norms, it is hardly surprising to encounter conflicts between customary law and human rights law. These conflicts may take the form of infringements of individual rights by customary law, or of threats posed to collective land, resource and traditional knowledge rights by individualistic concepts of human rights. The progressive realization of women's human rights within indigenous peoples and local communities is more likely to be effective where it comes about through persuasion rather than coercion (Engle Merry, 2006). Those promoting respect and recognition of customary law for realization of rights to self-determination and protection of traditional knowledge, will need to demonstrate a concomitant respect and recognition for the protection of women's human rights if they are to find widespread support for their goals among the wider international community.

Section II: International protection of traditional knowledge and customary law

Protection of traditional knowledge under international law has been slow in coming. During the last ten to fifteen years, an ever growing array of international organizations has begun to focus their attention on traditional knowledge issues, leading to a wide range of strategies for its protection. The WHO, for instance, has funded preparation of an Atlas on traditional medicine and adopted a strategy for protection of traditional medicine; UNESCO has adopted the Convention on Intangible Cultural Heritage and is supporting the financing of projects to strengthen traditional knowledge systems; UNCTAD has convened international workshops and published studies on traditional knowledge. Greater attention is now given to traditional knowledge in World Bank projects; CCD and Framework Convention on Climate Change (FCCC) have all sought to develop programs to incorporate TK into planning processes; while the CBD has sponsored an international study on status and trends of traditional knowledge, adoption of the Akwe-Kon guidelines on cultural impact assessment, and negotiation of an ethical code of conduct regarding traditional knowledge; the CBD is also in the process of developing and negotiating an international Regime on ABS and traditional knowledge. WIPO has prepared an international study of traditional knowledge and is host to ongoing negotiations on measures to protect traditional knowledge and traditional cultural expressions (TCE); WTO has seen the inclusion of traditional knowledge issues in the Doha round of negotiations; and the UNPFII has provided the opportunity for expert debate and made numerous pronouncements regarding the need for protection of traditional knowledge, and has also commissioned a report on the role of customary law in traditional knowledge protection.

Despite these collective efforts, traditional knowledge remains largely unprotected, a situation which is exacerbated by the lack of a coherent and coordinated international approach to traditional knowledge protection. Lack of a unified approach is, in part, a reflection of the differing mandates and objectives of international organizations and of the frequently divergent positions taken by national delegations at these different forums. Coherency at the international level is therefore dependent upon the adoption of consistent national positions across all forums. With a view to enhancing coherency at the international level UNPFII has promoted dialogue among international organizations. This initiative will need to be continued and strengthened in coming years as implementation of international instruments, negotiation of new instruments and funding and implementation of development projects advance.

Achieving coordinated, coherent and appropriate protection of traditional knowledge will depend in no small measures on the extent to which national authorities, international organizations, aid agencies, NGOs, research institutions, individuals and private sector actors give due respect and recognition to customary law. Achieving this end will require that relevant authorities, organisations, agencies, etc., give due consideration to customary law in the planning, adoption and implementation of national and international law and policy, as well as in aid and development programs and projects for protection of traditional knowledge.

This section reviews international protection of indigenous peoples' human rights and its relation to protection of traditional knowledge and recognition of customary law. Attention will focus on the International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights, Convention 169 of the International Labour Organization (ILO) and the United Nations Declaration on the Rights of Indigenous Peoples. The section also considers the treatment of customary law by the CBD and WIPO in their work on traditional knowledge protection. The section finishes with analysis of measures taken by the Andean Community to secure protection of traditional knowledge.

2.1. International protection of indigenous peoples' human rights

2.1.1 U.N. Covenants and self – determination

From the perspective of indigenous peoples, the most important of all their human rights is their right to self-determination. This right is set out in two binding instruments, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR). Article 1 of each covenant provides that:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of their means of subsistence.
>
> 3. The States Parties to the present Covenant … shall promote the realization of the right of self-determination, and shall respect that right in conformity with the provisions of the Charter of the United Nations.

These rights to self-determination were originally considered to apply primarily to newly emerging independent states in the period of decolonization. Over time, however, they have been interpreted as also applying to indigenous peoples and now form the basis for their struggle for greater political, cultural and economic autonomy.

Indigenous Peoples have drawn attention to the importance of self-determination as the basis for realization of their civil, political, economic, social, and cultural human rights. It is seen by indigenous peoples as crucial for the realization of economic rights and rights to self-development (Posey et. al., 1999); of rights to live in their own territories, with respect for [their] distinct cultures, political institutions and customary legal systems (Posey et. al, 1999); and for their effective control, management and administration of their resources (Posey et. al, 1999). They interpret self-determination as requiring their recognition '…as the exclusive owners of their cultural and intellectual property, which they should define for themselves (Julayinbul statement, in Posey et. al, 1999, 570).

Realization of the right to self-determination and to freely determine their political status and pursue their economic, social and cultural development implies a right of indigenous peoples to govern their affairs in accordance with their own internal laws and through their own institutions and decision-making authorities. Not only must they be empowered to regulate activities within their territories and among their community members; national authorities and the international community will need to ensure these rights are respected, protected and fulfilled. This will require the adoption of necessary legal and policy measures and the provision of aid where access to and use of genetic resources and traditional knowledge would infringe upon the effective realization of these rights. Indigenous peoples view their rights over traditional knowledge as being collective, intergenerational and inalienable, '…and which each generation has the obligation to safeguard for the next' (Posey et. al, 1999, 571) in effect, viewing traditional knowledge as their cultural patrimony or heritage.

So important is protection of traditional knowledge for indigenous peoples that they have declared it as being '… just as important as the struggle for self-determination' (Posey et. al, 1999, 574). In fact, the issues are intertwined with, on the one hand, self-determination acting as '… a strong counter force to … intellectual property rights systems' (Posey et. al, 1999, 574), which threaten traditional knowledge; while, on the other hand, appropriate protection of traditional knowledge serves to bolster realization of indigenous peoples' rights to self-determination. The existence of this interrelationship supports the arguments in favour of a human rights approach to protection of traditional knowledge. A firm indicator of the commitment to such an approach will be the extent to which national authorities and the international community secure recognition and enforcement of customary law in the regulation of ABS and traditional knowledge, thereby demonstrating that rights to self-determination are being respected, protected and fulfilled.

The close interrelationship between self-determination, protection of traditional knowledge and respect for indigenous peoples' customary laws is recognized in the document "Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples", prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Special Rapporteur Mrs. Erica-Irene Daes (1995) These state that, *inter alia*,

> 2. To be effective, the protection of Indigenous Peoples' heritage should be based broadly on the principles of self-determination, which include the right and the duty of Indigenous Peoples to develop their own cultures and knowledge systems, and forms of social organization;
>
> 4. International recognition and respect for the Indigenous Peoples' own customs, rules and practices for the transmission of their heritage to future generations is essential to these peoples' enjoyment of human rights and human dignity;
>
> 15 In the event of any dispute over the custody or use of any element of Indigenous Peoples' heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognized by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

2.1.2 ILO Convention 169 and rights to culture, land and traditional territories

The adoption of ILO Convention 169 marked a new chapter in recognition and protection of indigenous peoples' human rights. Most notably, it reversed the ILO's earlier approach which promoted the assimilation into the wider society, and moved towards the protection of cultural diversity and land, territorial and resource rights of indigenous and tribal peoples (ILO Convention 170, 1957) (Thornberry, 2002).

The Convention has been described as being very pro-indigenous customs and practices and replete with references to indigenous cultures, customs, traditions and customary law (Thornberry, 2002). Parties to the Convention are obliged to respect and protect the social, cultural, religious and spiritual values and practices of indigenous and tribal peoples (ILO Convention 169, Article 5) and to respect their values, practices and institutions (ILO Convention 169, Article 5). Governments are required to respect the cultural and spiritual significance of the relationship indigenous and tribal peoples hold to the lands and/or territories they occupy or otherwise use (ILO Convention 169, Article

13.1). In applying national laws and regulations, due regard is to be given to their customs and customary laws (ILO Convention 169, Article 8).

According to the Convention indigenous peoples are entitled to retain and develop their customs and institutions (ILO Convention 169, Article 8.2) and to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being, and the lands they occupy or otherwise use (ILO Convention, Article 7). They are also entitled to recognition of their rights to the natural resources pertaining to these lands and to participate in their use, management, and conservation. This extends to freshwater and marine areas traditionally occupied and used by indigenous peoples.

The Convention requires consultation with indigenous peoples prior to granting of any rights for exploration and or exploitation of resources on their lands (ILO Convention 169, Article 15.2). This applies to those resources over which the state has specifically retained ownership rights. Where the state has not specifically done so, it must be presumed that full ownership rights over resources rests in indigenous peoples. Where the state grants rights of exploration or exploitation of resources indigenous peoples are entitled to participate in the resulting benefits, wherever possible, and to receive compensation for any damages they sustain. Development of such measures should in accordance with the Convention be carried out in consultation with indigenous peoples, and are to be carried out in good faith and in an appropriate form (ILO Convention 169, Article 6). These provisions are of much importance for ABS and traditional knowledge governance, as they place significant obligations on Parties to the Convention to secure the rights and interests of indigenous peoples over their biological and genetic resources and traditional knowledge.

Taken together, the provisions of Convention 169 give significant support for indigenous peoples struggling to secure realization of their rights to autonomy. Despite its achievements the Convention has not escaped criticism, most specifically for its failure to give explicit recognition of rights of self-determination. It remains for now, however, the most far-reaching international instrument defining obligations on member states to respect and protect indigenous peoples' human rights.

Rights to culture and to apply customary law have, at times, found themselves in conflict with realization of individual human rights, in particular rights of women. Article 8.2, of Convention 169 addresses this issue stating that indigenous and tribal peoples,

> "...shall have the right to retain their customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and internationally recognized human rights" (ILO Convention 169, Article 8).

During negotiation of the Convention divergent views were raised regarding this provision. Some countries took the view that recognition of customary law frequently acts as a cover for continuing infringement of the rights of women[20] Cultural relativism, customary law and traditional authority can be and is used to maintain cultural practices that lead to infringements of individual human rights. The existence of such infringements does not of itself, however, signify that every application of customary law is in conflict with human rights. Strict imposition of human rights standards, based upon western individualistic values, may undermine customary law regimes which are vital for protection of collective rights over lands, territories, resources and traditional knowledge.[21] Finding the appropriate balance between protection of individual and collective rights is one of the significant challenges which must be addressed in development of functional interfaces between customary and positive law systems.

Those in favour of recognition of customary law have argued that 'the requirement of compatibility with national law [in article 8.2 of convention 169] is a licence for cultural genocide and allows assimilationist policies' (Thornberry, 2002, 360). In response to these fears, the ILO has taken the view that reference to national law and the fundamental rights it defines does not devalue the principle of recognition of customary law and is clearly linked to the references to human rights and to internationally recognised rights (Thornberry, 2002). This interpretation leads to the conclusion that national authorities must recognise and respect those elements of customary law regimes and the exercise of traditional authority, which do not conflict with fundamental human rights.

2.1.3 United Nations Declaration on the Rights of Indigenous Peoples

After more than 20 years of negotiations, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was finally adopted on the 13th of September, with 142 votes in favour, 4 against[22] and 11 abstentions[23]. Perhaps the most significant aspect of UNDRIP for indigenous peoples is its clear recognition in Article 3 of their right to self-determination. A study of the process surrounding the negotiation of UNDRIP and the impacts of its adoption, describes Article 3 as "undoubtedly the most central provision in the entire

[20] Thornberry, 2002

[21] Intervention of Ralph Regenvanu at UNU workshop on the Role of Customary law in TK Protection, side event at IGC 12, organised by UNU-IAS, Geneva, 2007.

[22] Australia, Canada, New Zealand and the United States. On the third of April 2009 Australia reversed its position and endorsed the Declaration.

[23] Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine

Declaration … [as] self-determination is generally perceived to be the keystone of all human rights, and a prerequisite for the effective enjoyment of other rights"[24]. The same study argues that recognition of rights to self-determination provide the basis for recognition and enforcement of land, territorial and resource rights, rights to apply customary law, and rights to have treaties entered into with States recognised under international law.[25](See Box 3)

UNDRIP recognizes indigenous peoples' rights over the lands, territories and resources they have traditionally, owned, occupied or otherwise used or acquired (UNDRIP, Article 26.1). This includes rights of ownership, use, development and control (UNDRIP, Article 26.2). States are obliged to give legal recognition and protection to these rights, with due respect for indigenous people's customs, traditions and land tenure systems (UNDRIP, Article 26.3). The Declaration also obliges states to consult with indigenous peoples through their representative organizations in order to secure their free prior and informed consent (FPIC) for any projects that might affect their lands territories or other resources, particularly where this involves resource development use or exploitation (UNDRIP, 32.2). They are also required to establish fair, independent, impartial, open and transparent processes, giving due recognition to customary law in order to adjudicate land and resource rights (UNDRIP, Article 27). This is to be done in conjunction with indigenous peoples (UNDRIP, Article 27). To comply with the Declaration, national and international ABS law and policy will need to be developed with the full and informed participation of indigenous peoples and local communities and with due regard for their customary laws and practices.

The Declaration provides that where lands and or resources have been confiscated, occupied, used or damaged, without their FPIC, indigenous peoples are entitled to redress. This may include restitution or, where not possible, just, fair and equitable, compensation (UNDRIP, Article 28.1). Compensation should take the form of lands, territories or resources equal in quality, size and legal status or monetary compensation, or other appropriate redress (UNDRIP, Article 28.1). The effect of these provisions is to create a right for compensation in cases involving exploitation of biological and genetic resources obtained without FPIC, which may extend equally to genetic resources which form part of traditional knowledge or which have been collected on their traditional lands or territories. The rights to compensation extend to events which occurred prior to the Declarations adoption and may arguably cover damages arising from placement of indigenous peoples' traditional knowledge in the public domain without their FPIC.

Where, any project causes adverse environmental, economic, social, cultural or spiritual impacts UNDRIP requires states to provide effective mechanisms for mitigation and for just and fair redress (UNDRIP, Article 32.3). Consideration of customary law may be required to help determine the nature and effect of impacts as well as of any remedies required including measures to prevent publication, screening, or other dissemination of traditional knowledge, and to halt other use of and secure repatriation of genetic resources or traditional knowledge,

UNDRIP recognizes the rights of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions as well as manifestations of their sciences, technologies and cultures. This includes human and genetic resources, seeds, medicines, and knowledge of

Box 3 – Self-determination as a basis for protection of human rights

Pursuant to the right to self-determination, indigenous peoples have the right to control and decide over their traditional territories and the natural resources within them. Furthermore, the right to self-determination implies that indigenous peoples have the same right as the majority population to determine the future of their societies, how their children will be educated, how their social and health care systems should be constructed, and so on. In short, with the confirmation that the right to self-determination applies also to non-state-forming, indigenous peoples, indigenous peoples have the right to "take over" many of the rights and responsibilities previously vested in the state, so they themselves can decide what their societies should look like

Intrinsically linked to the right to self-determination, Articles 5 and 34 of the Declaration proclaim that indigenous peoples have the right to retain and strengthen their distinct legal systems and customs. Indigenous peoples' customary laws distinguish themselves from statutory law merely by being more intrinsically attached to a people's culture than statutory law. The Declaration clarifies states' obligations to recognize such dual legal systems.

Also closely connected to the right to self-determination, Article 37 of the Declaration determines that "...indigenous peoples have the right to the recognition and observance of treaties entered into with states", and their enforcement under international law .

Source: Ahren M. 2007

[24] Minde H., A. Eide, and M. Åhrén (2007) *The UN Declaration on the Rights of Indigenous Peoples: What made it possible? The work and process beyond the final adoption*, Galdu Cala, Journal of Indigenous Peoples Rights No. 4/2007,at 125

[25] Ibid.

the properties of fauna and flora. The Declaration also recognizes their rights to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions (UNDRIP, Article 32.3). Member states are required to work with indigenous peoples in the development of effective measures to protect these rights (UNDRIP, 32.1). Adoption and implementation of national ABS and traditional knowledge laws and any international ABS and traditional knowledge regimes offer opportunities to advance the realization of these obligations. To comply with UNDRIP, these must be developed with the full, informed and effective participation of indigenous peoples. The provisions of the Declaration relating to traditional knowledge do not mention customary law; however, they do recognize genetic resources, seeds and medicines to be part of traditional knowledge. By implication, therefore, the obligations of states to regulate biological resources with due respect for customary laws and practices, may be seen as applying also to associated traditional knowledge.

Effective compliance with the Declaration would entail empowerment of indigenous peoples to regulate ABS and traditional knowledge issues within their own territories in accordance with their own customary laws and practices, so long as these do not infringe international human rights standards (UNDRIP, 32.1). UNDRIP specifically recognizes the right of indigenous peoples to define responsibilities of individuals to their communities (UNDRIP, article 35). It also requires that they have access to prompt, just and fair procedures to resolve disputes with states or other parties, and effective remedies for breaches of their individual and collective rights. These procedures and any decision taken under them must be taken with due regard for the customs, traditions, rules and the legal systems of indigenous peoples and international human rights (UNDRIP, Article 40).

At the national level, the Declaration requires states, in consultation and cooperation with indigenous peoples, to adopt law and policy to achieve its ends (UNDRIP, Article 38). This will include relevant ABS and traditional knowledge, law and policy.

Where national law and policy already recognize rights of indigenous peoples over the resources on their lands, the Declaration will further strengthen these rights and the role of customary law and practices to regulate ABS and traditional knowledge issues. Where no national ABS law and policy exists, UNDRIP may be seen as providing guidance for national authorities faced with decisions on ABS and traditional knowledge issues which affect indigenous peoples. Where national ABS and/or traditional knowledge law and policy exist, national authorities will need to review such law and policy to ensure it is in line with the Declaration (Tobin, 2008).

2.2 International regulation of traditional knowledge

2.2.1 Convention on Biological Diversity (CBD)

The entry into force of the CBD in 1993, reversed the practice of hundreds of years where biological resources were treated as the common heritage of mankind and open to unrestricted free access. The Convention recognises sovereign rights of member states over genetic resources and the right of indigenous peoples and local communities' to be consulted and to share in benefits associated with access to, and use of, their traditional knowledge.

In 1992 the Conference of the Parties (COP) to the CBD adopted the Bonn Guidelines on Access to Genetic Resources and Benefit Sharing. The Guidelines, though not legally binding, were intended to provide practical guidance for the adoption of national ABS regulation. The Guidelines were an effort to create a predictable and efficient international system that would suit the needs of both user and provider countries (Zadan, 2005). They provide suggestions on how national legislation can incorporate principles of FPIC (Commission on Human Rights, 2004, Article 5) and mutually agreed terms in bio-prospecting agreements; how to deal with traditional knowledge on an equitable basis; disclosure of holders of traditional knowledge and country of origin in patent applications; and a certification system for trade in genetic resources (Rosendal, 2006).

COP has declared the CBD as having primary responsibility for the regulation of traditional knowledge relating to biological diversity (CBD, COP Decision V1/10). Although, neither the Convention nor the Bonn Guidelines explicitly recognise any property rights over traditional knowledge, their effective implementation creates a de facto right in favour of indigenous peoples or local communities over their knowledge. To advance work on traditional knowledge issues CBD established an Ad Hoc Working Group on Article 8 (j) and related provisions of the CBD (WG 8(j)) with a mandate to provide advice on the development of legal protection of biodiversity-related TK, innovations, and practices (Zedan, 2005).

Based in part on the outcomes of the working groups deliberations COP has indicated that protection of traditional knowledge should be 'based on a combination of appropriate approaches including, the use of existing intellectual property mechanisms, sui generis systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice (CBD COP Decision V1/10A, para. 33).'

At the request of COP, WG 8(j) has commenced development of proposed elements for *sui generis* systems for the protection of traditional knowledge

(CBD COP Decision V1/10A). To date this work has emphasised the importance of FPIC and the need to ensure that any system is based on recognition and respect for customary law and practice[26].

Meanwhile, the CBD has given a mandate to its Ad Hoc Working Group on Access and Benefit-Sharing (WG ABS), to negotiate an international ABS regime, covering both genetic resources and traditional knowledge. The WG 8(j) has been called upon by COP to collaborate with the WG ABS in this work. From the outset the negotiations at the WG ABS have acknowledged the need to give due respect and recognition to customary law in any ABS regime. The 5th meeting of the WG ABS, held in Montreal in October 2007, identified measures required to ensure compliance with customary law and local systems of protection as one of a number of issues requiring further consideration for development of an ABS regime. COP 9, held in Bonn in May 2008 established a traditional knowledge expert group to examine, amongst other things, the role of customary law in any international ABS regime.

COP 9 established an expert group on compliance issues relating to an international ABS regime, which met in Japan in January 2009 and prepared a report for the seventh meeting of the WG ABS (UNEP 2009a). In its report the group of experts concluded that:

- An effective and pragmatic way to take account of customary laws could be to ensure respect for customary law in access agreements and/or the international regime.
- The involvement of indigenous and local communities representatives in the negotiation of mutually agreed terms would enable customary laws regarding genetic resources and associated traditional knowledge to be taken into account.
- Recognition of indigenous and local communities' rights in the international regime would indirectly promote respect for customary laws in the national laws of countries where indigenous and local communities are located.
- One possibility could be to let national law deal with the issue of customary law.

The Group of Experts, further, concluded that an approach along the lines they propose would recognise the diversity of customary law amongst the Parties to the CBD and respect the cultural specificity and variety of customary laws among indigenous peoples, avoiding a one-size-fits-all approach (UNEP, 2009a). The Group also identified a number of specific measures which could promote compliance with the rights of indigenous and local communities to genetic resources and associated traditional knowledge, and their customary laws, including:

- Establishment or recognition of indigenous competent authorities to advise on applicable processes for prior informed consent
- An internationally recognized certificate of compliance
- Recognition of existing rights of indigenous and local communities in minimum and standard contractual terms for ABS arrangements
- Monitoring of the use of traditional knowledge through checkpoints;
- Capacity building of indigenous and local communities' representatives to facilitate their participation in prior informed consent and mutually agreed terms.

The Group of Experts noted that traditional knowledge databases or registries could serve as proof in litigation and help bring transparency and certainty to issues regarding rights over traditional knowledge. However, they noted that some indigenous and local communities consider that databases and registers "…may in fact promote biopiracy since they will foster public diffusion of traditional knowledge without the necessary international guarantees that the rights of indigenous and local communities will be respected."(UNEP, 2009a). The Group's report provides little guidance on the role customary law should play in cases of misappropriation of traditional knowledge, which raises many complex practical, technical and legal issues, which remain as yet largely unexplored.

At the seventh meeting of the WG ABS, in Paris, in April 2009, the issue of customary law found significant traction amongst delegates as is apparent from the report of the meeting which includes the text outlining elements of an international ABS regime. References to customary law appear throughout the text, which will serve as the basis for future negotiations of the working group. These references appear in draft provisions relating to a wide range of issues including, the objectives of any regime; PIC procedures: benefit-sharing; negotiation of mutually agreed terms; development of international minimum conditions and standards; certificates of compliance; establishment of an ABS ombudsman's office; capacity building; and alternative dispute resolution (UNEP 2009b).

The ultimate section of the negotiating text is dedicated specifically to measures to secure compliance with customary law and local systems of protection (this section of the report (UNEP, 2009b) is set out in full in Annex III). It sets out proposed text which would require countries to recognise the rights of indigenous and local communities over their traditional knowledge and biological and genetic resources. It also includes draft provisions on recognition of customary law and for the use community protocols as a means to prevent

[26] CBD COP Decision VII/16, annex 'Some potential elements to be considered in the development of *sui generis* systems for the protection of traditional knowledge, innovations and practices of indigenous and local communities.'

misappropriation of traditional knowledge, the latter based largely on proposals made by the African Group.[27] With regard to misappropriation and its relationship with customary law the negotiating text includes draft provisions stating that:

[1. Contracting Parties [shall][should]:

(b) With the full and effective participation of the indigenous and local communities concerned support and facilitate local, national and/or regional community protocols regulating access to traditional knowledge taking into consideration the relevant customary laws and ecological values of indigenous and local communities in order to prevent the misappropriation of their associated traditional knowledge …;

(c) Ensure that any acquisition, appropriation or utilization of traditional knowledge in contravention of the relevant community protocols constitutes an act of misappropriation;

(d) Ensure that the application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, [shall][should] be guided, as far as possible and appropriate, by respect for the ecological values, customary norms, laws and understandings of the holders of the knowledge; (UNEP, 2009b)

The inclusion in the draft text for an international ABS regime, demonstrates once more, the need for further research in this area, which the CBD should initiate without delay. The text developed by the seventh WG ABS placed customary law firmly on the negotiating agenda for an international ABS regime. The extent to which such provisions are reflected in any final agreement on ABS will reflect the commitment of national governments and the international community as a whole to securing the rights of indigenous peoples over their traditional knowledge. Indigenous peoples and local communities will need to be vigilant to ensure that the protection of their rights and recognition of customary law does not become marginalised as the negotiations get closer to their conclusion and compromises are made as demands in one are traded for concessions in another.

[27] Proposals on recognition of customary law and community protocols made by Namibia on behalf of the African Group to the seventh meeting of the WG ABS are set out in UNEP (2009c) Collation of Operative Text Including Related Explanations and Rationale Submitted by Parties, Governments, International Organizations, Indigenous and Local Communities and Relevant Stakeholders in Respect of the Main Components of the International Regime on Access and Benefit-Sharing Listed in Decision IX/12, ANNEX I UNEP/CBD/WG-ABS/7/5

2.2.2 WIPO - IGC

In 2000, WIPO established the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) which acts as an international forum for examination of the interplay between intellectual property, traditional knowledge, genetic resources, and traditional cultural expressions (WIPO, 2008). The IGC's proceedings has been informed by a series of fact finding missions carried out by WIPO (WIPO, 2000), submissions of governments, international organizations, indigenous peoples and local communities, NGOs, private sector actors, research institutions and others. Meeting approximately twice a year since its inception, the IGC has increasingly provided opportunities for indigenous peoples to participate in its meetings both as observers and more recently as members of expert panels. Its work has led to the preparation of numerous information documents including documents setting out a gap analysis on protection of traditional cultural expressions and traditional knowledge. The IGC's proceedings are now focusing on two principal documents which set out draft objectives and principles for traditional cultural expressions and for traditional knowledge[28].

The IGC's draft document on Objectives and Principles relating to traditional knowledge makes specific reference to customary law stating that:

> Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework. If so desired by the traditional knowledge holders, protection should promote the use, development, exchange, transmission and dissemination of traditional knowledge by the communities concerned in accordance with their customary laws and practices, taking into account the diversity of national experiences[29].

The document sets out a comprehensive series of policy objectives, including to: recognise value; promote respect; meet the actual needs of holders of traditional knowledge; promote conservation and preservation of traditional knowledge; empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems; support traditional knowledge systems; contribute to safeguarding traditional knowledge; repress unfair and inequitable uses; promote innovation and creativity; ensure prior informed consent and exchanges based on mutually agreed terms; promote equitable benefit sharing; promote community development and legitimate trading activities; preclude the improper grant of intellectual property rights to unauthorised parties;

[28] WIPO/GRTKF/IC/12/5(c)

[29] WIPO/GRTKF/IC/12/5(c), Principle h

enhance transparency and mutual confidence; and complement protection of traditional cultural expressions.[30]

The proposed scope of traditional knowledge protection includes the content or substance of knowledge resulting from intellectual activity in the traditional context, passed between generations, in any field including agricultural, environmental and medicinal knowledge associated with genetic resources[31]. Legal remedies are to be provided where fair and equitable benefit sharing does not take place[32]; access is to depend on PIC[33], and an exemption is made for customary use and exchange of traditional knowledge[34].

The draft document outlines a system of traditional knowledge protection designed to prevent misappropriation which is defined as "… any acquisition, appropriation or utilization of … [traditional knowledge (TK)] … by unfair or illicit means; deriving commercial benefit from the acquisition, appropriation or utilization of TK when the person using that knowledge knows or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from TK."[35] The WG ABS, at its meeting in Montreal in 2007, incorporated this provision into the draft elements for an international ABS regime.

The IGC draft outlines a range of modalities for protection of traditional knowledge including a special law on traditional knowledge, intellectual property laws, law of contracts, laws concerning indigenous peoples, ABS laws etc[36]. The draft gives special recognition to customary law stating that:

> The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.[37]

The IGC draft Objectives and Principles on traditional knowledge recognizes that respect for customary law may require consideration of the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge[38]. Furthermore, it provides that key terms such as "unfair trade" may need to be defined with attention to concepts of unfair under customary law. The proposal sets out obligations requiring that use of traditional knowledge be subject to FPIC, a measure further enabling indigenous peoples and local communities to exercise control over their knowledge in accordance with their customary law and practices.

WIPO has recently prepared an issues paper on customary law (WIPO, 2006) which addresses the nature of customary law, the manner in which it may be recognized, and preferences of indigenous peoples and local communities with regard to its recognition. This paper sets out a list of fundamental questions to be considered in relation to customary law and intellectual property rights. (See Box 4)

The IGC has, to some extent, focused its work on closing loopholes in the existing IPR system including, as a priority, examination of the means to identify traditional knowledge in the public domain. This, it has been proposed, could be achieved by the creation of databases of traditional knowledge accessible to patent examiners in their search for prior art when judging the novelty of claimed inventions. Enabling identification of traditional knowledge as prior art (i.e. through examination of existing inventions, and the extent of existing knowledge) would help to prevent the granting of bad patents. It would not, however, signify any increased recognition and protection of the rights of indigenous or local communities over traditional knowledge. Collation of traditional knowledge in databases, a necessary element of such a system, has been opposed by indigenous peoples and local communities who fear it may lead to further loss of control over traditional knowledge. Analysis carried out by the United Nations University Institute of Advanced Studies, has demonstrated both the potential and the limitations of databases and registers as tools for protection of traditional knowledge, showing it to be a double-edged sword which must be treated with care if the rights of traditional knowledge custodians are to be secured (Alexander et al. 2003).

There have been criticisms that collation of traditional knowledge will place it in the public domain providing scientific and commercial users with increased free access to knowledge which might be utilized without the consent or compensation of indigenous and local communities. Treating traditional

[30] Ibid.

[31] Article 3, WIPO/GRTKF/IC/12/5(c)

[32] Article 6

[33] Article 7

[34] Article 8

[35] Article 1, WIPO/GRTKF/IC/10/5

[36] Article 2 Draft provisions.

[37] WIPO/GRTKF/IC/12/5(c), article 1.3

[38] WIPO/GRTKF/IC/12/5(c) Article 1.5 states that : The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable benefit sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge

Box 4. Fundamental issues for consideration concerning customary law and intellectual property law

- What forms of relationship between customary law and intellectual property law have been encountered in practice? What models could be explored?
- What lessons can be drawn from recognition of customary law in relation to other (but potentially related) areas of law, such as family law, the law of succession, the law of land tenure and natural resources, constitutional law, human rights law and criminal law, as well as dispute resolution in general?
- What experiences have been reported concerning the role of customary law in relation to intangible property, and rights and obligations relating to intangible property such as cultural expressions, traditional knowledge, and specific material such as motifs, designs, as well as the tangible form of expressions such as handicrafts, tools, and forms of dress?
- What role for customary law has been recognized in existing and proposed *sui generis* laws for the protection of traditional knowledge and traditional cultural expressions/expressions of folklore?
- For the holders of traditional knowledge, the bearers of traditional cultural expressions and the custodians of genetic resources themselves, what is the preferred role or roles of customary laws and protocols:
  - § As a basis for sustainable community-based development, strengthened community identity, and promotion of cultural diversity?
  - § As a distinct source of law, legally binding in itself – on members of the original community, and on individuals outside the community circle, including in foreign jurisdictions?
  - § As a means of factually guiding the interpretation of laws and principles that apply beyond the traditional reach of customary law and protocols?
  - § As a component of culturally appropriate forms of alternative dispute resolution?
  - § As a condition of access to TK and TCEs?
  - § As the basis for continuing use rights, recognized as exceptions or limitations to any other rights granted over TK/TCEs or related and derivative subject matter?

Source: Adapted from WIPO (2006)

knowledge as part of the public domain, without determining how it got there and where appropriate, protecting it against free use, may have the effect of legitimizing its historic expropriation. Although there is a good argument to be made that the existence of traditional knowledge in the public domain does not imply the exhaustion of rights of indigenous peoples to control its use, there is little in the way of legal precedent to demonstrate judicial support for this view. It is vital, therefore, that national and international law be developed in a manner which prevents inequitable application of the concept of the public domain to traditional knowledge. This is required to prevent exhaustion of the rights of indigenous and local communities over traditional knowledge through the imposition of foreign legal principles of which they were unaware or they did not fully understand at the time traditional knowledge was originally shared, collected or otherwise accessed. Interestingly, the IGC draft principles and objectives document would allow for some retroactivity in measures to protect traditional knowledge, potentially opening the door for protection of traditional knowledge which has fallen into the public domain. This is in line with the practice of a number of states which have adopted or are in the process of developing sui generis traditional knowledge regimes (Peruvian Law 27811, 2002).

2.2.3 WTO

At the international level the World Trade Organization (WTO) is the only body with a functional compliance mechanism capable of bringing meaningful pressure upon parties to abide by their obligations. The WTO has with the Doha round of negotiations, begun to give more attention to the issue of traditional knowledge and its relationship to the Agreement on Trade Related Intellectual Property (TRIPS), the principal instrument governing rights and obligations under the global intellectual property system.

Developing countries, led by Brazil, India and Peru, have consistently argued that protection of rights over traditional knowledge should be secured by modification of TRIPS to prevent biopiracy[39]. This they propose may be achieved by requiring disclosure of the origin of genetic resources and traditional knowledge, provision of evidence of PIC for use of resources and

[39] See Communication from Peru to the World Trade Organization, Peru (2007) *Combating Biopiracy – The Peruvian Experience*, Dated 13 August 2007, Ip/C/W/493, See also Peru's communications reference IP/C/W/441, dated 8 March 2005, and its revised version IP/C/W/441/Rev.1, dated 19 May 2005

traditional knowledge, and evidence of fair and equitable benefit sharing as a condition for processing intellectual property applications. This proposal is now supported by a majority of WTO Members (Kohr, 2008) and the issue has been squarely placed at the WTO director general's door as one of the key issues to be resolved as part of implementation of the Doha round of WTO (Mara, 2008).

Amendment of TRIPS to include disclosure requirements would greatly enhance the power of indigenous peoples and local communities to regulate access to and use of traditional knowledge. Where disclosure relates to origin, it would identify the source of traditional knowledge, which will provide transparency regarding provision of traditional knowledge and whether it has come from a legitimate source. However, if disclosure obligations are to prevent biopiracy they will need to include a requirement to provide evidence of PIC of indigenous peoples and local communities. Such a requirement will help to provide protection for traditional knowledge rights even in countries which have not adopted relevant traditional knowledge legislation. As such, it may be seen as a mechanism providing interim protection for traditional knowledge while relevant national and international law is being developed (Tobin, 2000). Requiring evidence of fair and equitable benefit sharing will help to ensure that those negotiating with indigenous peoples do so in good faith.

There has been little discussion regarding the nature which such evidence would take and it is unclear whether it would include provision of evidence of fair and equitable distribution of benefits within local communities or by an indigenous people. Requiring evidence of how benefits are to be shared within a community, is probably beyond the scope of international law and may indeed be resisted by indigenous peoples and local communities. However, equity cannot be assumed to have been realised merely by transfer of benefits to a representative organisation or traditional authority. Providing support for capacity building of indigenous peoples and local communities to receive, manage and equitably distribute benefits derived from use of their traditional knowledge must, therefore, be a part of any national or global traditional knowledge protection system.

2.3 Andean Community legislation on traditional knowledge

Peru is a member of the Andean Community (CAN)[40] which is empowered to enact regionally binding legislation. In 1996, CAN adopted Decision 391, which requires proof of prior informed consent, benefit sharing and disclosure of origin for grant of patents (Cervantes-Rodriguez, 2006). Decision 391 was shaped by the belief that the sharing of genetic resources would become a source of considerable wealth for the countries involved; that states should have strict control over the flow of genes in order to combat biopiracy; and that parties entering into ABS agreements should consider not only national but also regional interests in decision making. The result was legislation requiring strict and complex state-led processes to regulate the use and transfer of genetic resources (Ruiz, 2003). Decision 391 also provided common regional standards to protect the rights of traditional communities. The Agreement stipulates that member states should "provide greater protection of the knowledge, innovations and traditional practices of indigenous, Afro-American and local communities" (Dutfield, 2000). This legislation thus, went farther than the CBD and the Bonn Guidelines in that it endorsed protection not only of traditional knowledge, but also protection for the innovations and way of life of these communities.

In 2000 CAN adopted Decision 486, establishing a regional intellectual property rights regime which sets out clear obligations with regard to ABS and traditional knowledge. In similar language to Decision 391, Decision 486 recognises the rights and authority of indigenous, afro-american and local communities to control their collective knowledge. It also requires that it be applied in a manner which does not contravene Decision 391, in essence creating a link between recognition of rights over intellectual property and access to genetic resources and traditional knowledge. Decision 486 was the first regional instrument to include binding legal obligations to disclose the origin and demonstrate a legal right to use genetic resources and traditional knowledge in patent applications. These obligations apply to any applications for patents if the product or process for which the application is filed were obtained or developed from genetic resources or derived products or traditional knowledge originating in any one of the CAN member countries.[41]

Decision 486 establishes an important precedent by subordinating the right to a grant of patents to compliance with relevant Andean, international and national law relating to acquisition of genetic resources and traditional knowledge. Although, the decision does not specifically mention customary law, its requirement that PIC be obtained from indigenous, afro-american and local communities may in effect make the grant of patents conditional upon compliance with relevant customary law relating to access and use of traditional knowledge. The Decision provides that competent national authorities may *ex officio* or upon request of a party at any time, declare a patent null and void when

[40] The Andean Community of Nations includes Bolivia, Colombia, Ecuador and Peru. The Bolivarian Republic of Venezuela, a member of CAN and its predecessor the Andean Pact, retired from the regional group in 2004

[41] Comunidad Andina de Naciones (CAN) Decision 486, Régimen Común sobre Propiedad Industrial, Article 2. Downloaded from: http://www.comunidadandina.org/normativa/dec/d486.HTM

the applicant failed to show valid PIC for use of traditional knowledge (Ruiz, 2006). The application of these provisions for the protection of traditional knowledge rights has been severely undermined by the adoption in Peru of Law 29316 with a view to implementing the Peruvian - US Trade Promotion Agreement (hereafter referred to as the Free Trade Agreement) which was signed in the last days of the Bush administration in January 2009. This issue will be returned to in more detail below.

Indigenous peoples in the region have examined the possibilities of making the grant of intellectual property rights subject to compliance with customary law principles. One interesting proposal, is for the establishment of a right of cultural objection to an application for a patent or other intellectual property where grant of a property right would conflict with the ethical mores or threaten the cultural or spiritual integrity of an indigenous people or local community.[42] Exercise of such a right to object would require that traditional authorities be granted a role in defining and adjudicating cases in which an intellectual property grant would run counter to the rights of indigenous peoples or local communities. This would offer an opportunity to extend the remit of customary law beyond the communities own jurisdiction.

CAN has also developed a regional biodiversity strategy, adopted in 2002, which calls for establishment of a common policy to strengthen and protect traditional knowledge and practices relating to biodiversity with the participation of and consultation with indigenous, afro-american and local communities(Ruiz, 2006). The strategy includes as one of the expected outcomes of this work the establishment of a common Andean regime on protection of traditional knowledge. In order to advance work in this area CAN formed a working group to commence work on the development of a s*ui generis* Andean traditional knowledge regime. Based upon three regional workshops of indigenous representatives and indigenous legal and technical experts a draft proposal was prepared outlining elements for a regime founded upon a number of key principles, including PIC of indigenous peoples and the central role of customary law (De La Cruz, et. al, 2006). The proposal is noteworthy also for its expansive definition of traditional knowledge to include not only traditional knowledge directly related to biodiversity but also all forms of intellectual expression by indigenous peoples including cultural expressions, crafts, artistic works etc (Ruiz, 2006). Adopting such an expansive definition highlights the holistic approach which indigenous peoples view as necessary to secure the effective protection of their traditional knowledge. It also reflects their concerns that fragmentation of traditional knowledge into categories based upon existing categories of intellectual property may have the effect of compartmentalising specific elements of traditional knowledge of potential commercial value and undermine the integrated nature of traditional knowledge systems.

[42] This notion of a cultural objection is found in Article 66 of Costa Rica's Law 7788, known as the Biodiversity Law, which establishes "The right of local communities and indigenous peoples to oppose any access to their resources and associated knowledge, be it for cultural, spiritual, social, economic or other motives..."

Section III Customary law and protection of traditional knowledge in Peru

Peru has 48 indigenous peoples, with 42 linguistic groups living in the Amazon region. The indigenous population in Peru is approximately 9.3 million or 47% of the national population, in the main part Quechuas and Aymaras from the Andes. In addition to being home to one of the largest indigenous populations, Peru is also one of the most biologically diverse countries in the world. Peru's pluricultural and multiethnic nature provides a good testing ground for the development of traditional knowledge law and policy.

Peru's Constitution of 1993, recognises the right of indigenous peoples and local communities to apply their own customary laws within what is described as a special regime. Peru has since the early 1990s, had a vibrant national ABS and traditional knowledge debate and has been home to a number of precedent-setting experiences in the development of contractual, community and state measures to protect traditional knowledge. These include the ICBG agreements and Potato Park which will be examined in detail in the following section. At the national level, Peru has adopted *sui generis* law for protection of indigenous peoples' rights over their knowledge relating to biological diversity, which was the first comprehensive national regime of its kind. As such it is of much interest for both its successes and the limitations, all of which will serve to inform future developments in this area.

This section will consider the status of customary law in Peru, national regulation of traditional knowledge and the compatibility between national *sui generis* legislation and customary governance systems, as well as Peru's role in international processes relating to traditional knowledge protection.

3.1. Customary Law in Peru

Customary law has long provided the basis for internal regulation of community affairs of Peru's indigenous peoples. The extent of its influence has, however, been seriously compromised in some communities and has been subject to significant modifications in others. Notwithstanding, there are still indigenous peoples and local communities in Peru for whom customary law is the sole or primary source of law, and the state has demonstrated an ever increasing preparedness to respect, recognize and protect its role as a part of the Peruvian legal landscape.

The development of customary law amongst indigenous peoples of Peru has been shaped in part by the distinct nature of the environments and cultural societies which appeared in the Peruvian Amazon on one hand, and its Coastal and Andean regions on the other. While in the Amazon there was a tendency to group along the lines of family or tribal groups which rarely exceeded 500 members, in the Coastal and Andean regions there is evidence of extensive cultures which brought large areas and their inhabitants under centralized control and subject to more uniform legal governance. This process culminated in the great Inca Empire which spanned a territory stretching from Colombia to Chile and which made inroads as well into the Amazonian region, although it failed to subdue many Amazonian peoples.

Although legal systems may have varied extensively, in particular between the decentralized family/tribal customary regimes of the Amazon and the more centralized systems of the Coast and Andes, they are believed to have maintained one central point of similarity. They were primarily based upon the interest of the collective over the rights of the individual.

3.1.1 Constitutional recognition of indigenous peoples and customary law

The Peruvian Constitution of 1993 recognizes the State as being pluricultural and multiethnic (Peruvian Constitution, 1993, article 2.19). Indigenous peoples, referred to as campesino communities (Coastal and Andean Regions) and native communities (Amazonian region), are given legal recognition in the Constitution, which also recognises their autonomy, subject to national law, in relation to their organization, communal work, the free disposition of their territories, their economy and administration (Constitution of Peru, 1993, Article 89). Furthermore the Constitution entitles them to exercise judicial functions within their territories in accordance with their customary laws as long as they do not violate the fundamental rights of the person (Constitution of Peru, 1993, Article 149).

Article 149, of the Constitution sets out the elements of a system of 'special jurisdiction' for native and campesino communities, which may be summarised as:

1. Recognition of the jurisdictional functions of native and campesino communities' authorities.
2. The power of these authorities to exercise such functions within their territorial area
3. The right of these authorities to apply customary law
4. The requirements that this jurisdiction be exercised with due respect for the fundamental rights of the person
5. The competence of the legislature to define the forms of coordination between the indigenous special jurisdiction and the national judicial system (Tamayo Flores, 1998).

The recognition of customary law, in the Constitution of 1993 may be seen as an attempt to instil greater respect for the pluricultural and multiethnic nature of the State. The Constitution also, however, changed the relationship between the state and indigenous peoples from one of protection of communal rights to one of recognition of individual rights. This was part of a market economy philosophy which led to reclassification of the status of indigenous territories. In the 1979 Constitution, these were declared to be inalienable, immune from embargo, and impresciptible. However, the Constitution of 1993 no longer recognised indigenous lands as being inalienable and immune from embargo, and it allowed that impresciptibility of lands could be overridden where they were deemed to have been abandoned. This created the anomalous position where the Constitution, while recognizing Peru's obligation to protect the pluricultural and multiethnic nature of the State, at the same time removed the very guarantees to collective property upon which many indigenous peoples' cultures depend (Tamayo Flores, 1998).

In early 2008, the dangers apparent in this weakening of indigenous land rights became fully apparent with the adoption of a series of executive regulations which sought to reduce the percentage of community members whose vote was necessary to allow for sale of community-held land. They also provided for granting of rights on forested lands over which indigenous peoples have usufruct rights, opening the way for the granting of land rights for large scale commercial agricultural development. Following, extensive demonstrations by indigenous peoples, a number of these regulations were rescinded, but indigenous rights over traditional territories remain under threat.

3.2. Regulation of traditional knowledge in Peru

Development of relevant law and policy for protection of traditional knowledge has been the subject of intense national debate in Peru since the entry into force of the CBD in 1993. The national debate has been informed and influenced by a series of projects, programs and legislative developments at the national and regional level. This included the ICBG negotiations and agreements, regional negotiations leading to the adoption of Decision 391, and a national consultative process on traditional knowledge law.

Adoption of national regulations in this area requires political will to complement participatory processes and drafting processes for development of law and policy. In Peru this political will has not always been forthcoming and adoption of national law and policy has, in no small part, been due to the commitment and persistence of individuals in government agencies, NGOs and indigenous organizations who have promoted and facilitated debate of these issues. Adoption of legislation has also required, a preparedness of its promoters to take their opportunities where they arise, utilizing fortuitous events and a tendency of legislators towards political expediency, where appropriate. At times, this may require postponing the search for a perfect system of traditional knowledge protection at the outset, in order to get legislation on the books which may in time be modified to secure more holistic and sensitive protection of traditional knowledge.

Adoption of two significant measures in Peru, the national biodiversity law and Peru's traditional knowledge law, which have defined the scope of protection of traditional knowledge may, in part, be put down to such opportunism. Their importance is however not diminished by the nature of their adoption, although their impact may have been lessened by the failure to secure full and informed debate during their development and subsequent adoption by congress.

3.2.1 Development of biodiversity and traditional knowledge law and policy

Peru is considered to be a megadiverse country due to its extremely high level of biodiversity. It is estimated that Peru is home to over 4,000 medicinal plants and 130 native crop species (Ruiz, 2004). In addition to its tremendous biodiversity, there are 44 cultural and ethnic indigenous groups, located for the most part in the Andean and Amazonian regions of the country (Ruiz, 2004). Many of these ethnic and cultural groups have been recognized for their use of traditional knowledge in cultivating and conserving a wide variety of crops.

In July 1997, Peru adopted Law 26839, Law on Conservation and Sustainable Use of Biological Diversity. The law implements in part Decision 391 of the Andean community, recognising that indigenous, Afro-Peruvian and local communities have the right to control access to their traditional knowledge. The law recognised traditional knowledge to be the cultural patrimony of indigenous peoples.

Recognition of traditional knowledge as cultural patrimony of indigenous and local communities is of much significance. In the first place, it distinguishes patrimony of indigenous peoples from national patrimony, as a whole, thereby ensuring that rights over traditional knowledge are not presumed to vest in the state. Secondly, it recognizes the intergenerational and intra-generational nature of traditional knowledge. This implies a responsibility for indigenous peoples and local communities to manage traditional knowledge for the benefit of both present and future generations. Furthermore, it may be presumed that cultural patrimony should be subject to the same principles as those applying to national patrimony. In Peru, this means it should be inalienable, impresciptible and immune from embargo. However, as seen above these guarantees have been eroded under the 1993 Constitution.

3.2.2 Peruvian Law 27811

National concern to protect traditional knowledge was first demonstrated with the adoption of Legislative Decree 832 in April 1996. The Decree provided that a *sui generis* system of protection for TK may be established and, if appropriate, a registry of knowledge of native and campesino communities. This Decree established an important foundation for subsequent development of a comprehensive legal regime for protection of the collective rights of indigenous peoples over TK relating to biological diversity (Ruiz, 2006).

In August 2002 Peru adopted law 27811 for the Protection of the Collective Knowledge of Indigenous Peoples (Peruvian Law 27811, 2002). The law is declaratory in nature. This means it does not presume to grant rights over traditional knowledge but rather recognises that those rights spring not from any act of government but from the existence of the knowledge itself. Article 2, defines traditional knowledge as "the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity (Peruvian Law 27811, 2002)".

The declared objectives of the law are to: protect, preserve and develop collective knowledge; to ensure fair and equitable distribution of benefits derived from the use of collective knowledge; to use collective knowledge to benefit indigenous peoples and humankind; to assure that any use of collective knowledge requires the prior informed consent of indigenous peoples; to promote indigenous capacity to distribute collectively generated benefits; and finally, to prevent patents on inventions based on the collective knowledge of indigenous peoples without proper consent.

Law 27811 was influenced by and is, it has been claimed, based on the approach used by the ICBG agreements under which Aguaruna communities, using traditional decision-making processes, determined the conditions for use of their traditional knowledge for research and development activities (Ruiz et. al, 2004). The law requires prior informed consent from relevant custodians of traditional knowledge prior to use for scientific, industrial or commercial purposes. Where commercial use is intended parties are obliged to enter into a licence setting out the terms and conditions for use and minimum conditions on benefit sharing etc. The licence must comply with minimum standards set out in the law with regard to terms and conditions of access, use, and benefit sharing, including the payment of fees and royalties to indigenous communities (WIPO, 2000).

As with the national biodiversity law, traditional knowledge is recognized as cultural patrimony, with all the attendant intergenerational and intragenerational rights and responsibilities that signifies. The Law allows individual communities to negotiate for use of traditional knowledge with the condition that they notify other affected communities and seek their support for negotiations. Communities are individually free to enter into agreements for use of knowledge shared with other communities, but their agreement would not preclude other communities possessing the same resources from entering into a similar agreement (Ruiz, 2004). The law does not require consensus among communities for a negotiation to go ahead, which may potentially lead to conflicts. Resolution of tensions between the individual community rights to negotiate and the collective right of a people over their cultural patrimony may potentially be achieved by recourse to customary law. Law 27811 specifically provides that indigenous communities are entitled to resort to their own customary law and practice as a means for resolving disputes. There is no obligation, however, on any community to submit to customary law jurisdiction, other than the force of traditional authorities themselves and the result may be to hasten the demise of customary institutions where communities seek individual commercial gain. This issue will be returned to below in the case study of the ICBG Agreements.

The law gives powers to the Peruvian National Institute for the Defence of Competition and Intellectual Property (INDECOPI) to prevent the publication of material relating to traditional knowledge in breach of community rights. In essence, this amounts to recognizing traditional knowledge as a form of trade secret and attempting to protect it accordingly. An indigenous community in possession of collective traditional knowledge is to be protected against any unauthorized or unfair disclosure, acquisition or use of that knowledge, insofar as such traditional knowledge is not in the public domain. This protection extends to third parties having obtained the information under obligation of confidentiality (WIPO, 2000). In the case that community's rights to traditional knowledge are infringed; the law permits indigenous communities to take legal action to secure their rights with the burden of proof falling on the defendant to show their right to make use of traditional knowledge.

Benefits of agreements for use of traditional knowledge are to be shared not only with contracting indigenous communities but also with the wider indigenous community through an Indigenous Development Fund, managed by indigenous peoples. The Fund will receive a portion of benefits derived from bio-prospecting agreements, and a percentage of the profits obtained from inventions and technologies based on community traditional knowledge. The money is to be used toward the overall development of indigenous peoples by financing projects and activities (WIPO, 2000).

The regime establishes a national system of traditional knowledge registers, including a Public National Register; a Confidential National Register; and Local Registers, which are intended to provide both defensive and positive protection for traditional knowledge

(Ruiz, 2004). Defensive protection is to be achieved by helping to prevent the grant of bad patents by facilitating patent examiners in their search of prior art. Positive protection is achieved by the increased capacity of national authorities to protect registered traditional knowledge against misappropriation, as well as by facilitating the maintenance and transmission of traditional knowledge between generations. Under the law, INDECOPI is responsible for establishing both the national registers and with providing advice to local communities in establishing community registers, which are envisioned as local initiatives to document collective knowledge of each community which will be maintained by and for the benefit of the communities themselves (Ruiz, 2004). The role of community registers as a source of evidence of traditional knowledge rights is unclear as the national traditional knowledge law makes no provision for their recognition in legal proceedings at the national level. However, it is possible that both INDECOPI and the national courts may decide to recognize them as such.

During national debates on Law 27811, indigenous peoples demonstrated grave concerns that placing traditional knowledge in any register would lead to loss of control over access and increase the possibilities for unapproved and uncompensated use. Their concerns stem largely from fears that traditional knowledge will fall within the public domain resulting in the loss of rights to control its subsequent use and to share in benefits derived from such use. These concerns are well founded and a study prepared by the United Nations University Institute of Advanced Studies on the potential and limitations of registers and databases as a means for protecting traditional knowledge, concludes that '[s]trict application of the principle of the public domain to [traditional knowledge] may … lead to inequities for indigenous peoples. (Alexander et. al. 2003).

3.2.3 Traditional knowledge and the public domain

There is a widely and erroneous belief that the concept of the public domain is immutable and cannot be subject to reinterpretation. In fact, the concept and scope of the public domain is far from static and may vary from place to place and from time to time. Public domain is taken to refer to abstract materials considered to be 'public property', which is not owned or controlled by anyone (Wikipedia, 2008). What falls within the public domain is defined by reference to intellectual property legislation which defines copyright, trademarks, patents, etc. which are the subject of property rights. Identification of public domain material depends upon the status of intellectual property legislation nationally and internationally. As a result, public domain materials may differ from country to country. Material in the public domain in one country, may not be public domain in another. Following such an approach, identification of traditional knowledge falling within the public domain would most appropriately be done by reference to legislation which established protection of traditional knowledge.

As there is little legislation existing in this area, definition of traditional knowledge in the public domain falls to be interpreted under existing intellectual property rights legislation, which is widely recognised as being inadequate to protect traditional knowledge. Reinterpretation of the applicability of the concept of the public domain to traditional knowledge will therefore be necessary to prevent the effective negation of rights and obligations relating to traditional knowledge as set out international human rights law and in the customary laws and practice of indigenous peoples and local communities. The failure of international and national law to exclude from the public domain traditional knowledge, the subject of ancestral rights based on customary law serves to legitimise and facilitate its expropriation in violation of the rights of authors as set out in the International Covenant on Economic, Social and Cultural Rights and the wider set of rights over traditional knowledge recognized in the UN Declaration on the rights of Indigenous Peoples.

The Peruvian law adopts an interesting position regarding traditional knowledge in the public domain[43]. In the first place, it recognizes that indigenous peoples are entitled to be compensated for its use, and proposes a form of knowledge tax be imposed on all commercial sales of products, directly or indirectly utilizing traditional knowledge. This is an important precedent, in essence supporting the proposition that the rights of indigenous peoples over their traditional knowledge are not necessarily exhausted by the fact that such knowledge has made its way into the public domain (Dutfield, 2000). The law does not, however, recognize any right for indigenous peoples to control or otherwise regulate or prevent the use of their knowledge if it has fallen into the public domain. The result has been to define rights over knowledge on the basis of where the knowledge is found not on the basis of how it got there.

A more ambitious attempt to redefine the ambit of application of the public domain to traditional knowledge has been set down in draft model law on protection of traditional knowledge relating to biodiversity in Pacific Island countries, prepared for consideration by member states of the South Pacific

[43] Where something is held to be in the public domain, it is considered under law to be free for use by any person without prior informed consent and without the obligation to make any payment for its use. Ideas, products, processes etc. which may be likened to knowledge, innovations and practices are considered to fall within the public domain where they have been published or have appeared in the media, such as press, radio or films, or they have been widely commercialised. TK may fall into the public domain, for example through the publication of scientific reports, compendiums of traditional medicine or documentaries of traditional farming practices.

Forum. This draft took as its fundament that what is important is not where traditional knowledge is found but how it came to be there. Article 3 of the draft model law defines its application as including traditional ecological knowledge in the public domain. In determining the extent to which the Act should be applied to the public domain it says this '… will depend upon an assessment of the following factors:

> (a) whether there was an intention by the owner to share the knowledge, and if so the purpose for sharing;
>
> (b) whether permission was given to publicise or disseminate the knowledge;
>
> (c) whether the owner knew that the knowledge might be used for commercial ends;
>
> (d) whether the owner understood that sharing the knowledge with outsiders would result in a loss of control over its subsequent use;
>
> (e) the extent to which unauthorised use of the knowledge may undermine the spiritual and cultural integrity of the owners.'[44]

Both the Peruvian traditional knowledge law and the South Pacific Model Law demonstrate a willingness to challenge the notion of an immutable principle of the public domain in order to bring greater equity to traditional knowledge regulation. These efforts will need to be replicated at the international level otherwise the public domain will be used as a means to legitimize past and future expropriation of traditional knowledge.

3.2.4 Peru and international regulation of traditional knowledge

Peru was amongst the first countries to ratify the International Labour Organization Convention 169, which in accordance with the Constitution became part of national law. Convention 169 has been relied upon by indigenous peoples in Peru to defend their territorial and resource rights, and in 2008 was used to bring pressure upon the national authorities to repeal executive orders which would have affected their rights over forest lands in particular. Peru also voted in favour of UNDRIP and is also host to an office established to implement UNESCO's convention on intangible cultural heritage.

Peru was one of the first countries to ratify the CBD, and has played an active role in the promotion and implementation of its provisions. This has included the adoption of national law and policy on ABS and traditional knowledge as well as regional policy as part of the Andean Community. It has also involved active participation in ABS and traditional knowledge related debates at COP, WG ABS and WG 8(j), representation on the CBD's Expert Panel on ABS, co-chairing of CBD negotiations leading to adoption of the Bonn Guidelines, hosting of the CBD Technical Group of Experts on Certificates of Origin in January 2007, and chairing of the Group of Technical Experts on Compliance.

Peru has been actively represented at the IGC by government, NGO and indigenous organizations. Case studies of community management of traditional knowledge [45]; national measures to protect traditional knowledge, including sui generis traditional knowledge legislation; and the work and actions of the national biopiracy commission have been fed into the process. WIPO visited Peru as part of its fact finding missions and included significant coverage of the novel provisions of the ICBG Agreements in its final report. Peru has submitted a series of reports prepared by the INDECOPI, to the IGC, regarding instances of potential and actual biopiracy involving Peruvian genetic resources[46]. Peru has also made specific proposals at WIPO on the issue of disclosure of origin, which is promoted as a means to ensure that intellectual property regimes help regulate use and impede misappropriation of genetic resources and traditional knowledge.

The idea for a disclosure of origin system was developed in Peru in the mid 1990's (Tobin, 1997). Three factors influenced the construction of the proposal. First, although the CBD had entered into force, there was still a lack of any international law to prevent misappropriation of traditional knowledge. Second, a regional ABS regime, under development at the time by Andean countries, was seen as incapable of ensuring compliance by users once resources left their jurisdiction. Third, the negotiation of the Peruvian ICBG agreements, demonstrated the limitations of contracts to protect against third party misappropriation. In the case of Peru, disclosure requirements were originally incorporated into national regulations implementing the Andean regime for

[44] See Model Law For The Protection of Traditional Ecological Knowledge, Innovations And Practices, Downloaded 22 January 2009 from http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf

[45] Representatives of Peru's indigenous peoples have presented the case of the Potato Park to the IGG.

[46] Peru has submitted a series of reports on biopiracy related issues to the IGC, these include Peru (2003) *Patents referring to Lepidium Meyenii (Maca): Responses of Peru*,, WIPO/GRTKF/IC/5, submitted to the 5th IGC; Peru (2005a) Patent System and the Fight against Biopiracy: The Peruvian Experience, WIPO/GRTKF/IC/8/12, which sets out the results of the search for potential cases of biopiracy of six resources of Peruvian origin (hercampuri, camu camu, yacón, caigua, sacha inchi and chancapiedra) that was made using the databases accessible through the web sites of the United States Patent and Trademark Office, the European Patent Office and the Japan Patent Office, submitted to the 8th IGC; and, Peru (2005b) *Analysis of Potential Cases of Biopiracy: The Case of Camu Camu (Myrciaria Dubia)* WIPO/GRTKF/IC/9/10, submitted to the 9th IGC, which describes the progress made in identifying and analysing patent applications and patents concerning inventions obtained or developed through the use of camu camu (Myrciaria dubia).

protection of the rights of breeders of new plant varieties, by Supreme Decree 008-06-ITINCI (1996)[47].

3.2.5 The US- Peruvian Free Trade Agreement – Diluting traditional knowledge rights

In January 2009, Peru entered into a Free Trade Agreement with the U.S. As part of the process, Peru has adopted law 29316 (Peru, 2009) which includes a number of provisions relating to implementation of Decision 486 of the Andean Community and the national *sui generis* traditional knowledge law. These provisions have led to claims that rights over genetic resources and traditional knowledge in Peru are under threat to the detriment of indigenous peoples and local communities. Amongst the most contentious issues in Law 29316, are its failure to include isolates such as genes and germplasm in the list of exclusions from the definition of inventions; to provide for annulment of patents granted using traditional knowledge for which evidence of a licence or authorization has not been provided; and to secure indigenous peoples' and local communities' rights to control access to and use of traditional knowledge in the public domain.

The Andean Community has in Decision 486 excluded from the definition of inventions "… Any living thing, either complete or partial, as found in nature, natural biological processes, and biological material, as existing in nature, or able to be separated, including the genome or germplasm of any living thing" (Article 15 (b)). It does provide, however, for the patenting of microorganisms "… until other measures are adopted as a result of the examination provided for in TRIPS article 27 3(b)" (Second Transitory Provision, Decision 486). In contrast Article 25 B of Law 29316 only excludes from the definition of inventions "… (b) Any living thing, either complete or partial, as found in nature, (c) biological material, either complete or partial, found in nature, (d) natural biological processes." By failing to specifically refer to biological material able to be separated, including the genome and germplasm, Law 29316 may, it has been argued, have opened the door for patenting of Peru's genetic wealth as microorganisms - a term which has been very widely interpreted by patenting authorities in some jurisdictions. This argument has been countered by claims that the exclusion of biological material, either complete or partial, as found in nature would exclude genes, germplasm and other naturally occurring isolates.

The effect of Law 29316 on patenting of the genome and germplasm and other isolates, is highly ambiguous. Decision 486 is directly applicable in Peru and it is questionable whether Law 29316 has the power or the effect of modifying those areas excluded from the definition of inventions under that Decision. Peru may therefore be obliged to implement Law 29316 as if the provisions of Decision 486 had been faithfully repeated in its text. The resultant lack of legal certainty, serves no-ones interests and INDECOPI, in its role as Peru's patent authority, may be advised to issue an interpretative statement clarifying how it will approach any applications for patenting of genes or germplasm. This, it is proposed, should indicate that applications for patenting of isolates, including genes and germplasm, taken from biological material for which a country of the Andean Community is the country of origin will not be treated as inventions.

With regard to the issue of prior informed consent for the use of genetic resources and traditional knowledge, Law 29316 does not in effect modify the obligations created under Decision 486. Although, the new law defines conditions for patentability in traditional terms, the relevant provisions in decision 486 regarding the processing of patent applications remain in force in Peru. These include obligations to provide copies of access contracts for use of genetic resources and of licences or authorization for use of traditional knowledge for which a member state of the Andean Community is a country of origin. These provisions do add to the substantive provisions for granting of patents but are rather formal requirements which must be complied with as a precondition for the processing of patent applications. Where Law 29316 does seek to modify the provisions of Decision 486 is in relation to the remedies in the event of the grant of a patent. Article 75 (h) of Decision 486 empowers national authorities to either ex officio or at the request of a party at any time, "when pertinent", annul patents where a copy of an access agreement for use of genetic resources and/or a licence or authorization for access to and use of traditional knowledge, have not been provided (Ruiz, 2006). Article 8 of Law 29316, however, states that annulment can only occur where the reason for its annulment could have justified a refusal to grant the patent in the first place. This would effectively exclude failure to provide relevant access contracts or licences for use of genetic resources or traditional knowledge, which as noted above are not substantive requirements for the grant of a patent. Remedies in Law 29316 focus primarily on compensation involving monetary and non-monetary benefits, which may not be adequate to secure rights over traditional knowledge, especially in cases where knowledge has important cultural or spiritual significance. Interestingly Law 29316 specifically highlights the possibility of securing compulsory licences for use of protected inventions based on traditional knowledge. As stated above, it is unclear whether Peru is empowered to adopt national legislation modifying the applicability of provisions of Decision 486 other than in those cases specifically left to national jurisdiction, which is not the case with provisions on annulment of patents. However, even if Law 29316 is deemed valid on this issue, this does not

[47] Peru (2007) *Combating Biopiracy – The Peruvian Experience Dated* 13 August 2007, Communication from Peru to the WTO, Ip/C/W/493.

mean that patents involving traditional knowledge cannot be annulled.

Article 8 of Law 29316 provides that patents may be annulled where there has been fraud, misrepresentation, or inequitable conduct. Interpretation of what amounts to fraud, misrepresentation or inequitable conduct, may reasonably be presumed to include cases of biopiracy relating to genetic resources or traditional knowledge. This might arise, for instance, where prior informed consent for use of genetic resources or traditional knowledge was not obtained or was obtained as the result of coercion, misrepresentation or bribery, or where benefit sharing was patently inequitable. It may also potentially be utilized to annul patents over inventions utilizing sacred or other sensitive traditional knowledge whose development and use would have significant cultural or religious impacts on its custodians. This would be most likely to occur where the nature of the intended or potential use and impacts were not fully disclosed to traditional knowledge custodians at the time consent for access was given.

It is unclear from Law 29316 what nexus may be required between the applicant for the patent and the actor responsible, for the fraud, misrepresentation or inequitable conduct, in order to secure the annulment of a patent. This is a matter of some importance affecting not only traditional knowledge custodians but also commercial users of traditional knowledge. Law 29316 has, in its attempts to ease the requirements on patenting of inventions making use of traditional knowledge and genetic resources, increased rather than decreased legal uncertainty; which serves the interest neither of custodians or users of traditional knowledge. On the one hand, custodians will have less confidence about the ability of national and international law to protect their rights, leading to reduced openness to provide access to traditional knowledge; while, on the other hand, users will have less certainty that their investments will be secured against future challenges to patent rights. Considering the ambiguities caused by Law 29316, those wishing to use genetic resources or traditional knowledge for which a member country of the Andean Community is a country of origin, are advised to ensure that it has been legally obtained in accordance with national, Andean, and international law. The only means to effectively ensure this, will be to seek evidence of a contract for access to genetic resources and/or that a licence or authorization for access to and use of traditional knowledge has been obtained as Decision 486 requires.

While the failure to include provisions reflecting the annulment provisions of Decision 486 does not exclude the possibility for patents to be challenged, they do place an undue burden of proof regarding the right to use traditional knowledge on those least likely to be able to bear it. As discussed earlier, Peru has been one of the principal proponents of international measures for modification of the TRIPS Agreement to require disclosure of origin in intellectual property rights regimes. These proposals are based in part on the premise that the burden of proof regarding the right to use traditional knowledge should fall on those wishing to use it (Tobin, 1997) rather than on indigenous peoples and local communities. This is crucial if traditional knowledge custodians, who will rarely have the capacity and resources to identify breaches of their rights, are to commence and maintain costly actions seeking revocation of patents, and to enforce subsequent judgements are to attain access to justice. Implementation of Law 29316 should, therefore, be carried out in a manner which is supportive of the country's obligations to secure the human rights of indigenous peoples and local communities, including their rights over traditional knowledge. It will also need to consider the scope for interpretation of obligations, rights and exclusions to patentability under Law 29316, which is congruent with international, regional and national traditional knowledge law and policy.

As discussed earlier, the legal status of traditional knowledge in the public domain is still far from resolved. Peru's *sui generis* law recognises a right for custodians to share in benefits derived from use of their traditional knowledge even when it has fallen into the public domain. This is to be achieved by requiring payment of a percentage of benefits into an Indigenous Fund - this has not been affected by Law 29316. Peru's *sui generis* traditional knowledge law is not, however, clear as to whether prior informed consent is required for the use of traditional knowledge in the public domain. Law 29316 addresses this issue by specifically excluding use of traditional knowledge in the public domain from requirements for provision of copy of a licence or authorization for its use in patent applications. This may not in effect have modified in any meaningful fashion the obligations of users of traditional knowledge in the public domain vis-à-vis the national *sui generis* law. However, the articulation of this exclusion does greatly limit their possibilities to challenge use of traditional knowledge in the public domain on the grounds of ancestral rights, and in the light of emerging human rights law in this area. It also pre-empts ongoing negotiations in WIPO, CBD and WTO which are addressing rights over traditional knowledge including knowledge which has fallen into the public domain. As such it sets a lamentable precedent in limiting indigenous peoples' and local communities' rights to control access to and use of traditional knowledge which has fallen into the public domain, the result of which may be to legitimise the historic expropriation of indigenous peoples' traditional knowledge (Tobin, 2001).

Despite the specific exclusion of obligations to provide evidence of prior informed consent for use of traditional knowledge in the public domain in Law 29316, this does not necessarily mean that such use is free from any challenge. As noted above, Law 29316 entitles national authorities to annul a patent in the event of fraud, misrepresentation or inequitable

conduct. If traditional knowledge has fallen into the public domain as the result of such fraud, etc., indigenous peoples and local communities may, arguably, be entitled to challenge the grant of a patent. The national authorities would not appear to be constrained by the Free Trade Agreement with the U.S. from requiring the user to show that they had taken all reasonable steps to ensure that traditional knowledge used in development of a patented invention has been obtained with the prior informed consent of is traditional custodians. Failure to show that reasonable steps had been taken, could then be used as the basis for annulment of an invention which is based on traditional knowledge which directly or indirectly came into the public domain following fraud, misrepresentation or inequitable conduct. Users of traditional knowledge should, therefore, exercise caution in using traditional knowledge from the public domain and, when in any doubt, ensure that evidence of prior informed consent for its use and disclosure into the public domain is sought. Reliance on unsupported assurances of researchers, independent bioprospectors, etc., may prove costly if patent rights come under challenge due to improper access to and disclosure of traditional knowledge into the public domain.

Despite Peru having placed the issue of protection of national sovereign rights over genetic resources and the rights of indigenous and local communities over their traditional knowledge high on the agenda of the negotiations for the Free Trade Agreement at the outset, the final text provides only passing reference to these issues. Sovereignty over genetic resources is not referenced directly but may be inferred from the objectives of the Free Trade Agreement with regard to the environment which recognize that each Party has sovereign rights and responsibilities with respect to its natural resources. With regard to traditional knowledge, Article 18.11 (3) of the Agreement states that "The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity." These are a poor reflection of Peru's original proposals in this area, and Peru will need to give much attention to how it may ensure that the Agreement does not undermine the important advances made at the national level to protect traditional knowledge rights and its credibility as a champion of traditional knowledge rights on the international stage.

When seen in the light of the Free Trade Agreement's requirements for Peru to adopt TRIPS plus intellectual property rights protection, which will primarily benefit US industry, the failure to secure even minimal recognition of rights over traditional knowledge demonstrates clear discrimination against indigenous peoples, which in itself may amount to a breach of their human rights. Furthermore, the Free Trade Agreement has led to adoption by Peru of a series of legislative measures which threaten the lands and traditional territories of indigenous peoples and local communities - lands and territories whose inviolability is crucial for maintaining traditional knowledge systems and the cultures which have nurtured and developed them through the centuries. These laws have been met with fierce resistance by indigenous peoples, who have taken to the streets and forests to protect their hard won and still limited land and resource rights. Calling for effective recognition of their human rights as set down in Convention 169, indigenous peoples' opposition has led to the overturning of some of these measures. However, the threat to indigenous peoples' lands continues including measures designed to open up large tracts of Peru's Amazonian territories to large scale commercial agriculture. The Peruvian experience, cautions against seeking protection of traditional knowledge through trade measures alone, and shows the need for adoption of a human rights approach to international, regional and national protection of traditional knowledge.

3.2.6 Peruvian and other models for traditional knowledge law and policy

As much for its limitations as well as its successes, the Peruvian experience has provided important precedents to inform the international debate on traditional knowledge protection, and practical lessons for legislative development in other countries. Similarly, the Peruvian process was influenced and informed by emerging law and practice in other countries of the Andean region and from around the world. A detailed analysis of this national and regional legislation is beyond the scope of the present study; however, a brief overview of a number of important cases will help here to demonstrate some common principles which are emerging as well as a diversity of mechanisms and approaches being applied to traditional knowledge protection. A representative selection of articles on traditional knowledge protection drawn from national laws and legislative proposals is included in Annex I

Common principles which may be identified from examination of national and regional laws and draft traditional knowledge legislation include the following:

- Access to traditional knowledge requires PIC of indigenous peoples and local communities,
- traditional knowledge is inalienable, being held for the benefit of present and future generations,
- traditional knowledge laws do not affect the rights of indigenous peoples or local communities to continue with the traditional use, sharing and sale of traditional knowledge and related resources and products (e.g. traditional medicinal products),
- traditional knowledge laws are declaratory in nature; that means indigenous peoples' rights over their traditional knowledge stem from the existence of the knowledge itself and not from any act of government,

- where registers of traditional knowledge exist they may serve to help protect traditional knowledge but registration is not a requirement for recognition of rights,
- commercial use of traditional knowledge requires written contracts,
- traditional knowledge custodians are entitled to deny applications for rights to use their knowledge,
- rights over traditional knowledge are not necessarily exhausted by its existence in the public domain,
- Indigenous peoples' and local communities' customary laws have an important role to play in traditional knowledge regulation.

Although it is difficult to assess to what extent the development and adoption of the Peruvian law was influenced by and influenced action in other countries, it is notable that it incorporates these same core principles. The existence of a widely accepted set of core principles, may be taken to demonstrate a growing State practice, which should be recognised by and prove influential international efforts to develop law and policy in this area.

Although, common purpose can be found among legislative models adopted around the world, there is also much variance in the manner in which rights over traditional knowledge is approached. Bangladesh has prepared draft stand alone legislation for protection of traditional knowledge, which recognises sovereign rights over all intellectual and cultural practices related to biological and genetic resources, while providing recognition for the "original rights" of indigenous peoples and local communities over traditional knowledge directly linked to specific knowledge through their livelihood practices.[48] Costa Rica's national biodiversity law recognises *sui generis* community intellectual rights of indigenous peoples and local communities over their traditional knowledge, innovations and practices related to biodiversity, and establishes the basis for national projects to support traditional breeding practices and other elements of traditional knowledge (Costa Rica, Law 7788, 1998). India has amended its intellectual property legislation to impede the patenting of products which are considered obvious due to the state of the art of existing traditional knowledge. The Philippines has incorporated protection of rights over traditional knowledge within national legislation on indigenous peoples' rights, including rights over ancestral lands and natural resources.[49] In contrast with developing country legislation, Portugal, the first developed country to adopt traditional knowledge regulations, establishes a system of protection based upon principles of intellectual property law, making protection contingent on registration of knowledge and limiting protection where traditional knowledge is the subject of pre-existing rights (Portugal's Decree Law, 118, 2002).

At the regional level, the Organization of African Unity has adopted a model law for member states, which sets out a clear definition of Community Intellectual Rights, prohibits patenting of life forms and requires that records of collected traditional knowledge be given to local communities.[50] The South Pacific draft model law provides for a system of national and regional registers of traditional knowledge and seeks to distinguish between commercial and scientific use of resources.[51] Excerpts from Regional Model Laws concerning protection of traditional knowledge are included in Annex II.

Consideration of the challenges opportunities and impediments faced in the development adoption and implementation of national and regional measures for traditional knowledge protection provides a clear panorama of the wide range of issues which need to be addressed in development of traditional knowledge law and policy. However, existing experiences do not provide a definitive answer on how to recognise and incorporate customary law in any system for protection of traditional knowledge, an issue which is now at the centre of debates on compliance measures for an ABS regime.[52]

[48] (Draft) Biodiversity and Community Knowledge Protection Act of Bangladesh, 29 September 1998, Downloaded, 2 February 2009, from http://www.grain.org/docs/bangladesh-comrights-1998-en.pdf

[49] Philippines Republic Act No. 8371. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/ Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing, Mechanisms, Appropriating Funds There of, and for other Purposes, 28 July 1997, Downloaded 2 February 2009, from http://www.chanrobles.com/republicactno 8371.htm

[50] African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, Downloaded, 2 February 2009, from http://www.opbw.org/nat_imp/model_laws/oau-model-law.pdf

[51] Draft Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices. Downloaded, 2 February 2009 from, http://www.grain.org/brl_files/brl-model-law-pacific-en.pdf

[52] For discussion of customary law's role in securing compliance with ABS regulations see, Alexander et al. (2009)

Section IV: Case studies: ICBG and the Potato Park

The knowledge of indigenous and local communities has long been sought after by a range of collectors, including missionaries, anthropologists, and ethno-biologists. Only rarely have such communities been fully informed of the intended or potential future uses of such knowledge and even less frequently, invited to enter into negotiation of agreements for its use. With the entry into force of the CBD, this trend started to change and a number of high profile agreements have since been negotiated with the informed participation of indigenous peoples. Furthermore, some communities and peoples have established their own research protocols to regulate access to and use of their knowledge. These are still, however, the exception to the rule. This section examines two case studies where indigenous peoples have taken proactive measures with a view to protection of their rights and interests associated with traditional knowledge and biological resources. This has involved the use of a mixture of customary governance mechanisms and innovative new legal approaches designed by indigenous peoples and local communities.

The first study examines the negotiation of a bioprospecting agreement by indigenous communities of the Aguaruna people of the northern Peruvian Amazon negotiated within the framework of the International Collaborative Biodiversity Group (ICBG) Program.[53] The ICBG Program has sponsored collaborative bio-prospecting involving a range of academic, commercial and community partners, around the world, with a view to promoting collection of genetic resources traditionally used by indigenous peoples for the development of new medicinal products. The program had previously established projects involving traditional knowledge in Nigeria and Suriname; however, the project in Peru was the first in which indigenous peoples and their representatives were directly involved in the negotiation processes.

The second case study examines the experience of the Potato Park, an agricultural collective located near Cuzco. The Park was established by six Quechua communities, in order to protect their traditional genetic resources from threats of biopiracy. The communities, who manage the Park themselves, are currently in the process of developing *sui generis* governance mechanisms based on customary law to regulate access to and use of their genetic resources and traditional knowledge. They have also utilized customary law as the basis for contractual arrangements for repatriation of native crop varieties, and for the development of mechanism to oversee any benefit sharing between and within communities. This case study examines the compatibility of the Peruvian Law for the Protection of Traditional Knowledge with the customary governance mechanisms of the Potato Park.

4.1 Contracting into custom: The Case of the Peruvian ICBG Project

The Peru ICBG project was one of the first experiences in which indigenous peoples effectively negotiated on their own behalf an international bioprospecting agreement. In the process, it established a number of important precedents for bioprospecting activities involving traditional knowledge. This experience served as a model for the development of national *sui generis* legislation for TK protection in Peru (Ruiz, 2004).

The Peru ICBG Project involved a number of US and Peruvian research institutions including Washington University, the Peruvian University of Cayetano Heredia and the Natural History Museum of San Marcos University. It also included Searle & Co., a US pharmaceutical company, which at that time was a subsidiary of the Monsanto Corporation. From 1994 to 1996, representatives of the ICBG program partners were involved in negotiations with local organizations representing Aguaruna communities, and regional and national indigenous organizations. This ultimately led to the signing of a series of interrelated agreements for use of biological resources and traditional knowledge in the development of new pharmaceutical products.

Both the process and the final outcome of negotiations, provide an opportunity to consider the extent to which customary law played a role in protection of rights of the Aguarunas over their traditional knowledge. The issue of customary law and how it applies to the ICBG program in Peru is examined under three main headings: Representative organizations; prior informed consent; and the ICBG contracts. A final subsection considers the lessons learned and their significance for national traditional knowledge regulation and future bioprospecting agreements involving indigenous peoples.

[53] For a fuller description of the ICBG Program see, Lewis W. and V. Ramani, (2007) Ethics and Practice in Ethnobiology: Analysis of the International Collaborative Biodiversity Project in Peru, In: McManis, C. (2007) *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge*, Earthscan, Rosenthal, J. P. (1997) *The International Cooperative Biodiversity Groups (ICBG) Program, A U.S. Government funded effort to promote equitable sharing of biodiversity benefits in the context of integrated research and development toward drug discovery, biodiversity conservation and economic development. A Benefit-sharing case study for the Conference of Parties to Convention on Biological Diversity.* Downloaded from *http://www.cbd.int/doc/case-studies/abs/cs-abs-icbg.pdf*, December 8, 2008. ICBG (1997) *Report of a Special Panel of Experts on the International Cooperative Biodiversity Groups (ICBG),* Report Release Date: August 15, 1997, Program Review Meeting: Bethesda, Maryland - February 27-28, 1997, downloaded from *http://www.icbg.org/pub/documents/finalreport_19970815.pd,* December 8, 2008.

4.1.1 Community representation

The Aguarunas (Awajun) are part of the Jivaro linguistic family who are reputed for their resilience and ability to maintain their cultural and territorial integrity, having successfully resisted colonization by the Incas, as well as the encroachment of religious organizations and sustained periods of pressure from external forces including Spanish conquistadores. For centuries the Aguaruna peoples maintained this integrity without a centralized authority, remaining grouped mainly by family. In the 1970s, however, in response to increased threats to their way of life, the Aguaruna began to establish new political organizations to defend themselves (Wikipedia, 2008). These organizations significantly changed Aguaruna internal governance structures with the creation of new political bases for indigenous peoples of the region. By 2002, there were 13 distinct indigenous organizations - working at the local or regional level - representing Aguaruna communities. The majority of the 187 individually titled Aguaruna communities in Peru are affiliated with local Aguaruna-run organizations, or in some cases regional organizations which include other Amazonian ethnic groups (e.g. the Huambisa and Chayahuita) (Greene, 2004). The most influential representative organizations established during this period were the Organización Central de Comunidades Aguarunas del Alto Marañon (OCCAAM) founded in 1975, and the Consejo Aguaruna y Huambisa (CAH) an organization founded in 1977. Both of these organisations played a central role in the ICBG negotiation process.

The ICBG negotiations with Aguaruna organizations may be separated into two distinct phases. The first set of negotiations involved ICBG program partners and the Consejo Aguaruna y Huambisa which, at that time, represented a majority of Aguaruna communities. These negotiations were terminated in early 1995, amidst claims by the Consejo Aguaruna y Huambisa of biopiracy and lack of good faith by Washington University - claims which were disputed by Washington University.

In late 1995, the ICBG program partners entered into a new set of negotiations with three local federations representing Aguaruna communities not affiliated to the Consejo Aguaruna y Huambisa. These included OCCAAM, the Federación de Comunidades Aguarunas del Río Dominguza (FAD), the Federación de Comunidades Nativas del Río Nieva (FECONARIN) and their national representative organization, the Confederación de Nacionalidades Amazónicas del Peruana (CONAP) (hereafter referred to collectively as the "Collaborating Organizations") (Greene, 2004). These organisations were later joined by the Organización Aguaruna Alto Mayo (OAAM). In these latter negotiations, the Collaborating Organizations secured independent legal advice from the Peruvian Environmental Law Society (SPDA).

At the date of commencement of negotiations, the CBD had been signed and ratified by Peru and was part of national law, although no implementing ABS or traditional knowledge law had been adopted. Negotiations were, however, ongoing in the Andean Community to develop regional ABS legislation, and there was a vibrant national debate on ABS and traditional knowledge issues. Immediately prior to the completion of the negotiations the Andean community adopted Decision 391 establishing a regional ABS regime. Throughout the ICBG negotiations, the government played only a very peripheral role in the process, in effect leaving the issue to the Aguarunas and the contracting ICBG parties.

4.1.2 Prior informed consent

Despite the lack of national legislation on ABS or traditional knowledge legislation at the time of the ICBG negotiations, these were influenced by the CBD's provisions on traditional knowledge. The process was also influenced by the negotiations for Andean Community Decision 391, which provided that access to traditional knowledge requires the PIC of indigenous communities. The parties accepted from the outset that PIC was a prerequisite for any agreement to collect and use traditional knowledge and/or collect resources on indigenous people's lands. There was, however, no defined procedure for seeking PIC. In the absence of national regulations on this issue, it was left to the parties and customary law to define the modalities for seeking PIC.

As there was no unified decision making structure amongst Aguarunas, the question of who was entitled to negotiate on their behalf was, by and large, decided on the basis of the extent to which the negotiating parties were deemed to be representative of a significant sector of Aguarunas. In the first set of negotiations this was less problematic, as the Consejo Aguaruna Y Huambisa was (at the time) the most widely representative of the Aguaruna people as a whole. However, when these negotiations collapsed and Washington University wished to enter into a new set of negotiations with CONAP and the local Participating Indigenous Organizations, one of the first questions requiring clarification was the level to which these organizations represented a significant sector of Aguaruna communities, and the extent to which these communities would support the ICBG project.

To ensure the negotiations had local backing, the Collaborating Organisations requested that the ICBG program fund a consultative meeting with community representatives in the Aguaruna heartland. This led to a meeting in the form of an IPAAMAMU, held in Santa Maria de Nieva in the northern Peruvian Amazon 1995. An IPAAMAMU has been described as the maximum instance of consultation and decision making amongst the Jivaro people, being based upon traditional means employed by the Aguaruna and Huambisa, to build unity and maintain fraternal relationships in the manner

of their ancestors (Sarasara, n.d.). The IPAAMAMU brought together more than 80 representatives of 60 Aguaruna communities - as well as representatives of some Huambisa communities - to hear the proposal from the ICBG parties, in order to determine whether or not to go forward with the negotiations. The extent to which the IPAAMAMU meeting truly reflected traditional decision-making authority and practice amongst the Aguarunas is unclear. However, by harnessing a traditional structure for seeking good community relations and deciding upon common activities, the collaborating indigenous organizations sought to apply an element of customary law to present day decision making needs. The result was to build a bridge between traditional authority and new collective decision-making practices.

Although the IPAAMAMU took the form of a consultative meeting with the participation of the ICBG partners and legal advisers from CONAP and SPDA, all non-Aguaruna or Huambisa participants were asked at the end to withdraw, to allow for a closed discussion. Based upon these deliberations, it was agreed that the negotiation of the ICBG agreements should continue, a decision which was recorded in a declaration of the meeting. The declaration specifically placed responsibility for the negotiation in the hands of CONAP, its in-house legal adviser, and the legal adviser from SDPA.

The ICBG negotiations culminated in the signing of a series of agreements in 1996. Collections of biological resources were to be made only on the lands of communities affiliated with the Collaborating Organizations, and then only after the community itself had given consent for collection. Collection of traditional knowledge was only allowed from members of such affiliated communities and then only after approval by the community and subject to signing of a PIC form by the individual providing traditional knowledge. The agreements also established a detailed code of conduct for collectors. The code specifically recognises the rights of Collaborating Organizations and communities to, among other things, exclude any individual(s) or institution(s) guilty of a breach the code from participating in collection activities. (See Box 5)

Box 5 ICBG - Agreed Code of Conduct

The Parties to the Biological Collection Agreement agreed to practice guidelines of conduct and ethics associated with the collection of biological material and ethnobotanical information, and the recognition of intellectual property (IP). The following items in the agreed code of conduct are noteworthy:

- Collaborate with Aguaruna organizations, communities, and individuals, as well as others to develop multilingual and multicultural educational and training programs and other projects needed to enhance the cultural and linguistic recognition of the Aguaruna People and to improve the quality of life in Collaborating Communities.
- Collaborate in projects of conservation in order to maintain the biodiversity of the ecosystem.
- Develop programs of economic value at community and regional levels by restoring and enhancing economically significant plants and by other means.
- Take a socially responsible approach in their associations with the Aguaruna People, including a full feedback of scientific and other findings and results.
- Help secure the recognition of traditional indigenous knowledge as inventive and intellectual, and, therefore, worthy of protection in all legal, ethical, and professional frameworks.
- Respect the right of privacy of informants and the confidentiality of information received.
- Respect local social values, traditions, and customary law and practice among the Aguaruna People when residing in their communities and at other times.
- Not deplete populations of biological material nor collect species suspected of being rare or endangered.
- Collect only the requisite amount of biological material needed for making plant and animal vouchers and extracting plant collections.
- Exhibit particular sensitivity in collecting of material used by the informants, particularly when cultivated in home gardens and often in limited supply.
- Be respectful of traditional Aguaruna medicinal information and practice, mindful of potentially striking differences between Aguaruna medicine and western medicine.
- Collaborating Organizations and Communities are entitled to seek exclusion from collection activities of any individual or institution that commits a serious or fundamental breach of the code.
- Be respectful of the taboos and spiritual aspects of the Aguaruna People with regard to genetic resources and know-how.

- Be respectful when collecting information regarding the treatment of women, particularly when women healers do not wish to disclose information to men. In this regard, such information shall only be provided to ICBG women investigators.
- All information collected regarding the practices or innovations of the Aguaruna People, relevant to the means for the preparation of compounds, infusions, or poultices, etc., shall not be disclosed to third parties, nor utilized for the development of any product without the prior consent of the Collaborating Organizations.
- The investigators shall maintain a closed access database of the knowledge, innovations, and practices of Aguaruna Peoples collected during the course of the ICBG Project. Access to the database shall be on a need-to-know basis and shall be restricted to that necessary in order to achieve effective realization of the project's ends.

Source: WIPO (1999)

Both prior informed consent procedures and the code of conduct provided opportunities for the participating Aguaruna communities to employ customary law in order to govern access to resources on their lands as well as to traditional knowledge. Consent from indigenous communities, was required at three levels, first by participating organizations, secondly from communities affiliated to the participating organizations and thirdly from those individual members of consenting communities who provided traditional knowledge. (See Box 6)

Box 6 Prior informed consent procedures under the Peruvian ICBG Agreements.

Communities were informed by an indigenous project coordinator on a variety of issues including:

- What the project was about in some detail: collecting, research, and what might be produced
- What rights the people would have and how their knowledge would be protected.
- The concept of informed consent
- The benefits that the federation, community, and individual would obtain from the project: payments to assistants and informants, payments for food and lodging, payments for plant samples collected and used in research, and potential long-term benefits.
- The intention to establish an Aguaruna Fund with earnings from collecting and user fees and how it was proposed this income would be divided equally between the three (and later four) participating federations

If a community agreed to collection of traditional knowledge an Acta (written record of a decision of the community) would be drawn up and members of the village would provide a signature or mark by his or her name in agreement. This was followed at that time or at a latter date by the signing of the PIC document by those individuals willing to participate in provision of traditional knowledge.

The terms of the PIC document included:

- That consent was voluntary.
- Purpose of the project was to obtain plants and information of their use in traditional medicine, the material and information being used in research which could lead to the development of new pharmaceuticals.
- Participation would involve plant collecting and providing information, such as the common name of plants, use of plants, plant part used, methods of preparation and use, storage, and preference compared to other plants to treat particular diseases or conditions.
- Participants could withdraw from activity without prejudice.
- The Intellectual Property Rights (IPR) of the participants to be protected. If the participation of informant leads to a discovery or an invention, the informant and community will be acknowledged and if a product is commercialized the federations, and hence all communities and members, will be compensated through the Aguaruna Fund. Special recognition of the community and informant who provided the data would also be included in, for example, patents.
- Reasonable measures to be taken to protect the confidentiality of information provided.

Source: Lewis W. and V. Ramani (2007)

4.1.3 ICBG Contracts

The ICBG project includes a number of interrelated agreements including an overarching biological diversity collection agreement; a know-how licence governing use of traditional knowledge; a licence option agreement, which entitled Searle & Co. to a first option on any product discoveries made by ICBG program partners; and, subcontracting agreements with the Peruvian University partners.[54]

Biological Collecting Agreement

A biological collecting agreement was entered into by the three participating universities and the Collaborating Organizations. This agreement established the conditions for collection and use of plants, plant extracts, and traditional knowledge within the Indigenous territories involved in the agreement. The biological collecting agreement prohibited any patenting of life forms without the prior informed consent of the communities. Under the Agreement rights to use traditional knowledge and genetic resources are conditional upon the existence of a valid subsisting know-how licence, see below.

Know-How License Agreement

A know-how licence agreement was entered into by the Collaborating Organizations and Searle, which established the conditions for collection and use of traditional knowledge. The license extended the Collaborating Organisations' control not only over their traditional knowledge, but also over the use of plants, plant extracts, natural products isolated from plant extracts, and any compounds whose structural design was developed based upon the structure of such natural products isolated from plant extracts.

License Option Agreement

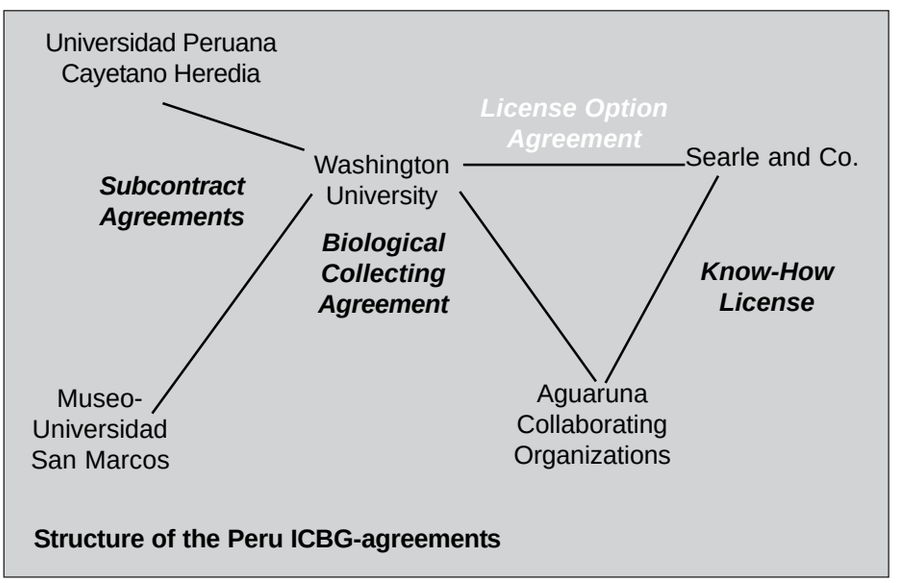
A licence option agreement was entered into by Washington University, the participating Peruvian universities, and Searle. This agreement established the terms and conditions governing transfer to and use by Searle of plants, plant extracts, and traditional knowledge, as well as Searle's rights to a first option over any discoveries or inventions made by the participating universities.

Subcontract agreements

Subcontract agreements were entered into by each of the Peruvian universities and Washington University. These agreements established the role of the Peruvian universities in the collection and assay of biological material, and the benefits they received from the ICBG grant. These agreements are peripheral to the main agreements, and are not discussed in the following analysis.

The ICBG agreements do not specifically mention customary law. However, they were negotiated with a view to ensuring the protection of traditional practices; strengthening opportunities for the Aguarunas to apply customary law to prior informed consent procedures and control of collection activities; and to ensure, to the greatest extent possible, that community values would be upheld with regard to access to and use of resources. In this manner, customary legal principles guided negotiations and played an important role in the implementation of the ICBG project.

At the centre of the ICBG agreements, a new contractual model was employed - in the form of a traditional knowledge know-how licence - and strict conditions were placed upon the use of resources and knowledge. The know-how licence agreement was designed to increase control over use of both genetic resources and traditional knowledge. It placed the participating Aguaruna organizations into a direct contractual relationship with Searle.[55] This agreement provided that Searle could not use any patent rights it



Structure of the Peru ICBG-agreements

[54] For further discussion of the Peruvian ICBG Agreements see, Greene S. (2004), Lewis W. and V. Ramani (2007), Tobin (2001) and (2002), and Tobin and Swiderska (2001).

[55] Searle's external legal advisers initially took the position that the proposal for a know-how licensing regime would signify such a major shift in Monsanto's way of doing business that it would require approval of the CEO which could take up to six months to obtain. This position was reversed within 24 hours following the decision by the Collaborating Organisations' negotiating team to break off negotiations unless the licensing regime was adopted. [personal record of negotiations - on file with lead author]

might obtain to impede traditional use, sale or exchange of traditional knowledge and resources, and provided the legal relationship necessary to enable the Collaborating Organizations to sue Searle if necessary for any breach of contract.

The ICBG biodiversity collection agreements made use of any plants, plant extracts or copies of extracts dependent upon the continuation in force of a know how licence for use of relevant traditional knowledge. Upon termination of the licence all parties were to terminate use of all genetic resources and traditional knowledge except as otherwise agreed with the Collaborating Organizations. The agreements adopted a number of interesting strategies for securing rights over traditional knowledge while recognizing the potential and limitations of intellectual property rights in a number of distinct areas, which included:

- Treating traditional knowledge as a form of information technology and utilizing a know-how licensing arrangement to regulate access to and use of both traditional knowledge and associated genetic resources,
- Definition of know-how to include all relevant traditional knowledge of the Aguaruna peoples whether or not it was available in the public domain,
- Preventing the exercise of patent rights to restrict the use, sharing or sale of traditional medicinal products,
- Preventing the use of traditional knowledge in the development and patenting of life forms,
- Securing grant-back of royalty free licences for use of patents in research and development by the Aguaruna people,
- Providing for joint ownership of patents. Research under the agreement led to an application for a patent in the names of the various research parties and the representatives of the indigenous parties to the agreement.

One of the most controversial aspects of the Peru ICBG, was the fact that not all the relevant custodians of the knowledge were party to the agreements (Rosenthal, 1997). The ICBG agreements responded to this by outlining a process to ensure the equitable sharing of benefits between Aguaruna, Huambisa and other Jivaro peoples (including communities which were not party to the agreements). The agreements established a requirement for the development of a benefit sharing mechanism within three years of the contracts coming into force. In the long run, however, this was not done – due, apparently, to a lack of funding support by the ICBG, as well as a lack of political will. This demonstrates the importance of ensuring that modalities for ensuring fair and equitable benefit sharing are secured as a pre-condition for carrying out collection activities under bioprospecting agreements where not all custodians of traditional knowledge are party to an agreement for its use.

4.1.4 ICBG agreements and national traditional knowledge regulation

The relationship between the ICBG agreements and the development of national traditional knowledge law cannot be overemphasized. In fact, it was the process of negotiation surrounding the ICBG agreements which served as the catalyst for the commencement of the national process for regulation of traditional knowledge. In early 1996, representatives of SPDA were invited to meet with the director of the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI – i.e. the Peruvian National Institute for the Defence of Competition and Intellectual Property) to discuss the potential for developing national law regarding TK. The meeting was convened to discuss the need for national legislation to protect traditional knowledge. Using the ICBG as an example attention was brought to the fact that without clear national legislation it was impossible to prevent biopiracy. Attention was given to the proposed agreements and the Searle & Co.'s offer to pay three times higher royalties for inventions developed utilizing biological resources traditionally used by the Aguaruna people than it offered for inventions based on randomly collected biological resources.

The difference in royalty rates represented the value being placed on resources identified by indigenous peoples as having medicinal, toxic, or other active properties. In effect, traditional knowledge was being rewarded for providing users with lead time in identifying useful biological material. Failure to secure protection of traditional knowledge was, therefore, not only a threat to indigenous peoples rights, it also unjustly enriched foreign and national commercial users to the detriment of indigenous peoples - and, thereby, of the national interest as a whole. It is unclear what influence these considerations had and the weight INDECOPI may have given them in relation to other important issues such as the need to protect the Aguarunas moral and ancestral rights over their knowledge. Within less than a month of this meeting, INDECOPI began to guide a legislative drafting process which would ultimately lead to the adoption of national *sui generis* legislation on traditional knowledge in 2002.

Having in effect kick-started the process that would eventually lead to the adoption of the national traditional knowledge law, most (if not all) local and regional organizations representing Aguaruna communities signed declarations, in the months leading up to its adoption, calling upon the national authorities to defer its adoption. These declarations were the result of two workshops held in Santa Maria de Nieva during 2002. The workshops, organized by local and national organizations representing the Aguarunas, with the support of the International Institute for Environment and Development (IIED) and the Lima based NGO the

Asociacion para la Defensa de los Derechos Naturales (ADN), provided an opportunity to review the then draft national *sui generis* law. The meetings enabled those organisations, which participated in the final ICBG agreements, as well as those which opposed them, to provide their opinions on the proposed *sui generis* law in the light of the ICBG experience.

One of the key concerns of those participating in the workshops was the potential conflicts which may arise due to provisions in the Peruvian law on traditional knowledge which on the one hand recognised traditional knowledge as collective cultural patrimony, and on the other hand, granted rights to any individual community to negotiate a contract for use of traditional knowledge on its own. The traditional knowledge law provides that a community negotiating for use of traditional knowledge should inform other communities with the same knowledge of the ongoing negotiations. They are not, however, obliged to provide information on the terms and conditions of the proposed contract. While the traditional knowledge law recognizes that communities are entitled to utilize customary law to resolve any ensuing conflicts, there are no provisions for ensuring this is done. The result may be to undermine customary law, as any community wishing to enter into a bioprospecting contract alone may refuse to recognize its applicability. The conflicts which arose, during the negotiation of the ICBG agreements highlighted the underlying tensions between recognition of the collective rights of the Aguarunas over their traditional knowledge and the lack of any functional system of collective decision making amongst all Aguaruna communities to govern who should and could negotiate for use of traditional knowledge.

Based upon their experience with the ICBG negotiations both workshops came to similar conclusions. These included:

- The draft traditional knowledge law should not be adopted until full informed participation of indigenous peoples in its development has been secured.
- Traditional knowledge is threatened by a wide range of national development policies, lack of protection of traditional territories and organized religion.
- Traditional knowledge law needs to address these multiple threats and should avoid promoting commercialization of traditional knowledge.
- National legislation should respect and recognize customary law and practice and its role in regulation of traditional knowledge.
- Indigenous peoples should take the initiative to defend their rights through the development of community protocols on access to and use of their traditional knowledge and biological diversity based upon customary law.

Just over two weeks after the second workshop in August 2002, the Peruvian traditional knowledge law was adopted by the national congress, with little if any amendment. The potential for review of the traditional knowledge law and the adoption of implementing regulations may, however, provide opportunities to secure amendment, interpretation and enforcement in a manner which more clearly reflects the aspirations of indigenous peoples, and secures the collective nature of traditional knowledge above any rights of individual communities to commercialize traditional knowledge. Proposals for development of community protocols and the call for a more holistic response to traditional knowledge protection, should provide guidance for national authorities for any future work in this area. Despite its failings, the adoption of the law has helped bring about recognition of rights of indigenous peoples over their traditional knowledge. Its progressive implementation has included the development of traditional knowledge registers at the national and local level.

The level of consensus found in the conclusions of the workshops is of much importance, demonstrating as it does the preparedness and desire of the Aguaruna people as a whole to play a more direct role in controlling access to their biological resources and traditional knowledge. It is also clear from the workshops outputs that they did not oppose bioprospecting per se, but did wish to see it regulated in accordance with customary law. Furthermore, they clearly signalled the need for traditional knowledge legislation to, not only regulate external use, but also to support and strengthen local use and continuing development of traditional knowledge systems. As the national authorities continue in their efforts to secure the effective implementation of the national traditional knowledge law, they would do well to reflect upon the results of the Aguaruna workshops in this area, with a view to addressing traditional knowledge protection in a holistic fashion which will secure its survival into the future as a dynamic and necessary part of local, national and international knowledge systems.

4.1.5 Lessons Learned

Analysis of the ICBG Project in Peru, highlights the challenges, opportunities and limitations associated with the use of bioprospecting contracts as a means to protect traditional knowledge. In doing so, it helps identify measures which may be taken by indigenous peoples and local communities - as well as private sector actors, NGO's and the state - to help ensure that bioprospecting is carried out in a manner conducive to the protection of traditional knowledge and traditional knowledge innovation systems, as well as the realization of fair and equitable benefit sharing. Among the lessons which may be taken from this case study are the following:

Prior informed consent, negotiating contracts and national traditional knowledge *legislation*

- Local community support for bioprospecting is vital to ensure the legitimacy of negotiations and any agreements for access to and use of traditional knowledge. Where possible community approval should be sought through traditional decision making practices.
- The capacity of indigenous peoples and local communities to protect their rights over traditional knowledge will be reduced where they lack unified decision making structures. Such structures may take the form of centralized functional traditional decision making authorities and/or unified political organizations with a capacity and mandate to represent the collective interests of all traditional knowledge custodians.
- Collaboration by all organizations representing a particular indigenous people or ethnic group or of a local or group of associated local communities, in the development of community protocols, may provide a more equitable means for governing access to and use of traditional knowledge, as well as establishing the basis for equitable benefit sharing.
- In order to ensure the appropriateness, legitimacy and implementation of national traditional knowledge law and policy, national authorities should work closely with indigenous peoples to develop timely, adequate and expansive participatory processes in order to enable full and informed participation in the development of national law and policy.

Bioprospecting contracts, customary law and fair and equitable benefit sharing

- Incorporation of principles drawn from customary law into contractual arrangements will extend the jurisdiction of customary law beyond the boundaries of local community or indigenous peoples' territories. Such agreements have the benefit of making users of traditional knowledge contract into custom.
- Utilization of well-established contractual principles and licensing models common to biotechnology and other commercial sectors makes it easier to negotiate functional agreement.
- Treating traditional knowledge as information technology provides a basis for the creation of contractual models which empower indigenous peoples and local communities to exercise greater control over use of traditional knowledge.
- Indigenous peoples should utilize bioprospecting agreements as a means to develop their own research and development activities. This may be achieved, in part, by incorporating obligations for capacity building, access to research results and products developed using their traditional knowledge and biological resources, as well as rights to royalty free licences to utilize inventions for their own future research and development activities.
- Making the use of genetic resources dependent on the holding of a valid licence to access and use associated traditional knowledge extends the control of indigenous peoples and local communities over such resources. This will prove important where national legislation does not specifically recognize their rights over genetic resources.
- Indigenous peoples and local communities wishing to exercise autonomy over their traditional knowledge and the benefits derived from its use should establish mechanisms, where not already existing, to ensure fair and equitable sharing of benefits. Failure to do so, may lead to state intervention to ensure equitable benefit sharing.
- Indigenous peoples entering into bioprospecting agreements should establish clear procedures for the making of key decisions regarding any modifications to agreements, including their extension, change of parties, revision of benefit sharing etc. Transparency needs to be built into any process to ensure that the collective interest in traditional knowledge is protected and that the equity of benefit sharing can be secured.

Despite the valuable precedents established by the Peru ICBG agreements and their influence on the development of national traditional knowledge law, their conclusion was not welcomed by all Aguaruna federations, and there was a concerted campaign, supported by a number of international NGO's, to derail the negotiation process (Greene, 2004). This reflected a clear political divide between various organizations representing the Aguaruna people as well as an ideological divide on development strategies. It was also fuelled by the lack of clear national legislation on ABS and traditional knowledge, and a lack of any conflict resolution mechanism to deal with such issues. Although Peru's TK law provides that communities may use customary law to resolve any conflicts, the lack of any centralized Aguaruna authority reduces the value of such provisions.

A future amendment to the law may usefully provide for access to alternative dispute resolution mechanisms mandated to review cases with due reference to and respect for customary law and practice, and, where possible, on the basis of traditional decision making practices (such for instance as the IPAAMAMU model utilized in the ICBG case). This would enhance opportunities for indigenous peoples and local communities to access justice on TK (Taubman, 2005). Legislation should provide a mechanism to enable custodians of TK to challenge any proposed bioprospecting agreement involving their TK, and

allow for resolution of the conflict based upon customary law and adjudged by relevant experts in customary law. Selection of experts might be made from a panel proposed by representative organizations of indigenous peoples and local communities.

4.2 Beyond Traditional Resource Management: Case of the Potato Park

The Potato Park, located near Cuzco, the ancient capital of the Inca Empire, is an agricultural collective that was developed in 2002 with the support of ANDES (Asociacion para la Naturaleza y el Desarrollo Sostenible - a local NGO, based in Cuzco). ANDES facilitate the efforts of indigenous communities to develop innovative landscape-based conservation models, based on traditional management practices and indigenous knowledge. The Potato Park has brought together six Quechua communities for the purpose of establishing a preserve where Quechua crops can be conserved, exchanged, developed and protected according to traditional practices, and under the guidance of Quechua community governance mechanisms, based on customary law and practice.

This case study analyzes Quechua community governance mechanisms and their application to governance of the Potato Park, as well as the compatibility of these systems with Peru's national traditional knowledge law. Prior to the creation of this national legal regime, customary governance mechanisms of local and indigenous communities had been the primary means of governing the conservation, use and sharing of genetic resources and traditional knowledge.

The study is based upon a series of interviews conducted in Lima with individuals who were involved in the development of the Peruvian traditional knowledge law, and/or are currently involved in the implementation of its principles, and/or have significant expertise regarding this piece of legislation. The second stage of data collection involved field work and interviews with representatives of ANDES, and the six communities of the Potato Park. The purpose was to understand national and customary approaches to governing traditional knowledge and genetic resources; how Peru's traditional knowledge law is likely to strengthen or weaken traditional resource management and customary law systems; and what could be done to make customary and positive systems of governance more compatible.

4.2.1 Quechua community governance mechanisms

For centuries Quechua community governance mechanisms have defined the parameters for patterns of conduct to which community members adhere (IIED, 2006). An important function of Quechua community governance mechanisms, is to regulate the way that agro-biodiversity and traditional knowledge are acquired, shared, conserved, and used. Customary laws of Quechua communities vary across place and time, and adapt in response to the conditions and needs of individual communities. For the most part, these laws are orally held and transmitted from generation to generation. While there is variance between and amongst individual communities, some similarities can be found within the customary laws of most Andean Quechua communities.

Almost all Quechua communities share the guiding principles of *reciprocity, duality, and equilibrium* (IIED, 2006). Reciprocity is the belief that what has been received, must be given back in equal measure. The principle of duality holds that everything has an opposite, which complements it. This translates into a variety of ethical beliefs including the belief that human behaviour should not be individualistic (IIED, 2006). Finally, the principle of equilibrium refers to balance and harmony in all aspects of life, including interactions with the natural environment. Customary laws relating to the management of biodiversity are largely derived from the above-mentioned principles.

Many indigenous communities and NGOs have pointed out the failure of existing international and national policy and legislation to consider indigenous customary laws in the formulation of formal laws, and to integrate indigenous governance mechanisms into the larger system of governance (Argumedo, n.d., 2007). Furthermore, external perspectives of what constitutes customary law often fails to appreciate the reality of local governance structures which frequently do not have specific modalities for regulating access and use of traditional knowledge by outsiders. For this reason, it has been proposed that a more expansive definition of customary law is required which takes into account more general customary principles or values as well as social norms and beliefs, which may be used as the basis for helping communities to derive/develop norms for third party access/use, and for benefit-sharing amongst communities.[56]

This study has found that the primary function of customary law in communities of the Potato Park is to conserve the complex political, economic, and ecological systems that exist at the local level. It also plays a crucial role in the overall biological and intellectual diversity that local systems are based upon, which is of crucial importance for ensuring their resilience and long-term adaptability. One ANDES staff-member explained that dynamic customary governance mechanisms of Andean communities could be credited with the very survival of these communities throughout history, in the face of colonization, state intervention, and the forces of globalization.

[56] Pers. Comm. Krystyna Swiderska, 13 February 2009, see also IIED, 2006.

Community governance mechanisms play a particularly important role in guiding community engagement with external actors, and institutions including national laws. Traditional institutions have an important function, providing an accepted means through which communities can make collective decisions regarding the community interpretation and community response to relevant laws. In other words, if a national law presents opportunities to strengthen the complex system and diversity in the community, then the relevant authorities may decide to adopt the useful elements of this law. Alternatively, if a national law is determined to pose a threat to the local system, then the community governance mechanisms will reject those elements within the local laws. Although, in some cases, this process may create tensions between the two legal systems, it is necessary for communities to maintain strong local governance mechanisms and resist the negative elements of outside influences, while benefiting from positive ones.

While it is necessary to avoid the common but false assumption that there is one "indigenous law" operating in the Andes, there are many common principles, prevalent in the communities of the Potato Park, which are shared with many other communities in the region. Communities of the Potato Park have over time adapted their customary laws and practices in order to respond to new challenges and opportunities associated with maintenance of their biocultural heritage, which has been defined as:

> "…the knowledge, innovations and practices of indigenous peoples and local communities which are collectively held and inextricably linked to resources and territories; including the variety of genes and species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities." (Swiderska, 2006)

4.2.2 Community Governance of the Potato Park

Quechua values of reciprocity, duality and equilibrium (IIED, 2006) provide the framework for the Potato Park's approach to protecting the communities' biocultural heritage. Customary governance mechanisms built upon Quechua values, regulate use, access and decision making regarding agro-biodiversity in the Park. These values have also guided the Potato Park communities in the design and implementation of a number of innovative activities, including the signing of a historic agreement with the International Potato Centre (CIP), for the repatriation of native crops, the development of an inter-community agreement for equitable benefit sharing, and the development of a community register to provide both positive and defensive protection for community resources.

The Potato Park is governed on a day to day basis by a Park's Council made up of community representatives. The Council is responsible for guiding development of *sui generis* governance mechanisms based on customary law to regulate the conservation of the Park's biodiversity, ecosystems and the communities' Quechua culture (Koerner, 2005). They have adopted a holistic approach to development of this governance system, with a view to protecting the biocultural heritage of the communities. This biocultural heritage includes not only biodiversity and traditional knowledge but also traditional community resource management practices.

The Potato Park communities' customary law remains dynamic, and is the means by which decisions are made to ensure coherence of complex local governance systems. Within the communities of the Potato Park, there are two distinct systems of local governance operating. On one hand, each year the communities elect an authority to represent the community within national political processes. This system of local governance was imposed through a state mandated initiative in the 1960s. These community officials are mainly responsible for providing the link with national authorities and the state led processes. There is also a parallel system of customary governance operating alongside this formal system in many Andean communities, and in all of the communities of the Potato Park: This is the traditional governance system. These authorities continue to exert a great deal of influence in the communities of the Potato Park, and in many Andean communities. Most of the structures and institutions that have existed in communities prior to the 1960's and the creation of the formal system, remain under the jurisdiction of the traditional authorities. For example, the traditional assembly of the communities, remains under the sanction of the traditional authorities and is responsible for decision-making regarding land distribution, water management, and resolution of conflicts.

A collaborative governance structure, linking the six communities of the Potato Park, constitutes the third - and most unique - type of governance structure operating in these communities. The Potato Park's governance strategy was developed through a co-evolutionary exchange of ideas, and a common belief in the need for a collective approach to conserving the entire landscape of the region. Each community now has an additional elected official known as a "barefoot technician" who is responsible for coordinating and representing the community in Potato Park decision making, and for collaboration with ANDES on Potato Park related activities. While the Potato Park governance system is recently created, it is derived from traditional governance principles and modes of operation, and closely linked with the traditional governance mechanisms of each of the six communities.

An intercommunity agreement is in the process of being negotiated, which will provide a common strategy for landscape conservation and identify

common principles related to access and benefit sharing. Because both the governance mechanisms of the Potato Park and the Inter-community agreement are based on customary principles common to the six communities, they are considered to be derivative of customary law. All community efforts to protect genetic resources and traditional knowledge, originate from the ideological position that traditional knowledge and genetic resources cannot be separated from the landscape and Cosmo-vision within which they were developed and are being conserved. Accordingly, these efforts are just one part of a larger collective effort to conserve the landscape, and the complex systems in which these resources are situated.

The traditional process for making a decision regarding access to and use of resources and knowledge requires that an external agent present proposals to the traditional community assembly, and clearly explain how each party will benefit from the exchange. The assembly, consisting of traditional authorities, will then make a private decision based on both the intentions of the outsider, and the potential benefits for the community. There is no general rule of thumb for making such decisions; instead, each decision will be made on a case by case basis, considering each situation independently. The importance of community governance mechanisms in this regard, is that they help to ensure that knowledge and resources are shared in a way that benefits, rather than destroys or undermines, the community way of life. While community members acknowledge that there are various occasions upon which they will turn to an external organization - such as ANDES - to ask for guidance or training, ultimately, all decisions are made through internal institutions and decision making structures, and communities remain in full control of their own decisions.

The basic premise governing exchange and sharing of resources within the Potato Park is the Andean principle of reciprocity (or *anyi*, in Quechua). As one community member put it, this means that "Good intentions are met with good intentions". When making decisions regarding the exchange of these resources, decision makers will take into account why the outsider wants access to these resources, and how external agents are likely to use these resources in the future. While some resources will be readily shared with an outsider who expresses a justifiable need, the communities hold that there are other resources which require complete secrecy.

4.2.3 Customary Governance and Peru's *sui generis* traditional knowledge law

Policy makers and legal experts, as well as community members and staff members of ANDES, revealed a number of areas of compatibility shared by the national and local legal regimes. For example, both national authorities and the Potato Park communities have recognized that biopiracy is a significant threat that cannot be prevented by traditional governance mechanisms alone. While traditional governance mechanisms are the primary means of making decisions within communities, and sometimes even *between* communities, it is very difficult for communities to enforce these mechanisms on outsiders and prevent the misappropriation of their resources. In order to address these issues, communities need the support of external institutions in order to protect their rights over traditional knowledge and genetic resources. At the same time, traditional governance mechanisms are integral to the maintenance and conservation of traditional knowledge and genetic resources within communities. So while traditional governance mechanisms are not capable of being entirely effective on their own, they can and must play an important part in the state institutional structure for the protection of these resources.

Policy makers explained that Peru's traditional knowledge law was designed to be as non-authoritarian as possible, and to give as much decision making control as possible to indigenous peoples through the enforcement of prior informed consent. While it was the "representative organizations" rather than the communities themselves that were granted the authority to provide prior informed consent, the national *sui generis* traditional knowledge law does demonstrate a willingness of the state to decentralize decision-making with regard to traditional knowledge.

4.2.4 Objectives, nature and form of protection,

Peru's traditional knowledge law and the CBD originate from a Western perspective of the world and associated concepts of knowledge and property rights. Customary Governance mechanisms, on the other hand, originate from an entirely different Cosmo-vision. Thus, it is not only the principles of the particular legal regimes that will need to be reconciled, but also their fundamental moral and ethical underpinnings.

There is a general sentiment among community members - and even some policy makers - that the national *sui generis* law is too narrow, focusing primarily on issues relating to commercialization and commoditization of traditional knowledge. The law emphasizes biopiracy or outside misappropriation of these resources as the principle threat to the conservation of traditional knowledge and genetic resources, giving little attention to the need to strengthen and support traditional knowledge systems for their wider cultural, social, ecological, spiritual and intrinsic values. While there is general support for government's efforts to address the threat of biopiracy, without a cross-sectoral approach to protection of traditional knowledge and traditional knowledge systems their long term sustainability cannot be assured.

There are a wide range of opinions regarding what it means to truly "protect" traditional knowledge. On one hand, within the circles of policy makers and legal experts, "protection" is commonly considered in terms of protecting against biopiracy and protecting indigenous communities' rights to commercialize and receive monetary benefits from outsiders' use of their resources. An alternative vision of protection promoted by community members as well as a number of other interviewees is much more holistic. This vision, which recognizes the embeddedness of these resources within complex local systems, and the importance of maintaining decision-making control within the community, is principally concerned with the protection of the day-to-day uses of these resources within the community. It also encompasses the right to land, the protection of the free flow of seeds, as well as maintaining control of these resources so that they can be passed on to future generations. In addition to the threat of biopiracy, there were other threats identified by members of the Potato Park, such as Western education, agricultural extension and the introduction of modern technologies, encroaching urban centres, outward migration, and the loss of culture and language within the communities.

From the perspective of communities, protection also requires support for communities in their day-to-day use and development of local crops, and in maintaining control of these resources within the community. At the very least, national legislation must be designed so as not to undermine other aspects of the complex local system in its effort to protect these resources. Given that the purpose of Peru's traditional knowledge law is to benefit indigenous peoples and local communities, and its approach is intended to be as non-authoritarian as possible, there may be a possibility for meaningful co-management whereby state legislation aids in the recognition and external enforcement of traditional governance mechanisms for the protection of traditional knowledge. Given the integral role and function of traditional governance in the maintenance and conservation of traditional knowledge and genetic resources, it is imperative that any national law for the protection of traditional knowledge must strengthen rather than undermine these local mechanisms. Any system that does not account for these local systems, is not likely to achieve the long-term objective of conserving traditional knowledge and genetic resources.

Communities of the Potato Park, have a deep-rooted concern and suspicion of the dominant legal system, in particular intellectual property rights regimes relating to patents. Overcoming such suspicions will require more concerted efforts to address traditional knowledge protection in a holistic fashion with full participation of its custodians. In order to obtain the legitimacy required to effectively protect traditional knowledge, efforts will need to be undertaken to secure the confidence of communities and overcome their strong perception that the dominant legal order cannot be relied upon to protect their rights over traditional knowledge. It is worth noting, however, that the Potato Park communities, while continuing to view intellectual property in the form of patents with suspicion, have come to view certain intellectual property tools as potentially advantageous. These include, for instance, trademarks and geographical indicators. They are also exploring the potential of using local community certificates of origin[57] and have established a local registry of traditional knowledge (based upon traditional recording practices of the Incas) as a means to protect their rights. Communities which have developed a clear understanding of the potential and limitations of intellectual property and other legal tools as a means for traditional knowledge protection, are in a better position to adopt and/or develop modified versions of such tools in order to creatively bridge the gap between customary and positive law systems of governance.

At the local level, it is evident that it is conceptually impossible to separate traditional knowledge and genetic resources from the landscape and the Cosmo-vision in which they are embedded, developed and conserved. It is thus necessary for any effective effort aimed at the conservation of traditional knowledge, to address not only the need to conserve these particular resources, but also the complex systems in which they are situated. This may be achieved where national law recognizes and respects the capacity of Andean communities to govern their local resources through traditional resource management practices, which are an integral facet of traditional knowledge in itself.

4.2.5 Participation, PIC, and legitimate representation

Background research and interviews with policy makers and legal experts regarding opportunities for indigenous participation in the development of the national traditional knowledge law, showed that these had been limited[58]. Despite positive intentions, the design of national traditional knowledge law was a largely top-down process beginning with the negotiation of the CBD. Communities of the Potato Park believe that, in order to ensure the legitimacy and effectiveness of Peru's traditional knowledge law, it is essential that indigenous peoples be given the opportunity to participate meaningfully in its review, adaptation and implementation, including in the

[57] See for discussion of certificates of origin, Tobin et al. (2008) *Certificates of Clarity or Confusion: The search for a practical, feasible and cost effective system for certifying compliance with PIC and MAT*, UNU-IAS, Yokohama.

[58] For a detailed discussion of the participative process associated with the development of Peru's TK law, see Tobin B. and K. Swiderska, (2001) *Speaking in Tongues: Indigenous participation in the development of a sui generis regime to protect traditional knowledge in Peru*, IIED. London.

process for development of any necessary regulations. This implies the need for a more participative national process involving indigenous peoples and local communities across Peru - even if this means significantly adapting the current legal framework.

Although the national sui generis regime and customary governance regimes are not as yet entirely compatible, it is significant that they are neither static nor inflexible. It is widely recognized by policy makers that the level of indigenous involvement in development in the Peruvian traditional knowledge law was minimal. It may, therefore, best be seen as a work in progress, recognizing that it will need to be modified over time as it is being implemented, in a process of trial and error. Similarly, the very nature of customary law is a system of governance that is dynamic and changes over time to adapt to new realities, both internal and external to the community. The communities of the Potato Park recognize that it is possible to benefit from outside opportunities and that it is not to their benefit to remain in isolation.

Despite the adoption of the Peruvian traditional knowledge law, communities of the Potato Park remain unconvinced of the commitment of policy makers to hear their voices, respect their rights and legal regimes, and to faithfully represent their interests and concerns. Where PIC procedures - regulated by local communities and indigenous peoples in accordance with their own customary laws and practices - are fully recognized and enforced by national law, this will help to build trust and serve as the basis for more collaboration between national and customary legal mechanisms for protection of traditional knowledge. Article 14 of the Peruvian traditional knowledge law provides that indigenous peoples are to be represented by their "representative organizations," with due consideration being given to their traditional forms of organization. By granting decision making control to "representative organizations," the regime assumes that these organizations, which are not defined under the law, are capable of representing the "indigenous perspective". This does not account for the fact that there is not one "indigenous law," but a diverse and sometimes competing series of "customary laws" across indigenous communities.

Through national legislation, Peru has imposed new forms of political authority to represent indigenous peoples and local communities in their dealings with the state. In some cases, these have replaced traditional decision making structures, while in others they exist in parallel with – and, at times, in competition with - customary legal authorities. Indigenous peoples and local communities have also established a wide range of political organizations at the local, regional, and national level, whose authority in decision making must also be considered. The reference to "representative organizations" in the traditional knowledge law is ambiguous regarding which "representative organization" is deemed to hold the authority for decision making. The communities of the Potato Park have stressed their opposition to any interpretation of the national traditional knowledge law which would grant authority to externally-imposed institutions to grant PIC for access to or use of their resources or knowledge. They argue that such organizations do not adequately represent them, and that they do not feel comfortable with organizations, imposed by national law, making decisions on their behalf. The law requires clarification, therefore, in order to avoid conflicts between and within indigenous peoples and local communities and "representative organizations" which have not been freely chosen by them to represent their interests, but have instead been imposed upon them by national law.

4.2.6 Awareness and capacity building.

There is a need for awareness and capacity building and intercultural exchange between those individuals creating policy and those who will be most affected by its impacts. It is evident that policy makers would be more effective in their roles if they had a more vivid and nuanced understanding of the reality and nature of communities, and of what these communities have been doing for millennia to govern and manage their resources. A second benefit of establishing awareness and capacity building processes, would be the education of policy makers, enforcement authorities, and administrative authorities, in order to support respect for customary law and more sensitive protection of traditional knowledge. In particular it is important for policy makers to understand the complexity of community traditional resource management, knowledge sharing and development, as well as the importance of customary law and practice in maintaining traditional knowledge and traditional knowledge systems as well as the diversity that sustains them.

Awareness and capacity building of communities is also vital. There is a deep suspicion of outsiders' interest in community resources and knowledge, and with regard to the intentions of national regulators in adopting Peru's traditional knowledge law. Building improved communication pathways and educational systems which respect and support traditional knowledge development, may serve to reduce suspicions and open the way to greater collaboration on traditional knowledge management and protection. Although there is general suspicion of dominant legal institutions and tools, including intellectual property rights, with the Potato Park the communities have shown a preparedness to adopt or adapt some tools such as trademarks, and local registers to meet their own needs. Building greater understanding of other Western legal tools, their strengths and limitations and how they could be utilized to support their interests and efforts will further empower communities to make more informed decisions. At the same time, education and capacity building efforts are required to enable

communities to evaluate the opportunities and modalities available at all levels to secure and strengthen traditional governance mechanisms and secure respect and enforcement of their rights in accordance with customary law at the local, national and international, levels.

4.2.7 Lessons Learned

Analysis of the experience of the Potato Park and its relationship to the development and implementation of national traditional knowledge legislation, highlights the need for new institutional and organizational structures to enable meaningful participation of indigenous communities in decision-making processes. This is requisite if customary governance mechanisms are to become part of the institutional structure for the protection of traditional knowledge in Peru.

It is clear that indigenous peoples and local communities on their own, will not be able to protect their resources and traditional knowledge (other than traditional knowledge held in secret) from threats such as biopiracy. There is, therefore, a need for collaboration on various levels with external actors in order to have customary law enforced outside of its traditional jurisdiction. One emerging possibility, will be to link more closely with local and regional governments which have been granted significant new powers in an ambitious decentralization process currently under way in Peru. While concerns do exist about the reliability of local governments, they seem to generate a greater level of trust and understanding with local communities than central government authorities.

It is evident that the Peruvian traditional knowledge law's reliance on "representative organizations" to make decisions on behalf of indigenous communities is not popular with the communities of the Potato Park. At the same time, in order to minimize conflicts between communities sharing the same resources, and recognizing that there is not one indigenous law operating in communities across Peru, it is necessary that communities develop some way of communicating, collaborating and making collective decisions regarding shared knowledge and resources. Where, as in the case of collective governance of the Potato Park, such collaboration and collective decision making is based on customary legal principles, it is more likely to find legitimacy among TK custodians. If communities are willing to work with the local and regional governments in this process, it may make sense for each region to develop an indigenous institution to support this function. Steps in this direction have been recently taken with the adoption by the Cuzco region of local regulations on biopiracy and protection of traditional knowledge.[59]

The Cuzco regional law on biopiracy and protection of traditional knowledge, makes access to traditional knowledge dependent upon the prior informed consent of indigenous and local communities, sets out conditions for benefit-sharing and places limitations upon the grant of patent rights over genetic resources. It also provides for the establishment of locally produced and controlled registers of traditional knowledge.[60] Although, it is as yet too early to determine the full significance of the adoption of such regional legislation, it has been welcomed as "a good example of how local governments can create the appropriate legal and institutional framework, as well as the mechanisms to implement it, to ensure that biopiracy does not prey on the creativity of indigenous peoples and local communities."[61] It is to be hoped the adoption and implementation of such regional legislation will ensure that protection of traditional knowledge will be more closely aligned to the realities, needs, interests and customary legal regimes of traditional knowledge custodians, such as the communities of the Potato Park.

Recognizing the importance of community traditional governance mechanisms, indigenous peoples and local communities may consider the benefits of developing community protocols as collective statements about how requests for access to TK and genetic resources are to be made and processed. In order to protect traditional knowledge once it travels beyond the jurisdiction of custodians the designers of community protocols will need to consider how they may be implemented and enforced with the support of both local government and national authorities. Communities may wish, individually at a local level or across a region, to create their own protocols, defining conditions for access to genetic resources and traditional knowledge. Local and regional government may then play a role in linking with the state in the effort to enforce these protocols.

Given the high degree of misunderstanding and suspicion within the communities towards the state and state institutions, securing meaningful participation of indigenous peoples in the review, adaptation and implementation of Peru's traditional knowledge law will provide an extremely important opportunity for changing perceptions and attitudes regarding state-community collaboration. In order for traditional knowledge legislation to respect and correspond with customary governance mechanisms it is imperative that the pressures stemming from international agreements are balanced with the needs, interests and conservation methods of indigenous peoples and local communities.

[59] O.R. Nº048-2008-CR/GRC

[60] http://tkcommunity.blogspot.com/2009/01/cusco-law-on-indigenous-knowledge-and.html

[61] Comments of Alejandro Argumedo, Director of Asociacion Andes on the adoption of the Cuzco law, http://tkcommunity.blogspot.com/2009/01/cusco-law-on-indigenous-knowledge-and.html

Section V: Comparative Analysis of Case Studies

A comparative analysis of the ICBG and Potato Park cases, demonstrates the importance of pro-active efforts by indigenous peoples and local communities to develop their own strategies and mechanisms for protection of traditional knowledge, if they wish to secure community control and a central role for customary law in traditional knowledge governance. They also show the influence such experiences can have on the development of national and local government regulations in this area. Furthermore, they provide evidence that indigenous peoples and local communities, when provided with the opportunity, resources, support and capacity, are able to negotiate and establish innovative agreements with private sector, research and international institutions which enhance their opportunities to benefit from and strengthen their traditional knowledge base.

Although, the ICBG bio-prospecting negotiations took place in the absence of national legislation on ABS and traditional knowledge, the final agreements remain one of the most precedent-setting examples of a bioprospecting agreement conforming to the aims and principles of the CBD. Both sets of ICBG negotiations and the agreements themselves, informed the development of the Peruvian *sui generis* law for the protection of traditional knowledge, in effect providing the model for the licensing regime upon which the law is based. In a similar fashion, the communities of the Potato Park, through their development of local *sui generis* mechanisms based on customary law, influenced the development of Cuzco's regional law on biopiracy and protection of traditional knowledge.

In the case of the ICBG negotiations, the Peruvian state left it up to the parties to negotiate on their own terms in an unregulated environment. Today, the Law for the Protection of Traditional Knowledge gives state institutions a clear role to play in such negotiations, yet many of the same questions still remain.

Questions such as:

- Who has the right to negotiate on behalf of indigenous communities?
- Are bio-prospecting agreements likely to create conflict amongst indigenous and local communities sharing the same knowledge and resources?"
- How can customary law adapt to respond to new realities facing indigenous and local communities?
- What changes are needed to ensure that international and national laws on traditional knowledge and ABS support, rather than undermine, customary institutions, decision-making structures and laws of indigenous communities?

Both case studies demonstrated the problematic nature of determining who should represent indigenous communities when making collective decisions regarding shared resources. A major source of conflict in the ICBG negotiations, was the lack of a unified decision making structure uniting Aguarunas. While many Aguaruna communities do align themselves with local and regional representative organizations, there is no one body that represents the Aguaruna people as a whole. This resulted in significant conflicts amongst communities, indigenous representative organizations and even saw international NGOs taking sides in an internal matter which should have been left to the Aguarunas to decide. These conflicts overshadowed informed debate of the ICBG project in Peru and stifled informed analysis of the important lessons which can be learned from both the strengths and weaknesses of the negotiation process and the agreements themselves.

The cases show that the potential for conflicts between communities over rights to negotiate for access to traditional knowledge which existed before the adoption of the national traditional knowledge law, still remains. The potential for conflict may indeed have been exacerbated by the law, which creates tensions between collective cultural patrimony and individual economic interests and undermines customary law and traditional decision making authorities.

In the first place, as a result of the diversity of interests within and between indigenous communities sharing traditional knowledge and genetic resources, there is a real risk that any benefits received by communities may be outweighed by conflicts over rights to enter into agreements and the sharing of benefits between communities. These problems may potentially be resolved, if indigenous peoples and local communities are given an opportunity to participate fully in a revision of the law and development of implementing regulations. In the absence of such opportunity, the custodians of traditional knowledge may be advised to develop collective community protocols to govern issues of access to, and use of, shared genetic resources and traditional knowledge.

In the second place, the law on traditional knowledge provides that "representative organisations" rather than traditional decision making authorities have the right to enter into agreements for use of traditional knowledge. Although this term may be open to interpretation, in the absence of clearer definition it appears to empower decision-making structures deemed inadequate by local communities. Community members of the Potato Park emphatically insisted that "representative organizations", established by national legislation in Peru, do not have any legitimacy to make decisions on access to and use of their traditional knowledge and genetic resources. Should they attempt to do so, the communities have made clear that this

would run counter to customary governance practices and be unacceptable to them.

Both case studies indicate that traditional governance structures and customary law remain vibrant, flexible and dynamic mechanisms capable of responding to new realities in the governance of traditional knowledge and biodiversity. In the case of the ICBG negotiations, customary governance mechanisms of the Aguaruna peoples informed and inspired the IPAAMAMU which provided the basis for future negotiations. While, the circumstances of negotiating a high profile international bio-prospecting agreement were entirely unprecedented for the Aguaruna peoples, the negotiations were given legitimacy through a participatory decision-making process based upon centuries old practice adapted to meet present challenges. In the case of the Potato Park, the adaptation of Quechua customary governance mechanisms which guide daily life and resource management strategies of local communities, have proven a firm basis upon which to develop a collaborative governance system based on customary law principles for the Park.

While the case studies indicate that customary law is flexible, dynamic and capable of responding to new realities, a major problem evident in both cases is how to leverage these customary governance mechanisms to make collective decisions on behalf of a wide range of communities sharing similar traditional knowledge and resources, and how to apply these mechanisms outside of the community. The challenges posed by the existence of a multiplicity of local organizations and national representative organizations, with oftimes competing interests and perspectives, demonstrates the need for innovative and collaborative processes to develop measures based on customary law which may serve as the basis for internal regulation of shared traditional knowledge. At the same time, they may serve to present a common framework for those applying for access and use rights.

Where indigenous peoples and local communities make decisions regarding biological resources and traditional knowledge in a fragmented fashion, undermining customary governance mechanisms and marginalizing communities left out of the decision making process, the inevitable result will be conflict and a race to the bottom. The experience of the Potato Park provides an extremely useful example of how communities can come together to develop new institutions and laws based on the fundamental principles of their customary law. In the years leading up to the formation of the agricultural collective that exists today, the communities of the Potato Park had experienced inter-community conflict and even violence. A very important precedent is set by the ability of these communities to draw upon the fundamental principles that they share in common, resulting from their shared Quechua heritage. The experience of the Potato Park, indicates that it is possible for communities sharing a similar Bio-Cultural Heritage to derive new collective decision-making structures from those fundamental elements of customary law that they share. Likewise, Aguaruna communities reviewing the ICBG experience, seven years on, were able to put aside differences regarding the agreements and draw upon their collective experience to inform their consideration of Peru's then draft traditional knowledge law.

The realities of the present international and national legal landscape require that indigenous and local communities in Peru develop new mechanisms to make decisions collectively regarding the traditional knowledge and resources that they share in common, and to find a way to build bridges so that these collective decisions can be applied outside of the communities. Both case studies, provide examples of how customary legal principles can be used to shape new local approaches for governing traditional knowledge that reflect changes in the national and international legal terrain. In the case of the ICBG agreement, customary legal principles were used to inform the process of negotiations, as well as to strengthen opportunities for Aguarunas to apply customary law to PIC procedures and control of collection activities, while ensuring to the greatest extent possible that community values would be upheld with regard to access to and use of resources. In the case of the Potato Park, Quechua customary legal principles and decision making processes have been used to develop local *sui generis* mechanisms for governing traditional knowledge and genetic resources in the face of new threats and opportunities. While communities of the Potato Park for the most part remain quite suspicious of state intervention, community members expressed optimism about the use of certain Western legal tools such as community registers and trademarks as well as the possibility of working with local governments to protect their customary governance mechanisms.

The role of customary law and traditional decision making authority, will be enhanced where indigenous peoples and local communities define and apply, both internally and externally, clear policies and regulations on access to and use of their biological and genetic resources and traditional knowledge. Community protocols outlining such policies and regulations are seen as one of the most promising means for empowering indigenous peoples and local communities, and for redefining the debate on how to recognize and respect customary law. Community protocols allow communities to build upon local capacities for the management of their traditional knowledge, while at the same time maintaining decision-making control firmly within the community. Efforts to create community protocols are important in order to reduce the risk of conflict between communities sharing similar knowledge and resources. As in the case of the Potato Park, it is possible that efforts of Peruvian communities to establish

community protocols may provide the added benefit of reinvigorating discussions about the importance of culture, traditional practices, and traditional governance mechanisms.

Development of community protocols can place the initiative in the hands of indigenous peoples and local communities. The Potato Park demonstrates the positive benefits of collaboration among a small number of Quechua communities, who have been able to agree on common principles for governing their resources within the context of national and international law. This alliance would be greatly strengthened in the event that resources and political will could allow for the participatory development of a Quechua- wide community protocol setting out minimum requirements for outsider use of Quechua shared resources. Development of similar protocols on an ethno-linguistic, ecosystem wide or regional basis, would place customary law at the heart of regulation of traditional knowledge.

In this vein, a cross border Bio-cultural protocol governing access and benefit sharing, relating to shared biological and genetic resources and traditional knowledge held by Jivaro communities in both Peru and Ecuador, as has been proposed by the Aguaruna, could play an important part in helping to define the role of customary law in traditional knowledge governance at the national and international level. Rather than waiting for the development of national and international law, indigenous peoples could through such action take the initiative and play a more proactive role in defining mechanisms for PIC, contractual arrangements and benefit sharing. Protocols of this nature need not be complex and highly worked out sets of rules, though they may indeed be so. They should however define a minimum process, identify who is entitled to provide PIC and negotiate access agreements and benefit sharing provisions, as well as providing guidance and a link to an internal community procedure for processing access applications.

In order to ensure complementarity between national law and customary governance systems, it is important for indigenous and local peoples to be actively involved in processes for the development and implementation of positive law. Both case studies identify the need for indigenous and local peoples to be involved in a significant way in the development, revision and implementation of Peru's traditional knowledge law and secondary regulations. Development of meaningful opportunities for participation, will require capacity building of indigenous peoples and local communities, as well as of state representatives, national authorities, NGOs, and scientific and private sector actors. Planning of participatory processes, will need to factor in the time and resources required to enable full informed participation of indigenous peoples and local communities and must include commitment of political support and funding. To make any process meaningful, participation of indigenous peoples and local communities must enable them to influence the outcome of relevant legislative and administrative decision-making processes.

Despite a prolonged national debate on the development of Peru's traditional knowledge law, both case studies demonstrate concerns by indigenous peoples and local communities about a lack of opportunities to influence the outcome of the process. The challenge for national authorities will now be to ensure greater buy-in by custodians of traditional knowledge in its future review, adoption of implementing regulations and development and management of registries, as well as in the development of a more holistic approach to national protection of traditional knowledge.

CONCLUSIONS

Customary law is closely tied to ethical, cultural and spiritual principles of indigenous and local communities and its application does not necessarily follow the logic of positive law. This makes it difficult to build functional bridges between systems with very different objectives. It does not, however, make it impossible and, with due care and full and informed participative processes, effective interfaces may be developed between positive and customary law systems. Caution will need to be exercised in the creation of institutions and mechanisms to implement customary law in order to avoid constraining customary law's dynamic nature and potential to respond to new challenges as they emerge. Respect for the form and nature of customary law, means that no pressure should be brought to require its codification, which would inevitably undermine its flexibility, continuity and future legitimacy. However, relying on existing oral customary law alone will not provide the bridge needed to ensure respect for customary law by national and international law. Responding to these challenges may require the development of new organizational and institutional structures, as well as the adoption of new modalities and mechanisms for resource and knowledge management, as has taken place throughout the course of history as indigenous peoples and local communities adapt and respond to new realities. These new structures and mechanisms will need to be based upon, and express, customary legal principles if they are to ensure the continuing legitimacy, adequacy and dynamism of community resource and knowledge management practices.

Amongst the steps required to secure protection of traditional knowledge, will be development of mechanisms which secure greater indigenous and local community participation in the adoption, review and implementation of relevant law and policy; adoption of a human rights approach to traditional knowledge protection; respect and recognition for the role of customary law, as the foundation for traditional knowledge regulation; establishment of functional interfaces between customary and positive law regimes; preparedness and capacity of national authorities to secure enforcement of customary law; the need for cohesion amongst indigenous peoples and local communities in defence of their interests; and, finally a more holistic approach to traditional knowledge protection, which focuses on both protection and strengthening of traditional knowledge and the knowledge systems from which it derives.

a. The full and informed participation of indigenous peoples in the design development, adoption, and implementation of traditional knowledge law and policy

1. Peru's traditional knowledge law as well as the CBD originate from a Western view of the world, and are based upon legal systems alien to indigenous peoples and local communities. Customary governance mechanisms, originate from an entirely different cosmovision based upon reciprocity in which the earth and its natural bounty are both provider and recipient of gifts to and from humankind. Traditional resource and knowledge governance is designed to maintain balance between use, sharing and protection of biological diversity, traditional knowledge and the traditional knowledge innovation systems upon which they depend. Securing effective protection of traditional knowledge will, therefore, require national and international authorities to work closely with indigenous peoples and local communities if national measures are to effectively complement and build upon customary systems of traditional knowledge governance.

2. In order to achieve appropriate, comprehensive, effective and culturally sensitive protection of traditional knowledge it will be necessary to ensure that customary law and positive law work complementarily. Achieving this, will require commitment from actors at all levels, including not only the State but also indigenous peoples and local communities themselves, who will need to develop coherent and cohesive policies if their interests are to be fully secured. NGO, research and private sector actors will also need to give due respect and recognition to the rights of indigenous peoples and local communities to make decisions over their resources and knowledge, in accordance with their customary laws and decision making authorities

b. Commitment to securing the realization by indigenous peoples of their human rights, and in particular their right to self-determination

3. Protection of traditional knowledge is inextricably linked to realization of indigenous peoples' and local communities' human rights. These include rights to food, health and freedom from hunger; to education, culture, land and traditional territories and biological resources; to development, human dignity; and perhaps most importantly to self-determination. Realization of these rights is both reliant upon, and necessary for, effective protection of traditional knowledge.

4. Self-determination is crucial to securing cultural diversity and the effective realisation by indigenous and tribal peoples of the full measure of their individual and collective human rights. Respect and recognition for

customary law is fundamental for securing rights to self-determination. Customary law and traditional authorities should not, however, be used as a screen for systematic breaches of individual human rights, in particular the rights of women.

5. Adoption of a human rights approach is vital to ensure that national, regional and international measures for protection of traditional knowledge are not subordinated to trade interests - whether of national elites, of the private sector or of dominant industrial nations. Particular care needs to be taken to ensure that national and international law on protection of traditional knowledge is not undermined by bilateral free trade agreements. To this end, the international community should approach the development of law and policy on traditional knowledge in a manner which supports and helps to enforce countries' obligations to respect, protect, and fulfil the human rights of indigenous peoples and local communities.

c. Adoption of law and policy which respects, recognizes and builds upon customary law and practice

6. The extent to which customary law and practice will play a role in defining issues such as prior informed consent, negotiation of agreements, benefit sharing, contract enforcement and project monitoring, will be influenced by the extent to which it continues to hold legitimacy among indigenous peoples and local communities. In some cases, half forgotten or lapsed customary practices may be unearthed, in others existing practices may be continued or strengthened, while in other cases practices may draw upon both community and national legal systems.

7. National law and policy should provide support for, and not undermine, customary legal regimes where subsisting. In particular there is a need to ensure that collective rights over cultural patrimony are not undermined by measures designed to facilitate commoditization or access to traditional knowledge and genetic resources.

8. To the greatest extent possible, traditional knowledge law and policy should support conflict resolution between and among indigenous peoples and local communities which share traditional knowledge, prior to access by third parties. Where this cannot be achieved, the state may need to intervene to ensure protection of collective rights over cultural patrimony, and the fair and equitable benefit-sharing between and within communities. Where this is required, decisions on access and benefit sharing should as far as possible be based upon the customary laws of indigenous peoples and local communities.

d. Establishment of functional interfaces between decision making authorities of indigenous peoples and local communities and the national judiciary and administrative bodies

9. Protection of traditional knowledge cannot be addressed by customary governance mechanisms alone. For this reason, it is essential that functional interfaces be established to build bridges between customary and positive legal regimes and their respective decision making authorities, at the local, national, regional and international levels. Links will also be required with judicial, dispute resolution and administrative bodies, as well as with enforcement agencies. An important barometer of the adequacy of such linkages will be the ability to provide indigenous peoples and local communities with access to justice, including remedies for breaches of contract and misappropriation, as well as protection of intellectual property, *sui generis* property rights and moral rights over traditional knowledge.

10. Defining the mechanics for securing respect and recognition of customary law in ABS and traditional knowledge regulation at the national and international level, will require expertise from indigenous peoples and local communities, legislators, legal practitioners, jurists and other specialists in a wide range of areas. This includes, not only experts in customary law, but also in areas such as contract law, tort, international trade law, conflict of laws, and human rights.

11. Further research is required to determine the modalities and extent to which customary law can and may be enforced on third parties acting within and outside of the local jurisdiction of indigenous peoples and local communities.

e. Preparedness and capacity to provide access to justice including remedies for breaches of contract and misappropriation of traditional knowledge in national and foreign jurisdictions

12. A central part of any ABS and traditional knowledge regime, will be compliance measures to prevent unapproved and uncompensated access and use of genetic resources and traditional knowledge. National and international judicial forums and conflict resolution mechanisms, will need the mandate, will and capacity to apply customary law as appropriate in the resolution of disputes. This will require a sustained capacity development program at all levels to ensure that indigenous

and local community claimants are provided with access to remedies for breach of their rights.

13. In order to ensure access to justice, it will be necessary to adopt measures to overcome impediments facing indigenous peoples and local communities including: opportunities, resources and capacity, to identify breaches of rights; ability to secure a presence before judicial and other enforcement authorities; restrictions such as provision of visas; costs of judicial proceedings; and access to independent and adequate legal representation. Existing rules on the sources of law, evidence, standing before the courts and recognition of foreign judgements will all need to be reviewed to determine their ability and adequacy for securing respect and recognition of customary law in national and international proceedings. A specific study on customary law and its role in the adjudication of cases of misappropriation is now required to future negotiations in this area.

14. Measures to ensure respect and recognition for customary law, will be required by states in which custodians of traditional knowledge traditionally reside and by user countries into which traditional knowledge is imported for scientific or commercial use. Consideration will also need to be given to the role of customary law in international legal enforcement of any ABS or traditional knowledge regime, including the status and weight it is to be given in judicial proceedings and in alternative conflict resolution. Alternative dispute resolution mechanisms, are one of the most promising avenues for development of mechanisms to enhance access to justice for indigenous peoples and local communities. National and international authorities, will need to examine modalities for funding alternative dispute resolution to ensure that high costs do not serve as a barrier to access to justice.

f. Traditional or other legitimate decision-making authorities at the level of indigenous peoples and local communities with the capacity to secure the effective implementation of their own systems of customary law and practices.

15. Indigenous peoples and local communities desirous of protecting traditional knowledge, in particular those wishing to benefit from commercial use of their knowledge and genetic resources, will need to be aware that users will want legal certainty regarding PIC procedures, rights of use, penalties for breaches etc. To this end, and to ensure customary law and traditional decision making authority are respected, they will need to define clear policy to regulate access to and use of their biological and genetic resources and traditional knowledge.

16. Development of community protocols, is one way for indigenous peoples and local communities to take the initiative in order to influence and redefine the debate on how to recognize and respect customary law and practice. What is required, is a horizontal bridge linking indigenous peoples sharing similar Bio-Cultural Heritage, as well as a vertical bridge linking indigenous groups with national and international law in a way that respects and builds upon customary practices. This, it is argued, can best be done through the adoption of community protocols which clearly enunciate the processes which must be followed to seek access and negotiate use of resources and knowledge.

g) *Holistic protection of traditional knowledge grounded upon indigenous peoples' cosmovision, commitment to strengthening of traditional knowledge systems and development policies which nurture and promote continued use of traditional knowledge by indigenous peoples and local communities.*

17. At the local level, it is often conceptually impossible to separate traditional knowledge and genetic resources from the landscape and the Cosmo-vision in which they are embedded, developed and conserved. It is thus necessary, for any effective effort for the conservation of traditional knowledge, to address not only the need to conserve in-situ biological and genetic resources but also the ecosystems and complex governance systems which have been responsible for their conservation and development. This can only be achieved through respect, encouragement and protection of the ability of local and indigenous communities to govern their traditional knowledge. National and international protection of traditional knowledge will, therefore, require provision of legal, technical and economic support to enable indigenous peoples and local communities to continue to protect local ecosystems and their traditional resource management practices, as well as their customary law systems and traditional decision making practices.

18. In the development of national and international law for protection of traditional knowledge, consideration should be given to existing regulatory experiences at the national and regional level. Any analysis should give due regard, not only to legislation adopted, but also to the nature of the debate leading to its adoption, as well as to early drafts and proposals by indigenous peoples, civil society

organizations etc. This will provide a more informed view of a wider range of ideas, legal concepts drawn from both positive and customary law, and their moral, ethical and cultural underpinnings, than may be reflected in legislation which has been adopted. The lessons which may be drawn from examination of such experiences are valuable not only for the success they demonstrate. They are equally important for their exposure of the inability of national law and policy, contracts, registers, and customary law and practice to provide protection for traditional knowledge in isolation.

In the final analysis, the adequacy of traditional knowledge law and policy depends not upon its intent, but upon the buy-in of all actors and their commitment to be bound by its provisions. From this perspective, international law and the international community is no different from customary law and any indigenous people, where community buy-in defines the legitimacy and effectiveness of their own norms. Getting global buy-in will require respect, recognition and commitment, on all sides, to finding a functional and appropriate system for protection of traditional knowledge.

A system which builds upon and is guided by fundamental principles of human rights, customary legal regimes and existing law and policies, will in the end, prove most likely to lend itself to equitable and effective governance of traditional knowledge. Achieving this end will in itself be an important step towards returning customary law to its rightful place together with natural law and positive as the basis for sound and sustainable national and international legal governance.

ANNEX I

Examples of Articles on traditional knowledge protection drawn from national legislation

Bangladesh,

(Draft) *Biodiversity and Community Knowledge Protection Act*, 29 September 1998

Article 2

1. The general objectives of this Act shall be:

a) to protect the sovereign rights of the Communities that have knowledge of biodiversity, and have managed, maintained, conserved, reproduced and enhanced biodiversity, genetic resources and traditional knowledge, culture and various forms of practice related to these resources and which are always held in common.

b) to create the legal and institutional environment so that the Communities, realizing the full potential of its benefits, can contribute and continue enhancing biodiversity through innovation, cultural internalization and expressions for a qualitatively rich and sustainable life.

c) to strengthen the informal knowledge system and the collective innovation of the Communities that prohibit claim for private ownership, private intellectual property rights or privileges that do not exist now, and that are against the moral, intellectual and cultural values of the Communities.

Article 3

3. Regulation of biological resources "….shall not apply to the traditional use and exchange of biological and genetic resources as well as related knowledge, culture and practices carried out by and between Communities based upon their customary and traditional practices,

Article 6 -

1. All the biological and genetic resources within the territory of Bangladesh, or originated in Bangladesh, as well as all related intellectual and cultural knowledge and practices among the people of the country, either existing in tangible forms or in various intangible forms and expressions, belong in perpetuity to the people of Bangladesh and is held for past, present and future members of the country.

4. The State will, nevertheless, recognize the original rights of indigenous and local communities, farming and fishing communities, and other communities that are directly linked through their livelihood practices to particular ecosystems and to the related knowledge, innovation and culture specific to that livelihood. These rights will be considered inviolable ….

Article 7

4. The biological and genetic resources and the intellectual and cultural knowledge and practices as well as any innovations arising from these shall not be sold, assigned transferred or dealt in any manner without explicit Prior Informed Consent and effective participation of the Communities concerned. The Communities will always have the right to refuse transaction based on gainful intent or any commercial utilization, exploitation and exchange.

Costa Rica

Law 7788 - Biodiversity Law.[62]

Article 4. - Exclusions

The law does not apply to the exchange of biochemical or genetic resources among the indigenous people and local communities, nor to the associated knowledge resulting from their non-profit making practices, uses or customs

Article 10 – Objectives,

Objectives of the Act include:

6. - To recognise and provide compensation for the knowledge, practices and innovations of indigenous peoples and local communities in the conservation and sustainable ecological use of the components of biodiversity.

Article 66. - Right to cultural objection

The right of local communities and indigenous peoples to oppose any access to their resources and associated knowledge, be it for cultural, spiritual, social, economic or other motives, is recognised.

Article 82- Sui generis community intellectual rights.

The State expressly recognises and protects, under the common denomination of sui generis community intellectual rights, the knowledge, practices and innovations of indigenous peoples and local communities related to the use of components of biodiversity and associated knowledge. This right exists and is legally recognised by the mere existence of the cultural practice or knowledge related to genetic resources and biochemicals; it does not require prior declaration, explicit recognition nor official

[62] Unofficial translation prepared by Bernard Mulcahy with the assistance of GRAIN, June 1999

registration; therefore it can include practices which in the future acquire such status…

Article 101- Incentives for community participation.

The participation of communities in the conservation and sustainable use of the biological diversity shall be promoted by means of technical assistance and special incentives in this law and its regulation, especially in areas harboring species which are rare, endemic or in danger of extinction.

Article 104- Promotion of traditional breeding.

The Ministry of Environment and Energy, and other public authorities, will promote the conservation and sustainable use of biological and genetic resources that have been the subject of breeding or selection by local communities or indigenous peoples, especially those which are threatened or are in danger of extinction and need to be restored, recuperated or rehabilitated. The Ministry will give the technical assistance or finance necessary to fulfill this obligation.

India

The Patents (Amendment) Act, 5 April 2005

Excludes patentability where:

Article 25 (k) - … the invention so far as claimed in any claim of the complete specification is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere,.

Philippines

Republic Act No. 8371, 28 July 1997. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/ Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for other Purposes

SEC. 13. Self-Governance.

The State recognizes the inherent right of [Indigenous Cultural Communities/ Indigenous Peoples (ICCs/IPs)] to self-governance and self-determination and respects the integrity of their values, practices and institutions. Consequently, the State shall guarantee the right of ICCs/IPs to freely pursue their economic, social and cultural development.

SEC. 15. Justice System, Conflict Resolution Institutions, and Peace Building Processes.

… (ICCs/IPs) shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights.

SEC. 32. Community Intellectual Rights.–

ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs. The State shall presence, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.

SEC. 34. Right to Indigenous Knowledge Systems and Practices and to Develop own

Sciences and Technologies.–

ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and hearth practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

SEC. 35. Access to Biological and Genetic Resources.–

Access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.

SEC. 65. Primacy of Customary Laws and Practices.–

When disputes involve ICCs/IPs, customary laws and practices shall be used to resolve the dispute.

SEC. 3 Definition of terms

f) Customary Laws - refer to a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs.

Portugal

Decree-Law No. 118/2002, April 20, 2002

Article 3. Traditional Knowledge

(1) Traditional knowledge comprises all intangible elements associated with the commercial or industrial utilization of local varieties and other autochthonous material developed in a non-systematic manner by local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those populations. That includes, but is not limited to, knowledge of methods, processes, products and designations with applications in agriculture, food and

industrial activities in general, including traditional crafts, commerce and services, informally associated with the use and preservation of local varieties and other spontaneously occurring autochthonous material covered by this Decree.

(2) That knowledge shall be protected against reproduction or commercial or industrial use or both as long as the following conditions of protection are met:

(a) the traditional knowledge shall be identified, described and registered in the Register of Plant Genetic Resources (RRGV)…

(3) The owners of the traditional knowledge may choose to keep it confidential, in which case the regulations shall provide for publication in the registration bulletin … which shall be limited to disclosure of the existence of the knowledge and identification of the varieties to which it relates, with the protection conferred by registration being limited to cases in which it is unfairly acquired by third parties.

(4) The registration of traditional knowledge that until it is requested has not been used in industrial activities or is not publicly known outside the population or local community in which it originated shall afford its owners the right to:

(i) object to its direct or indirect reproduction, imitation and/or use by unauthorized third parties for commercial purposes;

(ii) assign, transfer or license the rights in the traditional knowledge, including transfer by succession;

(iii) exclude from protection any traditional knowledge that may be covered by specific industrial property registrations.

ANNEX II

Excerpts from Regional Model Laws for Protection of Traditional Knowledge

Organization of African Unity

African Model Legislation for the Protection of The Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources

The specific objectives of this legislation include to:

a) recognize, protect and support the inalienable rights of local communities including farming communities over their biological resources, knowledge and technologies;

e) ensure the effective participation of concerned communities, with a particular focus on women, in making decisions as regards the distribution of benefits which may derive from the use of their biological resources, knowledge and technologies;

Art 2.2 This legislation shall not affect the following:

i) The traditional systems of access, use or exchange of biological resources;

ii) Access, use and exchange of knowledge and technologies by and between local communities;

Article 5.

1) Any access to biological resources, knowledge and or technologies of local communities shall be subject to the written prior informed consent of:

i) the National Competent Authority; as well as that of

ii) the concerned local communities, ensuring that women are also involved in decision making.

2) Any access carried out without the prior informed consent of the State and the concerned local community or communities shall be deemed to be invalid

Article 8.

1) [Any] agreement [to access traditional knowledge] shall contain commitments undertaken or to be undertaken by the collector, as follows:

ii) to guarantee to deposit … records of community innovation, practice, knowledge or technology collected with the duly designated governmental agencies and, if so required, with local community organizations;

iii) to inform immediately the National Competent Authority and the concerned local community or communities of all findings from research and development on the resource;

iv) not to transfer the biological resource or any of its derivatives or the community innovation, practice, knowledge or technology to any third party without the authorization of the National Competent Authority and the concerned local community or communities;

v) not to apply for any form of intellectual property protection over the biological resource or parts or derivatives thereof and not to apply for intellectual property rights protection over a community innovation, practice, knowledge or technology without the prior informed consent of the original providers;

vi) to provide for the sharing of benefits;

vii) access shall be conditioned upon a commitment to contribute economically to the efforts of the State and concerned local community or communities in the regeneration and conservation of the biological resource, and the maintenance of the innovation, practice, knowledge or technology to which access is sought;

Article 9.

1) Patents over life forms and biological processes are not recognized and cannot be applied for.

2) The collector shall, therefore, not apply for patents over life forms and biological processes under this legislation or under any other legislation relevant to the regulation of access and use of a biological resource, community innovation, practice, knowledge and technology, and the protection of rights therein.

Article 16.

The State recognizes the rights of communities over the following:

i) their biological resources;

ii) the right to collectively benefit from the use of their biological resources;

iii) their innovations, practices, knowledge and technologies acquired through generations;

iv) the right to collectively benefit from the utilisation of their innovations, practices, knowledge and technologies;

v) their rights to use their innovations, practices, knowledge and technologies in the conservation and sustainable use of biological diversity;

vi) the exercise of collective rights as legitimate custodians and users of their biological resources;

Article 17.

The State recognizes and protects the community rights that are specified in Article 16 as they are enshrined and protected under the norms, practices and customary law found in, and recognized by, the concerned local and indigenous communities, whether such law is written or not

Article 19.

Local communities have the right to refuse access to their biological resources, innovations, practices, knowledge and technologies where such access will be detrimental to the integrity of their natural or cultural heritage

Article 21.

1) Local communities shall exercise their inalienable right to access, use, exchange or share their biological resources in sustaining their livelihood systems as regulated by their customary practices and laws.

2) No legal barriers shall be placed on the traditional exchange system of the local communities in the exercise of their rights as provided for in paragraph (1) above and in other rights that may be provided by the customary practices and laws of the concerned local communities.

Article 23.

1) The Community Intellectual Rights of the local communities, including traditional professional groups, particularly traditional practitioners, shall at all times remain inalienable, and shall be further protected under the mechanism established by this legislation.

2) An item of community innovation, practice, knowledge or technology, or a particular use of a biological or any other natural resource shall be identified, interpreted and ascertained by the local communities concerned themselves under their customary practice and law, whether such law is written or not.

3) Non-registration of any community innovations, practices, knowledge or technologies, is not to mean that these are not protected by Community Intellectual Rights.

4) The publication of a written or oral description of a biological resource and its associated knowledge and information, or the presence of these resources in a genebank or any other collection, or its local use, shall not preclude the local community from exercising its community intellectual rights in relation to those resources.

South Pacific Island States

(draft) Model Law

Article 6 - Proof of ownership

(1) Upon a claimant declaring or acknowledging in a form or manner valid by its customs or practices that it has been using and is the owner of traditional ecological knowledge, an innovation or a practice, and providing proof of such usage, the claimant shall be considered to be the owner of such knowledge, innovation or practice.

8 Nature of ownership right

(1) The ownership right over knowledge, an innovation or a practice:

(a) is inalienable and non-transferable and is in addition to any other rights available under existing intellectual property laws but where there is an inconsistency with intellectual property laws, the intellectual property laws shall, to the extent of the inconsistency, be void;

9 Register of traditional ecological knowledge, innovations and practices

(1) An individual, entity or group may register its traditional ecological knowledge, innovations and practices in a national register, or where the knowledge, innovations or practices are or may be owned by 2 or more countries or by the Pacific region as a whole, in a regional register.

(2) Each national government in respect of a national register, and the Regional Coordinator in respect of a regional register, must put in place rules to establish and maintain a register and to provide for confidentiality.

(3) The fact of non-registration does not affect an individual's, entity's or group's ownership of its knowledge, innovations and practices.

10 Commercial use

(1) Any person using or proposing to use traditional ecological knowledge, or an innovation or any part of such innovation, or a practice for commercial use must:

(a) seek the prior informed consent of the owner, where there is one, or co-owners where there are several, of the knowledge, innovation or practice; and

(b) enter into an access and benefit sharing agreement with the owner or co-owners.

11 Non-commercial uses

(1) An owner or a co-owner, may in accordance with their customs and practices and such other conditions as they consider appropriate, allow use of their traditional ecological knowledge, innovations and practices by a group or an individual belonging to a group so long as such knowledge, innovations and practices are not acquired for or do not subsequently become the subject of commercial use.

ANNEX III

Excerpt on customary law from the WG ABS negotiating text for an International Regime on Access and Benefit-Sharing

UNEP/CBD/WG-ABS/7/8

C. COMPLIANCE

4) Measures to ensure compliance with customary law and local systems of protection

[Noting that customary law provides a sub-set of existing rules related to access and benefit-sharing of [genetic resources][biological resources], and measures to comply with such rules {*preambular paragraph*}]

[Recognizing that customary law functions within a specific belief system, is dynamic and includes mechanisms to preserve its underlying values and principles {*preambular paragraph*}]

[1. Contracting Parties [shall][should]:

(a) Take necessary policy, administrative [regulatory] and legislative measures to recognize the rights of indigenous peoples and local communities to [genetic resources][biological resources][, their derivatives] [and products] and/or associated traditional knowledge. Until, and to the extent such policies, administrative and legislative measures have not been put in place, the State shall nonetheless uphold obligations with respect to indigenous peoples' and local communities' rights to [genetic resources][biological resources][, their derivatives][and products] and/or traditional knowledge under international law;

(b) With the full and effective participation of the indigenous and local communities concerned support and facilitate local, national and/or regional community protocols regulating access to traditional knowledge taking into consideration the relevant customary laws and ecological values of indigenous and local communities in order to prevent the misappropriation of their associated traditional knowledge and to ensure the fair and equitable sharing of benefits arising from the utilization of such associated traditional knowledge;

(c) Ensure that any acquisition, appropriation or utilization of traditional knowledge in contravention of the relevant community protocols constitutes an act of misappropriation;

(d) Ensure that the application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, [shall][should] be guided, as far as possible and appropriate, by respect for the ecological values, customary norms, laws and understandings of the holders of the knowledge;

(e) Encourage and support the development of community protocols that [shall][should] provide potential users of traditional knowledge with clear and transparent rules for access to traditional knowledge where associated traditional knowledge is shared between: (i) indigenous and local communities spread across national boundaries; and (ii) between indigenous and local communities with different values, customary norms, laws and understandings;

(f) Where such community protocols are developed with the full and effective participation of indigenous and local communities, give effect to such community protocols through an appropriate legal framework;

(g) Community protocols in their efforts to prevent misappropriation of associated traditional knowledge and ensure fair and equitable benefit-sharing must also make efforts to respect, preserve and maintain relations within and between indigenous and local communities that generate and sustain the traditional knowledge by ensuring the continued availability of traditional knowledge for the customary practice, use and transmission;

(h) Consider relevant customary law and its potential application to access and benefit-sharing transactions in taking measures to raise awareness of access and benefit-sharing issues.

[2. Parties are encouraged to provide information on the indigenous community which has the responsibility to identify the appropriate customary law expert relevant to an access and benefit-sharing transaction.]

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List of Acronyms

ADN	Asociación para la Defensa de los Derechos Naturales
AIDESEP	La Asociación Interétnica de Desarrollo de la Selva Peruana
ABS	Access and Benefit-Sharing
ANDES	Asociación para la Naturaleza y el Desarrollo Sostenible
CAF	Corporación Andina de Fomenta
CAN	Andean Community of Nations
CBD	Convention on Biological Diversity
CONAP	Confederación de Nacionalidades Amazónicas del Peruana
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
FAD	Federación de Comunidades Aguarunas del Río Dominguza
FAO	Food and Agriculture Organization of the United Nations
FECONARIN	Federación de Comunidades Nativas del Río Nieva
FECORSA	Federación de las Comunidades Cambizas del Río Santiago
FEMAAM	Federación de Mujeres Aguarunas del Alto Marañon
FPIC	Free prior informed consent
GTZ	Deutsche Gesellschaft fur Technische Zusammenarbeit
ICBG	International Biodiversity Group Program
IGC	Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore
IIED	International Institute for Environment and Development
ILO	Internacional Labour Organization
INDECOPI	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual
IP	Intellectual property
IPR	Intellectual Property Rights
IUCN	International Union for the Conservation of Nature
NGO	Non-governmental organisation
OAAM	Organización Aguaruna Alto Mayo
OCCAAM	Organización Central de Comunidades Aguarunas del Alto Marañon
PIC	Prior informed consent
SPDA	Peruvian Environmental Law Society
TK	Traditional knowledge
TCE	Traditional cultural expressions
TRIPS	Agreement on Trade Related Intellectual Property
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNU	United Nations University
UNPFII	United Nations Permanent Forum on Indigenous Issues
WG ABS	Ad Hoc Working Group on Access and Benefit-sharing
WG 8(j)	Ad Hoc Working Group on Article 8 (j) and related provisions
WHO	World Health Organization

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Brendan Tobin
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The Peruvian Society for Environmental Law (SPDA) is a non-profit organization founded in 1986, working in the areas of Environmental Law and Policy. The SPDA is organized in five programs: International Affairs and Biodiversity; Environmental Policy and Management; Forestry; Conservation, and Public Interest Defense. It provides technical/legal assistance and consultancy services, carries out specific projects and promotes Environmental Law through its information centre and capacity building activities.

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The project objective is to prevent biopiracy with regard to biological resources and traditional knowledge in the region. A series of national and international activities have been already undertaken. These include: strengthening the *National Commission for the Prevention of Biopiracy in Peru*; undertaking research (Research Documents); organizing regional meetings with different actors, including intellectual property offices in order to evaluate measures to confront biopiracy; coordinate actions and strategies between member institutions in countries; coordinate actions with the Amazon Cooperation Treaty Organization, among others.

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