

THE ROLE OF CUSTOMARY LAW IN ACCESS AND BENEFIT-SHARING AND TRADITIONAL KNOWLEDGE GOVERNANCE: PERSPECTIVES FROM ANDEAN AND PACIFIC ISLAND COUNTRIES

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Although, this report relies heavily upon the Andean and South Pacific workshops and comments received from colleagues, responsibility for the analysis and conclusions lies with the author alone. This report was prepared in 2008, and is current as at that time.

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Foreword

The development of appropriate mechanisms for the protection of traditional knowledge (TK) and regulation of access to genetic resources and benefit sharing (ABS) are amongst the most challenging issues currently facing the international community. These issues have been the subject of much debate since the adoption in 1992 of the Convention on Biological Diversity and have now found their way onto the agenda of the World Intellectual Property Rights Organization (WIPO) and the World Trade Organization. Protection of TK has also been taken up at UNESCO, FAO and the WHO, and has been the subject of research by UNU and UNCTAD, as well as being a key topic for the United Nations Permanent Forum on Indigenous Issues (UNPFII).

Despite the breadth of interest by international bodies, to date TK remains largely unprotected and the rights of indigenous peoples and local communities over their knowledge is in the main part only recognized by their own customary laws and practices. This situation may however be on the point of change. The Convention on Biological Diversity has been given a mandate to its Working Group on ABS (WG ABS) to negotiate an international regime on ABS and issues relating to associated TK. The WG ABS has been charged with finalising its work before 2010. Meanwhile WIPO has extended the mandate for the Intergovernmental Committee on Intellectual Property Genetic Resources, Traditional Knowledge and Folklore (IGC) for a further two years from September 2007. The IGC has developed draft elements on TK which may serve as the basis for negotiation of an international regime on TK.

Indigenous peoples and local community representatives have been active in both the WG ABS and the IGC, calling for the development of mechanisms which are in tune with their realities, their values and their customary laws and practices. In both forums the work relating to TK has focused on proposals for sui generis mechanisms and in particular misappropriation as the basis for protection of TK. Indigenous peoples and local communities have frequently made the case that their customary laws and practices are in essence sui generis regimes specifically crafted for protection of their TK. Both the CBD and the IGC have at one time or another recognized the importance of customary law and practice and are, to varying degrees investigating the potential role of customary law in any international regime(s) relating to TK and ABS.

With the adoption by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS) on the 13th of September 2007, indigenous peoples' rights over their resources and knowledge were given a significant boost. The Declaration obliges parties to take measures to regulate indigenous peoples rights with due respect for their customs and traditions. The result is to create a basis for international recognition of customary law. Of equal importance DECRIPS provides a clear enunciation of indigenous peoples human rights whose realization is inextricably linked both depending upon and vital for protection of TK.

Recognition of a role for customary law in the protection of TK is challenging from both a practical and a political perspective. These challenges are now facing negotiators of an international ABS regime. With a view to promoting greater understanding of these issues UNU-IAS has developed a program of research into the role of customary law in the protection of TK. This work is being carried out in collaboration with a wide range of partners including the International Marine Project Activities Centre (IMPAC), the Republic of Palau Office of Environmental Response and Coordination (OERC), the South Pacific Regional Environment Programme (SPREP) and the Secretariat of the Pacific Community (SPC), the World Conservation Union (IUCN), and the World Intellectual Property Rights Organisation (WIPO). Support for this work has come from the United Nations Environment Programme (UNEP) Palau and the Christensen Fund.

The present publication provides an overview of the debate on customary law and the outcomes of the Andean and South Pacific workshops and provides some suggestions on the potential role for customary law in international governance of ABS and TK. We look forward to receiving your comments on this paper and to proposals for future work and collaborations in this area.

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UNU-IAS
April 2009

Executive summary

Despite an ever increasing awareness of the importance and multiple values of traditional knowledge (TK) it is still largely unprotected by national and international law. Ongoing negotiations at the Convention on Biological Diversity (CBD), World Intellectual Property Organisation (WIPO), and World Trade Organization (WTO) may significantly change this scenario. These negotiations have tended to focus primarily on development of legal measures to control unapproved and uncompensated use of TK by the scientific and commercial sectors. While such control is necessary, indigenous peoples and local communities have expressed concern that such a limited approach fails to address many of the more pernicious threats to TK including globalization, inappropriate development policies, loss of languages and failure to protect their human rights. They have called for a more holistic approach to protection grounded on their rights to self-determination over their lands, traditional territories, resources, knowledge, and cultures; strengthening of TK systems; and, respect and recognition of their own institutions, customs and customary laws and practices.

This paper examines the relationships between customary law, national and international regulation of TK and access to genetic resources and benefit sharing (ABS), and human rights. The paper is based upon a desk-top analysis of these issues and the deliberations and conclusions of a series of regional and sub-regional workshops held in Andean and South Pacific Island countries between 2003 and 2006.

Section I provides an overview of issues relating to protection of TK and recognition of customary law. Section II addresses international recognition of customary law, focusing on the work of the CBD and WIPO Intergovernmental committee on intellectual property, genetic resources, traditional knowledge and folklore (IGC). Section III examines the protection of rights of TK custodians under international human rights law. Section IV reviews the status of customary law in Andean and Pacific Island countries. Section V provides an overview of the debates and conclusions of the various workshops. Section VI presents the conclusions of the study and proposals for future action.

SECTION I: Customary law and protection of TK

TK covers a vast area of knowledge including, but not limited to, astrology, history, art, song, dance, stories, mathematics, language, land and resource management, agriculture, fisheries, human and animal health, education, religion and law. TK is threatened by a wide range of internal and external forces including changing cultural values, loss of land and resources, failure to transmit knowledge between generations, loss of language, exposure to the market economy, insensitive educational and health policies, inappropriate agriculture and fisheries extension programs, incursion of extractive industries, influence of organised religion, and biopiracy. Emphasis on controlling biopiracy alone will be inadequate to protect TK and the international community and individual nations will need to also address the underlying threats to the integrity of TK systems.

Indigenous peoples have consistently argued that measures for protection of TK should be based upon and support enforcement of their customary laws. Amongst the principal attributes of customary law are its legitimacy, flexibility and adaptability. In some countries it is recognised as a source of law, in others its role is limited to the exercise of internal autonomy by indigenous peoples and local communities, while many countries have yet to give formal recognition to customary law. Where it is recognised it is usually seen as coming at the bottom of the hierarchy of laws, a situation which must be revised in the light of recent developments in international human rights law.

Indigenous peoples and local communities recognise that customary law alone cannot protect their TK and TK systems or their rights over their knowledge and must be supported by national, regional and international law. A key determinant for securing effective recognition and application of customary law in TK protection will be the development of functional interfaces between indigenous peoples' and local communities' decision making and enforcement authorities and national and international legislative, administrative and judicial authorities. A multiplicity of existing customary law systems precludes harmonisation and adoption of a one size fits all solution.

If customary law is to play a meaningful role in international governance of ABS and TK issues then it will need to be applied in a transparent and equitable fashion. Amongst the questions which will need to be considered in determining the applicability of customary laws, will be: which laws apply to which knowledge; to what extent is a user of TK required to seek information on unwritten customary laws before making use of TK; to what extent is TK in the public domain subject to customary law; and, what conditions are required to ensure that a judgment made by a traditional authority or a national authority applying customary law can be enforced in a foreign jurisdiction.

Section II: Customary law and international ABS and TK governance

The CBD is recognised as the primary international instrument with responsibility for protection of TK related to biological diversity. The CBD Working Group on ABS (WGABS) has been mandated by COP 7 to negotiate an international ABS regime covering genetic resources and TK under Article 8 (j) in collaboration with CBD's working Group on Article 8 (j), which has responsibility for TK issues. Both working groups have recognised that customary law has a key role to play in any ABS regime, in particular with regard to issues of prior informed consent (PIC) procedures, fair and equitable distribution of benefits, compliance and dispute resolution.

The WIPO IGC has developed documents setting out draft elements which could serve as the basis for negotiation of international regimes for protection of traditional knowledge relating to biological diversity and traditional cultural expressions (TCE). Built upon concepts of misappropriation they propose that any regime be developed with appropriate recognition and respect for customary law and consideration of the spiritual, sacred or ceremonial characteristics of TK. WIPO has also prepared a draft issues paper on customary law which examines the manner in which it may be recognized by national and international law. Measures such as disclosure of origin, certificates of origin and registers of TK have been among the principal components put forward for establishment of any system to enforce misappropriation rules.

International negotiations and national experiences with the development of law and policy has brought to light significant challenges which must be overcome if positive legal regimes are to ensure recognition and respect for the rights of indigenous peoples and local communities over TK. Application of the principle of the public domain, for instance, threatens rights over TK which has been commercialized, widely disseminated through the mass media or published, thereby, potentially legitimizing its expropriation; access to justice is subject to many practical and legal impediments; while, collation of TK in registries and databases may undermine control by TK custodians of access to and use of their knowledge.

Section III: Customary law, ABS and human rights

Its central role in the lives of indigenous peoples and local communities makes its protection crucial for realization of a wide range of human rights, including those relating to food, health, education, development, human dignity, culture and self-determination. Its protection

is inextricably linked to recognition and protection of their rights to lands, traditional territories and resources. International human rights law recognises the rights of indigenous peoples and local communities over their TK as well as their rights to apply their customary laws to its governance.

International Labour Organization Convention 169 requires that in the application of national laws and regulations due regard is to be given to the customs or customary laws of indigenous or tribal peoples and that they be consulted prior to granting any rights for exploration or extraction of resources on their territories. The Convention recognises the rights of indigenous peoples to maintain their own institutional structures and their distinctive customs, including their customary law systems to the extent that these are in accordance with internationally recognized human rights standards. The United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS) goes even further recognising indigenous peoples right to self-determination and 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. DECRIPS also requires states to give due respect for indigenous peoples customs, traditions and land tenure systems, giving due recognition to customary law.

To protect TK and secure these human rights international law will need to clearly enunciate the responsibilities of all countries, including countries in which custodians of TK reside and countries in which it is, directly or indirectly, utilised. This may be achieved, in part, by the development of measures to ensure respect and recognition for the central role of customary law in TK governance including its role in judicial and alternative dispute resolution procedures. In the process of developing any TK law and policy the international community and national governments should at all times be guided by the overarching right of indigenous peoples to self-determination.

Section IV: Recognition of Customary law in Andean and South Pacific Island countries

Andean countries

The constitutions of all countries of the Andean Community of Nations recognise the pluricultural and multiethnic nature of the state and they have all ratified ILO Convention 169. Regional legislation on ABS and TK requires PIC of indigenous, Afro-American and local communities for access to and use of TK and disclosure of evidence of rights to use TK in patent applications. The Andean Community initiated a process to develop sui generis TK legislation with the preparation of a report by indigenous experts which calls for any regime to be based upon customary law.

Bolivia has held a wide consultation process with indigenous peoples and local communities, who took the view that users should be required to provide documentation to show TK had been legally obtained and concluded that the only way to protect TK was to keep it alive within communities themselves. The constitution of the Bolivarian Republic of Venezuela states that collective intellectual property rights in the knowledge, technologies and innovations of native peoples are guaranteed and protected. Colombia recognises the right of ethnic communities to conserve, enrich and diffuse their cultural patrimony, and generate knowledge over these, in accordance with their own traditions. Ecuador's constitution provides that indigenous peoples' own authorities are entitled to exercise judicial functions, applying their own laws and procedures for the solution of internal conflicts in accordance with their customs and customary laws. Peru has adopted sui generis TK legislation which obliges benefit sharing for use of TK in the public domain, and the national constitution provides indigenous peoples and local communities with extensive rights to regulate their own internal affairs in accordance with customary law.

South Pacific Island Countries

In South Pacific Island countries up to 80% of the land and significant marine areas and the resources they contain are subject to traditional tenure and are largely governed by traditional resource management strategies based on customary law. Restrictions in the form of what are commonly known as tabus, taboos or buls, widely used for community resource management, are increasingly being incorporated into marine conservation strategies. At the regional level the South Pacific Forum with the support of the South Pacific Regional Environmental Program has been responsible for promoting a wide ranging debate on development of measures for protection of traditional knowledge. This has led to the adoption of a regional model law on protection of expressions of cultural heritage and the preparation of a draft model for protection of traditional ecological knowledge.

Legal recognition of customary law varies greatly in the region. The constitution of Papua New Guinea (PNG), for instance, recognizes custom as a source of law. While, Samoa's constitution leaves it to the government and judiciary to determine which elements of customary law are to be recognised through acts of parliament or decisions of the courts. Vanuatu has adopted a progressive approach to recognition of customary law in many areas of governance including provision of support for traditional resource management while leaving considerable flexibility to communities on issues such as delimitation of protected areas, definition of permitted activities, sanctions and enforcement mechanisms. In Palau the courts are increasingly viewed as becoming a part of customary processes of dispute resolution, while the inclusion of chiefs in legislature and state government bodies is seen as forging a compromise between western and customary models of governance. This notion of compromise is also apparent in the Loyalty Islands Environment Charter, which seeks to articulate customary law principles in a fashion coherent to a western legal system. Samoa has promoted development of village fisheries management plans creating a bridge between national law and customary law and practice. In the Solomon Islands legislation has been developed which seeks to blend and synergise modern and traditional law, while seeking to retain the flexibility of the former. Pohnpei's experience in the development of conservation law and policy has demonstrated the need for community buy in and increased co-management of resource conservation and sustainable use. While in PNG, with over 800 languages and 2000 cultures, decentralisation is seen as a key tool for responding to diversity.

Section V: Andean and South Pacific Island workshops

This work is informed by two regional workshops one for Andean countries held in 2006 and for South Pacific Island countries held in 2005. Two sub-regional workshops were also held for Melanesia, in 2003 and Micronesia in 2004.

Participants in the Andean workshop noted that indigenous people's legal systems are in many cases based upon a mix of norms derived from customary law, national law and other sources. Therefore use of the term "customary law" should be clearly defined to avoid giving the impression that these are mere custom rather than complex systems of rules and practices which may have legal and juridical effect. They stressed that as customary law is closely tied to ethical, cultural and spiritual principles its application does not necessarily follow the logic of positive law and attempts to codify or assimilate customary law into the positive law system may lead to changes its nature and the loss of its underlying principles, nature and dynamism. The workshop concluded that in order to secure protection of TK in the short to medium term strategic alliances are needed with political actors at the local and national level; awareness building needs to take place at all levels by diffusing case studies which should focus on identifying general elements and underlying principles of customary law rather than in-depth analysis of its content; case studies should also address the interfaces between legal regimes and decision making authorities; and, clear guidelines are

required to control the use of research products, confidentiality of information, approval of publications and their diffusion.

The Melanesian workshop drew attention to the crucial role played by traditional resource management in sustainable resource management; the significant challenges which traditional resource management faces due to insensitive development policies; and increasing innovativeness of indigenous peoples and local communities as well as national governments in developing responses to such challenges. The workshop highlighted the need for awareness building and capacity development at all levels to secure respect and recognition for customary tenure and customary law and to protect and strengthen TK systems. It concluded that upwards of 80% of laws maintaining stability of communities and protecting the environment are customary; if rights to exercise traditional authority through the application of customary law is recognised the issue becomes one of respect for such laws and authority rather than one of adjudication of the validity of the law or of its intent; and, the key issue is the manner in which the state acts to support customary law and the exercise of traditional authority, which should be carried out in a manner which supports realization of human rights.

Participants at the Micronesian Workshop considered that loss of TK, which is the heritage of communities and the basis of cultural identity, is caused by a range of internal and external pressures including more centralized government, break down of family structures, a shift from communalism to individualism, lack of transmission to younger generations, and environmental degradation. The workshop concluded that national governments should recognize the power of local chiefs to participate in formation of laws and to implement and enforce customary law; there is a need for constitutional reform to reflect community traditions, practices and customs; the judicial system should accommodate traditional ways of resolving conflicts; and, strong national recognition of customary law is crucial for international recognition. The meeting proposed wider use of local languages in the education system; documentation and compilation of TK and customary law on genetic resources; more coordination among agencies involved in customary law and genetic resources management; increased enforcement of law and policy on TK and of customary laws; and funding from national/regional/international bodies to assist in education and enforcement of law and policy on TK and of customary law.

The South Pacific Regional workshop addressed capacity building, adoption of a regional model law on TK, the role of customary law in ABS and TK governance, and the relationship between the implementation of the Islands Biodiversity Program of Work and ABS regulation. The workshop concluded that there is a need to strengthen customary law regimes and secure their role in protection of TK and regulation of ABS; efforts to develop a Regional Model Law for protection of TK should continue; databases of TK should only hold information voluntarily submitted by indigenous peoples and local communities and be subject to strict conditions of confidentiality; GEF should support capacity building on ABS and TK issues including national, sub-regional and regional activities; and, research into the status of customary laws and their interface with national legal regimes should include work at the local level and involve local experts.

Section VI: Conclusions and future actions

Traditional resource management based on the three pillars of traditional tenure, traditional knowledge and customary law, is crucial for meeting both local and national objectives on conservation and sustainable use of biodiversity, and for effective development and implementation of TK and ABS law and policy. Constitutional recognition of customary law provides a basis for realization of rights to self-determination and supports continued local use and development of TK.

CBD is the primary international instrument with responsibility for protection of TK related to biological diversity. The mandate of the IGC also covers TCE's which are not fully covered by CBD. Negotiations on TK protection at CBD and IGC which are focusing on prevention of misappropriation have recognised the importance of giving due recognition to customary law and practice. There is a need in both CBD and IGC to broaden their approach to TK protection to give greater attention to the strengthening of TK systems. Full participation of indigenous peoples and local communities in the design of international and national TK measures is crucial to that they accords with their realities, rights and priorities, and ensures their relevance and effective implementation.

Any international ABS regime should provide a framework linking customary law, national sui generis TK law and policy in countries where TK custodians reside and in user countries. Requiring PIC for access to and use of TK empowers indigenous peoples and local communities to require users to contract into custom. Disclosure of origin and certificate of origin schemes can provide support for recognition and enforcement of rights over TK and of customary law. Alternative dispute resolution mechanisms, guided by principles of equity drawn from among other sources customary law, could help to consolidate the role of customary law in TK governance.

The international community alone cannot ensure effective TK protection. The commitment of national decision makers to promoting TK protection at the international level needs to be mirrored by adoption of relevant national TK law and policy. Regional law and policy will be important to ensure that shared TK held by indigenous peoples and local communities in more than one state is protects the rights of all custodians. Continuing use of TK by communities, development of policies for TK management, and establishment of community managed TK databases will be important for long term protection of TK.

It should not be the purpose of international law to promote harmonisation of customary law systems but rather to create flexible mechanisms which ensure respect and recognition for customary law regimes. To this end it is not necessary to focus as much on the content of customary law as on building effective interfaces between traditional decision making authorities and national, regional and international decision-making, judicial and administrative authorities. Devising measures to bridge the divide between positive and customary law regimes requires the identification of common objectives among TK custodians and regulators. In the search for such common objectives it will be necessary to address TK protection in a holistic fashion addressing not trade related aspects of TK governance and the strengthening of TK systems. Community protocols developed by TK custodians may serve to define the interface between customary law and positive law regimes without requiring codification of customary law itself. These may prove particularly influential in helping shape international TK law where covering TK held by indigenous peoples or local communities whose traditional territories cross national frontiers. The Global Environment Facility (GEF), international organizations and aid agencies, governments, NGO's, and the research and private sectors should be called upon to provide funding and technical support for indigenous peoples' and local communities' in their efforts to protect their TK, including in the development of community protocols

TK is inextricably linked to realization of human rights to food, health, freedom from hunger, land and traditional territories, natural resources, culture, education, human dignity, development and self-determination. Adopting a human rights approach to TK protection will provide guidance for development of more holistic protection of TK which focuses not only on unapproved and/or uncompensated use but also on the protection of the multiple inherent, social, cultural, environmental, spiritual and economic values of TK. In the application of human rights law to TK care must be made to recognise the sometimes competing nature of collective community rights and individual human rights. Full and informed participation of indigenous peoples, including women, elders and youth will be important to ensuring that the

potential conflicts between human rights law and customary law are addressed in a fashion which supports cultural integrity while preventing continued systematic denial of the human rights of marginalised sectors, in particular women.

There are significant practical and legal hurdles to be overcome if largely unwritten customary laws are to be given appropriate recognition by positive law systems, however, international law itself includes many elements which are unwritten and the oral nature of customary law should not impede its recognition.

The Role of Customary law in ABS and TK governance: Perspectives from Andean and South Pacific Island countries

Despite being an issue of international attention for many years, indigenous traditional knowledge is still vulnerable to misappropriation. It is time to recognise that indigenous traditional knowledge is not simply an intellectual property issue. Likewise, it is not simply a human rights issue, a trade issue nor an amalgamation of these issues. The proper protection of indigenous traditional knowledge is an indigenous issue and indigenous peoples should be central to this process.

Michael Dodson

There is only one word which can serve as a practical rule for our whole life, reciprocity.

CONFUCIUS

Introduction

The entry into force of the Convention on Biological Diversity (CBD) in 1993 signalled the beginning of what has become one of the most significant and frequently controversial debates by the international community on the concept of knowledge ownership and rights relating to the product of intellectual effort. Recognition by the CBD of rights of indigenous peoples over their traditional knowledge (TK) sparked a debate which has brought into question dominant western concepts of intellectual property and the public domain. In its train it has brought changes in the halls of international diplomacy creating new negotiating spaces for indigenous peoples and broadening the sources of law being drawn upon in the development and implementation of international law and policy. It has also opened another avenue for the promotion of indigenous peoples and local communities' human rights to food, health, land, freedom from hunger, land and traditional territories, culture, education, human dignity, development and self-determination.

Indigenous peoples and local communities have consistently called for recognition of their rights to self-determination as a basis for protection of their rights over TK. Realization of their rights to self-determination is closely linked to recognition and respect for their rights to regulate their own affairs in accordance with their own legal regimes, commonly referred to as their customary laws and practices. One of their principal demands has been that any measures for protection of traditional knowledge be based upon their customary¹ laws and practices. In both the CBD and the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) this call has been clearly made and clearly heard. This is apparent from various decisions of the Conference of the Parties (COP) of CBD and the IGC deliberations where it has been recognised that customary law has a fundamental role to play in any system for protection of TK. What the nature or extent of that role should be is yet to be determined. The question of the role of customary law is also pertinent to negotiations and actions for protection of TK at UNESCO, FAO, WHO and the World Trade Organisation.

In international negotiations indigenous peoples and local communities have demonstrated great faith in the ability of their customary laws and practices to protect TK, demonstrating their continuing confidence in their own legal systems. This is not the case for all indigenous peoples however. Many indigenous peoples, across the world, have seen their customary law disrupted or lost, largely due to external forces, including colonisation, globalisation, influence of organised religion, and development of new political structures which undermine

traditional decision making authorities. For such peoples customary law may no longer have any meaningful role to play in the development of measures for protection of their TK. However, even where there has been disruption of customary law, traditional decision making authorities and adherence to some form of internal community law may still play an influential role in community life.

Building bridges between customary law and national and international policy and regulation will not be the answer, or even relevant, for the protection of the traditional knowledge of all indigenous peoples. However, in many parts of the world customary law is a living, dynamic system that informs the day-to-day lives of indigenous peoples, recognised, albeit in varying, by the nation state.

While customary law is recognised in some contexts, there are many remaining challenges for building bridges between customary law, domestic regimes and the international system, at both the conceptual and political levels. Indeed, there are inherent limitations in customary law as a mechanism for protecting TK. In particular, these challenges become evident after TK has left the jurisdiction or control of local communities or indigenous peoples. In such cases, TK has moved outside the traditional jurisdictional bounds in which the customary law was developed, and, generally, outside the jurisdiction of national law. In such cases the effectiveness of customary law as a tool to protect TK will depend upon the extent to which it is recognised and supported by national, regional and/or international law and is enforced by relevant authorities. In order, therefore, for customary law to provide effective protection for TK it needs the support of positive law systems.

The intervention of the State has resulted in a competition between two sources of law, that of the State and customary law of indigenous people and local communities. Finding the balance between these two systems of law and their respective decision making authorities will be a major challenge for those seeking the development of functional law and policy on ABS and protection of TK. The capacity of states to effectively regulate ABS and TK protection for both the national good and in order to enforce rights of its populace requires the capacity to secure enforcement of its laws throughout its jurisdiction and obtain protection of these rights once resources and knowledge have left that jurisdiction. In many States this cannot be achieved without the full and committed participation of indigenous and local communities.

This paper examines the manner in which customary law is currently playing a role in protection of TK, with a focus on the experience in Andean and South Pacific Island countries.

The paper argues that neither customary law nor national and international measures alone can create an effective system for TK protection. There is therefore a need to build bridges between these two sources of law. In doing so, attention should be focused on identifying, strengthening or establishing functional interfaces between customary law and national, regional and international legal regimes, and their respective decision making bodies. To this end measures will be required to promote respect and recognition for customary law and traditional authorities' judicial functions, and for ensuring compliance with international, national and customary law obligations relating to TK. It concludes that the key to securing protection of TK lies in developing mechanisms which provide respect and recognition for customary law and traditional decision making authorities, while providing measures to ensure legal certainty and prevent arbitrary and inequitable abuse of customary powers.

The study is set out in six sections, Section I introduces the key terms and explores the nature, characteristics and principal elements of customary law and the challenges facing recognition of customary law at the national and international level. Section II addresses status of recognition of customary law at the international level through consideration of the

manner in which it is being addressed in international debates on ABS and TK governance, focusing on the work of the CBD and IGC. Section III examines the recognition of customary law from the perspective of international human rights. Section IV reviews the status of customary law in Andean and Pacific Island countries. Section V sets out the principal elements of the debates and findings of a series of workshops on the role of customary law in ABS and TK governance held in the Andean and Pacific regions. Section VI considers the lessons for international negotiators arising from the research to date and sets out some general conclusions and proposals for future work.

Methodology

As part of its commitment to helping inform the international debates on ABS and TK issues UNU-IAS in collaboration with a range of partners has promoted a series of regional and sub-regional workshops on the role of customary law in ABS and TK governance. This study is largely based upon the outcome of those workshops and relevant parts of the reports of the workshops are included in full in the Annexes to this paper. The workshops included:

- Andean regional workshop on the Role of Customary law in Regulating Access to Genetic Resources, Benefit Sharing and Protection of Traditional Knowledge, Quito, 9-10 January 2006.
- Meeting of Melanesian countries on Customary Law and Resource Management, April 2004, Townsville, Australia.
- Meeting of Micronesian countries on the Role of Customary Law and Practice in Regulating Access to Genetic Resources & Traditional Knowledge & Benefit Sharing, May 25-27, 2004 Koror, Palau.
- Pacific Regional Workshop - Benefit Sharing, Traditional Knowledge and Customary Law, November 21-24, 2005, Cairns, Australia.

The workshops were designed with a view to promoting dialogue on the nature of customary law, its role in protection of TK and the identification of best practices for defining the interface between traditional and national, regional and international decision making authorities. The current phase of the research focuses primarily upon the nature of customary law regimes, their role in ABS and TK governance at the local and national level, and the challenges for securing their wider recognition and acceptance.

SECTION I: Customary law and protection of TK

Concern for the protection of traditional knowledge, largely absent from national and international agendas until recently, began to surface in earnest in the early 1990's. With the entry into force of the CBD in 1993 debate on issues of access to genetic resources and benefit sharing (ABS) and associated TK drew attention to the inherent inequities of existing law and policy and in particular intellectual property rights legislation which failed to protect rights over traditional knowledge and to prevent the unjust enrichment of those exploiting it for commercial and scientific ends. This led to concerted efforts to develop measures to protect traditional knowledge the most of important of which has included the establishment of a Working Group on issues relating to traditional knowledge (working Group on Article 8 (j)) under the CBD and of the World Intellectual Property Organisation (WIPO) Intergovernmental committee on intellectual property, genetic resources, traditional knowledge, and folklore (IGC), whose respective work will be examined in more detail below.

TK covers a vast area of knowledge including, but not limited to, astrology, history, art, song, dance, stories, mathematics, language, land and resource management, agriculture, fisheries, human and animal health, education, religion and law. Its central role in the lives of indigenous peoples and local communities makes its protection crucial for realization of a wide range of human rights, including those relating to food, health, education, freedom from hunger, development, human dignity, culture and self-determination.² It is also inextricably linked to recognition and protection of their rights to lands and traditional territories and resources.³ International human rights instruments such as DECRIPS and International Labour Organisation Convention 169, on the rights of Indigenous and Tribal Peoples in Independent Countries, provide an important basis for the development of a holistic human rights based framework for the protection of TK.⁴

This section provides definitions for of a number of the key terms and concepts including traditional knowledge, protection of TK and customary law. It goes on to consider the status, nature, characteristics and principal elements of customary law; challenges for strengthening of customary law; legal pluralism and recognition of customary law; the interface between customary law and national and international legal regimes, and, issues of legal certainty.

1.2 Defining traditional knowledge

Indigenous peoples and local communities see TK as indivisible from biological resources whose particular characteristics have arisen as a direct result of their efforts to conserve, nurture and develop them. The breadth and diversity of areas covered by traditional knowledge makes it difficult to define concisely, a challenge further complicated its nature which is generally collective in character, developed over generations, and largely unwritten.

There is no universally accepted all encompassing definition of TK. There have been numerous attempts to provide definitions of TK, ranging from holistic definitions embracing both traditional ecological knowledge (i.e. knowledge relating to biological diversity, ecosystems, etc.) and traditional cultural expressions (i.e. song, dance, stories, art etc.) (See Box 1) to more succinct definitions which refer to its general characteristics, and those which focus on specific elements of TK.

Box 1 - Expansive definition of TK from the Pacific

The traditional knowledge and expressions of indigenous cultures are defined as the ways in

² Tobin B. (2009a)

³ Tobin B. (2009)

⁴ Swiderska K. (2006)

which indigenous cultures are expressed and which are manifestations of worldviews of the indigenous peoples of the Pacific. Traditional knowledge and cultural expressions are any knowledge or any expressions created, acquired and inspired (applied, inherent or abstract) for the physical and spiritual well-being of the indigenous peoples of the Pacific. This knowledge and these expressions include and are not limited to:

- spirituality, spiritual knowledge, ethics and moral values,
- social institutions (kinship, political, traditional justice),
- dances, ceremonies and ritual performances and practices,
- games and sports,
- music,
- language,
- names, stories, traditions, songs in oral narratives,
- land and sea and air,
- all sites of cultural significance and immovable cultural property and their associated knowledge,
- cultural environmental resources,
- traditional resource management including traditional conservation measures,
- all material objects and moveable cultural property,
- all traditional knowledge and expressions of indigenous cultures held in ex situ collections,
- indigenous peoples ancestral remains, human genetic materials,
- scientific, agricultural, technical and ecological knowledge, and the skills required to implement
- this knowledge (including that pertaining to resource use practices and systems of classification),
- the delineated forms, parts and details of visual compositions (designs),
- permanently documented aspects of traditional indigenous cultures in all forms (including
- scientific and ethnographic research reports, papers and books, photographs and digital images, films
- and sound recordings).

Source: Final Declaration, UNESCO symposium on the protection of traditional knowledge and expressions of indigenous cultures in the Pacific Islands, Noumea, 15-19 February 1999, <http://portal.unesco.org/culture/en/files/14264/10645002355Noumea1999.pdf/Noumea1999.pdf>

Definitions vary according to the purposes for which they are intended with international organizations tending towards adoption of definitions which can more clearly distinguish elements of TK for protection under specific laws. With regard to TK related to the environment representatives of indigenous peoples in the Andean region have defined this as including "... all the knowledge, indigenous peoples possess from their relations and practices in the environment which are transmitted from generation to generation, usually by word. This knowledge is intangible and integral to all ancestral knowledge and practices, constituting the intellectual cultural heritage of indigenous peoples ..."⁵ This definition goes on to identify specify a wide range of elements of TK which may provide : natural sciences; rituals, songs, dances and rhythms; crafts, ceramics and conservation of ecosystems;

⁵ De La Cruz, R, G. Muyuy, A. Viteri, G. Flores, J. Gonzalez, J. Mirabel, and R. Guimares. (2005). *Elementos para la Protección Sui Generis de los Conocimientos Tradicionales Colectivos e Integrales de la Perspectiva Indígena* Comunidad Andina, Corporación Andina de Fomento, Caracas. at 11, Downloaded from <http://www.caf.com/attach/17/default/perspectiva-indigena.pdf>.

knowledge of plants and animals; among others.⁶ The Council of Yukon First Nations have proposed a definition of TK related to the environment as "the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and that environment, that is rooted in the traditional way of life of First Nations".⁷

The Convention on Biological Diversity (CBD) refers to the "... knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity ..."⁸ This may be seen as an attempt by the international community to define TK in a manner which approximates existing concepts of knowledge and intellectual property. Under such an analysis traditional knowledge may be seen as know-how, practices may be likened to processes and innovations to inventions. Such an interpretation, however, brings with it the potential for fragmentation of TK systems which has been strongly opposed by indigenous peoples.

WIPO has provided a definition frequently cited in international negotiations which considers TK to be: "... any knowledge, creation, innovation or cultural expression, which is held by local or indigenous communities and has generally been transmitted from generation to generation is generally regarded as pertaining to a particular people or its territory, and is constantly evolving in response to a changing environment."⁹

More recently indigenous peoples and local communities have promoted the concept of what has been termed 'collective biocultural heritage', which is defined as "Knowledge, innovations and practices of indigenous and local communities which are collectively held and are inextricably linked to: traditional resources and territories; local economies; the diversity of genes, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities"¹⁰ The concept promotes an approach to TK protection which is integrated with protection inter-linked components of traditional knowledge systems—including bio-genetic resources, landscapes, cultural and spiritual values, and customary laws and institutions. This it is argued sets out a framework to develop mechanisms to protect traditional knowledge which are holistic and based on human rights, including rights to land and natural resources, and the right to self-determination.¹¹

In the final analysis definition cannot be disassociated from the purpose for which it is developed and as such efforts to find a single one-size-fits-all definition is neither feasible nor necessarily desirable. At the same time care needs to be taken to ensure that definitions utilised for the purpose of the development of international and national law and policy do not undermine the protection of traditional knowledge systems.

⁶ Ruiz 2006 at 166

⁷ *Presentation by the Council of Yukon First Nations to the Canadian Environmental Assessment Agency, CEAA Five Year Review*, Last Updated: 2003-10-07, http://www.ceaa.gc.ca/013/001/0002/0004/0004/cyf_e.htm last visited 21-2-2008

⁸ Article 8 (j), Convention on Biological Diversity.

⁹ WIPO (2001) *Intellectual Property Needs and Expectations of Traditional Knowledge holders, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999), Geneva.

¹⁰ Swiderska K (2006) says of this definition that it "... was developed at a workshop of research and indigenous partners of the project on Traditional Knowledge Protection and Customary Law, held in Peru, May 2005. However, it builds on a whole body of work: by communities such as Quechua farmers; anthropologists such as Darrell Posey's work on Traditional Resource Rights; and indigenous fora, such as the UN Working Group on Indigenous Population's draft principles and guidelines for protection of indigenous peoples' heritage by Erica Daes (E/CN.4/Sub.2/1995/26, Commission on Human Rights). Thus, it is not a new concept, but represents a renewed effort to promote holistic approaches for the protection of indigenous knowledge and heritage.

¹¹ Swiderska K. (2006)

1.3 Protection of Traditional Knowledge

Both internal and external forces are bringing pressure to bear upon the traditional knowledge and customary law regimes of indigenous peoples and local communities. While developing country governments, aid agencies and international organisations have been largely cohesive in their approach to challenging biopiracy and its impact on TK, many of these continue to employ development strategies which far from protecting and strengthening TK actually undermine it and hasten its erosion.

1.3.1 Threats to TK

Changing cultural values, loss of land and resources, failure to transmit knowledge between generations, and loss of language are amongst the greatest internal threats to TK systems. External threats include exposure to the market economy, inappropriate educational and health systems, agriculture and fisheries extension programs, incursion of extractive industries, the influence of organised religion, and biopiracy¹² (Box 2).

Box 2 : Threats to TK

Traditional knowledge may be threatened by numerous internal and external forces, which are changing the lives and societies of local communities, including:

- Increased contact with western society, changing work practices, assimilation of indigenous peoples into dominant cultures and migration of youth to cities.
- Promotion of external products, processes and practices by “experts”, state development projects and foreign aid programs.
- Displacement of traditional medicine by state health programs and pharmaceutical products.
- Replacement of farmers’ varieties with ‘improved’ varieties, and promotion of monoculture farming techniques, cash crops, non-traditional export crops, and exotic varieties.
- Educational systems, which promote belief in the inadequacy of TK and the superiority of products of industrial science and technology, and allow racist attitudes to erode cultural pride, reducing interest of youth in learning TK.
- Political violence and displacement of local communities and indigenous peoples from their traditional territories.
- Changing religious beliefs and discouragement of traditional spiritual practices by organized religion.
- Death of knowledgeable elders without leaving record of their knowledge.
- Loss of indigenous languages.
- Biopiracy

Source: Tobin. B, and K. Swiderska 2001

Emphasis by the international community on development of law and policy to define, delimit and protect those elements of TK which must be regulated in order to reduce current conflicts associated with the biopiracy debate, do not promise the form of protection of TK called for by TK custodians.. Focusing on regulation of the trade in TK alone promises a quick return to business as usual for international science and commerce, albeit with new conditionality on access and benefit distribution. With the focus off TK protection, attention is likely then to turn to promoting a global international ABS regime designed to facilitate access to resources and TK viewed as crucial to underpin the new biotechnological revolution. This would indeed be cause for concern as it would leave many of the underlying

¹² Tobin B. and K. Swiderska, (2001)

threats to the integrity of TK systems, such as those identified by a multi-country study coordinated by IIED, unaddressed. (See Box 3)

Box 3: Threats to TK identified by a multi-country study of TK systems

Research with indigenous and local communities has identified similar drivers of TK loss:

- reduced landholdings, insecure land tenure and privatisation of communal land
- policies that restrict access to forests and sacred sites and participation in natural resource management
- erosion of traditional values and economies due to globalisation
- weakening of traditional authorities/laws due to extension of government control
- spread of modern agriculture and technology
- weakening of social cohesion and collective organisation caused by all of the above

Source: Swiderska K. 2006

What is required is a paradigm shift in thinking on what is meant by TK protection and how at the national, regional and international level, this may be more effectively addressed. The international community should therefore broaden the focus of its work on TK from merely protection against external unapproved use towards consolidation and strengthening of TK systems and the protection of rights of communities over the product of their intellectual effort.

The development of law, policy, programs and projects for protection of TK should provide support to indigenous peoples and local communities in their efforts to secure their collective well-being, cultural integrity and development opportunities first and foremost. In doing so due attention can be given to the interests of the wider national and international community, but the definition of rights should not be limited by those interests, where to do so would deprive any indigenous people or local community of the means to defend their cultural integrity, traditional territories and resource rights.

1.3.2 Objectives of Protection

Establishment of clear objectives is a crucial preliminary step towards the design of any measures for protection of traditional knowledge. Considering the breadth of TK and its inherent, cultural, scientific, and commercial value the range of potential objectives for measures to protect TK are multiple. These may include, for example, protection for the purpose of:

- Preservation of elements of culturally important knowledge for the benefit of present and future generations of indigenous and local communities
- Education, for both custodians of TK and where appropriate the wider civil society
- Prevention of loss of endangered languages
- Protection of information relevant to religious and sacred practices
- Protection and strengthening of traditional medicine and medicinal practices, covering both human and animal health issues¹³.
- Recognition of property rights over TK¹⁴
- Securing fair and equitable sharing of benefits derived from use of TK
- Environmental protection through the collation of information on traditional land and marine management strategies, hunting, agricultural and fisheries practices.

¹³ See Thai Traditional Medicinal Intelligence Act 1999

¹⁴ See, for instance, Peruvian Law 27811 on Protection of the Collective Knowledge of indigenous peoples relating to biological diversity

- As a source of information to assist in the identification of traditional tenure rights over land and marine resources, for the purposes of securing recognition and protection of such rights by national authorities¹⁵
- Prevention of unapproved and/or uncompensated access and use of TK
- Protection of moral rights of custodians of TK
- Preservation of elements of cultural diversity considered part of national patrimony¹⁶

Indigenous peoples have emphasised as one of the most urgent priorities the protection of TK from those threats which place in jeopardy its daily use by communities.¹⁷ Building a regime for TK protection which reflects indigenous peoples and local communities real concerns interests and rights has led to the proposal for an approach based around the concept of bio-cultural heritage (See Box 4)

Box 4: Protection of TK as Bio-Cultural Heritage

This approach means:

- Acknowledging that a state's sovereign right over natural resources (as recognised by the CBD) is conditioned by indigenous and local communities' customary rights over their traditional resources and territories. These rights must also be recognised.
- Strengthening community natural resource management, customary laws and institutions, and collective land tenure as the basis for local control over traditional knowledge and resources. For example, the establishment of Indigenous managed Bio-cultural Heritage Areas can enhance rights over TK, traditional livelihoods and biodiversity conservation.
- Facilitating access by communities, not just scientists and companies, to genetic resources held *ex situ*. With genetic erosion caused by modern agriculture, development etc, many communities need access to this material if they are to restore diversity to cope with phenomena such as climate change.

Source: Swiderska K (2006)

Once the objectives of protection have been determined attention can turn to the identification of measures for any legislative, policy, program or project designed to help protect TK. Amongst, the measures which may be employed for protection of TK, to complement traditional protection mechanisms, are:

- adoption of national and regional legislation and policies including revision and rescinding where necessary of law and policy and perverse incentives which undermine protection of TK
- collation of knowledge in TK databases, registers and museums; provision of support for the establishment of community protected areas and for both in-situ and ex-situ conservation of biological resources

¹⁵ Traditional knowledge has been an important source of information called upon in Australia for the purposes of determining native title rights over both land and marine resources.

¹⁶ In 2008 Peru adopted national legislation declaring Ayahuasca to form part of national patrimony. While there may be some concerns amongst indigenous peoples regarding the designation of elements of cultural patrimony as forming part of national patrimony the case of Ayahuasca is of particular importance. A plant with sacred significance for indigenous peoples it is considered by some foreign countries to fall within the definition of psychotropic substances banned due to their hallucinatory properties and is such is in danger of being categorized as a recreational drug. The action of the Peruvian authorities sends a clear and welcome message to indigenous peoples of Peru that their traditional sacred use of Ayahuasca will be protected.

¹⁷ Pers. Comm. K. Swiderska 13 February 2009.

- provision of incentives and support for continued practice and development of traditional medicine and training of indigenous peoples and local communities in its use
- recognition and protection of sacred sites, and securing of rights of indigenous peoples and local communities to access such sites and to carry on traditional rites and practices; and
- regulation of the activities of religious and other groups to prevent undesired interference with the practice of traditional rites.

Indigenous peoples have consistently argued that whatever mechanisms are adopted for protection of TK they should be based upon and support enforcement of the customary laws of TK custodians and give due respect for and recognition of their decision making authorities and dispute resolution mechanisms. This raises many practical and legal questions which are not easily answered by referring to the moral authority of indigenous peoples to govern their own knowledge. There are significant legal and practical hurdles which will need to be overcome if largely unwritten legal concepts and rules are to be given force in regulating rights of access and use of TK after it has left the control of its traditional custodians.

1.4 Defining customary law

Customary law has played a role in the development of legal systems throughout the world and is recognised to varying extent by both common law and civil law systems. It may be roughly defined as a body of rules which have been developed or evolved over time through the practice of specific communities or populations, and which are recognised by such communities or populations as having legal effect.

Sir William Blackstone, perhaps the most famous of English common law jurists, in his *Commentaries on the Laws of England* set out a seven stage test for determining the validity of customary law, which required that a custom be traced back to the coronation of Richard I in 1189¹⁸. By the mid nineteenth century the test had been softened and once a custom was shown to exist the burden fell upon the one attacking the custom to show it was not immemorial.¹⁹ A recent study of customary law in Asia suggests it may be considered as;

‘an established system of immemorial rules which had evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their son’s sons (sic), until forgotten, or until they became part of the immemorial rules...’²⁰

This promotes a view of customary law as a process rather than as a strictly defined set of rules and regulations. An alternative way of viewing customary law is to consider its purpose, rather than its content. A description of Mayan law for instance, states that:

“ ... Indigenous law consists of a series of unwritten oral principles that are abided by and socially accepted by a specific community. Although these norms may vary from one community to another, they are all based on the idea of recommending appropriate behaviour rather than on prohibition.... 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

¹⁸ Callies (2006) At 167

¹⁹ Ibid at 168

²⁰ Roy R. D. *Traditional Customary Laws and Indigenous Peoples in Asia* Minority Rights Group International, March 2005

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.²¹

When viewed from this perspective it becomes possible to identify some of the underlying principles of customary law, such as harmony, balance, and collectivism, which need to be taken into account in the development of mechanism for protection of TK. In a multi-country study, coordinated by the International Institute for Environment and Development (IIED), project participants 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”²². This study concluded that it is possible to identify underlying principles, such as reciprocity, duality and equilibrium, which are common to customary law systems from countries as diverse as China, Peru, Panama, Kenya and India²³.

A commonly cited legal definition views customary laws 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.’²⁴ This definition has been used by both the CBD and WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC). The definition is not without ambiguities, however, as is pointed out in a WIPO issues paper on customary law²⁵, which notes the difficulties associated with defining what “as if” means in the context of identifying whether a customary practice has in fact become a law²⁶.

Another attempt at definition states that “... what characterises customary law is precisely that it consists of a group of customs that are recognised and shared by a collectivity (community, people, tribe, ethnic or religious group, etc.) in contrast with written law emanating from a constituted political authority, and whose application is in the hands of that authority, that is, generally the State. The fundamental difference then would be that positive law is linked to state power, while customary law is characteristic of societies lacking a State, or it simply operates without reference to the State.”²⁷

Whatever definition is preferred they all have one thing in common. That is that they require a case-by-case analysis of whether customary law is applicable in a particular instance. What is required is the demonstration of a customary law principle and of its applicability to a particular situation. For indigenous peoples and local communities themselves the lack of a clear definition may be less problematic due to their knowledge of their own laws and decision making procedures. For outsiders however this lack of a clear and binding definition is likely to cause a greater sense of insecurity.

The use of the term customary law itself is has been considered problematic by some indigenous commentators which have argued that it fails to reflect the true nature of their

²¹ *Guisela Mayén, quoted by Louisa Reynolds, [Mayan law still lacks official recognition](#), Latin America Press, October 6, 2006*

<http://www.globalissues.org/HumanRights/indigenous/#CustomaryLawbackwardorrelevantjusticesystems> last viewed 8 May 2007

²² Protecting community rights over traditional knowledge: Implications of customary Laws and Practices, Interim Report (2005-2006), IIED, November 2006, available at

<http://www.iied.org/NR/agbioliv/documents/TK%20Interim%20report-23%20Nov.pdf> last viewed 16 May 2007

²³ See further at note 43 below and accompanying text.

²⁴ Black’s Law Dictionary, 7th edition, 1999

²⁵ *Customary law & the Intellectual property system in the protection of traditional cultural expressions and knowledge*. WIPO Issues Paper, Version 3.0, December 2006,

http://www.wipo.int/tk/en/consultations/customary_law/issues-revised.pdf

²⁶ Ibid.

²⁷ IDB: Indigenous Peoples and customary Law²⁷

current legal systems which frequently incorporate both elements of customary law and elements taken from national law. This has led to proposals for use of terms such as “indigenous law”²⁸ or “our own laws”²⁹ which it has been suggested would better reflect the nature of legal regimes which may include elements of both customary law and positive law³⁰.

This blending of customary and national law within the legal regimes of indigenous peoples and local communities, may be seen as part of an evolutionary process which helps in the construction of functional interfaces between national and customary law systems. A process which, to be effective, must be reflected in national laws, policy and administrative practices, which recognise and respect customary law and practice and the decision making capacity of traditional authorities³¹.

Although concerns regarding the use of the term customary law have much merit, the recognized dynamism of customary law regimes seems to allow for an interpretation which is sufficiently all embracing to include those elements of law derived from traditional sources and those elements of positive law incorporated by indigenous peoples and local communities into their internal legal regimes. Analysis of the convenience and utility of terms such as “customary law” “indigenous law” and “our laws” in relation to development of regimes for protection of TK will require consideration of the objectives of any regime. For the purpose of this study the term customary law will be used in the broadest possible sense to refer to that body of laws and practices which have been developed or adopted by indigenous people or local communities to regulate their activities and which they consider to be binding upon them, without the need for reference to national authorities.

1.5 Status and nature of customary law

Customary law has played a role in the development of legal systems around the world, including the common law and civil law systems. In countries with long established positive law regimes the notion of customary law tends has been interpreted to refer to widely accepted rules which have been handed down from time immemorial. Increasingly this notion of customary law as derived from some immemorial past is being shaken off as customary legal regimes are seen as dynamic and constantly evolving bodies of law, in which traditionally held rules are adapted, modified and added to as new precedents are made and new legal challenges are faced.

Customary law depends upon community buy-in for its effectiveness and compliance is closely linked to traditional authorities and their capacity to ensure its enforcement. Creation of new forms of indigenous authority, often imposed by the state, may cause tension and conflict within communities eroding traditional authority and undermining customary law systems. In some countries, such as Palau, Yap and Vanuatu, inclusion of traditional chiefs in national and state legislatures, has been seen as a means to shore up traditional authority and to build bridges between positive and customary law regimes. In some Andean countries delegation of wide-sweeping powers to indigenous peoples and local communities to regulate their own internal affairs has strengthened the role of customary law.

²⁸ Intervention of Alejandro Argumedo at Regional Workshop on the Role of Customary Law in Regulating Access to Genetic Resources, Benefit Sharing, and Protection of Traditional Knowledge, organized by IUCN-SUR and UNU-IAS, Quito Ecuador 9-11 January 2006

²⁹ Intervention of Gabriel Muyuy at Regional Workshop on the Role of Customary Law in Regulating Access to Genetic Resources, Benefit Sharing, and Protection of Traditional Knowledge, organised by IUCN-SUR and UNU-IAS, Quito Ecuador 9-11 January 2006

³⁰ See further footnotes 2002 and 221 below and associated text

³¹ Tobin B. (2009b)

Where traditional authority has eroded, new forms of indigenous representation and organisation have often sought to regenerate respect for customary law and traditional decision making practices in order to respond to new commercial and legal challenges. An interesting example of this occurred during the negotiation of the International Biodiversity Group Program Contracts in Peru. In these negotiations three indigenous organisations representing Aguaruna communities of the Peruvian northern Amazon, with the support of their national Organisation CONAP, held a traditional IPAAMMAMU or community meeting, bringing together representatives of over 60 communities, to decide whether or not to negotiate a bioprospecting agreement with pharmaceutical and research institutions.³²

Customary law plays a key role in traditional resource management, and is at the basis of the land management strategies of both Andean and Pacific Island peoples. In South Pacific Island countries, for instance up to 80 % of land and significant marine areas is held under traditional tenure. In most countries of the region customary law survived alongside colonial systems of law. Upon independence, which came late to many countries, the role of customary law was enshrined in constitutional and national law. While, customary law is generally considered to lie at the bottom of the hierarchy of laws, in practice it carries much weight and where national authority is weak customary law continues to be the dominant body of law applicable to day to day governance of a wide variety of civil and criminal law issues for many indigenous peoples and local communities.

Customary law is, at one and the same time, a part of traditional knowledge and a mechanism for governing and protecting such knowledge. While customary law may work well for regulating the internal affairs of local communities and indigenous peoples within their own territories, it is less well prepared to solve problems which may arise with external actors. As many communities no longer have specific customary laws and even more have no specific rules for regulating access to and use of TK and genetic resources by third parties it is necessary to look at more general customary principles or values, and social norms and beliefs, and use these as the basis for helping communities to derive/develop norms for third party access/use, and for benefit-sharing amongst communities.³³

For this reason it is important that customary law is supported by national, regional and international law. Where customary law is recognised by constitutional and national law there is tendency to limit its applicability in those cases where it would lead to a breach of fundamental human rights, an issue discussed in more detail below.

1.6 Characteristics and principal elements of customary law

Relying on collective community adherence customary law draws its strength from the willingness of indigenous and local community members to be bound by its unwritten laws. Indigenous peoples tend to view the primary purpose of customary law as being the promotion of community well-being and to ensure a speedy return to stability of the community following a breach rather than as a tool for retribution³⁴.

Amongst the principal attributes of customary law identified during the Andean and South Pacific workshops were its legitimacy, flexibility and adaptability. Characteristics of customary law which distinguish it from positive law include that it is: unwritten, informal, spontaneous, conservative, status based, and reliant upon its own enforcement procedures.³⁵

³² Greene S (2004) Lewis and Ramani (2008) Tobin B. and E. Taylor (2009)

³³ Pers comm. K. Swiderska, 13 February 2009.

³⁴ See conclusions of the Melanesian and Micronesian workshops, Section V, below

³⁵ 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 ABS, TK and Customary law, Organised by UNU-IAS, 21-24 November 2005, Cairns, Copy with UNU-IAS

Identification of underlying principles of customary law offers the possibility of establishing a body of guiding principles which can assist in building bridges with positive law regimes. In a multi-country study coordinated by IIED three customary law principles drawn from Quechua peoples of the Andean region are identified, which the study claims are reflected in customary law regimes in Panama, Kenya, India and China, although they may be termed differently. These include:

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 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 principle³⁶.

The identification of such common principles may have an important role to play in the development of national and international measures to respect and recognise customary law and practice. This should not be seen, however, as an attempt to establish and codify customary law or to limit its scope, but rather as a process to help build awareness and understanding regarding the underlying premises of customary law. Such action could help in, amongst other things, the development of a body of international principles of equity which truly reflects the pluricultural nature of the global society and respects customary law as both a source of law and of ethical principles.

1.7 Strengthening customary law

Customary law is generally considered to be strong and widely applicable amongst indigenous peoples and local communities in Andean and Pacific Island Countries. However, due to a range of factors it is being debilitated. These include in particular the imposition or emergence of non traditional authorities, lack of transmission, and the appearance of alternative judicial dispute resolution mechanisms. Customary law has proven inadequate in many instances to prevent natural resource exploitation, including illegal logging and fishing by both community members and third parties, and at times it has been hijacked by unscrupulous leaders for their own commercial interest and political benefit. This has further undermined customary law regimes and raises questions regarding the means and appropriateness of seeking support of national law for its enforcement.

Efforts by indigenous peoples and local communities to ensure continuing application of their own legal regimes requires respect and recognition of customary law by local and national authorities, and the adoption of complementary national measures to help secure its enforcement. The lack of international measures for protection of TK has led to calls by some indigenous peoples and local communities for greater attention at the local and national level, with a view to securing action sooner rather than later³⁷. However, national and international measures alone cannot protect traditional knowledge or secure the role of customary law in its protection. Unless indigenous peoples embrace, appreciate and customary law, taking the steps necessary to pass it down to the next generation it will become progressively less relevant and eventually erode altogether³⁸.

³⁶ Swiderska K, et al. (2006) *Protecting Customary Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Interim Report* (2005 2006) IIED November 2006, available at <http://www.iied.org/NR/agbioliv/documents/TK%20Interim%20report-23%20Nov.pdf>, last viewed 22/8/2007

³⁷ See discussion of Andean workshop, section V, below

³⁸ See discussion of Micronesian workshop in section V, below

Development of community protocols³⁹ may provide indigenous peoples and local communities with an opportunity to take the initiative in defining mechanisms for protection of TK, in a manner which secures a more central role for customary law. This may take the form of definition of prior informed consent (PIC) processes for access to TK and associated biological and genetic resources, as well as the definition of benefit sharing mechanisms. The utilisation of contracts may also serve as a means to secure buy in by third parties to customary law principles and jurisdiction. Protocols and contracts of this nature would not freeze customary law in time but merely provide mechanisms for identifying the conditions associated with decision making with regard to specific subject matter at a specific time. Protocols and contracts may allow for periodic revision and amendment from time to time.

A key issue in both the Andean and Pacific is the link between customary law and land rights. Failure to recognise and effectively delimit land rights in Melanesia for instance was considered to be a key factor in undermining traditional authority and customary law⁴⁰. In order to recover and reconstitute the role of customary law in traditional resource management there is a need to work with indigenous peoples and local communities to delineate and legally recognise traditional land rights. The adoption by the United Nations of DECRIPS provides further legal basis for countries to prioritise this issue.

Development of codes of ethics may be one way to incorporate customary law principles into management of TK. In this vein, the WG8(j) of the CBD, which is responsible for promoting measures for implementation of the conventions provisions on traditional knowledge, is in the process of developing an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities.

National laws which seek to protect language, traditions and customs can help to guarantee collective rights in a manner which supports enforcement of customary law. In Colombia for instance Ley 397 promotes ethno-education responding to a commonly held concern in both the Andean and South Pacific region that inappropriate educational programs undermine TK and customary law systems. Vanuatu has also taken steps towards reforming its educational system with a view to reversing the negative effects of a western educational model which is seen as having undermined respect for its culture and history.

Ensuring full and effective participation of indigenous peoples and local communities in all levels of decision making on the development of law and policy affecting the application of customary law is of much importance. This requires development of appropriate structures for incorporating traditional authorities more formally into relevant national decision making processes, as well as in the design and implementation of judicial procedures. Measures such as the Establishment of Councils of Traditional Leaders as exist in some Pacific Island States is a positive step in this direction. Involving indigenous peoples and local communities at the earliest stages of policy and legislative development can help to ensure that the role of customary law is fully taken into consideration. In the Andean community, for example, work to develop regional legislation on protection of traditional knowledge began with the convoking of a group of indigenous lawyers, statesmen, and representatives of indigenous

³⁹ The term community protocol has been used in a variety of manners to describe a range of measures which may be adopted to help enforce customary law provisions in dealings between indigenous peoples, local communities and outsiders. Amongst the measures which have been described as community protocols have been contracts based on or incorporating elements of customary law, research protocols establishing terms and conditions for the carrying out of research on indigenous territories, or in relation to traditional cultural expressions, traditional knowledge in general or other elements of indigenous culture, and protocols governing issues of prior informed consent and access, collection and use of biological and genetic resources and associated traditional knowledge for scientific or commercial purposes. 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.

⁴⁰ See Discussion of Melanesian workshop, section V, below

organisations to prepare a preliminary draft for consideration by States. Provision of necessary funding to enable indigenous peoples decision making authorities and official representatives to undertake the tasks associated with defending and promoting rights of local communities and indigenous peoples will also be of importance.

Establishing functional systems of law to protect TK and regulate ABS in a manner consistent with customary law will depend in no small measure on awareness, capacity and commitment of national and international authorities to respecting the status of customary law as a source of law and to revisiting the status customary law is accorded in the hierarchy of laws. This in turn entails a commitment to recognition and respect for the multiethnic nature of international society and that of many nations. At the national level this has frequently been linked to respect for legal pluralism, i.e. the recognition of more than one legal regime which may operate in a given jurisdiction at the same time. At the national level this may include for example national law, indigenous and local community customary legal regimes, canon law, military law, internal regulations of professional bodies and relevant international law, all of which may have a role, sometimes competing, over specific issues or sectors of the population.

1.8 Customary law and national and international legal pluralism

Increasingly states have begun to incorporate recognition of the multiethnic nature of their societies into national constitutions often in tandem with provisions recognising legal pluralism⁴¹. Such recognition has tended to limit the role of customary law to regulation and management by indigenous peoples and local communities of their own internal affairs. It is unclear in many cases to what extent customary law may be applied to non community members or beyond the territorial jurisdiction of the relevant indigenous people or local community. To extend the remit of customary law to apply to resources which have moved beyond the territories of indigenous peoples and local communities requires legislation at both the national and international level. This includes legislation in both the country where the custodians of TK are based and in user countries i.e. countries where TK is being used for scientific or commercial purposes.

At the international level law the concept of state sovereignty has traditionally served to exclude the individual and non-state communities from acting as either law makers, sources of law or as actors entitled to initiate actions for defence of their rights. International human rights law legislation has begun to make inroads into this exclusive domain of the sovereign state and increasingly legal pluralists are arguing for recognition of a wide range of sources which together go to make up a hybrid body of law with often contested jurisdiction over the same subject matter. This has been well articulated in a study of legal pluralism which states that:

“.... the past fifteen years have seen increasing attention to the important—though sometimes inchoate—processes of international norm development. Such processes inevitably lead scholars to consider overlapping transnational jurisdictional assertions by nation-states, as well as norms articulated by international bodies, nongovernmental organizations (“NGOs”), multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.”⁴²

Legal pluralism tends towards the identification and recognition of parallel and/or contesting jurisdictional claims, rather than a blending of legal regimes. In support of a more intercultural approach to development of law and policy in multiethnic societies, it has been proposed that principles of customary law should be enshrined alongside positive legal

⁴¹ See for instance the Constitutions of Colombia 1991, Peru 1993, Bolivia 1994 and Ecuador 1998.

⁴² Schiff Berman, P. *Global Legal Pluralism*, Southern California Law Review, Vol. 80, p.1155, 2007

principles in relevant national and international law⁴³. One obvious area of law for inclusion of customary law principles is the development of a global body of rules of equity to guide interpretation and implementation of any ABS and TK regime.

1.8 Recognition and enforcement of customary law

Customary law is recognised directly or implicitly in a majority of Andean and South Pacific Island countries, with the level of recognition varying greatly from country to country. Legal recognition may occur under the constitution, national or local law, as well as under regional and international law which becomes part of national law either directly or through an act of parliament.

Constitutional recognition of customary law is prevalent in both Andean and Pacific countries. During the 1990's all countries then part of the Andean Community⁴⁴ adopted new constitutions which tended towards recognition of the pluricultural and multiethnic nature of the state. In many cases this included recognition of rights to exercise local jurisdiction in accordance with customary law. Likewise, South Pacific Island countries as they emerged from colonial domination adopted constitutions which gave voice to the aspirations of their indigenous peoples and local communities. The recognition of custom and customary law has been a central element of this constitutional recognition of rights, most importantly perhaps recognising the status of traditional tenure over land and marine areas.

Recognition of customary law by national law has been described as either generic (i.e. customary laws applicable to certain populations), or discrete, (i.e. relating to discrete subject matter, such as land law, family law, environmental management etc)⁴⁵. Generic recognition may be either constitutional or legislative, while discrete recognition occurs in specific legislation relating to specific sectors such as land law family law etc. (See Box 5)

Box 5: Generic and Discrete Recognition of Customary Law

The two principal forms of generic recognition are constitutional and legislative.

Constitutional recognition:

National Constitutions may recognise custom or customary laws leaving the definition of specific norms to the customary regime. "This approach has been followed in the Constitutions of Papua New Guinea (Sch. 2.1), Solomon Islands (Sch. 3[2]), Vanuatu (s.95 [3]), Federated States of Micronesia (art. V.1), Marshall Islands (art. X.1) and Cook Islands (s. 66A [3])".

Legislative recognition:

In civil & criminal cases courts may be obliged to take into account customary law pertaining to a wide range of issues such as rights over land, marine areas, and biological resources.

Discrete recognition refers to statutes that recognise a specific role for customary law.

These may cover such issues as:

- Land rights - Customary land tenure systems (use, holding of and transfer of interests in customary land) are protected in virtually all Pacific Island states,
- Family law – including issues of succession to property
- Authority of chiefs and elders – In some cases Chiefs and Elders may play a role in national political institutions and/or exercise control over the appointment

⁴³ Walsh, C. *Interculturalidad, reformas constitucionales y pluralismo jurídico*, Publicación mensual del Instituto Científico de Culturas Indígenas. Año 4, No. 36, marzo del 2002

⁴⁴ In 2006 the Bolivarian Republic of Venezuela withdrew from the Andean Community of Nations (CAN) leaving four member countries Bolivia, Colombia, Ecuador and Peru. Regional legislation on TK and ABS referred to in this paper was developed prior to its withdrawal from the CAN.

⁴⁵ Tomtavala, Y. (2005)

of key roles in government.

- Dispute resolution - Community based mechanisms for dispute settlement created in the nature of 'village', 'island' or 'local' courts in many countries.

Source: Tomtavala, Y. 2005

In some countries customary law is recognised as a source of law, this is the case, for example, in Papua New Guinea (PNG), Solomon Islands and Vanuatu. In Colombia the constitution takes a different approach not recognising customary law as a source of law *per se* but entitling indigenous peoples to exercise autonomy in their own territories in accordance with their own norms and procedures. Ecuador, Peru and Bolivia all recognise rights for communities to resolve internal disputes in accordance with customary laws. Ecuador makes this conditional upon conformance with the constitution and national law, while Peru limits its application where this would conflict with fundamental rights of the person. In Samoa constitutional recognition is limited to those elements of customary law which are recognised by an act of parliament or decision of the courts. Fiji likewise requires parliament to take action to recognise customary law. The constitution of the Bolivarian Republic of Venezuela makes no specific reference to customary law, but recognises many rights in favour of indigenous peoples including rights over TK which can only be realised through recognition of customary law.

Analysis of the hierarchy of laws in South Pacific island countries ranges from the constitution, acts of parliament or state governments, local government regulations and village by-laws, administrative orders, common law, torts and customary law⁴⁶. Despite the apparently low ranking of customary law in this hierarchy of laws its real strength may be greater where rights over land and marine areas are based upon traditional tenure. In Andean countries customary law is also ranked below national law.

The power of states to overrule customary law through adoption of national laws may be limited due to obligations to ensure compliance with national constitutions or international and regional law to which countries are party. ILO convention 169, for instance, which has been ratified by all Andean countries, requires recognition of the rights of indigenous peoples to maintain their own institutional structures and their distinctive customs including their customary law systems⁴⁷. This obligation is tempered by the proviso that customary law may only be applied to the extent that it is in accordance with internationally recognised human rights standards.

Regional laws adopted by the Andean Community require PIC of indigenous peoples and local communities for access to genetic resources on their territories and for access to traditional knowledge. This creates an opportunity for indigenous peoples to extend the remit of customary law through agreements for access to and use of their resources and knowledge. The Andean community is currently working on the development of regional *sui generis* legislation to protect TK. Draft elements for such a regime, prepared in a consultative process led by indigenous peoples, propose that any regime be based upon customary law.⁴⁸

One of the most challenging issues facing the negotiators of international regimes on ABS and TK is how to ensure access to justice for aggrieved parties when there is a breach of contract, unapproved access or use, or misappropriation of genetic resources and/or TK. Amongst the hurdles to be faced are the opportunity and capacity to identify a cause of action; jurisdiction and law of the contract; personal access to the relevant authorities; right of action before a court; capacity to start and maintain an action, including access to

⁴⁶ Ibid.

⁴⁷ ILO Convention 169 Article 8 (2)

⁴⁸ De La Cruz, et. al (2005)

independent legal representation; economic capacity to sustain an action; and, the readiness and capacity of authorities in a foreign jurisdiction to recognise and apply customary law, or enforce a judgment made under customary law. Analysis of these issues will require consideration and potentially modification of relevant international law, including in the area of private international law.

Securing the application of customary law to the use of resources in foreign jurisdictions raises many legal challenges and in some cases may prove unworkable. It may also be the case that, at least with regard to economic compensation, TK custodians may find that remedies under the existing law in the foreign jurisdiction may prove more effective in securing relief for loss than under customary law. Therefore, in promoting customary law as a tool for protection of TK at the international level attention will need to be given to ascertaining the most effective means for achieving the objectives of TK custodians in seeking to defend their rights. In some cases tort and contract law may prove adequate to secure economic interests while customary law may be more appropriate for securing cultural, moral and spiritual rights associated with TK.

1.9 Interface between legal regimes

A key determinant for securing effective recognition and application of customary law in TK protection will be the development of functional interfaces between indigenous peoples' and local communities' decision making and enforcement authorities and national and international legislative, administrative and judicial authorities. National and traditional decision making authorities and the legal regimes upon which they are based are in constant interaction at the legislative, political, administrative, judicial, and enforcement levels. This may manifest itself in numerous ways including for instance, through recognition of customary law under constitutional and national law; formal and informal interactions between government and traditional chiefly authority; integrated and conflicting jurisdictional authority between national court system and traditional dispute resolution processes, and; enforcement of customary law based decisions, sanctions and awards.

Various modalities for building bridges between customary law and national regimes may be identified. These include: delegation of power to traditional authorities to make regulations and to apply customary law remedies under mainstream legal frameworks, as has occurred in Vanuatu; appointment of judges from within the community to administer justice based upon a mixture of positive and customary law, such as is the case in Peru; and incorporation of traditional chiefs into the national legislature and state government, as in the case of the Marshall Islands. A multiplicity of existing systems precludes harmonisation of customary law and adoption of a one size fits all solution. What is required is the construction of interfaces between customary law and positive law regimes and their respective authorities in a manner which empowers local decision making and enforcement of customary law. This has been likened to application of a principle of subsidiarity similar to that applied by the European community in seeking to decentralise decision making⁴⁹.

An international legal framework seeking to protect TK in accordance with customary law will need to build links between legal measures in the country where the custodians of TK are resident and legal measures in the country where TK is being used. For an international TK regime to be effective it will need to create binding legal obligations for countries to adopt sui generis legislation to protect TK of their indigenous peoples and local communities, with due recognition and respect for customary law. Likewise, it will need to establish binding legal

⁴⁹ Caillaud et al (2004) *Tabus or not Taboos: How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia*, SPC Traditional Marine Resource Management and Knowledge Information Bulletin No. 17, at 34, available at <http://www.spc.int/coastfish/News/Trad/17/Traditional17.pdf>.

obligations for adoption by countries of user measures to ensure protection of rights over imported TK, with due respect for customary law. User measures should be designed to promote compliance with national ABS and TK legislation in the countries where the custodians of TK are located. An international regime may require that in any action involving claims of misappropriation of TK the relevant courts give due regard to the laws of the country where the custodians of TK reside, including relevant aspects of customary law. This will prove easier to achieve where customary law is recognised by national law.

There is a need for relevant research to identify best practices for maintaining or developing functional interfaces between customary legal regimes and positive legal regimes and their respective authorities. This will be key for providing guidance in the development of appropriate international, regional and national law and policy on TK protection and ensuring that recognition and respect for customary law is secured in practice

1.10 Customary law and legal certainty

If customary law is to play a meaningful role in international governance of ABS and TK issues, whether inside or outside the jurisdiction of its indigenous or local community custodians, then it will need to be applied in a transparent and equitable fashion. Users will want legal certainty with regard to their rights and any potential liabilities associated with access to and use of TK and associated biological and/or genetic resources. Failure to clearly define rights and obligations associated with TK may discourage potential users from seeking access. Although some indigenous peoples and local community groups have expressed a desire to maintain their knowledge and resources outside of any commercial market others have taken a different track. For those who are prepared to countenance the scientific, commercial or other use of their resources or knowledge it will be necessary to consider how to provide some form of legal certainty to potential users of TK. This is particularly so where it is desired to regulate access and use wholly or in part on the basis of unwritten customary law and practices.

Blackstone's definition of customary law would determine validity on a seven step test, based upon whether it is: immemorial, continuous, peaceable, reasonable, certain, compulsory and consistent⁵⁰. While the requirement that customary law be in existence from some immemorial past is no longer considered appropriate, many of the other requirements set out in this test may prove important for securing recognition in international law and in any procedures seeking its enforcement in foreign jurisdictions. Determining what criteria should guide decisions regarding the reasonableness, certainty, and consistency of customary law may prove controversial. As customary law is closely tied to ethical, cultural and spiritual principles its application does not necessarily follow the logic of positive law. Procedures to determine issues such as reasonableness would need, therefore, to take into account the underlying principles guiding its application by indigenous peoples and local. This would include the reasonableness of provisions of customary law as means to secure the rights of custodians of TK in light of their cultural, social and economic reality, as well as their right to protect their cultural patrimony and integrity.

Among proposals which have emerged for securing legal certainty have been suggestions that customary law should be codified. This would help to ensure that it is clearly identifiable and not open to arbitrary change by traditional authorities. Proposals for codification have in general met with strong opposition from indigenous peoples who argue that it would turn customary law into positive law. Codification, it is felt, could also open the doors for external legal interpretation and progressive limitation of the remit of customary law, thereby undermining its dynamic nature.

⁵⁰ Sir William Blackstone in 1769 Commentaries on the Laws of England. Blackstone

Alternatively, the question has arisen whether it might be possible to frame a globally uniform body of customary law to regulate the interests of indigenous peoples. Again this idea has been rejected by indigenous peoples who argue that the multiplicity of existing customary law regimes would make it impossible to identify a specific body of rules which could apply to all cases. The Four Directions Council, a North American indigenous organization, is frequently cited for its position which states, that:

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 concerned⁵¹

One way of considering the importance of customary law is to look at its role in traditional resource management practices, which are responsible for conserving and nurturing much biodiversity and agro-biodiversity. Traditional resource management may be considered to rest on three pillars. The first is traditional land tenure, which defines the area over which indigenous people or local communities have rights. The second is the traditional knowledge developed by communities over resources existing in areas of traditional tenure. The third pillar is customary law which defines the manner in which communities and indigenous peoples may utilise their environment and its resources in order to ensure sustainability and the capacity of the environment to meet the present and future needs of the indigenous people or local community as a whole⁵². Looked at in this way we can see that customary law is the glue that stands at the heart of sustainable management of resources.

As a primary step in any process to investigate and/or develop measures on TK it will be necessary to identify the extent to which customary law is already recognized by international law or in national or regional TK related law and policy. (See Box 6)

Box 6: Existing and potential roles for customary law in protection of TK

Drawing on WIPO draft provisions on protection of TK and TCEs as well as a range of national *sui generis* laws and conventional IP law, the following roles for customary law have already been developed or applied in practice:

Customary law can:

- Serve as the fundamental legal basis or source of law for communities' legal rights over TK or TCEs.
- Be a factual element in establishing communities' collective rights over TK or TCEs.
- Be one element of the definition of TK or TCEs, or can otherwise establish the relationship to community that is central to the concept of TK and TCEs.
- Determine or guide the procedures to be followed in securing a community's free prior informed consent.
- Define specific user rights or exceptions, exempting the continuing customary uses and practices from other legal restrictions on the use of TK or TCEs.
- Guide the assessment of cultural or spiritual offence or damage caused by inappropriate forms of use of TK or TCEs.

⁵¹ See Dutfield, Graham, *Rights Resources and Responses*, in Posey, Darrell, *Cultural and Spiritual Values of Biodiversity*, London, Intermediate Technology Publications 1999.

⁵² Tobin, B. (2004) *The role of customary law and practice in international ABS and TK Governance*, in Caillaud A, et al. (2004)

- Determine or guide how benefits from the use of TK or TCEs should be shared equitably within a community.
- Determine appropriate forms of remedies, sanctions or restitution following the breach of rights over TK or TCEs.
- Serve as an avenue for resolving disputes over ownership or other forms of custodianship over TK or TCEs.
- Guide the transmission of rights over TK or TCEs from one generation to a following generation.

Source: Adapted from WIPO Customary law Issues Paper (2006)

Amongst the questions which will need to be considered in determining the applicability of customary laws, will be: which laws apply to which knowledge; to what extent is a user of TK required to seek information on unwritten customary laws before making use of TK; to what extent is TK in the public domain subject to customary law, and; what conditions are required to ensure that a judgment made under customary law by a traditional authority will be enforced in a foreign jurisdiction. These and many more such issues will need to be more fully investigated if customary law is to play a meaningful role in international protection of TK.

Promoting sound working relationships between national and traditional decision making authorities and developing mechanisms through which they may become more mutually supportive will be increasingly important for ensuring effective implementation of the CBD.

Section II Customary Law and International ABS and TK Governance

Customary law regimes may be considered as subsisting *sui generis* legal systems grounded in community experience, which are uniquely suited to protection of not only aspects of TK but of the knowledge systems from which TK derives. Issues of jurisdiction, social, economic and cultural change may reduce the effective application of customary law and the ability of local communities and indigenous peoples to control access to and use of their TK. This is particularly the case where TK has moved beyond the traditional territories of its custodians and where it has fallen into the public domain. Increasing interest in biodiversity prospecting, ever greater incursions of resource exploitation activities onto indigenous territories, and inappropriate development policies e.g. education, health, agricultural and fisheries, etc) all place strains on traditional knowledge systems and customary law.

This section examines the manner in which customary law is being addressed by the CBD and its working groups on Article 8(j) and ABS, the WIPO IGC, and considers a number of issues which are proving of much importance for the development of TK protection schemes. These include traditional knowledge sharing practices and the public domain, intellectual property, certificates of origin and the role of databases and registers in TK protection.

2.1 Customary law and the Convention on Biological Diversity

The issue of customary law is presently of much importance in the work of the CBD. It is widely recognised as having a key role to play in the definition of prior informed consent procedures as well as in mechanisms for ensuring the fair and equitable distribution of benefits. There is also recognition that customary law may have a role to play in dispute resolution relating to TK. Indigenous peoples have consistently promoted a view of customary laws as being *sui generis* systems for regulating ABS and TK issues relevant to their knowledge, resources and territories.

COP sees the CBD as the primary international instrument with the mandate to address issues regarding protection of TK relevant for the conservation and sustainable use of biological diversity⁵³. To advance work in this area COP 4 established the Working Group on Article 8 (j) (WG 8(j)) to address implementation of Article 8(j)⁵⁴ and related provisions of the Convention⁵⁵. At the same time COP has given a mandate to the Working Group on ABS (WG ABS) to negotiate an international ABS regime, including issues relating to Article 8 (j). The result is an overlap of competencies and responsibilities which as yet has not been fully synergised.

The manner in which the WG ABS and WG 8 (j) address issues of customary law and its role in international regulation of ABS and TK will play a crucial role in defining the manner which indigenous people's rights over their resources and knowledge are recognized and protected. It will also be decisive in the establishment of measures to ensure effective realization of the CBD's objectives.

2.1.1 Working Group Article 8(j)

The WG 8(j) is approaching the protection of TK from a number of different angles. These include development of *sui generis* elements for protection of TK, and negotiation of an ethical code regarding cultural heritage and traditional knowledge.

⁵³ CBD Decision IV/10

⁵⁴ Article 8 (j) of the CBD establishes the rights of indigenous peoples in relation to their traditional knowledge, innovations and practices, including the need for consent for its use and their right to fair and equitable benefit sharing.

⁵⁵ CBD Decision IV/9, paragraph 1.

At the request of COP 6 the WG ABS has prepared draft elements for sui generis systems for the protection of traditional knowledge. To date this work has focused primarily on elements relating to customary law and issues of prior informed consent. This includes "... recognition of customary law relevant to the conservation and sustainable use of biological diversity with respect to:

- (i) Customary rights in indigenous/traditional/local knowledge;
- (ii) Customary rights regarding biological resources; and
- (iii) Customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources⁵⁶.

At its fourth meeting the WG drew attention to issues of PIC, disclosure of origin, and customary law, to be considered for inclusion in an international ABS regime⁵⁷. It also urged Parties and Governments to develop, adopt and/or recognize national and local *and where appropriate* regional *sui generis* frameworks for TK protection. The WG said that the full and effective participation of indigenous and local communities should be ensured in all processes for the development of relevant TK law and policy⁵⁸.

The importance of customary law as a basis for protection of TK is recognised in a detailed paper on sui generis issues prepared by the Secretariat to the CBD for the 5th WG 8(j)⁵⁹. This document states that "For *sui generis* systems to be effective there will likely be a need for measures at local, national and international levels. It is highly desirable that local measures be based closely on the relevant customary laws of the indigenous and local communities concerned and developed with their full and effective participation and their prior informed consent. In fact, traditionally, there may already be *sui generis* protection in place, through customary law and such measures require formal recognition by the State and support to ensure their effectiveness and continuity."⁶⁰ Referring to customary law regimes as sui generis systems may help facilitate the international debate by focusing attention on the links between any international ABS regime and sui generis TK protection. Rather, than on the content or normative basis for customary law regimes themselves.

Building upon the suggestion of the UNPFII the WG has commenced work on possible elements of an ethical code of conduct on TK. The code is intended to help ensure respect for the cultural and intellectual heritage of indigenous and local communities, relevant to the conservation and sustainable use of biological diversity⁶¹. The proposed code of conduct may encompass both TK held secret by communities and TK which has fallen into the public domain. IT may also address issues such as the role of customary law, protection of the integrity of indigenous peoples' collective rights and ethical principles of indigenous peoples⁶².

One thing the WG 8 (j) will need to do will be to find a balance between its work on an ethical code and on sui generis elements and the need to address the issues relevant for negotiation of an international ABS regime. Although, WG 8(j) has proved an important forum for discussion of TK issues it is the WG ABS which holds the mandate for negotiating

⁵⁶ CBD 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.

⁵⁷ CBD Decision VII/19 D

⁵⁸ UNEP/CBD/COP/8/7 Recommendation 4/5, Development of elements of sui generis systems for the protection of the knowledge, innovations and practices of indigenous and local communities.

⁵⁹ UNEP/CBD/WG8J/5/6

⁶⁰ Ibid.

⁶¹ UNEP/CBD/COP/8/31, Decision VIII/5 F.

⁶² Ibid.

a regime addressing 8(j) issues. If the WG 8 (j) fails to provide significant input into the WG Abs deliberations it will in effect marginalise itself from the process.

COP has requested the WG 8 (j) to collaborate with the WG ABS on the elaboration of an international regime on ABS relevant to TK and the fair and equitable sharing of benefits arising from their use⁶³. Key issues facing negotiators at the 5th meeting of the WG 8(j), held back to back with the 5th meeting of the WG ABS will include the role of customary law in any international regime on ABS and the complementary role of sui generis mechanisms including any ethical code of conduct in ensuring a holistic approach towards protection of TK.

2.1.2 Working Group on ABS

The Working Group on ABS (WGABS) has been mandated by COP 7 to negotiate an international ABS regime covering not only genetic resources but also TK under Article 8 (j)⁶⁴. COP 8 in Curitiba, Brazil, has strengthened the mandate calling upon the WG to negotiate an international ABS regime with the aim of adopting an instrument/instruments to implement the provisions in Articles 15 and 8(j) and the three objectives of the Convention. It has been tasked with concluding its work by COP 10 in 2010⁶⁵.

Negotiations on an international ABS regime began at the 3rd WG ABS meeting in Bangkok in 2005. At this meeting a document was prepared setting out issues to be considered in the negotiation of an international regime. Several of these were closely related to Article 8(j), including:

- Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j).
- Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights.
- Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located.
- Customary law and traditional cultural practices of indigenous and local communities.
- Code of ethics/code of conduct/models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities.⁶⁶

The 4th meeting of the working group elaborated a set of draft provisions covering issues such as the potential objectives, scope, nature and elements of a regime. Among the possible objectives the draft provisions suggest are recognition of rights over TK, and securing compliance with the prior informed consent (PIC) of indigenous and local communities. The proposal envisages measures to ensure compliance with PIC of local and indigenous peoples; requirements for disclosure of origin as well as evidence of compliance with PIC and benefit sharing obligations in intellectual property rights applications procedures; use of certificates of origin as a means to show a valid legal right to use TK; and development of a dispute settlement mechanism to help secure compliance and access to justice. The draft proposes measures to prevent misappropriation of TK, which is defined as including:

- Use of TK without compliance with the provisions of the international regime.
- Any acquisition, appropriation or utilisation of TK by unfair or illicit means.

⁶³ CBD Decision VIII/5

⁶⁴ CBD Decision VII/19D

⁶⁵ Para. 1 of CBD Decision VII/19D

⁶⁶ CBD Decision VII/19 D

- Deriving commercial benefit from the acquisition, appropriation or utilization of TK when the person using it knows or is negligent in failing to know that these were acquired or appropriated by unfair means.
- Other commercial activities contrary to honest practices that gain in equitable benefit from TK.
- Use of TK other than for the purposes for which it was accessed.
- Obtaining unauthorised information that can be used for the reconstitution of TK⁶⁷.

These provisions are based largely upon the definition of misappropriation developed by the IGC⁶⁸, which will be discussed below.

Notably absent from the draft provisions prepared by the fourth WG ABS is any direct reference to customary law. Customary law had been included amongst the issues for consideration in development of elements of a regime by COP 7. Considering the importance given to it by the WG 8(j) and by indigenous peoples and local community organisations, and in the light of the adoption of DECRIPS it is bound to become an issue of negotiation in the future work of the WG ABS. The exclusion of customary law from the text of the WG ABS elements for an international regime is in marked contrast to the draft provisions developed by the WIPO IGC on protection of TK, discussed below.

2.1.3 CBD responsibility for protection of TK

As noted above, COP has recognised the CBD to be the primary international instrument with responsibility for protection of TK related to biological diversity. However, COP has frequently demonstrated a reluctance to take any significant action on protection of TK while the WIPO IGC deliberations continue. As WIPO has as yet to give the IGC a clear mandate to negotiate an international regime, the result has been to place the issue of where responsibility lies for protection of TK in a virtual limbo. The issue of responsibility for TK protection is further complicated by the differing mandates of the CBD and WIPO. While WIPO seeks to prevent misappropriation CBD is also responsible for promoting wider use of TK, promoting fair and equitable benefit sharing⁶⁹, protecting and encouraging customary use of resources⁷⁰; and encouraging and developing indigenous and traditional technologies⁷¹.

Within CBD, the issue of responsibility for protection of TK is also unclear. While, the WG 8 (j) has been tasked with developing sui generis elements for protection of TK and is working on an ethical code of conduct for research relating to TK and indigenous peoples and their resources in general, the WG ABS has been given the mandate to negotiate an international regime including TK associated to genetic resources. However, it is unclear whether the mandate of the WG ABS is to be interpreted to cover all aspects of TK protection and strengthening covered by the CBD⁷². It will be for the CBD to ensure that work at the WG ABS and WG 8(j) maximise the potential of both working groups with a view to hastening the development of the various measures which may be required to ensure holistic protection of TK.

It will be important for the WG ABS and the IGC to exchange information and ideas on how to synergise their respective efforts in order to ensure that at the end of the day they may complement one another. However, in the absence of any specific mandate at the IGC to

⁶⁷ CBD Decision VIII/4 Annex, Compliance and enforcement, draft provision 12

⁶⁸ Points 2, 3, 4, and 5 set out above are based directly upon Article 1 of the revised draft provisions for protection of traditional knowledge: Policy Objectives and Principles, WIPO/GRTKF/IC/10/5

⁶⁹ CBD Article 8 (j)

⁷⁰ CBD Article 10 (c)

⁷¹ CBD Article 20 (4)

⁷² Tobin B. (2009a)

negotiate a TK regime primary responsibility for protection of TK relating to biological diversity continues to rest with the CBD. Negotiations of an international ABS regime will therefore need to address this issue in a comprehensive fashion.

2.2 Customary law and the IGC

The WIPO IGC has during recent years dominated the debate on protection of TK. In no small part due to the innovative approach which has been taken by the WIPO secretariat in helping to inform and advance the committees work. To this end, it has it has, carried out research on the interests and concerns of indigenous peoples; collated contractual models for protection of TK, and, most importantly; developed documents setting out draft elements which could serve as the basis for negotiation of international regimes for protection of traditional knowledge relating to biological diversity and traditional cultural expressions (TCE). The focus of the IGC debate is currently directed towards these two key documents. The current study will focus on the document relevant to protection of TK relating to biological diversity.

The draft document on TK sets out a comprehensive series of policy objectives, including to: recognise value; promote respect; meet the actual needs of holders of TK; promote conservation and preservation of TK; empower holders of TK and acknowledge the distinctive nature of TK systems; support TK systems; contribute to safeguarding TK; 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 grant of improper intellectual property (IP) rights to unauthorised parties; enhance transparency and mutual confidence; and, complement protection of TCE.

The proposed scope of 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 resources⁷³. Legal remedies are to be provided where fair and equitable benefit sharing does not take place⁷⁴; access is to depend on PIC⁷⁵, and an exemption is made for customary use and exchange of TK⁷⁶.

The draft presents a potential TK regime built upon concepts of misappropriation. It defines misappropriation to include any acquisition, appropriation or utilization of 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 TK⁷⁷. The provisions of this article served as the basis for provisions on misappropriation in the draft elements for an international ABS regime prepared by the WG ABS, set out above.

One of the key elements of the draft proposal is that any regime be developed with appropriate recognition and respect for customary law and its role in protection of TK. The proposal recognises that respect for customary law, may require consideration of the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge⁷⁸. It

⁷³ Article 3, WIPO/GRTKF/IC/10/5

⁷⁴ Article 6

⁷⁵ Article 7

⁷⁶ Article 8

⁷⁷ Article 1, WIPO/GRTKF/IC/10/5

⁷⁸ 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

also acknowledges that key terms such as unfair trade may need to be defined with attention to concepts of unfair under customary law.

The draft provisions are an ingenious response to many of the concerns relating to protection of TK. They pointedly avoid proposing intellectual property rights (IPR) style protection with all their inherent limitations, including individualistic, time limited, industrial criteria which are foreign to TK systems. The proposal does not, however, exclude the possibility that, where appropriate, intellectual property models such as, for example, geographical indicators, trademarks, and trade secrets may be adopted as a means for protecting TK. One limitation of this approach, i.e. avoiding creation of a clearly defined property right over TK per se is that indigenous peoples and local communities will be dependent on the actions of their national authorities and the authorities in the countries in which their TK or products derived from its use are being used for recognition, delimitation and protection of their rights.

The text before the IGC envisions that legal protection for TK may be secured by one or more of a range of measures, including a special law on TK, intellectual property laws, law of contracts, laws concerning indigenous peoples, ABS laws etc⁷⁹. Amongst the possible mechanisms proposed are national ABS laws and sui generis TK regimes based upon customary law. Protection could also conceivably be provided through an international ABS regime within the framework of the CBD. The proposal requires PIC as a condition for access to and use of TK thereby enabling indigenous peoples and local communities to exercise control over their knowledge in accordance with their customary law and practices. The draft provisions recognise that a measure to protect TK may have some level of retroactivity in it. This is interesting in light of debates on the application of the principle of the public domain to TK, an issue discussed in more detail below.

WIPO has prepared a draft issues paper on customary law (now published as Section I of this volume) which identifies numerous questions to be addressed in order to determine the most include issues relating to the nature of customary law, the manner in which it may be recognized by national and international law and the preferences of indigenous peoples and local communities with regard to recognition of customary law. The WIPO issues paper condenses these into a list of fundamental questions (See Box 7). A complete compilation of questions on customary law set out in the WIPO paper appears in Annex I.

Box 7: 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?

understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge, WIPO/GRTKF/IC/10/5

⁷⁹ Article 2 Draft provisions.

- 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: WIPO (2006)

2.3 Traditional knowledge sharing spaces and the public domain

Protecting the rights and ability of indigenous peoples and local communities to continue to share and otherwise exchange knowledge according to their own customary laws and time honoured practices is crucial to maintaining the vitality and integrity of TK systems. Legal regimes adopted at the national and regional level, such as those of the Andean Community and countries of the region, have specifically excluded traditional sharing and exchange of knowledge from the remit of ABS and TK legislation.

Sharing of information by indigenous peoples and local communities including the sharing with third parties does not under customary law of itself signify a right of the recipient to use such information for their own purposes. Rights to reproduce, or further share such information is frequently restricted by customary law. Failure to respect and abide by such customary laws has resulted in situations where TK has been inappropriately transferred into the so-called public domain.

Application of the principle of the public domain to TK threatens rights over traditional which has been commercialized, widely disseminated through the mass media or published, thereby potentially legitimizing historic expropriation of knowledge.⁸⁰ There is a need to distinguish between information which has been willingly and knowingly placed in the public domain and knowledge which has inadvertently fallen into the public domain, due to sharing in traditional knowledge sharing spaces⁸¹

One positive means for extending protection beyond indigenous and local community jurisdiction is to recognise that even where TK falls in the public domain it is still subject to the rights of communities. The Peruvian collective knowledge law, for instance, provides that indigenous peoples are entitled to share in the benefits derived from use of their TK even when it was sourced from the public domain. The same concept appeared in a proposed model law on TK protection for the south pacific. The important message from both these experiences is that it is not where TK is found which matters so much as how it got there,

⁸⁰ Tobin B. (2005) *Towards an International Regime for Protection of Traditional Knowledge: Reflections on the Role of Intellectual, Property Rights*. Online ipgenethics.group.shef.ac.uk/conference/papers/Tobin.pdf.

⁸¹ Raven M., *Rethinking the Public Domain: A Challenge for Knowledge-Sharing Spaces in the Information Age*, in *Work in Progress* Vol. 17, No. 2, United Nations University, Tokyo, Summer 2005

and what subsisting rights should be recognised over it. These rights will define the extent to which TK may be subject to control by its custodians even where it has fallen into the public domain and their rights to participate in fair and equitable benefit sharing. The South Pacific proposal also recognised the importance of protecting TK of which has sacred nature and/or is culturally sensitive. Customary law is uniquely placed to play a role in both the identification of such knowledge and in its protection.

2.4 Intellectual property rights, certificates of origin and databases

Intellectual property rights principles have, in a limited fashion, been harnessed to recognise rights over TK and as a means to secure enforcement of these rights. In some cases this has been in the form of the recognition of a collective property right over TK, in others it has been in form of a commitment to defend against misappropriation of TK by treating TK as a form of trade secret. Ecuador's constitution, for instance, recognises indigenous peoples "collective intellectual property over their ancestral knowledge". The constitution of the Bolivarian Republic of Venezuela guarantees the collective intellectual property rights of native peoples over knowledge innovations and practices. Peru's TK law considers TK to be cultural patrimony of indigenous peoples and provides for protection as a form of trade secret. Responsibility for protection is placed in the Peruvian national patent office (INDECOP). Despite the use of terms and modalities of protection drawn from intellectual property regimes these have been modified to the extent that they are being used to defend collective rather than individual rights and that they are being employed without any time limitation. As such the construction of sui generis regimes based upon a mixture of positive and customary law principles has already begun.

Misappropriation is the basis for proposals on protection of TK at both the IGC and CBD. A misappropriation regime would not establish a property right per se over TK but would rather establish mechanisms to prevent or arrest unapproved use, secure compensation etc. A crucial element for any misappropriation regime is the development of measures to ensure compliance. Measures such as disclosure of origin, certificates of origin and registers of TK have been among the principal components put forward for establishment of an effective system to enforce misappropriation rules. Discussions on the merits and disadvantages of such approaches are ongoing. Regional and national law is seen as having a key role to play in moving from theory to practice.

Establishment of requirements for evidence of PIC for use of TK as a condition for granting of IP rights has been championed by Peru and other Andean countries at both WTO and WIPO. The Andean Community was the first region to adopt requirements for disclosure of origin and evidence of PIC as a condition for processing patent applications. Disclosure of origin has been proposed as an interim measure for TK protection while development of comprehensive national and international sui generis legislation is ongoing. Indigenous peoples have examined the possibilities of making the grant of intellectual property rights subject to compliance with customary law principles. One interesting proposal has been to establish a right of cultural objection to an application for a patent or other IP 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. Exercise of such a right to object would require that traditional authorities be granted a role in defining and adjudicating cases in which an IP grant would run counter to the rights of indigenous peoples or local communities. Thereby offering an opportunity to extend the remit of customary law beyond the communities own jurisdiction.

Disclosure measures are one of a number of so called user measures which have been proposed for securing rights over TK. Other potentially important user measures are certificates of origin and measures for securing compliance and access to justice. Certificates of origin or a system to document resource and knowledge flows and evidence

of compliance with relevant access laws is high on the agenda of negotiations on an international ABS regime. Indigenous peoples have expressed some reservations with proposals both with regard to their effectiveness and with regard to issues of who would issue any certificate and what it would certify. Development of a documentation system for TK may seek to link the use of knowledge to terms and conditions established by indigenous peoples based upon customary law, another form of contracting into custom.

Securing access to justice in a manner consistent with customary law raises many practical and legal questions. Amongst these are the possibilities of indigenous peoples and local communities obtaining access to information of breach of contractual or fiduciary obligations; having access to independent legal advice; obtaining standing before courts, and; securing necessary funding to commence and sustain actions. Alternative dispute resolution offers an interesting possibility to develop mechanisms which can help to level the playing field between indigenous peoples and corporate users of TK. To prove effective any such alternative dispute resolution will need to be directly accessible by indigenous and local communities. It should be guided by principles of equity drawn from numerous sources including principles such as reciprocity, duality and equilibrium, common to many customary law regimes. Providing access to justice through an international dispute resolution mechanism may be supported by establishment of international TK ombudsman's office, to assist indigenous peoples in identifying, preparing and prosecuting actions involving their TK.

An issue of concern for many indigenous peoples and local communities has been the increasing use of registries and databases as a means to collate and protect TK. Concern has been particularly high with regard to development of registries and databases by government, research, NGO and other bodies.⁸² In some cases access to registries and databases requires PIC of indigenous peoples and local communities, enabling them to customary law principles. To date experiences in Pacific and Andean countries have included establishment of local community registers, NGO databases⁸³, national confidential registers, registers of TK in the public domain⁸⁴, and publicly accessible TK databases.

One the most promising experiences to date with the development of a register with government support which is designed to protect TK is that of the Vanuatu cultural centre which has established a nationwide process for collection of information with the assistance of representatives of communities from around the country. An interesting proposal from the Andes has been for access to information to be governed on the basis of a stoplight principle. Under this proposal information would be categorized as green light for free access, amber for partially restricted access and red light for prevention of all access except to community members.⁸⁵

A key challenge for registers and databases is to ensure that they are available to indigenous peoples and local communities. This requires capacity building at all levels. Further research into modalities for development of culturally appropriate procedures for collating and maintaining registers and databases is urgently required. This includes investigation of existing experiences and the technical, cultural, social and economic opportunities associated with such registers and databases.

⁸² For discussion of the potential benefits and difficulties associate with the development of TK registers and databases see Alexander et al, (2003) *The Role of registers and databases in the protection of traditional knowledge a comparative study*, UNU-IAS 2004. See also K. Bannister and P. Hardison, (2005) *Mobilizing Traditional Knowledge and Expertise for Decision-Making on Biodiversity*, .

⁸³ See Biozula experience in Alexander et al (2004)

⁸⁴ Peru is currently in the process of developing a national register compiling TK in the public domain. India has led the way in this field with development of the Traditional Knowledge Digital Library (TKDL)

⁸⁵ See the experience of the Potato Park in Peru set out in (et al. 2005) *Estudio regional en los países andinos: el derecho Consuetudinario en la Protección de los conocimientos tradicionales*, WIPO 2006

Section III: Customary law, ABS and human rights

International recognition of the rights of indigenous peoples to regulate their affairs in accordance with their customs, customary laws and institutions has been clearly set out in human rights legislation. Beginning with the adoption in 1966 of the United Nations International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights, recognition of indigenous peoples' rights to self-determination, has progressed steadily. International Labour Organization (ILO) Convention 169, The Convention on the Prevention of all Forms of Racial Discrimination, the Convention on the Rights of the Child, European, African, and American regional human rights instruments and most recently the DECRIPS have all advanced recognition of human rights, and in varying levels the awareness and acceptance of the role of customary law as both a source of law and as self-standing legal systems governing the affairs of large sectors of the global populace. This section examines the relationship between DECRIPS and ABS and TK governance, customary law and access to justice; it provides a brief overview of ILO 169 and its importance for securing rights over TK and customary law; it goes on to consider the relationship between customary law and the realization of individual human rights; and closes with discussion of the relationship between self-determination, customary law and protection of TK.

3.1 DECRIPS

For more than 20 years negotiators laboured over a United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS), making it the most prolonged negotiation of a declaration in the UN's history. The DECRIPS was finally adopted on the 13th of September 2007 by an overwhelming majority of 143 votes in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

In welcoming adoption of the declaration, Les Malezer, chairman of the indigenous caucus, said DECRIPS "... contains no new provisions of human rights. It affirms many rights already contained in international human rights treaties, but rights which have been denied to the Indigenous Peoples."⁸⁶ the importance of DECRIPS for indigenous peoples is he says that is, "... we now see a guarantee that our rights to self-determination, to our lands and territories, to our cultural identities, to our own representation and to our values and beliefs will be respected at the international level. Incorporation of specific recognition of indigenous peoples' rights to self-determination in DECRIPS was a major step forward in light of the concerns of many countries that recognition of this right was a slippery slope toward claims for secession. DECRIPS responds to this concern by stating in Article 46.1 that "... nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States.. It is questionable what effect this provision has on the rights of states to secession which is recognised in the International covenants

3.1.1 DECRIPS, ABS and TK

The Preamble to DECRIPS recognises the importance of indigenous knowledge, cultures and traditional practices for sustainable and equitable development and proper management of the environment⁸⁷. It recognizes indigenous peoples' rights over the lands, territories and

⁸⁶ <http://www.songlines.org.au/?p=50>

⁸⁷ DECRIPS Preamble, Paragraph 11.

resources they have traditionally, owned, occupied or otherwise used or acquired⁸⁸. This includes rights of ownership, use, development and control over land, territories and resources.⁸⁹ With regard to biological and genetic resources the declaration in effect recognizes rights of indigenous peoples over those resources they have owned, used or acquired. This would seem to support indigenous peoples' claims that they are rightsholders and not merely stakeholders with regard to resources on their traditional lands and territories.

DECRIPS requires states to give legal recognition and protection to indigenous peoples rights over their lands, territories and resources. This is to be done with due respect for indigenous peoples customs, traditions and land tenure systems.⁹⁰ Compliance with DECRIPS will require that national and international ABS law and policy be developed with due regard for the customary laws and practices of indigenous peoples. The Declaration obliges states to establish fair, independent, impartial, open and transparent processes, giving due recognition to customary law in order to adjudicate indigenous peoples land and resource rights⁹¹. This is to be done in conjunction with indigenous peoples⁹². This provision may be interpreted as requiring states to regulate indigenous peoples' rights over their land and resources prior to granting any bioprospecting rights on their lands or over their resources.

DECRIPS provides that where lands and or resources have been confiscated, occupied, used or damaged without their free prior and informed consent indigenous peoples are entitled to redress. This may include restitution, or where not possible, just fair and equitable compensation.⁹³ This compensation should take the form of lands, territories or resources equal in quality, size and legal status or monetary compensation, or other appropriate redress⁹⁴.

DECRIPS recognizes indigenous peoples' right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources⁹⁵. It obliges states to consult with indigenous peoples through their representative organizations in order to secure their free and prior informed consent for any projects which might affect their lands territories or other resources, particularly where this involves resource development use or exploitation⁹⁶. The effect of these provisions is to create an obligation upon states to confer with indigenous peoples representative organizations prior to granting any bioprospecting rights on indigenous lands or territories. Where any projects cause adverse environmental, economic, social, cultural or spiritual impacts DECRIPS requires states to provide effective mechanisms for mitigation and for just and fair redress⁹⁷.

DECRIPS 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 amongst other things human and genetic resources, seeds, medicines, and knowledge of the properties of fauna and flora⁹⁸. The declaration recognizes the rights of indigenous peoples to maintain, control, protect and develop their intellectual property over such cultural

⁸⁸ Article 26.1 DECRIPS

⁸⁹ Article 26.2 DECRIPS

⁹⁰ Article 26.3 DECRIPS

⁹¹ Article 27 DECRIPS

⁹² Ibid.

⁹³ Article 28.1 DECRIPS

⁹⁴ Article 28.2 DECRIPS

⁹⁵ Article 32.1 DECRIPS

⁹⁶ Article 32.2 DECRIPS

⁹⁷ Article 32.3 DECRIPS

⁹⁸ Article 31.1 DECRIPS

heritage, traditional knowledge, and traditional cultural expressions⁹⁹. States are to work with indigenous peoples to develop effective measures to protect these rights.¹⁰⁰ The negotiations of an international ABS regime and the negotiations within the IGC both offer opportunities to advance the realization of the obligations under the DECRIPS with regard to protection of rights over TK.

The term intellectual property is not defined in the declaration. Considering the opposition indigenous peoples have consistently shown to proposals for use of intellectual property rights (IPR) as a means to protect their TK, it may be surmised that what is intended is to promote adoption of sui generis regimes for protection of the product of indigenous peoples intellectual effort. The relevant provisions of the declaration dealing with TK do not mention directly customary law. However, in so far as the provisions refer to genetic resources, seeds and medicines it is clear that they refer to resources owned by indigenous peoples. Accordingly states will be obliged to adjudicate ownership over these resources and associated TK with due respect for customary laws and practices.

3.1.2 DECRIPS, customary law and access to justice.

As noted above DECRIPS requires that in adjudicating rights over land and resources states give due regard for customary law. In regulating both resources and traditional knowledge states are obliged to do so in conjunction with indigenous people and in so far as this involves tangible resources it must do so with attention to customary law¹⁰¹.

The central premise of DECRIPS is that indigenous peoples have a right of self-determination¹⁰² by virtue of which they are entitled to autonomy or self-government over their internal affairs¹⁰³. This includes the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions¹⁰⁴. Indigenous peoples are in effect recognized as having a right to organise and regulate their own internal affairs. The Declaration recognizes the rights of indigenous peoples to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs¹⁰⁵.

The cumulative effect of these provisions would appear to be to allow indigenous peoples to regulate ABS and TK issues within their own territories in accordance with their own customary laws and practices. The only proviso being that they are in compliance with international human rights standards¹⁰⁶. To what extent indigenous peoples are allowed to apply customary law to third parties is unclear. DECRIPS specifically recognizes the right of indigenous peoples to determine the responsibilities of individuals to their communities¹⁰⁷, whether this should be taken as limiting rights to create responsibilities or adjudicate behaviour of third parties is unclear.

As seen above DECRIPS requires states to provide for compensation when there has been breach of rights relating to resources and in determination of compensation or other redress

⁹⁹ Ibid.

¹⁰⁰ Article 31.2 DECRIPS

¹⁰¹ The term customary law is not in fact utilized in DECRIPS which variously refers to the customs, traditions, rules and legal systems of indigenous peoples. The use of the term customary law here is done for the purpose of consistency of terminology of the paper. It is beyond the scope of the present paper to examine the reasons why the term was not used in the Declaration. It should however be noted that indigenous peoples have identified a number of difficulties with the term which will be addressed briefly later in this paper.

¹⁰² Article 3 DECRIPS

¹⁰³ Article 4 DECRIPS

¹⁰⁴ Article 5 DECRIPS

¹⁰⁵ Article 34 DECRIPS

¹⁰⁶ Ibid.

¹⁰⁷ Article 35 DECRIPS

states are obliged to take into consideration customary law. The Declaration therefore recognizes customary law as a source of law which must be taken into consideration in regulation and adjudication of rights and responsibilities and in determining breaches of rights and establishing compensation and other measures of redress. DECRIPS also requires that indigenous peoples 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. The declaration provides that these procedures and any decision taken under them is to be with due regard for customs, traditions, rules and the legal systems of indigenous peoples and international human rights¹⁰⁸.

DECRIPS precludes action by the state to limit rights under the declaration and specifically prohibits any form of discrimination¹⁰⁹. The declaration specifically prohibits discrimination against women¹¹⁰ declaring that all the rights and freedoms recognized in the declaration are guaranteed equally to male and female indigenous people¹¹¹. Potential difficulties may arise in reconciling DECRIPS provisions prohibiting discrimination and provisions acknowledging rights of self-determination. Amongst the rights which may conflict with a gender equality approach to implementation of the declaration may be the right to define responsibilities of the individual to the community, to apply customary law to regulate community affairs, and to choose representatives to participate in decision making¹¹². These provisions leave a lot of power in the hand of traditional authorities which may be dominated by men and be guided by laws which have historically subjugated women. Securing gender equality and equity in ABS and TK internal governance of indigenous peoples may in some cases therefore prove problematic. Where there is a failure to secure such equality and equity may conceivably lead to state intervention in indigenous affairs through the adoption of measures including law and policy to comply with obligations under the declaration to protect and secure women's rights.

Where possible indigenous peoples may prefer to act first and to modify or adopt customary laws designed to secure greater gender equality and equity in management of ABS and TK law and policy. In doing so they may be guided by the ultimate provision of DECRIPS which provides that the declaration is to be interpreted in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good-governance and good faith¹¹³.

3.1.3 DECRIPS and the development of national and international law and policy

At the national level the Declaration requires states in consultation and with the cooperation of indigenous peoples to adopt law and policy to achieve its ends¹¹⁴ this will include relevant ABS and TK law and policy. Where national law and policy already recognises 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 TK issues. Where no national ABS law and policy exists DECRIPS may be seen as providing guidance which should be followed by national authorities faced with decisions on ABS and TK issues which affect indigenous peoples. Where national ABS and/or TK law and policy exists national authorities will need to review such law and policy to ensure it is in line with the Declaration.

¹⁰⁸ Article 40 DECRIPS

¹⁰⁹ Article 46 DECRIPS

¹¹⁰ Article 22.2 DECRIPS

¹¹¹ Article 44

¹¹² Article 18

¹¹³ Article 46.3

¹¹⁴ Article 38 DECRIPS

At the international level negotiations of an ABS regime in the WG ABS and of TK issues at the IGC will need to appraise their mandates and focus to ensure it is in line with the Declaration. The vast majority of CBD parties and member countries of WIPO have ratified the Declaration. It may be expected therefore that negotiations of ABS and TK issues will from now on be informed by the DECRIPS and influenced by it. In order for the ABS and TK negotiations to comply with DECRIPS they will need to: be informed of the status of indigenous ownership of biological and genetic resources; create obligations and incentives for provider and users countries to take measures to ensure that rights under DECRIPS are recognized and protected; give due regard to customary law, and; provide mechanisms for securing access to justice and redress including where appropriate compensation for misappropriation or use of resources contrary to customary law.

The UN Declaration is not a legally binding instrument. It has, however, been adopted with the support of 143 countries many of whom are parties to the CBD and who will play a role in the ABS negotiations. It seems likely therefore DECRIPS will be highly influential in defining the position to be taken by negotiators of an ABS regime. While the US, one of the four countries to oppose adoption of the Declaration, is not a party to the CBD and has therefore only limited influence on the negotiations, three of the other opposing nations, Canada, Australia and New Zealand are all active and influential parties in the CBD negotiations. Similarly a number of parties which abstained from voting on the Declaration, in particular Kenya and Colombia are also highly active in the ABS debate. It remains to be seen to what extent the position of these countries with regard to the Declaration and in particular its provisions regarding rights over resources and recognition of customary law will influence the outcome of the ABS negotiations.

A key impediment to realization of indigenous people's rights over their TK and resources relates to the difficulties associated with enforcing rights, in particular where use is made in a foreign jurisdiction. As mentioned above, the Declaration requires States to establish and implement fair, independent, impartial, open and transparent processes in conjunction with indigenous peoples to recognise and adjudicate rights relating to their resources. This is to be done with due recognition for their laws, traditions, customs, and land tenure systems¹¹⁵.

It is clear that this provision was written with the intention that it apply to countries adjudicating rights of indigenous peoples over land and resources where the parties, land and resources were all in the same jurisdiction. The declaration may also however be read as establishing obligations upon user countries to take measures in conjunction with indigenous peoples to recognise and adjudicate rights over TK and biological and genetic resources which have been imported. It seems unlikely any country could be expected to consult with all indigenous peoples regarding resources imported as a result it would seem more practical for countries to seek a multilateral solution through international ABS and TK regulation.

The declaration has raised the status of customary law brings into question its treatment as lying on the lowest rung on the hierarchy of laws. It is posited that national authorities and the international community must now review the status of customary law and give it more standing in relation to other sources of law. In the future constitutional courts may be called upon to examine the compatibility of national and local laws and policies with customary laws. At the international level the International Court of Justice and other international a regional judicial bodies will need to give due regard to national, regional and international treatment of customary law in determining whether and how it should be recognised among other sources of law which form the international body of laws which are the basis of global legal pluralism.

¹¹⁵ Article 27

3.2 ILO Convention 169

In regulating issues of access to biological and genetic resources on the territories of indigenous people's attention must also be given to International Labour Organization Convention 169. The Convention requires that indigenous peoples be consulted prior to granting any rights for exploration or extraction of resources on their territories¹¹⁶. It also states that in the application of national laws and regulations due regard is to be given to the customs or customary laws of indigenous or tribal peoples.

The obligations placed by the Convention on parties to it will need to be taken fully into consideration by them in the negotiations on ABS and TK¹¹⁷. The binding nature of the obligations under the Convention means that countries party to it will need to ensure that laws on ABS and related TK are developed with due regard to the customs and customary law of relevant indigenous and tribal peoples.

The Convention recognises the rights of indigenous peoples to maintain their own institutional structures and their distinctive customs, including their customary law systems to the extent that these are in accordance with internationally recognized human rights standards¹¹⁸. From a western human rights perspective the requirement that customary law and practices must conform to human rights law seems unquestionable, from the perspective of indigenous peoples this may at times appear to be an imposition of foreign value systems. In an interesting presentation made during a workshop organised by UNU-IAS¹¹⁹ it was argued that inappropriate imposition of concepts of individualistic personal property rights could potentially undermine the integrity of community subsistence strategies, based upon collective resource management and property systems.

3.3 Customary law and potential conflicts with human rights law

Customary law developed by local communities and indigenous peoples has at times found itself at odds with human rights developed to respond to largely western concepts of rights of the individual. Efforts by national constitutions and laws to recognize customary law while meeting human rights obligations have as a result at times seem strained. Debate surrounding the adoption of a new Constitution by Fiji in the late nineties, for example, demonstrates the challenges faced by legislators.

The issue of discrimination as it pertains to the application of customary law relating to marine resources was addressed by Reeves Commission Report, upon which the 1997 Act amending the Fijian constitution was based. The report recommended that "customary law relating to:

The holding, use or transmission of land or fishing rights; or the distribution of the produce or proceeds of fishing rights or minerals; or the entitlement of any person to a chiefly rank or title; should not be open to challenge on the ground of discrimination

...¹²⁰

¹¹⁶ Article 15 Convention No. 16) Concerning Indigenous and Tribal Peoples in Independent Countries.

¹¹⁷ At present 18 countries have ratified the convention these are: Argentina, Bolivarian Republic of Venezuela, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, and Spain.

<http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>

¹¹⁸ Article 8, ILO convention 169.

¹¹⁹ Presentation by R. Regenvanu, Vanuatu Cultural Center at Workshop on the Role of Customary Law in TK Governance, side event at IGC 10, Geneva, April 25 2006.

¹²⁰ Corrin, Care, J., *The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997*, Journal of South Pacific Law, Vol. 4, 2000 USP

This would seem to run counter to western concepts of human rights. The issue is not, however, cut and dried where as in cases such as this protection of collective traditional marine and land rights may be crucial to protection of the collective rights and interests of indigenous peoples and local communities. The argument has been made that the collective human rights of communities should not be lightly overruled in favour of the protection of individualistic human rights whose exercise may undermine community structures and subsistence strategies¹²¹. This position has much merit with regard to the prevention of actions and behaviour which would undermine community stability and collective well-being.

The issue of human rights and customary law is more complicated with regard to questions of equality within communities. Women's groups for instance have argued that:
tradition, culture and custom in the main is defined by men, not women –
therefore there is a conflict about whose custom is being applied, especially
given that custom is largely unwritten¹²²;

3.4 Customary law and the right to self-determination

The right to self-determination of all peoples is set out in identical terms in the first article of The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These two binding international human rights instruments provide that:

Article 1

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.

Although originally treated primarily as a right for populations of colonized countries the international community has progressively expanded its interpretation of these provisions to encompass indigenous peoples. This right has been explicitly recognised in DECRIPS, it has however, been defined in a manner which excludes secession from the states in which they reside. It has been argued that, absent the right to secession, claims of the existence of a right of indigenous peoples to self-determination are largely romantic, and that for the purposes of international human rights law the status of indigenous peoples may be considered that of 'superminorities' rather than 'peoples'.¹²³

Albeit, restricted by the limitations on rights to secession the right to self-determination recognised in DECRIPS is crucial for effective realization of a wide range of human rights, including rights to food, health, education, culture, land and traditional territories, resources, and traditional knowledge. Professor Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, has highlighted the importance of self-determination for securing such rights, saying: 'Indigenous peoples' ancestral lands and territories constitute the bases of their collective existence, of their cultures and of their spirituality. The Declaration affirms this close relationship, in the

¹²¹ Presentation of R. Regenvanu, director Vanuatu Cultural Centre at side event on the role of customary law in Protection of TK, organized by UNU-IAS, at IGC 10.

¹²² Submission by the Fiji Women's Rights Movement and the Fiji Crisis Centre to the Beattie Commission of Inquiry on the Courts, Fiji 1994.

¹²³ Pers. Comm. Jerry Casagrande, University of Middlesex, 26 Feb 2009

framework of their right, as peoples, to self-determination...'.¹²⁴ In a similar vein, a recent study prepared by indigenous experts argues that their right to self-determination is not "... a sui generis right but the general right to self-determination, applicable to all peoples.... [which] ... encompasses a right ... to autonomy in their internal affairs, which in turn envelops the right to determine over their genetic resources (GR) and traditional knowledge, innovations and practices (TK).¹²⁵

The interrelationship between indigenous peoples rights to self-determination and their rights over TK and genetic resources has been repeatedly reiterated in series of declarations, starting in the early 90's and continuing to the present. Self-determination has been portrayed as the basis for realization of their social, cultural and economic rights¹²⁶, including the protection of rights over TK.¹²⁷ The exercise of this right is presented as embracing the '... rights of indigenous peoples to live in [their] own territories, with respect for [their] distinct cultures, political institutions and customary legal systems, while allowing [them] the means to carry out their own sustainable self development ...'.¹²⁸ The importance of TK for the life of indigenous peoples has led to the claim that the struggle for protection of rights over TK is '... just as important as the struggle for self-determination.'¹²⁹ While professing themselves ready to share their TK for the benefit of humankind and intellectual property¹³⁰ indigenous peoples take the view that in exercising their rights of self-determination they '... must be recognized as the exclusive owners of their cultural and intellectual property'.¹³¹ Rights over self-determination and TK also lead to demands that their rights over genetic resources should be respected.¹³² Many declarations also stress the central role of customary law as the basis for protection of TK.¹³³

The link between self-determination, protection of TK and respect for indigenous peoples' customary laws is recognised in Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, elaborated by the Special Rapporteur to the Subcommission Mrs. Erica-Irene Daes, which state that:

2. To be effective, the protection of Indigenous Peoples' heritage should be based broadly on the principles of self-determination, which includes 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.¹³⁴

¹²⁴ United Nations Press Release, 14 September 2007

<http://www.unhcr.ch/hurricane/hurricane.nsf/0/2F9532F220D85BD1C125735600493F0B?opendocument>

¹²⁵ Alexander et al 2009.

¹²⁶ See Recommendations from the conference 'Voices of the Earth: Indigenous Peoples, New Partners and the Right to Self-determination in Practice' Amsterdam, 10-11 November 1993 in Posey et al 1999 at 566

¹²⁷ Leticia Declaration and proposals for action from the international meeting of indigenous and other forest-dependent peoples on the management, conservation and sustainable development of all types of forests, Leticia, Colombia, 13 December 1996 in Posey et al 1999, at 581

¹²⁸ Contribution submitted by the International Alliance of the Indigenous Tribal Peoples of the Tropical Forests to the Intergovernmental Panel on Forests (IPF/II) Geneva 1996, in Posey et al, at 595

¹²⁹ UNDP consultation on the Protection and Conservation of Indigenous Knowledge, Sabah, East Malaysia 24-27 February 1995, in Posey et al. (1999) at 574

¹³⁰ Julayinbul statement on Indigenous Intellectual Property Rights, Jingarrba, Australia, 27 November 1993, in Posey et al (1999)

¹³¹ Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993 in Posey et al (1999) at 564

¹³² Declaration On Indigenous Peoples' Rights To Genetic Resources And Indigenous Knowledge, Convened at the Sixth Session of the United Nations Permanent Forum on Indigenous Issues, May 14-25, 2007, New York, downloaded from, <http://www.grain.org/bio-ipr/?id=511>

¹³³ See generally *Declarations of Indigenous Peoples Organizations*, in Posey et al 1999 at 555 et seq.

¹³⁴ E/CN.4/Sub.2/1995/26-21 June 1995

Codes of conduct of professional bodies such as the International Society for Ethnobiology have also recognised the importance of respect for self-determination, stating that:

‘...Indigenous peoples, traditional societies and local communities have a right to self-determination (or local determination for traditional and local communities) and that researchers and associated organisations will acknowledge and respect such rights in their dealings with these peoples and their communities.’¹³⁵

Despite the growing recognition of indigenous people’s rights to self-determination and its close relationship to rights over TK, these rights have not yet been realised by a majority of the world’s indigenous peoples. A number of countries, mainly in the Americas and Oceania, have in recent years modified national constitutions, adopted national legislation and/or entered into agreements with indigenous peoples which have advanced recognition of these rights at the national level. However, the global trade in TK, which may flow far beyond the local jurisdiction of its original custodians, makes realisation of rights to self-determination over TK dependent upon action in countries into which it is imported for scientific or commercial ends.

Securing rights to self-determination of indigenous peoples over TK has, as can be seen, an international context creating responsibilities for both the countries in which its traditional custodians reside and other countries in which it is utilised. The international community will need to address these collective and individual responsibilities of all countries to respect indigenous people’s rights to self-determination over their TK in the development of any international TK regime. This may be achieved in part by the development of measures to ensure respect and recognition for the central role of customary law in TK governance. In the process of designing mechanisms to achieve this end the international community should at all times be guided by the overarching right of indigenous peoples to self-determination.

A variety of options are open for the recognition of customary law in an international TK regime. A recent study prepared for the Secretariat of the CBD suggests that such recognition of the right to free PIC in an international regime is one ‘...efficient way to ensure compliance with indigenous peoples’ customary norms and protocols pertaining to traditional knowledge and genetic resources.’¹³⁶ Such a system may also call for adoption of disclosure of origin requirements in intellectual property law and an international system of certificates which demonstrate amongst other things compliance with relevant customary law as a condition for access to TK.¹³⁷ More will be required, however, if customary law is to play a role in regulating TK once it leaves the jurisdiction of its custodians. An international regime may also require adoption of sui generis TK legislation, recognising rights over TK and the role of customary law in its governance. Measures will also need to cover the manner in which customary law will be treated in judicial and alternative dispute resolution procedures.

Besides the obligations it places on national authorities, an international regime may also adopt measures recognising customary law as a source of law for the development of a global body of rules of equity to guide its implementation. It may also consider the establishment of international dispute resolution mechanisms, and an international Ombudsman’s office to help secure access to justice for TK custodians.¹³⁸ Any international regime will need to provide indigenous peoples with a right to take actions directly to seek compliance by states with their obligations. A preliminary report on customary law and TK prepared for the UNPFII points out that if the International Court of Justice is to play any role

¹³⁵ ISE code of Practice adopted 2006 Principle of Self Determination, downloaded from http://ise.arts.ubc.ca/_common/docs/ISE%20COE_Eng_rev_24Nov08.pdf

¹³⁶ Alexander et. Al. (2009)

¹³⁷ Ibid.

¹³⁸ Barber, C. et al. (2003)

in resolving disputes relating to a treaty on TK the a jurisdictional provision to this end will need to be included in the treaty.¹³⁹ The report for UNPFII also stresses the dangers of codification of customary law whether at the national or international level, which may undermine its dynamism and flexibility and its progressive curtailment.

¹³⁹ Dodson, M. Report on Indigenous Traditional Knowledge, E/C.19/2007/10, downloaded from: http://www.un.org/esa/socdev/unpfii/documents/6_session_dodson.pdf

Section IV. National and Regional Recognition of Customary law

Customary law is widely recognised at both the national and international level as having a role to play in the regulation of the rights and interests of indigenous peoples and local communities over their natural resources and traditional knowledge. This section provides a comparative analysis of customary law in the Andean and South Pacific regions and considers the possibilities for its wider enforcement on issues relating to resource management and control over traditional knowledge.

4.1 Andean Countries

Negotiations at the WIPO IGC have increasingly involved consideration of the role which customary law currently plays in regulating access to and use of TK, and its potential role in an international regime to protect TK. With a view to helping inform this debate UNU-IAS in collaboration with WIPO and IUCN-SUR organised a workshop on the Role of Customary Law in Protection of TK in Andean countries, in Quito, Ecuador, 9-10 of January 2006. The meeting brought together indigenous and non-indigenous experts on TK issues from Bolivia, Ecuador, Colombia, Peru and Venezuela¹⁴⁰.

The workshop included presentations on customary law and the international protection of TK and the current state of national law, in the five Andean countries, regarding recognition of customary law. Working group sessions examined the main challenges and opportunities for securing effective respect and recognition for customary law and its role in protection of TK and prepared a proposal for a regional study on the role of customary law in the protection of TK, including terms of reference for national studies. The content of the presentations and discussions is summarised below, along with the general conclusions prepared by the workshop participants.

Latin American States have historically adopted policies, which promote integration and assimilation of indigenous peoples and the elimination of their legal systems, languages and cultures¹⁴¹. While these systems dominated in urban centres, traditional systems of law, land rights and cultural relations continued unchanged in the countryside, and the majority of indigenous peoples of the region continue to maintain their own systems of community life. Attitudes towards indigenous peoples took a sea change in the 1990's during which all countries then part of the Andean Community¹⁴² adopted new constitutions, which reflect a shift from a policy of assimilation towards one of recognition of the pluricultural and multiethnic nature of the state. Some constitutions such as that of Peru and Colombia go further recognising special rights of indigenous peoples to apply their own laws to regulation of their internal affairs.

Although legal pluralism is recognised by some countries of the region, in practice positive law tends to resist acceptance of customary law, except where specifically recognised by law. The Andean countries have all ratified ILO Convention 169 creating specific obligations regarding respect for land and resource rights. Recognition of indigenous land and resource rights implies recognition of customary laws.¹⁴³

¹⁴⁰ Amongst the indigenous experts present were a number who had played a key role in the preparation of a report outlining proposed elements for a sui generis regime for protection of TK for the Andean Community see De la Cruz et. al. (2005)

¹⁴¹ Oviedo G. and Noejovich, F, 2005. *Composite Report on the Status and Trends Regarding the Knowledge, innovations and Practices of indigenous and local Communities. Regional Report: Latin America, Central and the Caribbean Information document*, UNEP/CBD/WG8j/4/inf/. <http://www.biodiv.org/doc/meeting>.

¹⁴² In 2006 the Bolivarian Republic of Venezuela withdrew from the Andean community, leaving four member countries Bolivia, Colombia, Ecuador and Peru. Regional legislation on TK and ABS referred to in this paper was developed prior to its withdrawal from the CAN.

¹⁴³ Manolo Morales, ECOLEX Ecuador. Presentation at Quito workshop.

4.1.1 Sui generis protection of traditional knowledge

The Andean Community of Nations (CAN for its letters in Spanish) has, since the entry into force of the CBD in 1993, been one of the leaders in the development and implementation of law and policy on ABS and TK issues. CAN is a regional economic group whose decisions are legally binding on member states. In 1996 it established a regional regime on ABS, which recognized the rights of indigenous, Afro-American and local communities to control access to their TK. Decision 391 requires that, as a pre-condition for approval of bioprospecting agreements, a side agreement be signed with communities for the collection of resources on their land or for use of their TK.

CAN Decision 486, which regulates regional intellectual property issues applicants for patents utilising genetic resources or TK from the region disclose its origin and show that prior informed consent has been obtained for its use. Countries of the region have championed the debate on disclosure of origin at the WTO and have been amongst the promoters of the concept of certificates of origin in the international ABS negotiations at the CBD.

In 2004 the Secretariat of the Andean Community together with the Comision Andino de Fomento (CAF) instigated a research program on regional protection of TK. The result of this research, led by a number of respected indigenous experts, was published in 2005 in the form of draft elements for a sui generis regime on protection of TK¹⁴⁴. The report, which presents an indigenous perspective on TK protection, has been widely promoted at the regional level, in a process of awareness building as a preliminary step before formal negotiations on a regional TK regime.

The Report recommends that,

“...given the collective and integral characteristics of traditional knowledge of indigenous peoples, it is recommended that indigenous peoples own ancestral systems based on customary law and their own cultural practices be applied for their protection, thus allowing communities to further consolidate their traditional structures...”¹⁴⁵

Andean legislation requires prior informed consent (PIC) of indigenous, Afro-American and local communities for access to and use of TK creating an opportunity for communities to apply their customary law to regulate PIC procedures. Customary law may also be used to guide decisions on issues of benefit sharing, confidentiality of information, and resolution of conflicts.

The remit of customary law may be further extended by having users contract into custom¹⁴⁶. One such example is the experience is a precedent of setting agreement entered into by communities of the Potato Park, a project of campesino communities of the Cuzco region of Peru with the international potato centre in Lima, Peru for the repatriation of traditional potato varieties¹⁴⁷. Many of the provisions of this agreement, in particular those relating to benefit sharing amongst communities are based upon the communities own laws. The communities who manage the potato park are also in the process of developing a community wide benefit sharing agreement based upon customary law¹⁴⁸. The extent, to which such agreements will

¹⁴⁴ De la Cruz, R. et. al. (2005)

¹⁴⁵ De la Cruz, R. et. Al. (2005)

¹⁴⁶ See Brahy, N. *The Contribution of Databases and Customary Law to Protection of Traditional Knowledge*, in Les Carnets du Centre de Philosophie du Droit No. 117, 2005, available at <http://biogov.cpd.r.ucl.ac.be/publications/brahyn117.pdf>

¹⁴⁷ De la Cruz (2007) – *Customary law in the Protection of Traditional Knowledge*, OMPI/GRTKF/LIM/07/5Lima papers.

¹⁴⁸ Personal communication Alejandro Argumedo, Lima January 2007

be achievable, will depend upon a number of factors, including the relative negotiating strength of the parties, the value of the resources and knowledge, their availability from other sources, etc.

4.1.2 Bolivia

Bolivia has 35 indigenous peoples with an approximate population of 8 million people, or 70 % of the national population¹⁴⁹. The Constitution of 1994 recognised Bolivia to be multiethnic and pluricultural. It commits to recognising, respecting and protecting the social, economic and cultural rights of indigenous peoples, in particular with regard to their traditional lands, the sustainable use of natural resources, their identity, values, languages, customs and institutions¹⁵⁰. Under the Constitution indigenous peoples are entitled to exercise customary law for the purposes of conflict resolution in so far as it does not conflict with the constitution or national law. Proposals for constitutional reform have included a number of highly controversial measures including the recognition of “judiciaria comunitaria” as being on a par with the national court system¹⁵¹.

Bolivia was the first Andean country to adopt national ABS legislation implementing Decision 391 of the Andean Community. Decreto Supremo No. 24676, of the 21 June 1997, states that the national competent authority will, amongst its functions guarantee the recognition of the rights of indigenous peoples and campesino communities as the providers of the intangible component associated with genetic resources¹⁵². Benefit sharing is to be carried out “in a manner which recognises the collective rights of communities over natural resources...”¹⁵³ The regulation creates an obligation to enter into an “accessory contract” when accessing genetic resources on the lands of indigenous peoples or where there is TK involved.

Bolivia has promoted an extensive debate amongst indigenous peoples on regulation of ABS and TK protection. Two processes one for the Andes and one for the Amazonian region were held during the mid 1990s. Participants in the Amazonian consultations called for establishment of codes of ethics and argued that in cases of use of TK and resources from indigenous territories the principle *caveat emptor* – let the buyer beware, should apply. It was suggested that users should be required to provide documentation to show resources and knowledge had been legally obtained¹⁵⁴. Participants in the consultations also highlighted the need to strengthen the capacity of indigenous peoples to document, protect, teach, and apply all aspects of cultural patrimony¹⁵⁵.

Likewise, in the Bolivian Andes a series of 8 workshops were held with indigenous peoples and campesino communities. The consultation concluded that the only way to protect TK was to keep it alive within communities themselves. It was felt that the maintenance and protection of TK should be done by indigenous peoples, avoiding the loss of natural resources, maintaining, valuing, respecting, caring and preserving customs and traditions, and generating ethical conduct with respect to the use of knowledge within indigenous peoples. The majority of groups felt that information should be held in registers maintained by the communities themselves, while, protection should be through collective rights.¹⁵⁶

¹⁴⁹ De La Cruz, R, (2007).

¹⁵⁰ Article 171

¹⁵¹ http://www.thehrf.org/reports/Bolivia_Communal_Justice_Report_01-15-2008.pdf

¹⁵² Article 5 (c)

¹⁵³ Article 43 (a) Author’s translation.

¹⁵⁴ *Hacia una Norma Nacional De Protección de los conocimientos tradicionales de los pueblos indígenas de las tierras bajas de Bolivia* Estudio elaborado por CIDOB, CPESC and CABI, Ministerio de Desarrollo Sostenible y Planificación, December 1998. At 64

¹⁵⁵ *Ibid* at p.64.

¹⁵⁶ *Resultado de los Talleres de trabajo con Pueblos Indígenas, Campesinas y Originarios de Tierras altas de Bolivia*, Ministerio de Desarrollo Sostenible y Planificación, December 2001.

4.1.3 Colombia

Colombia has 86 ethnic groups with an estimated population of around 785,000.¹⁵⁷ The Constitution of 1991 declares the country to be pluriethnic and multicultural. It granted indigenous peoples fairly wide ranging powers to exercise autonomy in their territories, subject to the constitution and national law. This includes rights to, exercise jurisdictional functions in accordance with their own norms and procedures¹⁵⁸; administer and govern their territories¹⁵⁹; and to be governed by their own authorities and administer their interests, in accordance with their own customs¹⁶⁰. The result is to provide indigenous peoples with significant rights to exercise control over their lands, resources, knowledge, cultures etc.

Legislation adopted in 1997 creates obligations on the state and the wider population to protect the cultural patrimony of the nation. It also recognises the right of ethnic communities to conserve, enrich and diffuse their cultural patrimony and identity and generate knowledge over these in accordance with their own traditions¹⁶¹. This legislation seeks to protect the language, traditions, customs and knowledge of ethnic groups, guaranteeing their collective rights and promoting ethno education and diffusion through the mass media¹⁶². The cumulative effect of these and related legislative provisions is to provide a firm basis for the exercise of customary law by indigenous peoples¹⁶³.

A draft law proposal on protection of TK and associated biological resources was presented for consideration by the Senate in August 2005.¹⁶⁴ Although subject to significant criticism the draft is a further step towards the development of national law and policy on TK protection, which has been preceded by a number of previous legislative proposals over the years. The proposal does not refer directly to customary law but provides that access to TK must be with the prior informed consent of indigenous peoples who are specifically given the right to deny rights to access and use¹⁶⁵. This would in practice entitle indigenous peoples to place conditions on access requiring compliance with customary law.

4.1.4 Ecuador

Ecuador has 27 indigenous peoples with a population of approximately 4.5 million. The indigenous peoples of Ecuador have exercised an important role in recent years in the political life of the nation. This has led to an ever increasing recognition of their rights under national law and policy.

The Constitution of 1998 established a firm basis for the collective rights of indigenous peoples and Afro-Americans. Article 84 recognises their rights, to:

- Maintain, develop and strengthen their identity and their spiritual, cultural, linguistic, social, political and economic traditions.
- Conserve the inalienable property of communal lands, which are not subject to alienation or embargo and are indivisible.

¹⁵⁷ De la Cruz, R. (2006) *The Role of Customary Law in the Protection of Traditional Knowledge and Benefit Sharing* IUCN and UNU-IAS, March 2006.

¹⁵⁸ Article 246

¹⁵⁹ Article 286; and,

¹⁶⁰ Article 287.

¹⁶¹ Ley 397, 1997

article 13

¹⁶³ De la Cruz (2007), at 17.

¹⁶⁴ PROYECTO DE LEY N° 38 / 05 SENADO http://www.etniasdecolombia.org/proyectos_ley.asp

¹⁶⁵ Ruiz, M. (2006) *The Protection of Traditional Knowledge: Policy and Legal Advances in Latin America*, IUCN, BMZ, SPDA, Lima- Peru

- Conserve and promote their own practices for managing biodiversity and their natural environment.
- Conserve and develop their traditional forms of co-existence and social organisation, to generate and exercise authority.
- Collective intellectual property over their ancestral knowledge, to its valuation, use and development, as provided by law.
- Their systems, knowledge and practices of traditional medicine, including the right to the protection of ritual and sacred places, plants, animals, minerals and ecosystems of vital interest from the perspective of traditional medicine¹⁶⁶.

Ecuador's National Biodiversity Strategy promotes the development of necessary legislation to protect collective intellectual property over ancestral knowledge, establishment of registries of such knowledge and sui generis regimes for its protection. It also calls for capacity building for the negotiation of contracts on traditional knowledge associated with biological resources and development of information systems on traditional resource management practices. The Strategy promotes participation of indigenous peoples in implementation of article 8 (j) of the CBD.¹⁶⁷ Ecuador has also regulated to protect and strengthen traditional agricultural practices, promoting research programs involving the Ministry of Agriculture and local communities.¹⁶⁸

The Constitution recognises a role for customary law stating that indigenous peoples own authorities are entitled to exercise judicial functions, applying their own laws and procedures for the solution of internal conflicts in accordance with their customs and customary laws, to the extent that it does not conflict with the constitution and national law¹⁶⁹. It is unsure to what extent indigenous peoples might be entitled to claim a right to exercise jurisdiction in cases involving a breach of their rights over traditional knowledge, involving non-indigenous persons.

4.1.5 Peru

Indigenous peoples of Peru are referred to as campesino communities (Coastal and Andean Regions) and native communities (Amazonian region). Peru has 48 indigenous peoples, with 42 linguistic groups living in the Amazon region.¹⁷⁰ The indigenous population is approximately 9.3 million or 47% of the national population, in the main part Quechuas and Aymaras from the Andes.

Under the Peruvian Constitution of 1993 the State is declared to be pluricultural and multiethnic¹⁷¹. Campesino and native communities are legally recognised, and are entitled, subject to law, to exercise autonomy with regard to their organization, economy, administration, communal work and in the free disposition of their territories¹⁷². They are also entitled 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 person¹⁷³.

In August 2002 Peru adopted the first comprehensive legal regime for protection of the collective rights of indigenous peoples over traditional knowledge relating to biological

¹⁶⁶ Authors translation

¹⁶⁷ De la Cruz (2007) at 9.

¹⁶⁸ Reglamento de la Ley de Desarrollo Agrario (Art. 5), De la Cruz (2007) at 9.

¹⁶⁹ Article 191

¹⁷⁰ Brack Egg, A and Yañez, C. *Amazonia Peruana: comunidades Indígenas conocimientos y tierras tituladas*, GEF/PNUD/UNOPS, Lima 1997

¹⁷¹ Article 2.19

¹⁷² Article 89

¹⁷³ Article 149

diversity¹⁷⁴. The law is declaratory in nature recognizing that rights over traditional knowledge spring not from any act of government but from the existence of the knowledge itself. The law declares traditional knowledge to be the cultural patrimony of indigenous peoples¹⁷⁵, thereby recognizing intergenerational and intragenerational rights and responsibilities relating to it. Access to and use of TK requires prior informed consent and a licence for commercial use¹⁷⁶. Benefits arising from 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 peoples¹⁷⁷.

The Peruvian law charges the national intellectual property and consumers' rights office (INDECOPI) with responsibility to aid indigenous peoples in protecting their knowledge by establishing both an open and a confidential register of knowledge¹⁷⁸. INDECOPI is also charged with providing advice to local communities in establishing community registers¹⁷⁹. Furthermore, it is empowered to prevent the publication of material relating to traditional knowledge in breach of community rights¹⁸⁰. In essence recognizing traditional knowledge as a form of trade secret and attempting to protect it accordingly.

Communities are required to notify other affected communities and seek their support for negotiations. An important element of the law which may help to overcome any resultant conflicts between indigenous communities is a recognition that they are entitled to resort to their own customary law and practice as a means for resolving disputes¹⁸¹.

The Peruvian law adopts an interesting position regarding traditional knowledge in the public domain. In the first place it recognizes that such knowledge is subject to a right of indigenous peoples 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 knowledge¹⁸². 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.¹⁸³ The law does not, however, recognize any right for indigenous peoples to prevent or otherwise control use of knowledge which 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 study of the Peruvian experience with development of national sui generis legislation highlights the importance of securing the full and informed participation of indigenous peoples as soon as possible in the process¹⁸⁴. It also calls for a shift away from merely protection of TK to the strengthening of TK systems, drawing attention to the multiple internal and external forces which debilitate TK. In particular, it signals the importance of a multisectoral approach to TK protection and the need to ensure that development policy, in particular that relating to education, health and agriculture and fisheries policies are supportive of TK. Analysis of the process surrounding development of the Peruvian law provides a number of important insights into the challenges to be faced in developing law

¹⁷⁴ Law 27811, Regime for the protection of the collective knowledge of indigenous peoples associated with biological diversity.

¹⁷⁵ Ley 27811 Article 11.

¹⁷⁶ Ley 27811 Article 6

¹⁷⁷ Ley 27811 Article 8

¹⁷⁸ Ley 27811 Article 15

¹⁷⁹ Ley 27811 Article 22

¹⁸⁰ Ley 27811 Article 49

¹⁸¹ Ley 27811 Article 46

¹⁸² Ley 27811 Article 13

¹⁸³ Duffield G. *Intellectual property rights, trade and biodiversity*, Earthscan, London, 2000

¹⁸⁴ 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

and policy which reflects the nature of TK and responds to the rights and interests of indigenous peoples and local communities. (See Box 8)

Box 8: Guiding principles for participatory processes

The rights of indigenous peoples and local communities over their traditional knowledge stem from the existence of the knowledge itself, and not from any act of government. The role of the government in the development of sui generis legislation must therefore be that of facilitator and not of arbiter of rights. In other words, governments should assist indigenous peoples and local communities to articulate the means for protection of their knowledge based upon their declared concerns, interests and desires, and should avoid adopting measures which do not meet with the full and informed approval of the custodians of traditional knowledge.

1. Any process to develop measures for the protection of traditional knowledge must commence with a clear definition of the objectives, scope and modalities for the recognition of rights.
2. The active participation of indigenous peoples must be assured from the very outset to ensure that any programs, projects, law or policy are based on their aspirations and priorities with regard to the protection of their knowledge.
3. To address the complex legal, social, economic and cultural issues involved in development of regimes for protection of traditional knowledge, there is a need to draw upon the skills and knowledge of both the custodians of such knowledge and those whose professional expertise can assist in developing innovative legal and other mechanisms conducive to strengthening of local use and control over TK.
4. The development of mechanisms for the protection of traditional knowledge must be developed with due respect and recognition of the customary laws and practices of indigenous and local peoples. Care must be taken to avoid the development of external solutions which could become instruments for legitimizing the historic expropriation of TK, or for reducing community control through commoditization of TK undermining its role as the basis of indigenous culture, identity, livelihoods and self-determination.
5. Innovative legal mechanisms will be required to bridge the gap between the often diametrically opposed customary laws and practices of indigenous peoples and dominant legal regimes. Regimes based on concepts of law which may be totally alien, inappropriate and insensitive to the reality of indigenous and local communities and their perceptions of property and underlying philosophy of life or 'cosmovision'.
6. Obtaining the confidence of indigenous and local communities is one of the most crucial challenges for national and international authorities seeking to develop sui generis legislation. Confidence may be built by demonstrating respect and awareness of indigenous peoples' customs and traditional authorities, and ensuring their full involvement in design of the participatory process itself, as well as in the definition of its goals and anticipated products.
7. To build confidence, it is fundamental that invitations to participate clearly explain the proposed nature of the process, the intended outcome and products, as well as the opportunities which will be afforded to indigenous peoples to affect the outcome. To this end, participants must be informed as to whether the process is one of consultation, negotiation, joint decision-making etc., and how their input may be considered, accepted, rejected or incorporated in any final decision.
8. Participation is both a right and a responsibility, and may imply both costs and opportunities. Therefore, representatives of indigenous peoples and local communities will need to assess carefully the implications of accepting or refusing to respond to opportunities to participate, taking into account their responsibility for ensuring wider awareness and heightened levels of

participation of their communities in decision-making processes, as and when possible.

9. Indigenous and local communities should be aware that their rights over their traditional knowledge cannot be protected by customary law alone once that knowledge has been disclosed to outside parties, and that collaboration with government is crucial to ensure protection of their interests, both nationally and internationally.
10. NGOs can play a potentially catalytic and bridge-building role through timely use of resources and opportunities to foster greater dialogue between legislators and custodians of TK. However, NGOs should also carefully consider the benefits and drawbacks of participating in, and potentially legitimizing, processes which have not secured the full and effective involvement of indigenous peoples' representative organizations.
11. Preparedness to learn from experience, modify processes and develop collaborative working practices, based on respect for the ancestral and human rights of indigenous and local communities, is a prerequisite for the development of functional regimes.
12. Government agencies, indigenous organizations and non-governmental organizations should develop a commitment to collaboration and seek to overcome jealousies, mistrust, and competition for resources. To this end, it is crucial that all those participating recognize that indigenous peoples alone are entitled to define the nature of the protection to be granted to their knowledge.
13. Efforts to protect traditional knowledge have tended to focus on preventing its unapproved commercial use. In fact, this is only one of many reasons for its loss, and internal and external threats to traditional knowledge arise from many facets of government activity in the fields of education, health, agricultural extension and development policy. Similarly, the activities of researchers, aid workers, organized religion, the private sector and non-governmental organizations can all contribute to the loss of traditional knowledge. Therefore, protection of traditional knowledge requires the adoption of a multisectoral approach, promoting cultural and religious tolerance, respect for cultural diversity and the active discouragement of all forms of racism.

Source: Adapted from Tobin B. and K. Swiderska, (2001)

Peru has been very active in investigating and challenging cases of biopiracy associated with Peruvian genetic resources and has established a National Commission for the Prevention of Biopiracy. The Commission established by Law 28216 in 2004, has prepared reports on various suspected cases of biopiracy which have been presented in international forums such as the WTO and WIPO.

4.1.6 Venezuela

In 1999 the Bolivarian Republic of Venezuela adopted a new Constitution which recognises the multiethnic, pluricultural and multilingual nature of the State. The Constitution marked a new relationship between the state and indigenous peoples. It recognises the existence of native peoples and communities, their social, political and economic organization, their cultures, practices and customs, languages and religions, as well as their habitat and original rights to the lands they ancestrally and traditionally occupy, and which are necessary to develop and guarantee their way of life¹⁸⁵. Exploitation of natural resources in native habitats is subject to prior information and consultation with the native communities'

¹⁸⁵ Article 119

concerned¹⁸⁶. Indigenous peoples are entitled to systems of education¹⁸⁷ and health¹⁸⁸ which take into consideration their own traditions and cultures. They also have the right to maintain and promote their own economic practices based on reciprocity, solidarity and exchange¹⁸⁹.

The Constitution states that collective intellectual property rights in the knowledge, technologies and innovations of native peoples are guaranteed and protected¹⁹⁰. The nature of this intellectual property over TK has not as yet been defined. While, Venezuela's Biological Diversity law recognises indigenous peoples and local communities' patrimony and traditional rights in relation to biological diversity¹⁹¹, in the form of collective property rights¹⁹² and rights to control resources associated to ways of life, which physically and intellectually belong to the unique identity of a community¹⁹³. Community rights are defined as the faculty to decide over knowledge, innovations and practices which make up the collective intellectual property of indigenous peoples and communities¹⁹⁴. The law recognises the collective nature of community property of rights to control access to and use of resources,¹⁹⁵ The Law recognises collective rights to be acquired rights, different to individual property rights¹⁹⁶. As such they are not dependent upon any administrative act for their recognition but exist where they arise as part of an "... accumulative process of use and conservation of biological diversity".¹⁹⁷

Neither the Constitution nor the biodiversity law mentions customary law specifically. However, the wide range of cultural, economic, land, and social rights recognised under the Constitution could not be fully realised without the exercise of customary law¹⁹⁸. Likewise, the biodiversity law recognises the right of indigenous peoples to deny their consent for collection and use of biotic material and for access to traditional knowledge¹⁹⁹. This provides opportunities for indigenous peoples and local communities to apply their customary law and have recourse to their traditional decision making authorities.

A proposed Law on Collective Intellectual Property on Traditional Knowledge Associated to Biological Resources of Indigenous Peoples would entitle indigenous peoples and local communities to dictate their own regulations, in order to regulate the use of traditional knowledge associated with biological resources.²⁰⁰

4.2 South Pacific Island Countries²⁰¹

In South Pacific Island countries up to 80% of the land and significant percentage of coastal marine areas (this may include marine areas up to the horizon²⁰²) and the resources they

¹⁸⁶ Article 120

¹⁸⁷ Article 121

¹⁸⁸ Article 122

¹⁸⁹ Article 123

¹⁹⁰ Article 124

¹⁹¹ article 39

¹⁹² Article 40

¹⁹³ article 41

¹⁹⁴ Article 42

¹⁹⁵ Ruiz (2006) at 129

¹⁹⁶ Article 85

¹⁹⁷ Ruiz (2006) at 132.

¹⁹⁸ De la Cruz (2006)

¹⁹⁹ Article 43

²⁰⁰ Ruiz (2006) at 133.

²⁰¹ This summary draws heavily upon presentations made at the Micronesian and Melanesian workshops, discussed in more detail in Section V. For the full text of these papers see Caillaud, A., et al. (2004) Tomtavala Y. (2005) *Customary Laws in Pacific Island Countries & their Implications for the Access & Benefit Sharing Regime*" PowerPoint Presentation on 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

contain are subject to traditional tenure. All Pacific Island countries come from a customary law background, have gone through a history of colonization and now have western systems of law. Both during colonisation and subsequently customary law has continued to play a role in local community governance. Following independence states in the region have adopted a variety of constitutional and national legal measures to recognise customary law.

The hierarchy of laws in Pacific Island countries is constitution, act/statute, regulation and by-law, case law and finally customary law²⁰³. Although customary law is subject to national law, the actual status of customary law in local community and national governance varies. In Micronesia the role of customary law is firmly rooted in national decision making processes, with traditional chiefs exercising significant influence over national law and policy. The Government of Yap, for instance, is made up of four branches including, executive, legislative, judiciary and traditional chiefs who are integrated into the government. The chiefs are like government employees who receive remuneration and are who are empowered to make decisions to ensure Yap customs are upheld. The country's national legislation includes provisions requiring due recognition for customs and traditional systems of law.

4.2.1 Traditional Resource Management

Indigenous peoples and local communities throughout the South Pacific region have developed land and marine resource management strategies governed by customary law, which regulates hunting, land use, forest management and fishing and marine harvesting practices, among others. Restrictions in the form of what are commonly known as tabus, taboos or buls are widely used for community resource management and are increasingly being incorporated into marine conservation strategies.

In Vanuatu restrictions may be used as a form of direct management, for example, where a ban is placed to correct observed degradation of ecosystems or resource stocks, or as indirect management where placed for more cultural or spiritual reasons²⁰⁴. In Vanuatu tabus may take many different forms and many regional and island variations have been identified. These may cover an entire environment, portions of it or just certain species²⁰⁵.

The ability to enforce customary law is a key determinant as to its effectiveness. In Palau Buls (moratoriums) are placed by traditional chiefs during spawning season to ensure that resources are replenished. Effective enforcement often requires cooperation amongst communities, such as occurred in recent years when chiefs of Ngarchelong and Kayangel jointly imposed a closure of reef channels known to be fish spawning aggregation sites²⁰⁶. In this case, where there was a breach of the moratorium by a fisher from a third community Koror, negotiations between the chiefs of Ngarchelong and Koror led to a fine being paid²⁰⁷.

Local communities may play an important role in the development of fishery and marine conservation and management policies and implementation strategies. In Fiji communities have been actively involved in the establishment of local marine management areas (LMMAs) with the support of NGOs and government ministries²⁰⁸. These LMMAs which cover traditional marine areas are seen as important tools for resource management and for

²⁰² In Yap communities can claim ownership rights over the marine resources (including reefs) as far as they can see

²⁰³ Presentation of Clark Peteru at Palau workshop

²⁰⁴ Nari R., (2004) *Merging traditional resource management approaches and practices within the formal legal system in Vanuatu*, in Caillaud et.al (2004).

²⁰⁵ Llewellyn D., (2004) *Customary law on Malo, south Santo, Vanuatu, and the protection of the Marine environment*, in Caillaud et.al 2004.

²⁰⁶ Ridep Morris, A., (2004) *Traditional management of marine resources in Palau*, in Caillaud et al, 2004.

²⁰⁷ Ibid.

²⁰⁸ Tawke A., and S. Tuivanuavou, (2004) *Community involvement in the implementation of ocean policies: the Fiji Locally Managed Marine Areas network*, in Caillaud et al, 2004

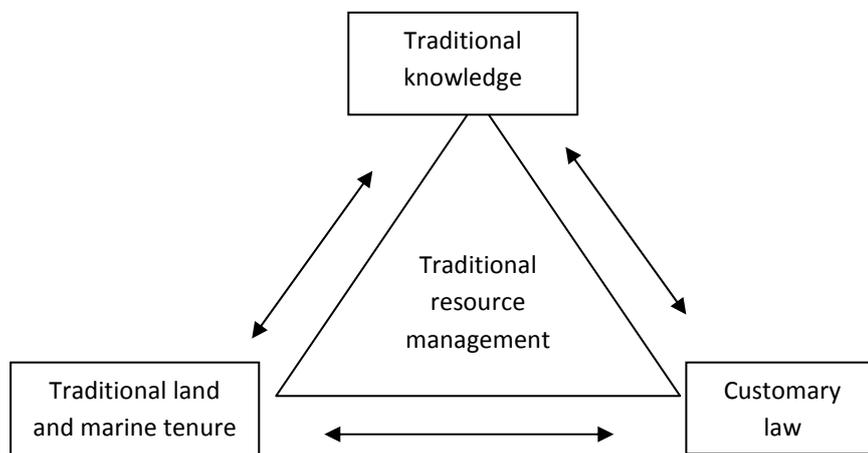
reinvigorating traditional subsistence fisheries (*quoliqoli*) which has been severely hit by large commercial scale fishing.

In New Zealand the 1996 Fisheries Act recognises Kaitiakitanga “the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangat whenua (people of the land) in accordance with tikanga Maori”²⁰⁹. Under the Act Maori experts may be appointed to administer and enforce rules in traditionally controlled areas, to assist fisheries officers and give access permission to indigenous areas ...”²¹⁰. In July 2008, in the *Blue Mud Case*, the Australian High Court recognised the rights of aboriginal peoples over coastal areas from the high to low tide mark. This case was decided with close attention to customary law and builds upon earlier Australian decisions relating to native title²¹¹.

In Vanuatu the Fisheries Act requires that customary owners of marine areas be consulted prior to declaring an area protected under the act. This has led to innovative collaborations, such as occurred when government representatives shared scientific information with local chiefs and communities in Malekula, communities. On the basis of this information communities decided to place a tabu upon marine areas and adjacent mangrove forest for a year²¹². This form of co management has been described as a step towards the incorporation of traditional management systems (i.e. customary law) “... into “overall fisheries strategies” and therefore codified law”²¹³.

From the foregoing it is possible to identify the fundamental role of what may be seen as the three pillars of traditional resource management²¹⁴ traditional tenure, TK and customary law. Traditional marine tenure defines the area controlled by the community, TK is the knowledge of communities over the resources in the areas controlled by them, and customary law defines the way TK is used to manage resources within the areas of traditional tenure. (see figure 1).

Figure 1: Three Pillars of Traditional Resource Management



Source: Adapted from Tobin. B. 2004.

²⁰⁹ Havemann, P., Kaitiakitanga, (2004) *Customary fisheries management in New Zealand*, in Caillaud et.al 2004

²¹⁰ Ibid.

²¹¹ <http://www.creativespirits.info/aboriginalculture/land/blue-mud-bay-high-court-decision.html>

²¹² Llewellyn, D, (2004) in Caillaud et.al 2004

²¹³ Ibid.

²¹⁴ Tobin, B., (2004)

Analysis of the role of customary law in traditional resource management may prove a useful means to identifying its strengths and weaknesses as a tool for protection of TK and regulation of ABS, as well as its potential role in national regional and international regulation of these issues. Some questions to guide such research have been set out in a study of the role of customary law in traditional resource management in the South Pacific (see Box 9)

Box 9. Questions on customary law and its role in traditional resource management:

- What framework of national legislative, administrative and policy measures is most conducive to ensuring the full and effective recognition and respect for the jurisdiction and effective implementation of customary law and practice?
- What is the correlation between the recognition and respect for traditional authority and conservation and sustainable use of resources?
- What is the link between traditional knowledge, customary law and practice and traditional land and marine tenure?
- What is the role of customary law and practice in securing conservation and sustainable use of resources?
- Are there cases where allowing the free exercise of traditional authority and/or customary law and practice may have negative social, cultural, environmental and economic impacts?
- Are there any instances when national law may legitimately intervene in traditional decision-making processes in order to ensure social, economic, cultural or environmental rights?
- Where must a line be drawn between protection of human rights and the right to freely apply traditional authority and customary law and practice?
- What conditions are necessary for the functioning of a stand-alone system of customary law and practice?
- What conditions lead to the deterioration of traditional decision making authority?
- To what extent are non-codified customary law regimes susceptible to manipulation by incumbent authorities?
-

Source: Adapted from Tobin B. 2002

One factor seen to be debilitating to traditional resource management is a decline in the practice of traditional customs. One reason given for this is the “... poor transmission of TK from one generation to generation due to a westernized education that ignores or bypasses traditional culture ...”²¹⁵. Respect for taboo sites has also been influenced by external pressures. In Vanuatu, for instance, a decline in respect for taboo sites has been linked to the influence of Christianity and European mores and variances of perception based upon cultural differences, which may lead to significant diversity of opinion and strategy on how marine management should be carried out²¹⁶. Reversing the process of knowledge erosion and decline of respect for customary law requires committed action by both communities and the state. In this vein, Vanuatu has adopted an Education Master Plan (2000-2010) which seeks to reverse the negative effects of a western educational model, which failed to respect the country’s culture and history. The Plan seeks to incorporate traditional knowledge into national education²¹⁷. Indigenous peoples in New Caledonia have also been seeking to recover control over community education to make it more relevant and reflective of their cultures. The Loyalty Islands environment charter, which will be discussed in more detail below,²¹⁸ seeks to promote, amongst other things, culturally appropriate education.

²¹⁵ Boengkih, S., *The Loyalty Islands Environment Charter in Kanky-New Caledonia*, in Caillaud et al, 2004

²¹⁶ Ibid.

²¹⁷ Nari, R., in Caillaud et al, 2004

²¹⁸ Ibid.

Strengthening traditional resource management requires therefore a multi-sectoral response which promotes, among other things culturally appropriate educational programs and development of policies, projects and programs which provide incentives and mechanism for continuing transmission of traditional knowledge between generations. These in turn need to be supported by adequate respect and recognition of customary law in national law. Constitutional recognition of customary law is of utmost importance in this regard.

4.2.3 Constitutional recognition of customary law

The extent to which customary law is recognised in the constitutions of countries in Melanesia varies greatly, (See Box 10). The Samoan constitution, for instance, leaves it to the government and judiciary to determine which elements of customary law are to be recognised, through acts of parliament or decisions of the courts, respectively²¹⁹. Fiji's constitution recognises customary land rights and establishes obligations for parliament to make provisions for recognition of customary law and for dispute resolution in accordance with Fijian traditional processes²²⁰. While the constitutions of the Solomon Islands, Vanuatu and Papua New Guinea (PNG) in varying degrees, recognize customary law as being part of national law.

PNG recognizes custom as a source of law "... whether or not the custom or usage has existed from time immemorial"²²¹. This it has been said "...elevates the status of custom and makes it clear that it will continue to develop and form part of the legal system"²²². Despite its positive approach to customary law, PNG's constitution has been criticized for sweeping aside many good customs, in part due to a lack of preparedness of customary authorities to champion their interests before the national authorities²²³. Both the Solomon Islands and Vanuatu recognise the continuing validity of customary law in so far as it does not conflict with the constitution or national law.

Box 10. Constitutional recognition of custom and customary law in Melanesia

COUNTRY	PROVISION
Fiji Islands	Constitution of Fiji 1998, s186: ... Parliament must make provision for the application of customary laws and for dispute resolution in accordance with Fijian processes. In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.
Papua New Guinea	Constitution of Papua New Guinea 1975, sch. 2.1(1): '...custom is adopted, and shall be applied and enforced, as part of the underlying law'.
Samoa	Constitution of Samoa 1962, Art III(1): "'Law" ... includes ... any custom

²¹⁹ Constitution of Samoa 1962, Art III(1)

²²¹ Corrin Care, J., *The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997*, Journal of South Pacific Law, Vol. 4, 2000 USP.

²²² Ibid.

²²³ Genolagani, J., and D. Henao, *Biodiversity and sustainable use of marine biodiversity in PNG: Policy and legal implications*, in Caillaud et. Al. 2004

or usage which has acquired the force of law in Samoa ... under the provisions of any Act or under a judgment of a court of competent jurisdiction.'

Solomon Islands Constitution of Solomon Islands 1978, s76 and sch. 3, Para. 3:

'Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands'.

Vanuatu Constitution of Vanuatu 1980, Art 47(1): '...If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.'; Art 95(3): 'Customary law shall continue to have effect as a part of the law of the Republic.'

Source: Adapted from Corrin Care, J. 2000

4.2.4 Building bridges between national and customary law

Vanuatu has adopted one of the most progressive approaches to recognition of customary law in many areas of governance, including natural resource management. The Environmental Management and Conservation Act (2002), for instance, integrates "... traditional resource management approaches and practices into the formal legal system ... based on traditional principles and values that underpin traditional concepts and practices."²²⁴ The Act has three principal areas of focus; environmental impact assessment, biodiversity and bioprospecting, and conservation of biodiversity. The law provides support for traditional resource management while leaving considerable flexibility to communities on issues such as delimitation of protected areas, definition of permitted activities, sanctions and enforcement mechanisms. The result it has been said is a resource management system that "...seeks to unify the economic, environmental and social objectives that underlie the philosophy behind sustainable development".²²⁵

The challenges associated with building functional links between national law and customary law are more pronounced in countries with high cultural diversity. Papua New Guinea (PNG), with over 800 languages and 2000 cultures is a case in point. Decentralisation is seen as a key tool for responding to diversity. Decentralisation has not always proved successful, however, where there has been a failure to "... give sufficient recognition to the wards and clans who are the real masters of indigenous laws".²²⁶ Decentralization has, however, had a more positive effect in cases where local authorities are empowered to enact local environmental laws. In Talasea, for example, local marine environmental legislation was developed which seeks to incorporate traditional knowledge and practices for the protection and sustainable use of marine resources in the Kimbe Bay area²²⁷. Clans can request the establishment of LMMAs, which once established are managed by a Locally Managed Marine Area Committee (LMMAC) which includes members of the clan, and representatives of NGOs, churches, ward development committee, the local government, women and youth groups²²⁸. Reef closure is determined based upon traditional knowledge which may be supported by scientific knowledge. Violations are resolved by the village court system, which has the power to impose penalties based on customary law²²⁹.

²²⁴ Nari, R., in Caillaud et al, 2004

²²⁵ Ibid.

²²⁶ Genolagani, J., and D. Henao, in Caillaud et al, 2004

²²⁷ Kwa, E., *Traditional and modern law: A marriage in progress – The draft Talasea Local Government Marine Environment Plan (Papua New Guinea)*, in Caillaud et al, 2004

²²⁸ Ibid.

²²⁹ Ibid.

The relevance of national and customary legal regimes depends to a large extent upon the capacity of national and or traditional authorities to secure compliance with its provisions. In Pohnpei experience in the development of conservation law and policy has demonstrated the need for community buy in where societies "... lack (or are free from) the intellectual, cultural and historical traditions supporting centralized authority over local resources. [and where central government] ... does not command the necessary regulatory capacity and infrastructure to enable its government to genuinely control the everyday uses of the resource they govern."²³⁰ Adoption of the Pohnpei Watershed Forest Reserve and Mangrove Protection Act in 1987 was perceived by some as "... a government land grab in direct conflict with traditional Pohnpei resource use and authority"²³¹. The resultant conflicts and incapacity of the government to enforce its laws led to increased dialogue with civil society and eventually to increased co-management of resource conservation and sustainable use.

As the capacity of the national government to exercise control over resources increases this may lead to erosion of the authority of traditional chiefs and community decision making authorities. One means to compensate for this effect is by incorporating traditional chiefs in national authority structures. In Palau inclusion of chiefs in legislature and state government bodies is seen as "... forging a compromise between western and customary models..."²³² of governance. This notion of compromise is also apparent in the Loyalty Islands Environment Charter, which is based upon French law adapted to Kanak culture and traditions²³³.

The Loyalty Islands Environment Charter is designed to promote "sustainable development" based upon traditional resource management practices. It is seen as an important step towards the recognition of traditional knowledge and customs at the national level²³⁴. The Charter sets out an impressive list of goals and principles regarding issues such as, recognition and valuing of cultural heritage, strengthening of Kanak languages, protection of traditional knowledge and skills, development of traditional arts, research into Kanak identity, scientific research for environmental protection, and technology transfer. The Charter may be seen as an attempt to build a bridge between two systems of law. Seeking to articulate customary law principles in a fashion coherent to a western legal system, without limiting the flexibility of the indigenous legal regimes from which these principles evolve. To some extent it may therefore be seen as a form of hybrid community protocol.

4.2.5 Community protocols and enforcement of national and customary law

Despite the general support for customary law amongst a large sector of societies in South Pacific Island countries there is a growing awareness that customary law alone cannot prevent destructive farming and fishing, as well as illegal logging by community and non-community members. The lure of high earnings, centralized administration of permitting procedures for granting of fishing and extraction licences, and abuse of traditional authority for personal profit have all served to undermine traditional authority. As awareness of the importance of customary law for effective resource management increases, so does awareness of the need to empower traditional authorities, while providing mechanisms to ensure against abuse of that authority.

Difficulties associated with securing compliance with national and customary law related to resource management demonstrates a need to "... build upon the strengths and shore up

²³⁰Rose, J. *Pohnpei Watershed Management: A Case Study of Legal and Institutional Reform for Co-management in the Pacific*, in Caillaud et al, 2004

²³¹ Ibid

²³² Ridep-Morris, in Caillaud et al 2004

²³³ Boengkih, S, in Caillaud et al 2004.

²³⁴ Ibid.

the weaknesses of both ... customary and governmental institutions.”²³⁵ Developing collaborative mechanisms for securing effective enforcement of customary and national law has led to an ever increasing tendency to develop linkages between the judicial functions of national and customary law regimes. Processes which provide state support for enforcement of customary laws can help to revitalize traditional resource management practices while promoting greater accountability and transparency in the exercise of traditional authority. At the same time it can enhance the realization of national objectives relating to the conservation and sustainable use of resources and the strengthening of TK systems.

The Government of Samoa has actively engaged participation of the fono (council of chiefs) and untitled men and women in development of village fisheries management plans²³⁶. These plans include the use of taboos and fines for their breach, which proved difficult to enforce on outsiders. As a result the government introduced fisheries bylaws, which may be enforced by the state. The fisheries bylaws may be seen as a bridge between national law and customary law and practice, while the village fisheries management plans take the form of a community protocol on fisheries.

In the Solomon Islands disputes were traditionally resolved and penalties imposed following discussions between elders and chiefs, but erosion of chiefly authority is undermining the possibility of enforcing customary rules²³⁷. In 1994 the Western Province Resource Management Ordinance was adopted with the aim of empowering customary owners in land management. Part III of the Ordinance (Customary Land Resources Management Ordinance) seeks to promote effective collaboration between national and customary law in a process designed to “... blend and synergise modern and traditional law, while seeking to retain the flexibility of the former”²³⁸. This blending includes the utilization of the national courts to resolve disputes which may be appealed from the local courts to the court of appeals

One interesting response by a local community to problems of enforcement of customary law in the Solomon Islands was to prepare a community protocol, based upon customary practice, which articulated procedures regarding the management of community resources. The protocol was provided to the local police station in order to provide guidance on how they should support the implementation of customary law²³⁹. Preparation of community protocols is becoming ever more common, providing as it does the opportunity to define specific criteria regarding access to and use of resources without needing to codify customary law per se. As such, it may be seen as a form of secondary regulation, providing guidance in the form of procedural steps, codes of conduct, and/or terms and conditions for contract negotiation or benefit sharing where the primary legislation remains customary law in its unwritten form. Harnessing the support of national government and the court system can help to offset the costs of enforcement of marine conservation laws which may be very costly.

In Palau there is ever more frequent recourse to the courts which are seen as having “... become part of the customary process of dispute resolution.”²⁴⁰ The potential for community members aggrieved by the decision of traditional authorities to take their grievance to national courts may, however, further undermine traditional authority. Furthermore, there are fundamental differences in the underlying principles and philosophy of customary and positive law systems. One difference is a perception that the court system always leads to winners and losers, while the purpose of customary law is primarily to restore harmony to the

²³⁵ Rose, J., in Caillaud et al, 2004.

²³⁶ Skelton, P., and R. South, *Fisheries Bylaws in Samoa*, in Caillaud et al, 2004

²³⁷ Sulu, R., *Traditional Law and the Environment in the Solomon Islands*, in Caillaud et al, 2004

²³⁸ Ibid.

²³⁹ pers. comm. with workshop participants Solomon Islands 2000

²⁴⁰ Ridep-Morris, A. in Caillaud et al, 2004,

community. Building the capacity of national courts to exercise jurisdiction with due regard for customary law and community collective welfare is therefore crucial. Similarly, awareness needs to be built amongst local communities of the existence of relevant law and policy which empowers them to manage their resources, and their capacity developed to take advantage of such laws²⁴¹.

4.2.6 Regional ABS and TK Governance

Countries in the region have a range of measures in existing national law which may help support protection of TK but there is no comprehensive system of protection outside of customary legal systems. Laws such as the *Historical and Cultural Preservation Act 19 PNCA 102* (Palau) which establish provisions to promote identification and registry of tangible cultural property and living national treasures (the storehouses of traditional knowledge and of relevant customary law) may assist in protecting TK. However, a lack of necessary technical expertise, infrastructure and funding limits the possibilities for effectively addressing this issue.

At the regional level the South Pacific Forum with the support of the South Pacific Regional Environmental Program has been responsible for promoting a wide ranging debate on development of measures for protection of traditional knowledge. This has led to the adoption of a regional model law on protection of expressions of cultural heritage and the preparation of a draft model for protection of traditional ecological knowledge. This latter draft has gone through a number of iterations and there are hopes that it may soon be adopted at the regional level.

Work on the development of a Model law for protection of TK in the South Pacific has been going on for a number of years, and has been the subject of numerous regional, sub-regional and national workshops. The proposal was endorsed in principle by the workshop. This proposal has gone through a number of iterations one of the most interesting of which sought to address the issue of rights over TK in the public domain, not on the basis of where information was found but on how it got there.

The proposal took the position that in determining whether TK is to be considered as falling within the public domain the draft proposes that the following questions need to be addressed:

- Was there an intention to share TK and what was the purpose for sharing?
- Was permission given to publish or disseminate TK?
- Did communities have knowledge of potential commercial use?
- Were indigenous peoples aware they would lose rights over their TK?
- What impact is there to cultural and spiritual integrity?²⁴²

While the CBD recognizes national sovereignty over genetic resources, this does not necessarily reflect the status of rights over biological resources in many South Pacific Island States, where under national and customary law ownership may be vested in local communities. Ownership of TK is also complicated due to the shared nature of knowledge within and amongst communities, and between island countries. Devising a regional strategy for TK protection needs to address these complexities in a manner which helps bring about legal certainty, while balancing competing interests and providing sufficient flexibility to allow for differing legal realities and customary laws and practices.

Therefore, identification of 'best practices' in recognizing and respecting customary law in the Pacific could serve as a model for international negotiation processes.

²⁴¹ Sulu, R., in Caillaud et al, 2004

²⁴² Tobin B. (2005)

Section V Andean and South Pacific Island Workshops

UNU-IAS has worked with a range of organizations to promote an expansive debate on the role of customary law in natural resources management, ABS and protection of TK in the Andean and South Pacific region. This work has been informed by two regional workshops one for Andean countries held in Quito in 2006 and for South Pacific Island countries held in Cairns, in 2005. Two sub-regional workshops were also held for Melanesia, in Townsville, in 2003 and Micronesia, in Palau, in 2004.

5.1 Andean workshop

In 2006 a regional workshop on the role of customary law in protection of TK in Andean countries was held in Quito Ecuador. The workshop brought together a range of experts from among indigenous peoples, NGO's and academia to explore the status of customary law and its role in protection of TK at the national and regional level. One of the main objectives of the workshop was to prepare draft guidelines for future research on customary law in the region. To this end the workshop dedicated significant effort to debating the manner in which any studies should be carried out, the subject matter which should be covered, and the focus which any study should be given.

One of the first issues of debate was the use of the term "customary law". It was noted that indigenous people's legal systems are in many cases based upon a mix of norms derived from customary law, national law and other sources. Some participants felt that use of the term "customary law" may lead to misunderstandings regarding the nature of indigenous and local community legal regimes. In particular there was concern to avoid giving the impression that these are mere custom rather than complex systems of decision making based upon rules and practices which may have legal and juridical effect.

Alternative terms were proposed to refer to the complete body of norms which go to make up the internal regulations of indigenous peoples. These included: "indigenous law" (being the mixture of traditionally recognised laws and those elements of law which have been incorporated following contact with the state)²⁴³, and "our own law" (used by indigenous peoples in Colombia)²⁴⁴. One question which arose from this analysis was whether or not the concept of "customary law" should be taken to include both customary law and positive law elements of legal regimes which are in force in indigenous and local communities. The discussion was inconclusive and further analysis of the definitional issue appears warranted. In working group sessions participants responded to three questions, these were:

- What needs to be done to recognise the role of customary law in ABS Governance?
- What actions are required at the local, national and international level to strengthen systems of customary law?
- Why do some indigenous peoples maintain their own customary laws, and why do others adapt to more positive law systems?

A brief summary of the main issues of debate and terms of reference for a preliminary regional study were also agreed upon and these are set out in detail below.

5.1.1 Recognizing the role of customary law in TK protection

It is difficult to envision one single legal instrument which will be adequate to regulate and protect all aspects of TK. For this reason it will be necessary to identify a variety of instruments which together can provide comprehensive coverage for TK, against both

²⁴³ Intervention of Alejandro Argumedo at Quito workshop 2006

²⁴⁴ Intervention of Gabriel Muyuy at Quito workshop January 2006

unapproved use and ever increasing erosion. Customary law regimes may form part of a wider body of instruments which together go to make for a holistic system of TK protection. Presenting customary law as part of a wider system of TK protection may prove a positive way to secure wider support for its role in TK protection.

In order to promote recognition of customary law, awareness building needs to take place at all levels, with a view to ensuring the incorporation of this issue in the agenda of key forums at the national international and sub regional level. It is also necessary to build awareness within communities by diffusing case studies on the role of customary law in the protection of TK. To this end it would be useful to create a map of the initiatives being taken by communities to promote or strengthen the use of customary law in natural resource management and protection of TK.

While there is much rhetoric at the international level this has to be turned into concrete action to protect TK. Participants to the Andean and South Pacific Island felt that in order to secure protection of TK in the short to medium term it will be important to promote more action at the national level and they emphasised the need to develop strategic alliances with political actors at the local and national level.

5.1.2 Actions needed to strengthen customary law systems

There are a multiplicity of actors, themes and actions which influence indigenous peoples in their decisions to maintain or adapt their own legal systems. Analysis of the interrelationship between these various factors and the relationship between different levels of decision making is required to ensure a more informed debate of the role and nature of customary law. Investigation of these issues should be carried out in an integral fashion, viewing the issues from a number of different angles. Emphasis should be placed on identifying general elements and underlying principles of customary law rather than seeking in-depth analysis of its content. Considering the fact that customary law regimes are currently in force in communities, such research should be bottom-up. In designing any research program it will be important to have clear guidelines on issues such as, the use of research products, confidentiality of information, production, revision and approval of publications, and diffusion of research results.

There is a need to examine the role of customary law in protection of TK from the perspective of both positive and customary law in order to evaluate the interface between these two systems of law. One means to approach analysis, in a bottom-up fashion, is through information gathering and case studies examining the relationship between customary law and positive law from the perspective of communities. Such studies should be complemented by examination of the status of legal and actual recognition of customary law and of traditional authorities under positive law. This will help demonstrate the extent of legal pluralism in a country. Participants felt that attempts to assimilate customary law into the positive law system is contrary to the notion of legal pluralism and should be resisted.

5.1.3 Factors influencing maintenance/adaptation of customary law

Factors influencing the maintenance or erosion of customary law may be external or internal. External factors include the influence of the State, church and/or markets. Internal factors derive from the nature of community leadership and the willingness of community members to be bound by customary norms. Creation of new political authorities may undermine traditional authority structures, causing tension and conflicts. These tensions may undermine the continuing application of customary law. In some cases, however, the situation is reversed and it has been new authorities and indigenous organisations which have led the way in revitalising customary law which has been allowed to enter into decline by traditional authorities.

While customary law works well for the internal affairs of indigenous peoples within their own territories it does not resolve many problems which may arise with external actors. For this reason it is important that national law and customary law work together.

Codification of customary law has been proposed by some as a means for bringing about legal certainty. One of the principal difficulties with codification is that it draws customary law towards the form of positive law. This in turn may lead to changes its nature and the loss of its underlying principles, nature and dynamism, which are responsive to the circumstances and the cultural life of indigenous peoples.

5.1.4 Workshop conclusions ²⁴⁵

Participants to the Quito workshop defined customary law as “ ... a collection of norms, uses and customs, transmitted intergenerationally that are exercised by indigenous peoples’ own authorities and institutions in their territories and that constitute legal systems that are recognised, accepted and respected by a collectivity and form part of the legal pluralism of countries with an indigenous population”.²⁴⁶ The workshop conclusions identified some of principal elements defining the nature of customary law, including:

- Permanence in time and space, and tied to the cultural identity of the indigenous people.
- Practices which promote reciprocity regarding the exchange of goods, services and knowledge within communities.
- Knowledge legacies. The yachak, shamans, taitis, elders etc. Transmit traditional knowledge intergenerationally by means of customary law.
- A body of subsisting cultural norms that are constantly being adapted, which makes possible the conservation and use of biological resources
- In Situ cultural regeneration in communities, through a system of knowledge connected with the indigenous cosmovision.
- Adaptive management of systems, and administration of knowledge and natural resources, that is consistent with indigenous people’s autonomy and self-determination.
- Knowledge system originated in ancestral law, our law or natural law (indigenous law).²⁴⁷

The customary use of biological resources is based upon a code of conduct which is generally recognised accepted and respected by a collectivity (unwritten law).

Customary law is closely tied to ethical, cultural and spiritual principles 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. Any attempt to create institutions for the exercise of customary law based on the perspective of positive law will turn it into positive law. There should be no pressure for codification of customary law as this would turn it into positive law undermining its flexibility, continuity and legitimacy.

There are numerous different varieties of customary law systems. It should not be the purpose of any system to promote harmonisation but rather to create flexible mechanisms which ensure respect and recognition for customary law regimes. To this end it is not necessary to focus as much on the content of customary law at this stage as on the links between traditional decision making authorities, and judicial and administrative processes, and authorities at the national, regional and international level.

²⁴⁵ These conclusions are based upon those set out in De la Cruz, R. (2006) at 23 and 24.

²⁴⁶ De la Cruz, R. (2006)

²⁴⁷ De la Cruz, R. (2006)

The approach of a sui generis system for protection of TK should be aimed at effective protection by means of customary law, and not by means of access and commercialization as methods for appropriation under the intellectual property rights system.

In recognition of collective entitlement, the intergenerational and integral nature of TK should be reaffirmed in favour of indigenous peoples and local communities.

The principle of prior informed consent of indigenous peoples and local communities for the use of their TK should be further developed with attention to the principles on this issue developed by the UN Permanent Forum on Indigenous Issues.

The potential for cultural objection to use of TK should be fully examined as much TK is sacred, and should not be the subject of systems for use of TK which are being envisaged at CBD and WIPO.

The importance of customary law as a time honoured system of protection should be respected. Sui generis regimes should foster and respect as broadly as possible the ancestral practices of use, management and exchange of genetic resources and TK by indigenous peoples.

Direct participation of indigenous peoples and local communities should be guaranteed through their representative organizations and the involvement of indigenous experts in the negotiations on sui generis regimes for protection of TK.

One of the key outputs of the meeting were terms of reference to guide future research on customary law in Andean countries (see Box 11).

Box 11: Terms of reference for research on Customary law in Andean Countries.

General Goal:

To contribute to meeting the basic objectives of the CBD, related to biodiversity conservation, the protection of associated traditional knowledge and the prevention of its illegal use.

Specific objectives:

To strengthen the role of customary law in the protection of traditional knowledge associated with biological resources

To carry out national and in-situ legal studies with indigenous peoples on their practical experiences with customary law for the conservation of biological resources and associated traditional knowledge

To contribute further arguments supporting the importance of customary law for the protection of traditional knowledge at CBD, WIPO and within the sphere of the Andean community, in the latter case, with a view towards the development of a future Andean Decision on protection of traditional knowledge.

To develop the capacity of indigenous peoples and promote their active participation in national, regional and international negotiation processes.

Proposed framework for National Studies on Customary law

Introduction and context

Why is this topic important? Basic principles of customary law (duality, reciprocity, parity, balance, equilibrium, etc.)

Conceptual framework: Legal pluralism.

Recognition of customary law in the regulatory environment (do laws exist or not?)

Recognition of special indigenous jurisdiction (in which cases does such jurisdiction apply?).

Incorporation of the protection of TK in communities own internal regulations (e.g. Potato Park in Peru, "Plan de la Vida" projects in Colombia and Venezuela)

References to case studies on customary law in Andean countries

Criteria, focal points/ elements and nature of customary law for the analysis of case studies

Analysis of the subject and/or organisation (the collective subject to which customary law applies; its functionality – decision-making powers etc.)

Customary law (Scope, reach)

Institutional framework (procedures), norms, principles.

Meeting points, interfaces, subordination to the system of positive law.

Recommendations for international organizations - WIPO, CBD, Andean Community of Nations, governments, indigenous peoples.

Bibliography

Annexes

References to relevant legislation²⁴⁸

Source: De la Cruz, R. (2006)

5.2 Melanesian Workshop

In March 2003 a workshop on Traditional Knowledge and Coastal Resource Conservation for Countries and States of the Melanesian Spearhead Group was held in Townsville, Australia. The meeting was organized by the International Marine Project Activities Centre (IMPAC) with the support of UNU-IAS, the Christensen Fund and others. The workshop was informed by a wide range of presentations regarding the role of customary law in natural resource management, ABS governance and TK protection in the Pacific. Presentations also covered international measures to protect TK and the potential role of customary law in international ABS and TK Governance.

The workshop presentations and working group sessions debates drew attention to four key areas. First, that traditional resource management, founded upon traditional land and marine

²⁴⁸ De La Cruz (2006) at 24.

tenure, traditional knowledge and customary law, plays a crucial role in natural resource management in Pacific Island countries. Second, traditional marine resource management²⁴⁹ faces significant challenges due to insensitive development policies including those relating to education, fisheries and extractive industries. Third, indigenous peoples and local communities as well as national governments are showing increasing innovativeness in developing responses to such challenges. To this end there have been increasing efforts to build functional interfaces between traditional and national authorities, and their respective legal regimes. Fourth, awareness building and capacity development at all levels is required to secure respect and recognition for customary tenure and customary law and practice and to protect and strengthen TK systems.

The workshop drew attention to the dynamic and flexible nature of customary law regimes and the challenges they face in playing a role in protection of TK in the future (see Box 12).

Box 12: Characteristics, Challenges and Measures to strengthen Customary law

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
-

Challenges facing customary law regimes

- Erosion of traditional decision making structure
- Failure to clarify landownership
- Changing economic and social reality
- It cannot protect TK outside community jurisdiction
- It may not provide clear guidance on TK ownership
- Certain elements and practices under customary law may come into conflict with human rights
- Depends on buy in of communities

Measures to strengthen customary law

- Identify customary land owners; - include sea area that belongs to each grouping,
- Identify groupings of customary land owners - clan, district, regional
- Identify aspects of customary laws that are directly linked to environmental management;
- Identify major components of CL that are/could be used for resource management
- Assess whether customary laws are compatible with 'codified' local and national laws

Source: Final report Townsville Workshop

²⁴⁹ Tobin B, (2004)

5.2.1 Workshop conclusions

Participants in the Melanesian workshop concluded that upwards of 80% of laws maintaining stability of communities and protecting the environment are customary. National law in many cases is viewed as expensive and as largely irrelevant if it doesn't recognise customary law. Lack of codification of customary law it was felt should not be seen as preventing government from engaging with communities seeking to enforce their laws²⁵⁰. The recognition and/or delegation of power to make regulations and apply customary law remedies and processes under mainstream legal frameworks, provides a link between customary and positive law systems. Inclusion of relevant procedures from indigenous TK and customary law regimes in monitoring and enforcing compliance with natural resource law and policy can help to empower traditional authorities and strengthen compliance with both customary law and positive law. It has been suggested that applying a principle of subsidiarity, such as is used in the European community would allow for decisions on relevant issue to be taken at the most appropriate level²⁵¹, in effect making a link between national law and customary decision making.

If a right to exercise traditional authority through the application of customary law is recognised the issue becomes one of respect for such laws and authority rather than one of adjudication of the validity of the law or of its intent. The key issue then becomes the manner in which traditional authority is to be recognised and the manner in which the State acts to support its effective enforcement. One widely recognised caveat to this is that customary law and the exercise of traditional authority should not infringe human rights.

5.3 Micronesian Workshop ²⁵²

The Micronesian Regional Workshop: Role of Customary Law and Practice in Regulating Access to Genetic Resources & Traditional Knowledge & Benefit Sharing, was held in Koror, Palau from 25-27 May 2004. The workshop was organized by the Republic of Palau Office of Environmental Response and Coordination (OERC), UNU-IAS, the South Pacific Regional Environment Programme (SPREP) and the Secretariat of the Pacific Community (SPC). The workshop was sponsored by the United Nations Environment Programme (UNEP).

Participants at the workshop included traditional Chiefs, representatives and delegates of national governments from Palau, Kosrae, Yap, Pohnpei, Marshall Islands, Chuuk and Kiribati; community representatives; and representatives from UNU-IAS, South Pacific Regional Environment Programme (SPREP), Secretariat of the Pacific Community (SPC), and invited speakers from the Coral Reef Research Foundation and Papua New Guinea.

The workshop's objectives were, to:

- Build awareness of the importance of customary law/practice for natural resource management;
- Identify the role of customary law in regulating ABS and protection of TK
- Develop proposals for implementation of law and policy on ABS and TK in Palau and the region, and
- Develop recommendations for future work on customary law in Micronesia and the wider Pacific region.

The workshop included a series of presentations addressing the links between customary law and resource management in Micronesia; Pacific approaches to protection of TK and

²⁵⁰ LLewell, D., in Caillaud et al, 2004

²⁵¹ Caillaud et al 2004.

²⁵² The presentation of the content and conclusions of the Micronesia workshop is largely based upon the final report of the Workshop prepared for UNEP by Margaret Raven and Wendy Elliott of UNU-IAS.

regulation of ABS; international TK and ABS governance, and; comparative experiences in traditional resource management.

5.3.1 Workshop conclusions

The workshop involved extensive working group activities during which participants considered, the nature of TK; the challenges it faces; strategies for its protection; the role of customary law, and; actions for national, regional, and international authorities in relation to protection of TK and recognition and respect for customary law. The following resume of the workshops conclusions is drawn directly from the working group conclusions and summary²⁵³.

Participants felt that traditional knowledge is the basis of cultural identity. Traditional knowledge differentiates cultural groups and makes them what they are as Kiribati, Yapese, Palauan, etc. Traditional knowledge has carried communities from their beginnings to where they are today. It has dictated values, social roles, educational systems, governance and conduct within the family unit, within the clan and within the nation. In other words, traditional knowledge is the heritage of communities.

Not all traditional knowledge has been lost; some is still intact and some has been transformed, much, however, has been eroded. This is caused by a range of internal and external pressures, including structural change (i.e. change in the cultural foundations of society). Such change may be identified in:

- Movement towards different government structures, from the traditional independent entities (Beluu) with their own system of governance to centralized government, introduced during colonisation;
- Family structure with the extended family breaking down and nuclear family systems becoming more of the norm, and the consequent changing of values. These changing values are due to various factors such as:
 - Outside influence (religion, western-style lifestyle, education system, medicine, economy, government, judicial system, and new values, among many others)
 - Change in livelihood –communities have moved from a subsistence lifestyle to wage earning, from home education to current school systems, from extended families to nuclear families – all of which are connected to the increased value placed on participation in the market economy
 - Shift from communalism to individualism
- Devaluation of traditional knowledge as the general perception grows that traditional knowledge is less valuable than Western knowledge a perception that continues to erode what traditional knowledge still remains. This is brought on by a number of factors including:
 - Lack of appreciation, lack of use
 - Improved technology (e.g. Transportation, communication, etc)

Part of the problem with erosion of traditional knowledge may be related to its nature. Participants identified a number of aspects of traditional knowledge which may limit efforts for its protection, such as:

- Knowledge is imbued with elements of power which may restrict sharing
- It is traditionally kept within the family and passed on only to family members
- The majority of knowledge is not recorded or documented

²⁵³ The workshop conclusions are drawn directly from the report of the meeting and the working group conclusions, as compiled and edited by Margaret Raven with the support of Wendy Elliott at UNU-IAS

One significant impediment to maintenance of TK is that it is in many cases not being transmitted to younger generations, due to lack of opportunity, lack of time and lack of incentive to learn. Environmental degradation also leads to loss of natural resources and results in loss of the knowledge regarding conservation and use of such resources.

Participants identified roles for communities themselves and national authorities in the adoption of measures and actions to protect TK and for reverting processes leading to its erosion. They also set out an extensive list of considerations for action at the national, international and regional level to recognize customary law as a tool for protection of TK. These included:

National Considerations:

- National governments should recognize the power of local chiefs to implement and enforce customary law, and the power and authority of women to select the local chiefs
- Traditional leaders should actively participate in formation of laws
- International laws and treaties must be implemented at national level through legislation which reflects elements of customary law
- Customary law must be effectively recognized through the strengthening of traditional natural and genetic resources management. National government should respect traditional rights (of traditional farmers) in natural resource management
- Ratification of international treaties with elements of customary law should be subject to an exhaustive national consultative process. The onus would be on appropriate government agencies to organize the consultation process
- Recommend Constitutional reform to reflect more elements of community traditions and cultural practices and customs
- Community involvement and traditional responsibilities of implementation of the customary law
- National government should support education and awareness at the local level that strengthens customary law
- The existing judicial system should accommodate traditional ways of resolving conflicts and disputes
- Write down customary law
- National governments should support local initiatives to strengthen the use of local languages of different communities.

International Considerations:

- Strong national recognition of customary law allows for international recognition of customary law
- Must recognize national policies/legislation especially the national constitution.

Regional Considerations:

- Adopt understanding of regional law/recommendations
- Regions should work together to ensure protection of customary law

The meeting also set out a list of future action/projects which should be taken on customary law: these included:

- Promoting greater inclusion of local languages in the education system
- Documentation and compilation of all TK and Customary law on genetic resources for a central/national database, taking into account its flexibility and adaptive nature
- Assisting communities to develop action plans taking into account cultural changes
- More coordination among agencies involved in customary law and genetic resources management, including NGOs, and more collaborative set ups between the traditional and western systems

- Enforcement of the legislation/policies on TK/ Customary laws
- Funding support from national/regional/international bodies to assist in education and enforcement of TK/Customary law.

The conclusions of the workshop were presented before Palauan traditional chiefs; government Ministers and a wide range of invited guests from national authorities, NGO's and local communities. The participants highlighted the importance of the sub-regional workshop which was the first of its kind to address questions of customary law, ABS and the protection of TK and called for further sub-regional dialogue on these issues.

5.4 South Pacific Regional Workshop

Building on the Melanesian and Micronesian sub regional workshops UNU-IAS in collaboration SPREP, and with support of the Christensen Fund, Government of Australia, UNDP and UNEP, organised a South Pacific regional workshop on Access and Benefit Sharing, Traditional Knowledge and Customary Law. The workshop was held from the 21-24 November 2005, in Cairns, Australia. The workshop brought together senior legal and environment officers and representatives of indigenous peoples and community organizations from South Pacific Island Countries (SPIC) and Australia as well as experts in customary law and resource management and representatives of regional and international organisations. These included SPREP and SOPAC legal officers, representatives of the GEF, UNU-IAS, and The Christensen Fund.

The workshop addressed four issues relevant to ABS and TK governance in the region, capacity building, adoption of a regional model law on TK, the role of customary law in ABS and TK governance, and the relationship between the implementation of the Islands Biodiversity Program of Work (IBPOW) and ABS regulation.

There was detailed discussion of a proposal for a GEF capacity building project on ABS and TK issues. Participants also considered a draft Model Law for protection of traditional ecological knowledge, developed and supported by SPREP and the Pacific Islands Forum Secretariat.

The workshop drew attention to the important role of customary law and practice for securing appropriate and effective regulation of ABS and associated TK²⁵⁴. The final day of the workshop was dedicated to in-depth consideration of this issue. Debate was informed by a number of presentations and was debated in working group sessions, which highlighted the need for more in-depth analysis of the relationships between customary law regimes and national, regional and international governance of ABS and TK issues. One of the outputs of the meeting was the preparation of criteria to guide future research on customary law. Further discussion of the presentations and outcome of the meeting is set out below.

5.4.1 Workshop conclusions

The Pacific Island workshop concluded that there is a need to strengthen customary law regimes and secure their role in protection of TK and regulation of ABS. To this end participants called for research into the status of customary laws and their interface with national legal regimes. With regard to codification there were mixed opinions regarding its value and concern that it could not fully capture the essence of customary law, and might undermine its dynamic nature. One option which was felt might be useful would be to follow

²⁵⁴ Ibid.

the example of New Zealand which prepared a report on customary law which focused on identification of core values underlying customary law systems.²⁵⁵

The manner in which research is carried out was considered of much importance. To help guide preparation of a regional study the meeting prepared terms of reference which set out possible areas of focus and a suggested methodology for any study. It was felt that research should focus primarily on examination of the interfaces between national and customary regimes. Participants felt that research should involve local consultancy teams who understand how Pacific systems work, and be based upon both desk top studies and case studies in the field. (See Box 13).

Box 13: Customary law and TK governance and Terms of reference for regional study

Customary Law and its role in TK Governance

- Establish a Council of Traditional Leaders and terms of reference regarding ABS/TK and assist them in contributing to regulations under relevant legislation.
- Provide guidelines on how to deal with access questions
- There is uncertainty about whether Customary Law should be written down as a written code cannot capture all elements.
- Desktop and field studies are needed on Customary Law as it is practiced and described
- Studies on the relationship between customary law and the common law are needed
- A study of how customary law relates to traditional knowledge (synergies and conflicts) is needed.

Terms of reference for a regional study of customary law:

- Identify synergies and conflicts
- Use local consultancy teams of mixed expertise who understand how the Pacific systems work.
- A thorough stakeholder analysis and consultation is needed
- Give early notification to stakeholders of their projected involvement in the process
- An in-depth process is needed
- The interface between international, national and customary law should be explored
- Study results should be circulated to several government departments in each country

Source: Final report of Pacific Regional Workshop on Access and Benefit Sharing, Traditional Knowledge and Customary Law.

Participants considered a draft Model Law for protection of traditional ecological knowledge, developed and supported by SPREP and the Pacific Islands Forum Secretariat. There was widespread support for the proposal. However, there was concern that any database of traditional knowledge established to support TK protection should only hold information voluntarily submitted by indigenous peoples and local communities, and should be subject to strict conditions of confidentiality²⁵⁶.

²⁵⁵ See *Final report of Pacific Regional Workshop on Access and Benefit Sharing, Traditional Knowledge and Customary Law*, copy with UNU-IAS

²⁵⁶ Ibid.

There was detailed discussion of a proposal for a GEF capacity building project on ABS and TK issues. In determining where the emphasis should be placed in capacity building participants signalled the need to secure an optimum balance between national, sub-regional and regional activities. They also stressed the importance of building the awareness and capacity of communities and the need to ensure that any project included work at the local level.²⁵⁷

²⁵⁷ See Annex II

Section VI: Conclusions and future directions

Drawing upon the workshops in Andean Countries, Melanesia, Micronesia and the Pacific Region a number of broad conclusions regarding customary law and its role in ABS and TK governance can be made.

6.1 Traditional resource management and customary law

Land and marine rights in the South Pacific Island countries are largely regulated by traditional tenure systems. In Andean countries traditional governance practices is widely practiced to regulate rights over land and freshwater resources of indigenous peoples and local communities. In both Andean and South Pacific Island countries traditional resource management is central to community management of their lands and resources. Traditional resource management, based on the three pillars of traditional tenure, traditional knowledge and customary law, is crucial for meeting both local and national objectives on conservation and sustainable use of biodiversity. Taboos, in the form of bans or moratoriums on resource exploitation, respect for sacred places, and community allocation of land and marine resources .plays an important role in securing the capacity of resource stocks to meet community needs.

There is an ever growing trend towards the building of collaborative mechanisms for enforcing conservation and sustainable use objectives between national and community legal regimes, decision making authorities and enforcement mechanisms. This includes provision by the state of support to ensure enforcement of customary law and the application of customary bans on resource exploitation to support conservation objectives of both communities and the state.

6.2 Recognition and enforcement of customary law

Customary law is recognized in the Constitutions of most Andean and South Pacific Island countries. While some constitutions recognise custom or customary law as a primary source of law, others give much weaker recognition requiring an Act of parliament or decision of the courts in order to confer legal status on customary law. Constitutional recognition of customary law has been described as being either generic or discrete. Generic, where the constitution or national law recognizes the legal status of custom or customary law and leaves it to the customary regime to define specific regulations and enforcement measures. Discrete, where it defines specific subject matter such as land law, family law, criminal or environmental issues, which may be governed by communities in accordance with their customary laws²⁵⁸.

The value of customary law is linked to capacity to secure its enforcement. Communities have developed a variety of means to achieve this end, including dispute resolution mechanisms, reciprocity based measures and the development of community protocols to secure the support of national authorities in enforcement of customary law.

The effectiveness of national law is linked to the state's capacity to enforce its laws. In isolated areas in both Andean the South Pacific Island countries this capacity is still weak and the state must rely on customary law and traditional authorities to help support implementation of national law. As state power and capacity to enforce its laws grows this may place a strain on traditional authorities and has the power to undermine customary law. To counteract the erosion of chiefly power caused by centralized government some countries have formally incorporated chiefs and elders in national and state legislatures and

²⁵⁸ Tomtavala, Y. (2005)

other relevant decision making authorities. There are also increasing efforts to secure effective interaction between community courts and national courts. Efficiency and effectiveness of linkages between the legislative and judicial authorities of the state and of communities requires capacity building on all sides and mutual respect and commitment to shared goals.

In order to secure a balanced approach to enforcement of human rights and protection of cultural integrity it will be necessary to find a balance between the rights of the individual and the collective rights of communities and indigenous peoples in South Pacific countries.

Adoption and implementation of law and policy on ABS and TK issues will require the support of local communities and indigenous peoples. Recognition of the role of customary law in resource management and in governance of TK will be fundamental to achieving effective implementation of TK and ABS law and policy.

The Customary law of indigenous peoples and local communities is a vibrant and subsisting source of law and policy. It plays an important role, for amongst other things, governing land and marine rights, guiding traditional resource management strategies and establishing rules for access to and use of traditional knowledge. It is widely recognised in both developed and developing countries and recognition and respect for customary law in many parts of the world appears to be on the rise.

A majority of Andean and Pacific Island countries give constitutional recognition, either directly or indirectly, to customary law. National law also provides for recognition of customary law. In the main part recognition empowers indigenous peoples and local communities to regulate their own affairs and resolve internal disputes in accordance with their own laws and practices. This tends to be qualified by the proviso that enforcement of their laws should not conflict with internationally recognised human rights.

Effective recognition and respect for customary law will require adoption of measures in all countries. Where national law does recognise a role for customary law in the regulation of ABS and TK issues, the international community can play a role in helping to ensure the recognition and respect for such laws. Requirements for adoption of users' measures to oblige users of TK to demonstrate compliance with relevant national ABS and TK laws may effectively make use of TK dependent upon compliance with customary law.

One of the principal requirements for ensuring good ABS and TK governance will be the adoption of measures and mechanisms to ensure access to justice for local communities and indigenous peoples. This includes access to information regarding breaches of rights, legal support, funding, and most importantly access to the courts, through recognition of standing, provision of visas, accommodation, travel expenses etc. Without such support rights of access to justice will be a dead letter. In order to enhance the possibilities for indigenous peoples and local communities to access justice, the international community, regional bodies and national governments should promote the development of alternative dispute resolution mechanisms. Such mechanisms should, in their deliberations, be guided by a body of internationally recognised ethical principles drawn from among other sources customary law and practice.

6.3 ABS and TK Governance and Customary law

COP sees the CBD as the primary international instrument with responsibility for protection of TK related to biological diversity. COP has given the WG ABS a mandate to negotiate an international regime on ABS and Article 8 (j). Considering the mandate given to the WG ABS to develop an international regime on ABS and article 8 (j) it would appear that negotiations on an ABS regime will need to include comprehensive measures on TK protection relating to

biological diversity. COP has charged the WG 8 (j) with the task of developing sui generis elements on protection of TK, and requested the working group to collaborate with the WG ABS on issues of TK and benefit sharing relevant for an international ABS regime. The WG 8(j) has clearly identified customary law as a key element for sui generis TK protection it has also begun negotiations on an ethical code of conduct for TK. The WG ABS will need to consider how such sui generis elements; including customary law and any ethical code of conduct are to be addressed in any international ABS regime.

The IGC is also negotiating towards development of instruments, which may include an international regime, for protection of TK. Ensuring synergies and collaboration between the efforts of CBD and IGC will enhance coherency in international TK protection. However, it is important that negotiators recognise that although there is overlap between these initiatives their mandates are not identical. The CBD's responsibilities with regard to TK protection are broader requiring not only prevention of misappropriation and promotion of equitable benefit sharing, but also requiring the promotion and strengthening of TK systems. The IGC on the other hand is addressing not only TK related to biodiversity, which is the remit of the CBD's work, but also traditional cultural expressions, which are not directly covered by the CBD, although a subset of TCE's may be covered, at least in part, by CBD where they are relevant to biological diversity.

Although the CBD has declared primacy over TK protection the IGC has advanced further in the development of draft elements for the protection of TK. The CBD should pay close attention to the IGC's work and may wish to adopt all or part of this work as part of its own measures to protect TK and regulate ABS. Securing full and effective participation in the CBD and IGC negotiations will help negotiators as they seek to determine which instrument or mix of instruments are most conducive to protection of their rights in accordance with their interests, priorities and existing customary laws and practices.

Both COP and IGC have recognised that laws relating to protection of TK must be developed with due regard for customary law and practice. Adoption of a common approach by CBD and IGC to recognition of customary law will serve to enhance a coherent international approach to this complex issue. Indigenous peoples and local communities The WG ABS should fully consider the approach to customary law adopted in the IGC draft elements on TK protection and its potential for securing effective recognition of customary law in any international ABS regime.

The CBD and IGC are each developing measures for protection of TK based upon the concept of misappropriation, involving measures in both provider and user countries. The basic elements for a misappropriation based regime are requirements for disclosure of origin, certificates of origin/source/legal provenance and registers and databases of TK. Indigenous peoples and local communities have expressed reservations regarding the use of registers and databases, and some doubts regarding the utility of certification schemes²⁵⁹. There is therefore a need for further dialogue with indigenous peoples and local communities about modalities for making any misappropriation regime function in a manner which accords with their desires and priorities..

The WG ABS and IGC recognise that any regime to protect TK should be based on free PIC and negotiation and adoption of mutually agreed terms (MAT). Requiring users to obtain PIC of indigenous peoples and local communities, as a condition for access to genetic resources and TK, provides an opportunity for TK custodians incorporate customary law principles in bioprospecting agrrrments.. Having users contract into custom can extend the remit of customary law, however, there is need for further research to determine the possibilities and potential impediments to enforceability of such contracts, particularly in foreign jurisdictions.

²⁵⁹ Tobin B, et al (2008)

An international ABS regime may usefully serve to provide a framework linking sui generis law and policy, based on customary law, regulating access to and use of TK, with user measures requiring compliance with national and customary law relating to ABS and TK. Development of an international alternative dispute resolution mechanism guided by principles of equity, drawn from among other sources customary law, would help consolidate the role of customary law in TK governance.

Regional legislation on ABS in the Andean Community and draft proposals for sui generis laws on TK in the Andean Community and South Pacific, increase the possibilities for recognition and respect for customary law and its role in TK protection by establishing PIC procedures which empower custodians to control access to TK.

6.4 Interfaces between customary law and positive law systems

There are numerous different customary law systems. It should not be the purpose of international law to promote harmonisation but rather to create flexible mechanisms which ensure respect and recognition for customary law regimes. To this end it is not necessary to focus as much on the content of customary law at this stage as on the links between traditional decision making authorities and judicial and administrative processes and authorities at the national, regional and international level.

The interface between customary and positive law regimes occurs at the legislative, administrative, and enforcement levels. In Palau the inclusion of chiefs in legislatures and state government bodies creates a compromise between western and customary legal models. Palau has also seen a growing use of the courts to help offset the costs of enforcement of laws established by traditional authorities. In this sense the courts are perceived as becoming a part of the customary process of dispute resolution.

Securing mutual respect, confidence and collaborative enforcement between legal systems requires capacity building at all levels. This includes capacity building of the judiciary and court functionaries in order to ensure that national courts are prepared to respond to and apply customary law. Awareness also needs to be built amongst communities of relevant national and international laws and the means through which these may help promote compliance with their own customary laws. Providing that courts be advised by experts from within communities may help to ensure more sensitive application of customary law.

At the administrative level collaboration on issues such as fisheries management in New Zealand, development of locally managed marine areas in Pohnpei, Fiji and PNG and of community registers in Peru provide opportunities for incorporation of customary law principles in the implementation of national law. Collaboration is also evident in the Loyalty Islands Environment Charter, which is based upon French Law adapted to Kanak culture and traditions. A blending of positive and customary law is also apparent in the Solomon Islands land ordinance which seeks to empower traditional authorities while providing access to national courts on appeal from local courts applying customary law.

Identifying the points of interface between national, regional, and international law and policy and decision making authorities and the customary laws and practices and traditional authorities of indigenous and local communities, will require consideration of the various ways in which these legal systems and their respective administrative, judicial and enforcement authorities function and interact. Developing mechanisms for enhancing effective interaction and processes to promote collaboration and mutual respect between these indigenous and local community authorities and institutions and those of the State and international community requires a firm understanding of each system, its working practices, strengths and limitations.

6.5 Building Bridges - sharing the load

Customary law is closely tied to ethical, cultural and spiritual principles and its application does not necessarily follow the logic of positive law. This may make it difficult to build functional bridges between systems with very different objectives. It does not however provide a reason from shirking away from the challenge. In the end the bridge must be built, the quality of that bridge will depend to a large extent upon the effort and commitment given to that task by negotiators of the international ABS regime. However, the international community alone cannot ensure effective TK protection. This needs to be complemented by action at the national and regional level and by indigenous peoples and local communities themselves.

Action at the national level will be crucial for recognition of rights over TK and of the role of customary law in its protection is to be fully recognised by the international community. The commitment of national decision makers to promoting TK protection at the international level, which has been clearly demonstrated at the CBD and IGC negotiations as well as in negotiations at the WTO on disclosure of origin, needs to be mirrored by adoption of relevant national law and policy to protect TK. To this end national authorities will need to identify the threats to TK posed by existing legislation and development policies in areas such as education, health, agriculture and fisheries, hunting, forestry and other extractive industries such as mining and oil and gas exploration, as well as bioprospecting and other scientific research activities. In addressing threats attention will also need to be given to the influence of organised religion, in particular evangelical and other missionary groups and the need for recognition and protection of rights associated with sacred sites and the practice of traditional spiritual rites and practices.

TK does not respect national boundaries and regional law and policy will be important to ensure that shared, TK held by indigenous peoples and local communities in more than one state, is protected in a manner which is respectful of all custodians, and ensures their fair and equitable participation in benefit sharing. Initiatives to develop regional TK law, such as those of the Andean Community of Nations and the South Pacific Forum, can provide opportunities for the formulation of law and policy which is sensitive to the realities of indigenous peoples and local communities who share TK across national boundaries. This is particularly so where representatives of indigenous peoples and local communities are fully integrated into decision making from the earliest stages of legislative and policy design.

Indigenous peoples and local communities themselves have a vital part to play in defining and implementing measures for protection of TK. Without their support the action of national regional and international authorities will have only limited impact on the already worrisome level of TK erosion and the decline of the role of customary law in TK management.

6.6. Four C's: Codification, community protocols, contracting into custom, and capacity building

Identification of underlying principles of customary law such as those of reciprocity, duality, and equilibrium²⁶⁰, offers the possibility of establishing a body of guiding principles which can assist in building bridges with positive law regimes. However, in both the Andean and South Pacific workshops it was noted that it is not possible or desirable to develop a one size fits all model of customary law. For this reason any regime recognizing the role of customary law must provide sufficient flexibility for the recognition of a diversity of systems.

²⁶⁰ Swiderska K, et al. (2006) *Protecting Customary Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Interim Report* (2005 2006) IIED November 2006

Codification of customary law as a means for securing its recognition has raised many concerns amongst indigenous peoples and local communities who feel this may begin the process of turning it into positive law. This it was generally felt would undermine its flexibility, continuity and legitimacy. Resistance to codification was most strident in the Andean region. There was some mild support for the idea in the Pacific region, but only for codification of underlying principles or ethics of customary law, such as had occurred in New Zealand. Lack of codification of customary law was not seen as an insurmountable impediment to governments and the international community engaging with indigenous peoples and local communities with a view to developing mechanisms to give force to customary law. One means to bridge the gap with positive law without recourse to codification of customary law is the development of community protocols which define processes for seeking access to and use of TK without requiring that customary law itself be codified.

Establishment of protocols defining procedures for applications to research, collect and/or use TK enables its custodians to define conditions for PIC, benefit sharing, and place restrictions on TK such as that with significant sacred and/or cultural importance. Taking the initiative in development of community protocols provides TK custodians with an opportunity to influence the development of national, regional and international law and policy in this area. Community protocols may be seen as a bridge between customary law and positive law regimes. As such their development is an aid to effective regulation of TK issues at all levels.

Community protocols may prove particularly influential where they are developed by indigenous peoples whose traditional territories span one or more national boundaries, or where they involve more than one indigenous people or local community within a single state. Proposals for workshops to identify the possibility of developing an Inuit Protocol on TK governance²⁶¹ and by the San people²⁶² are initiatives with the potential to significantly influence the design of national, regional and international law and policy. Similarly a proposal by the indigenous peoples in Peru calling for the development of a protocol amongst all Jibaro peoples (Shuar, Achual Aguaruna, Huambisa and Candoshi) whose territories span the Peruvian Ecuadorian border would if brought to fruition provide clear guidance on how to define PIC processes, benefit sharing etc. in accordance with customary law principles.

Empowering indigenous peoples and local communities to develop community protocols on TK and ABS will in the long run assist national and regional authorities and the international community to develop appropriate mechanisms for protection of TK while giving due regard for customary law. Considering the status of current negotiations at the CBD, IGC and the WTO, as well as ongoing regional and national efforts to develop TK law and policy, provision of such support to indigenous peoples and local communities should be prioritised. The Global Environment Facility (GEF), international aid agencies, governments and international institutions as well as the research and private sector should all be called upon to make funding available to support the development by indigenous peoples and local communities of such protocols. In the long run this may prove one of the most effective tools for securing effective TK protection and appropriate respect and recognition for customary law.

To assist this process the UN Permanent Forum on Indigenous Issues and the WG Article 8 (j) could usefully work, in collaboration with relevant international organisations, governments, indigenous peoples etc. to prepare a report on community protocols already in existence. Indigenous peoples of Australia, Canada, New Zealand, Panama and the US

²⁶¹ communication with Violet Ford July 2007

²⁶² communication with Sachan Kabila November 2008

have been amongst the leaders in the development of community protocols. Their experience and similar experiences from around the world might, usefully, be examined with a view to the development of model protocols. These could in turn be used by indigenous peoples and local communities around the world in the development of locally appropriate protocols to govern TK and ABS issues. Provision of support to indigenous peoples and local communities to develop such protocols will assist not only TK custodians but international, regional and national efforts to regulate TK. In the long run empowering the custodians of TK may in the long run prove the most effective means for securing development of a functional international system to respect and protect TK.

Indigenous peoples and local communities are becoming ever more dependent upon the support of local and national authorities in order to ensure respect for and enforcement of customary law relating to TK. This requires increased awareness of TK rights and a new approach towards development planning and the exercise of power by administrative, judicial, and enforcement authorities with a view to ensuring effective respect for and implementation of customary law. Capacity building will be required for judicial authorities and alternative dispute resolution practitioners involved in resolving cases involving issues of customary law.

A need has also been identified for capacity development of communities regarding their TK rights and their rights and opportunities to apply their own customary laws to the management of TK. Building awareness and capacity of indigenous peoples to negotiate contracts which incorporate customary law principles and/or are made subject to the jurisdiction of traditional authorities may provide opportunities for obliging users of TK to contract into custom. It is unclear as yet to what extent such agreements to be bound by customary law might be enforced and whether judgments made under them would be enforceable in foreign jurisdictions. The adoption of national and regional laws, requiring PIC and formal contracts/licences with TK custodians for access and use of TK and of genetic resources on their territories, such as exists in countries of the Andean region, increases the potential for securing compliance with such contracts and enforcement of relevant customary law principles enshrined in any agreement.

6.7 TK, Customary law and human rights

TK is crucial for, and at the same time dependent upon, realization by indigenous peoples of their human rights to life, food, health, education, culture, freedom from hunger, land and traditional territories, resources, human dignity, development and self-determination. Many of these are economic, social and cultural, rights, which are treated as aspirational. This means that their realization is dependent upon the capacity and resources of states to provide them to their population. Where states lack such resources and capacity they are obliged to seek support from third countries where necessary to secure their realization. This may include seeking support for the development of necessary law and policy and its enforcement.

Rights to life, human dignity and self-determination fall within the category of human rights which are *ab initio* binding upon states. Indigenous peoples framing an action for breach of their human rights on the basis of the failure of by any state to protect their TK should where possible frame their claims primarily around such binding rights. Any action will be strengthened by reference to the impact of loss of TK on economic, social and cultural rights.

Considering the close nexus between TK and indigenous peoples' human rights, states and the international community should take necessary steps to ensure that development of law and policy on TK protection is guided by a human rights approach. A human rights approach provides an explicit normative framework for the formulation of international and national law

and policy based on ‘... universally recognized moral values and reinforced by legal obligations’ enshrined in international human rights law.²⁶³

6.8 Future research

One of the key findings from the workshops and cases studies carried out to date is the need for concerted efforts to raise awareness of the nature, scope, role and possibilities associated with customary law as a sui generis means for protection of TK. Including its role as part of any international, regional or national system for protection of TK. Participants in the various workshops set out a range of topics considered crucial for this process, many of which have been highlighted above. Attention was also given to the modalities for carrying out research.

Across the workshops there was support for research which placed emphasis on identifying general elements and underlying principles of customary law rather than in-depth analysis of its content. Analysis of customary laws role in protection of TK will need to examine the issue from the perspective of both positive law and customary law. Considering the sensitive nature of the subject matter, research will need to be carried out using the highest possible standards of confidentiality and under specific agreement with indigenous peoples and local communities on the use of any knowledge obtained during research.

It is unlikely that any one single instrument can provide the means to effectively secure protection of TK. Research should, therefore, consider a range of instruments which together may form a TK regime. A brief synopsis of objectives, areas of focus, and terms of reference and modalities for such research drawn from the workshops are summarized below.

6.8.1 Objectives and areas of future research

- Should be bottom up,
- Identify elements and general principles underlying customary law regimes
- Develop clear guidelines on the use of research results, confidentiality etc.
- There is a need to carry out research with a view of the issues from both a customary law and positive law perspective
- Need case studies on how CL is recognised in practice by national authorities, not just the law but the day to day practice of the relationship between traditional and national authorities.
- Look at the range of instruments to protect TK. (Darrel Posey proposals for a collection of rights drawn from international instruments of human rights etc.)
- Examine the functioning of models of legal pluralism, how authorities take decisions when there are a range of different sources of law and say principles of equity.
- What does equity mean – what sources of law should serve to provide the underlying principles of equity in international ABS and TK law
- Status of recognition of CL
- Indigenous jurisdiction how can it be extended
- Indigenous laws on TK
- Cases studies on the interface between CL and national regional and international legal systems. Came from pacific and Andean countries.

Methodology

- Stakeholder analysis
- Early notification to stakeholders

²⁶³ Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies, Office of the High-Commissioner for Human Rights Downloaded from <http://www.unhchr.ch/development/povertyfinal.html>

- In-depth Desk top and field studies.
- Carried out with a range of experts including indigenous experts and non indigenous
- Study results should be circulated to governments etc to help build capacity for international negotiations

Terms of reference for future studies

- What are the dominant characteristics of CL?
- What features of CL are most enduring?
- Why do communities prefer CL?
- When do communities prefer national law?
- Is there a danger of forum shopping?
- If CL is mainly oral how can external bodies recognise it?
- What is the danger with codification?
- What is the final decision making authority?
- When should there be an appeal to an external body?
- When should community decisions be enforced by national/international bodies?

6.9 Conclusions

The effectiveness of customary as a tool to protect TK will depend upon the extent to which it is recognised and supported by national, regional and/or international law and is enforced by relevant authorities. To this end, it will be important that any obligations developed at the international level are complemented by the financial and in kind support necessary to ensure implementation and enforcement in developing countries. Where customary laws and practices are unwritten the capacity and willingness of external authorities to enforce such laws and practices may be diminished. There are significant practical and legal hurdles to be overcome if largely unwritten legal concepts and rules are to be given force in the administration of access to and use of TK when it has left the control of the custodians of such knowledge. However, international law itself includes many elements which are unwritten and the unwritten nature of customary law is not in itself a good reason for refusing recognition

Adoption of legislation and development policies which empower indigenous peoples to exercise control over their traditional lands and resources in accordance with customary law is crucial to TK maintenance and in turn conservation and sustainable use of biodiversity. But law alone will not be enough to secure recognition and respect for TK. Legislative efforts will need to be supported by awareness building in all sectors of TK's importance, as well as the need for respect for land and marine rights and recognition of customary law. This implies multiple levels of interaction between indigenous and local communities and national authorities. Engagement by indigenous peoples with relevant processes for the development of law and policy at all levels is crucial to ensuring their voice is heard. Reliance on the state and regional and national processes to define adequate mechanisms for protection of TK is, however, unlikely of itself to secure the interests of TK custodians. Adoption of a pro-active approach with regard to the development of measures to protect TK is required. Development of community protocols which can provide a clear definition of procedures to be followed in seeking access to and rights to use TK is an area which holds much promise.

Negotiations at CBD and IGC relating to ABS and protection of TK have identified the important role customary law has to play in TK protection. Moving from conceptual recognition to effective regulatory respect and recognition will require a significant effort on the part of the international community, regional organisations and national authorities. This effort is complicated by the vast diversity of customary legal regimes, the oral nature of most customary law and the resistance of indigenous peoples to its codification.

Securing effective respect and recognition of TK will require inventiveness and willingness to find the means to bridge the divide between positive and customary legal regimes and their respective decision making and enforcement authorities. Building functional interfaces between these regimes and authorities will require acceptance of their interdependence. Devising appropriate positive law measures to respect and protect TK and the development of community protocols and other measures to bridge the divide between regimes will need to be guided by common objectives. In the search for common objectives it will be necessary to address TK protection in a more holistic fashion than has been shown by the international community and national authorities to date. This will require decision makers to address not only on regulating trade related aspects of TK governance but also the strengthening of TK innovation systems.

Strengthening TK systems will require a multi-sectoral approach addressing the threats to TK for a wide range of internal and external forces which undermine the capacity of indigenous peoples and local communities to maintain and continue to use and develop their TK.

TK is inextricably linked to realization of human rights to food, health, freedom from hunger, land and traditional territories, natural resources, culture, education, human dignity, development and self-determination. Adopting a human rights approach to TK protection will provide guidance for development of more holistic protection of TK which focuses not only on unapproved and/or uncompensated use but also on the protection of the multiple inherent, social, cultural, environmental, spiritual and economic values of TK. In the application of human rights law to TK care must be made to recognise the sometimes competing nature of collective community rights and individual human rights. Full and informed participation of indigenous peoples, including women, elders and youth will be important to ensuring that the potential conflicts between human rights law and customary law may be addressed in a fashion which supports cultural integrity while preventing continued systematic denial of the human rights of marginalised sectors, in particular women.

Adoption of a human rights approach to TK protection guided by international instruments such as the UN Declaration on the rights of indigenous peoples offers an opportunity for the international community and the world's indigenous peoples and local communities to build an all embracing framework for TK protection. Without this expansive vision this vital source of knowledge will continue to erode to the immediate detriment of those whose lives and futures depend upon it and to the impoverishment of the world as a whole.

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ANNEX I: issues for consideration on customary law

Compilation drawn from WIPO Customary Law issues Paper :

CUSTOMARY LAW & THE INTELLECTUAL PROPERTY SYSTEM IN THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS AND TRADITIONAL KNOWLEDGE ISSUES PAPER – version 3.0, December 2006.

General questions re customary law

- What is the nature of the customary law and protocols of indigenous and local communities, and other communities bound by such laws? Can common themes or elements be identified, or are customary laws and protocols simply too diverse?
- What relationships between customary law and intellectual property law have been encountered in practice? What models could be explored?
- How has customary law been recognized or applied in other 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 the law and practice of dispute resolution in general? How does customary law define the very legal or cultural identity of a community? What lessons does this wider experience offer to the law and practice of IP?
- 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, narratives, as well as the tangible form of expressions such as handicrafts, tools, and forms of dress?
- How do *sui generis* laws for the protection of traditional knowledge and traditional cultural expressions/expressions of folklore apply or otherwise recognize customary law?
- 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?

Issues for consideration: in general

- How do customary law and practices define, shape and sustain TK and TCEs within traditional communities? How can this role be better understood by external parties? Where communities themselves wish to strengthen the role of customary law in the governance of their TK and TCEs, what resources or other forms of support would they find helpful?
- What are the existing ways of recognizing or respecting customary law and practices in the external environment, beyond the traditional community? What possible

pathways could be developed? To what extent is this matter of law – national and sub-national laws, public international law, and private international law? To what extent is it a matter of greater awareness, ethical guidelines, or capacity building?

- How can customary law and practices be recognized specifically within the IP system? What legal or operational contexts are relevant? What are the lessons of practical experience?
- What aspects or elements of customary law and practices can be understood and applied beyond the social and cultural context of the community which develops and follows them? What aspects or elements can only be understood within that community?

Issues for consideration: promoting understanding and maintenance of customary law

General

- If a community which holds TK and TCEs wishes to bolster or enhance the role of customary law and practices in maintaining and protecting TK and TCEs, what resources and what forms of external support do they call for?
- How does customary law interact with the existing conventional IP system? What specific issues and legal mechanisms are relevant?

Beyond the community

- What is the level of understanding of customary law in policy and legal processes beyond the original communities? What are the priority areas for increasing this understanding?
- What mechanisms are available to continue wider learning from communities' experiences and concerns regarding customary law and practices?
- How to promote, in particular, more widespread understanding of the nature of customary law and practices relating to TK and TCEs, while also maintaining respect for the diversity and local characteristics of these laws and practices?

Within the community

- What options and resources are available to assist communities in maintaining and promoting the continuing role of customary laws and practices in the life of community members?
- What continuing challenges do communities face in sustaining and promoting customary law and practices, in particular regarding the maintenance, dissemination and appropriate use of TK or TCEs?
- What national, regional and international programs and processes have included the recognition, promotion or protection of customary laws and practices, especially in the context of promoting, protecting or safeguarding TK or TCEs?
- What options have been explored, and what lessons learned?

Issues for consideration: nature of customary law

- How to characterize or define customary law?
- What makes it binding on members of the original community?
- What makes it binding on third parties, beyond the original community?
- Can customary law have influence or effect on third parties short of binding legal effect?
- What is the boundary between *description* of a customary practice and *prescription* of customary legal obligations?

Issues for consideration: customary law and the nature of TK and TCEs

- How can customary law and practices help in understanding or defining:

- the nature of TK and TCEs;
- forms of custodianship, ownership or collective tenure of TK and TCEs;
or
- the nature of a traditional community's rights and obligations regarding TK and TCEs?

Issues for consideration: the principle of locality

- What experience has there been with a 'principle of locality'?
- How can customary law be better recognized or strengthened within its original context?
- What role does local customary law play in guiding more general legal and policy development?
- What is it for customary law to have jurisdiction outside traditional territories? What models are available for guidance?
- Should a principle of locality also set boundaries or limitations for laws and other measures intended to protect TK and TCEs, so that they do not pre-empt or contradict customary laws, or disrupt or impede customary practices?

Issues for consideration: legal recognition of customary law

- What forms of 'recognition' of or 'respect' for customary law have worked in practice? What models could be explored?
- continuing customary practices within the actual life of a community
- appropriate recording or documentation of customary law and practice
- direct application of customary law as legally binding on the community
- legal mechanisms to extend the legal scope of customary law obligations:
within domestic law
through international law
- customary law as providing factual input to other laws
- customary rights and obligations as exceptions within other legal systems
- customary law as providing policy guidance to other legal systems
- applying customary law procedures in other legal processes
- customary law as providing substantive norms and principles for broader application
- What legal, practical, ethical and constitutional factors have been relevant?
- What forms of 'recognition' of or 'respect' for customary law have been applied in practice? What models could be explored?

ANNEX II: Pacific Islands workshop closing statement

Workshop on Access and Benefit Sharing, Traditional Knowledge and Customary Law, 21-24 November 2005, Cairns, Australia

CLOSING STATEMENT

From the 21-24 of November 2005, government and community representatives of Pacific Island countries and a number of observers met in Cairns for a Workshop on Access to Genetic Resources, Traditional Knowledge and Customary law, organized by the United Nations University, Institute of Advanced Studies (UNU-IAS), and the Pacific Regional Environmental Program (SPREP) in association with the Pacific Islands Forum Secretariat. The Meeting was organized with the support of The Christensen Fund, the Government of Australia, UNDP and UNEP.

The Meeting was organized to discuss issues relating to the development and implementation of national and regional Access and Benefit Sharing (ABS) law and policy, protection of Traditional Knowledge (TK) and the role of customary law in ABS and TK Governance. Working Group sessions were held to consider these issues in detail and prepare proposals for national, regional and international action to enhance the development of relevant measures on ABS and TK.

The Meeting discussed in detail a GEF Proposal for a capacity building project, which was widely supported. Participants discussed the need to find an optimum balance between national, sub-regional and regional activities and while recognizing the value of strengthening regional institutions to support national processes stressed the importance of building the awareness and capacity of communities. The Working Groups stressed the need for increased awareness building at the national level on ABS and TK issues.

The Meeting also considered a draft Model Law for protection of traditional ecological knowledge, developed and supported by SPREP by the Pacific Islands Forum Secretariat. The proposal was given wide support with a proviso that the development of any database of traditional knowledge should only hold information voluntarily submitted by the relevant custodians of traditional knowledge, and subject to strict conditions of confidentiality.

The Working Groups highlighted the importance role of customary law and practice for securing appropriate and effective regulation of ABS and associated TK.

The Islands Biodiversity Program of Work (IBPOW) developed in response to the call by COP7 of the CBD was presented by SPREP which is facilitating regional input. Activities under the IBPOW relating to ABS were highlighted and feedback requested from member countries. Participants noted the importance of ensuring the consistency between ABS activities under the IBPOW and any other regional ABS programme.

The Meeting encouraged supported the actions of UNU-IAS and SPREP in promoting regional capacity building initiatives and called for their continued and increased efforts to promote awareness building and participative processes for development of ABS and TK law and policy.

Participants also suggested expansion of participation to include Pacific Island territories and other island communities such as Rapa Nui (Easter Island) and West Papua (Irian Jaya).

In closing the participants stressed support for:

- the GEF ABS Proposal and called for its urgent submission to the Global Environmental Facility

- the Model Law on TK protection and its submission to the highest levels of regional and national decision-making;
- Increased efforts at all levels to highlight the importance of customary law and practice for ABS and TK governance. In particular participants called for preparation of in-depth studies of traditional decision making authorities, customary law and practice and their relationship to national and international law and policy. Detailed terms of reference for such work were prepared by the Working Groups and are attached as an Annex.

The participants welcomed the opportunity to gather for this workshop and strongly supported increased work on ABS and TK issues with a particular call that such work include greater opportunities for national-level activities on these themes. They further encouraged involvement at upcoming Meetings of the ABS and 8(j) Working Groups as well as the WIPO Intergovernmental Committee.