



Sistema Económico
Latinoamericano y del Caribe

Latin American and Caribbean
Economic System

Sistema Económico
Latino-Americano e do Caribe

Système Economique
Latinoaméricain et Caribéen

Protection of traditional knowledge, traditional cultural expressions (folklore) and related genetic resources: SELA's approach

*Regional Meeting on Protection of Traditional Knowledge, Folklore Expressions
and Genetic Resources in Latin America and the Caribbean
Caracas, Venezuela
28 and 29 May 2009
SP/RR-PCTEFRG-ALC/DT N° 2-09*

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C O N T E N T S

FOREWORD

EXECUTIVE SUMMARY	3
I. INTRODUCTION	7
II. SOCIAL AND ECONOMIC IMPORTANCE IN LATIN AMERICA AND THE CARIBBEAN	7
1. Local communities in Latin America and the Caribbean	7
2. Genetic Patrimony in Latin America and the Caribbean	10
III. CONCEPTS AND REGULATIONS	11
1. Concepts	11
1.1. Traditional Knowledge	11
1.2. Traditional Cultural Expressions (folklore)	14
1.3. Genetic Resources	15
2. National Regulations in Latin American and Caribbean countries	16
IV. REGIONAL INSTRUMENTS AND ACTIONS	18
1. Integration groups by subregions	18
a) Andean Community (CAN)	18
b) Caribbean Community (CARICOM)	20
c) Common Market of the South (MERCOSUR)	21
d) Central American Integration System (SICA)	21
e) Union of South American Nations (UNASUR)	22
2. Integration and cooperation organizations	22
a) Latin American Integration Association (ALADI)	22
b) Andrés Bello Convention (CAB)	22
c) Andean Development Corporation (CAF)	23
d) Amazon Cooperation Treaty Organization (ACTO)	23
3. Multilateral forums and instruments	24
V. GLOBAL INITIATIVES AT MULTILATERAL FORUMS	26
1. United Nations Environment Programme (UNEP)	26
2. Convention on Biological Diversity (CBD)	28
3. United Nations Conference on Trade and Development (UNCTAD)	29

VI. ELEMENTS FOR A REGIONAL PROGRAMME ON PROTECTION, PRESERVATION AND PROMOTION OF TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES WITHIN THE FRAMEWORK OF SELA	30
1. Guidelines	30
2. Suggestions	32
i) Institutional framework	32
ii) Analysis and information	33
iii) Capacity building	34
iv) Legal issues	34
v) Trade issues	35
vi) International relations	35
VII. CONCLUSIONS AND RECOMMENDATIONS	35
BIBLIOGRAPHY	37
TABLES:	
Table 1 Latin America and the Caribbean. Census of indigenous population at the beginning of the 21st century	9
Table 2 Legal protection of traditional knowledge and its challenges	12
Table 3 Intellectual property models that could be used to protect some forms of traditional knowledge	13
Table 4 Regulations in Latin American countries on access to genetic resources, traditional knowledge and benefit sharing	17
Table 5 Andean regulations on access to genetic resources and protection of traditional knowledge	20
ANNEXES:	39
Annex 1. SPDA. Development of an international regime for equitable and efficient Access and Benefit Sharing within the context of the technological advancements	41
Annex 2. Trade in intangible goods	43

ACRONYMS USED IN THIS DOCUMENT

ABS	Access and Benefit Sharing
ACTO	Amazon Cooperation Treaty Organization
ALADI	Latin America Integration Association
CAB	Andrés Bello Convention
CAF	Andean Development Corporation
CAN	Andean Community
CARICOM	Caribbean Community
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP 8	Eighth Conference of the Parties to the UN Convention on Climate Change
FAO	United Nations Food and Agriculture Organization
FTA	Free Trade Agreement
ICTs	Information and Communications Technologies
IP	Intellectual Property
ITPGR	International Treaty on Plant Genetic Resources for Food and Agriculture
MERCOSUR	Common Market of the South
RAMSAR	Ramsar Convention on Wetlands
SICA	Central American Integration System
SPDA	Peruvian Society of Environmental Rights
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
TRIPS	Trade-related aspects of intellectual property rights
UNASUR	Union of South American Nations
UNCCD	United Nations Convention to Combat Desertification
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Education, Science and Culture Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

F O R E W O R D

SELA's Work Programme for 2009, approved by the XXXIV Latin American Council, held from 25 to 27 November 2008, foresees Activity II.1.7, which recommends to analyze and draft proposals to create a Cooperation Programme for Protection of Traditional Knowledge in Latin America and the Caribbean. Based on the above, a Regional Meeting on this matter has been convened with the following objectives: i) to delve deeper in the discussion at the international level on the protection of traditional knowledge, traditional cultural expressions or folklore and genetic resources based on an integral approach; ii) to highlight the experiences and criteria on this subject in Latin American and Caribbean countries, maximizing the existing efforts at the regional level; iii) to explore the bases to establish a regional programme for protection, preservation and promotion of traditional knowledge, traditional cultural expressions and genetic resources in Latin America and the Caribbean, within the framework of the SELA.

In order to offer useful elements for the analysis of this issue in the aforementioned Regional Meeting, SELA has drafted this document, which reviews the economic and social importance of this issue and the concepts of traditional knowledge, traditional cultural expressions and genetic resources. It presents the set of regulations and legal instruments developed by some Latin American and Caribbean countries, as well as the integration schemes (CAN, CARICOM, MERCOSUR, SICA and UNASUR); regional cooperation agencies (ALADI, ACTO, CAB and CAF) and multilateral initiatives (UNEP, CBD and UNCTAD). It also proposes elements for the formulation of a regional programme within the framework of the SELA that would enable consultations, cooperation and coordination on this matter in Latin America and the Caribbean, as a contribution to the protection and preservation thereof. The last section of the document contains the conclusions and recommendations that are deemed pertinent to support the activities of the region's countries at the regional and multilateral levels.

This study has been drafted by Colombian consultant Juan Acuña, whom the Permanent Secretariat wishes to thank for his efforts and hereby expresses its recognition of his work.

EXECUTIVE SUMMARY

Latin America and the Caribbean is a privileged region due to its rich biodiversity and the valuable immaterial patrimony of its traditional knowledge and development of its folklore as a result of the intellectual and cultural contribution of the indigenous people, as well as its relation to the new cultures which arrived from Europe, Africa and Asia after the Discovery of America.

In general, all Latin American and Caribbean countries are rich in vegetable, animal, lacustrine and maritime biodiversity, to the extent that eight Latin American countries are included in the group of Like Minded Megadiverse Countries¹ that contribute 75% of the world's biodiversity. The size of the local Latin American and Caribbean communities, in turn, make up a population mass of large dimensions in which, for example, the indigenous communities² alone, can reach up to some 50 million inhabitants (10% of the total population), to which we would have to add the other local African-American and peasant communities.

The development of biotechnology and the growing capabilities for identifying and incorporating exotic genetic material onto trade and research currents has forced changes in activities such as bio-prospecting, agriculture, industry and intellectual property regimes. It is broadly accepted that the new technologies and the hopes for sustainable development depend on the access and use of a very ample variety of genetic resources.³

The importance of traditional knowledge differs among sectors. In botany and natural healthcare it is used to identify new products, determine their safety and efficacy and develop agronomic practices. In pharmaceuticals it is used to guide research programs. In turn, the databases with information on the local use of plants are often consulted by agricultural companies.⁴

Based on observations in the market of drugs, seeds, pesticides, healthcare products, cosmetics, ornamental plants, species, plants, extracts, perfumes and others, the estimated world market value for products derived from genetic resources at the end of the 1990s was calculated to be within a range of 500 to 800 billion dollars a year. By 2020, it could reach 5 trillion.

Since the 1990s, the need to revise the relationship among the conservation of biologic diversity, access to genetic resources, property rights on traditional knowledge and sustainable development has been discussed with much force in international forums, in light of the interest created by the growing erosion of genetic diversity and the loss of traditional knowledge, due among other reasons to transculturization of the local communities or their oftentimes forced migration.

The idea of protecting traditional knowledge and folklore obeys to reasons such as the following:

¹ Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Peru and Venezuela. The other countries are China, India, Indonesia, Malaysia, the Philippines, Kenya, South Africa and Madagascar.

² Some sources prefer to use the term indigenous populations, as per ILO Convention 169 on Indigenous and Tribal Populations in Independent Countries.

³ Bifani, Paolo. CARICOM Interests in Relation to Biodiversity and Intellectual Property Rights within the Context of FTAA Negotiations. August, 2001.

⁴ Bifani. Ibid.

4

- Understanding that third parties are benefitting without the acknowledgment, the prior consent or compensations to the indigenous people and local innovators and creators;
- Said knowledge is being exploited and privatized through practices such as “bio-piracy” and the illegal access and use of this traditional knowledge.
- The unequal and unfair access and use of biodiversity and genetic resources connected to traditional knowledge.

Thus, the objectives for the protection of traditional knowledge would be the exclusion of third parties from unauthorized use and access thereof, the control of its use, the prevention of the inadequate and illegal use thereof, the recognition of collective rights, the distribution of benefits and the maintenance and preservation of traditional knowledge (TK).

Referring to the protection of traditional knowledge (and folklore) and the access to genetic resources requires taking into consideration the principles of sustainable development, the respect of the values, interests and needs of the local communities, the protection of human rights and the exercise of sovereignty. At the same time, due to its economic, social and cultural importance for the Latin American and Caribbean countries, a traditional knowledge and folklore and access to genetic resources protection policy could constitute an opportunity for the search for development alternatives in the region, since their own wealth is being defended, taken advantage of and promoted.

The study on the scope, content and modes in which the topic at hand could be focused for the protection of traditional knowledge and the access to genetic resources is a matter to which the international and regional communities have devoted many of their efforts in the past decade. Even though important conceptual, regulatory and cooperation advances have been achieved, its instrumentation is limited or nil within the domestic economies of the countries in Latin America and the Caribbean, since the preservation, promotion and protection of the access to genetic resources and traditional knowledge is above all put in the hands of the trustee countries, as well as those in the region.

In the international arena,⁵ general reference rules for the protection of traditional knowledge and the rights of the indigenous populations are included in the Convention on Biological Diversity (CBD); the International Treaty of the United Nations Food and Agriculture Organization (FAO) on phylogenetic resources; the United Nations Declaration on the rights of the indigenous populations; the Bonn guidelines for the CBD, various guidelines of the United Nations Education, Science and Culture Organization (UNESCO) and the United Nations Convention to Combat Desertification (UNCCD).

Other instruments linked to intellectual property and access and benefit sharing contracts are also being negotiated at the CBD and the World Intellectual Property Organization (WIPO).

It is pertinent to mention that intellectual property (IP) *protection* can be differentiated from the concepts of *safeguarding and preservation* from cultural patrimony, which refers to the identification, classification, transmission, revitalization and promotion of tangible or

⁵ WIPO. Project on the Analysis of Gaps in the Protection of Traditional knowledge. Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore. Geneva, Switzerland, 30 May 2008.

intangible cultural heritage in order to guarantee its continuation and feasibility. In reality, preservation and promotion instruments and programmes supplement protection policies.⁶

At the regional level, Decisions 391 (Common Regime on Access to Genetic Resources) and 486 (Common Industrial Property Regime) of the Andean Community (CAN) develop the principles contained in the CBD regarding access and benefit sharing contracts. They also regulate the defensive protection of traditional knowledge, so as to avoid the unlawful appropriation of knowledge and wisdom by requiring authorization from its trustees in patent requests. Decision 391 foresees that in the future, the Andean Community will adopt a decision aimed at protecting more specifically the traditional knowledge, innovations and practices of the indigenous, African-American and local communities, taking into account their inherent characteristics by means of the development of a *sui generis* protection system, for instance.

Brazil, Costa Rica, Panama, Peru and Venezuela have related relevant regulatory and institutional experiences on the access to genetic resources and traditional knowledge.

In the past decade, important research work and forums have been conducted at the regional instances – The Andean Community (CAN), the Amazon Cooperation Treaty Organization (ACTO), the Caribbean Community (CARICOM), the Central American Integration System (SICA), the Latin America Integration Association (ALADI), and the Andean Development Corporation (CAF) – which have permitted the drafting of interesting proposals for the protection of traditional knowledge and access to genetic resources. UNASUR, the Union of South American Nations, has environmental issues as part of its regional objectives.

Progress at the multilateral level, which could serve as a reference and guideline for the regional activities, comes from diverse scopes such as the CBD, FAO, WIPO, UNESCO, WTO, UNCTAD and the multiple environmental agreements entered into.

Taking into account this diversity as well as the progress made in the drafting of regulations, recommendations and proposals, it is worthwhile to suggest that synergies be developed among the regional entities and local authorities in order to strengthen the regulatory and institutional capacity, the capacity to participate and take advantage of all these processes by the local communities – especially the indigenous communities – and reinforce the participation of Latin America and the Caribbean at international forums in which environmental issues are discussed.

In this regard and considering the advances attained within the framework of the Andean Community, the initial suggestion is the use of these advances to broach the integral treatment of this topic from the regional perspective, thereby avoiding the duplication of efforts and resources and the finding of supplementary common ground. Nevertheless, we must bear in mind that, in subscribing Free Trade Agreements (FTAs) with the United States, the negotiators left aside these protection mechanisms. The frontiers of biodiversity and traditional knowledge transcend national geographic frontiers; therefore the countries share among each other local communities, biological resources, cultural expressions and traditional knowledge.

⁶ WIPO. Project on the Analysis of Gaps in the Protection of Traditional Cultural Expressions. Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore. Geneva, Switzerland, 30 May 2008.

6

In consequence, it would be desirable to forge a strategic alliance among the Latin American and Caribbean countries and existing regional entities to constitute a regional action programme in order to foster protection, prevention and promotion policies for traditional knowledge, traditional cultural expressions and genetic resources and reinforce the administrative and negotiation skills of the countries and local communities, backed by specialized instances and the international community.

For said purposes, a proposal is made to draft a regional programme for protection, preservation and promotion of traditional knowledge, traditional cultural expressions and genetic resources in Latin America and the Caribbean, divided into six areas of competence: i) Institutional Issues, ii) Analysis and Information, iii) Capacity Building, iv) Legal Issues, v) Trade Issues and vi) International Relations.

i) Institutional issues: Refers to the systematic and permanent consultation and coordination with government authorities responsible for domestic policies, the entities in the region with competence in the subject matter and the populations of the interested countries, by means of the following instances: a regional forum of authorities for the protection of traditional knowledge; a regional consultation forum among regional and multilateral integration and cooperation secretariats; a regional forum made up by local indigenous, African-American and peasant communities of Latin America and the Caribbean and an institutional aid mechanism for the local communities.

ii) Analysis and information: This would enable the exchange of information on regulations and application experiences, reports on global and multilateral advances, the creation of a site in SELA's portal on the protection of traditional knowledge and a forum of specialized experts for the analysis of specific topics within the framework of SELA.

iii) Capacity Building: It would encompass training and experience-sharing programmes aimed at the local communities as well as the national authorities with the endorsement of international organizations. It would procure a rapprochement to information and communication technologies (ICTs) for the local communities to establish links with other communities and preserve their knowledge under their direct control.

iv) Legal Issues: This area would follow-up on the legal instruments adopted by Latin American and Caribbean countries on the protection of traditional knowledge, folklore and access to genetic resources.

v) Trade Issues: It shall establish a regional list on biodiversity goods and services, draft an inventory on market access barriers, promote bio-commerce in Latin America and the Caribbean and procure the elimination of trade barriers at every level – regional and bilateral.

vi) International Relations: This area shall intensify the coordination, negotiation and proposal capabilities of the countries in the region to reach common stances against third parties and at international forums, for instance at the CBD, WIPO, FAO and the WTO.

I. INTRODUCTION

The purpose of this document is to conduct a review of the genetic resources and traditional knowledge and their implications on the indigenous populations of Latin America and the Caribbean; the existing regional protection instruments and the elements for a possible regional agenda based on the existing recommendations and the institutional tools developed so far.

According to a note by the General Secretariat of the United Nations Conference on Trade and Development (UNCTAD) addressed to the Trade and Development Board and dated February 2006⁷, traditional knowledge is a reason for international concern for the following reasons, among others:

- They are important for the life of the majority of the inhabitants in the world;
- They are fundamental for the conservation of biological diversity;
- They are rapidly being depleted;
- The apogee of the granting and use of unauthorized or inadmissible patents, with scarce or nil benefits for the original holders of said knowledge; and
- The interest in local sustainable development that traditional knowledge is capable of offering.

Starting at the Earth Summit held in Rio de Janeiro in 1992, the topic of the access to genetic resources and the protection of traditional knowledge were added to the debate and the guidelines on the protection of folklore expressions presented by UNESCO and WIPO in 1985.

There is at present a very broad international framework for the treatment of these topics: the Convention on Biological Diversity (CBD); the World Intellectual Property Organization (WIPO); The World Trade Organization (WTO); the United Nations Organization Food and Agriculture Organization (FAO); the United Nations Education, Science and Culture Organization (UNESCO); the United Nations Environment Programme (UNEP) and several environmental forums such as CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Convention on Wetlands, reached in RAMSAR, Iran.

II. SOCIAL AND ECONOMIC IMPORTANCE IN LATIN AMERICA AND THE CARIBBEAN

1. Local communities in Latin America and the Caribbean

According to ECLAC calculations,⁸ approximately 30 to 50 million indigenous persons live in Latin America and the Caribbean. By means of population census conducted between 2000 and 2002, some 30 million indigenous persons were counted. However, the type of questions in the census must be perfected as well as the information collection methodologies, which would back the figure given by several authors that state that the indigenous communities represent 10% of the Latin American and Caribbean population.

⁷ Trade, Environment and Development. Background note prepared by the Secretariat of UNCTAD TD/B/COM.1/79, 01/20/06.

⁸ ECLAC – Panorama de la inserción social de América Latina – 2006. Santiago, Chile.

8

If we add to these figures the African-American communities and the other local communities, it could be deemed that the issue of the protection of traditional knowledge and access to genetic resources is one of the most sensitive components in the region's social agenda. Expressed otherwise, any effective result in this subject matter would have significant effects on a large sector of the population which "is usually characterized through marginality, exclusion and poverty".⁹

According to the same source, in Latin America and the Caribbean there are 671 recognized indigenous populations, more than half of which have settled in tropical forest areas but also in towns in voluntary isolation, rural areas and urban and even transnational settlements.

As per the figures compiled through the census at the start of the 21st century, 80% of the 30 million of indigenous people would be located in four countries that have between 5 to 9 million inhabitants: Peru, Mexico, Bolivia and Guatemala. A second group would be made up by 5 countries with populations of among 500,000 and one million inhabitants: Brazil Colombia, Chile, Ecuador and Venezuela. Nevertheless, it is clarified that some calculations would indicate that in the case of Ecuador, the indigenous population could represent 25% to 35% of the total population, or 3.1 to 4.3 million. Additionally, for Georgina Méndez,¹⁰ the indigenous population in Mexico could reach 14 million, equivalent to 14% of the population in 2000. With these two adjustments to ECLAC's calculations, the indigenous population in Latin America and the Caribbean would be close to 50 million. Other countries registering indigenous populations and which do not exceed the 500,000 inhabitants are Argentina, Costa Rica, El Salvador, Honduras, Panama, Paraguay and Uruguay.

Regarding the relative magnitude with respect to the total population, it must be noted that the largest proportions are present in Bolivia, Guatemala and Peru, to which Ecuador should be added, if the calculations by certain analysts are veracious. Between 5% and 10% would be in Chile, Honduras, Mexico, Nicaragua and Panama. In the case of Mexico the lesser proportion is due to the magnitude of the total population, since its indigenous population in absolute figures is even greater than in Bolivia or Guatemala.

Manuel Ruiz¹¹ calculated this population to be 49 million inhabitants since Bolivia's participation compared to the total would be 71 % (some 5.9 million), in Chile it would be almost double ECLAC's calculations – or a little more than 1.2 million; in Ecuador it would exceed 43% of the population (some 5.6 million), in Mexico it would encompass 14% of the population (a bit more than 14 million), whereas in Peru it would be 47 % of the total population (about 12.7 million).

Lucrecia Pisquiy¹² underscored that Central America is a region rich in ethnic diversity, with 15% of its total population being indigenous. There is 17% of indigenous population in Belize, 2% in Costa Rica and El Salvador, 43% in Guatemala, 7% in Honduras, 8% in Nicaragua and in Panama it is 10%.

⁹ Ibid.

¹⁰ MENDEZ, GEORGINA. *New Participation Scenarios: The Experiences of Indigenous Women in Mexico and Colombia*. In *Indigenous Women, Territoriality and Biodiversity in the Latin American Context*. Universidad Nacional de Colombia. Bogota, January 2007.

¹¹ RUIZ, MANUEL. *The Legal Protection of Traditional knowledge: Some Political and Regulatory Advances in Latin America*. UICN, BMZ, SPDA. Lima (Peru), 2006.

¹² PISQUIY, L. *op.cit.*

Regarding the numbers of the indigenous population¹⁷, the region with the greatest cultural Diversity is the Amazon basin encompassing French Guiana, Surinam, Guyana, Venezuela, Colombia, Ecuador, Peru, Bolivia and Brazil, home to 390 culturally differentiated peoples and with specific socio-economic organizations. In Peru, for example, in the Amazon area alone there are 42 different populations. In Ecuador in the same area there are nine peoples (self-denominated nationalities).

TABLE 1
LATIN AMERICA AND THE CARIBBEAN
CENSUS OF INDIGENOUS POPULATION AT THE BEGINNING OF THE 21ST CENTURY
 (Thousands)

COUNTRY OR TERRITORY	INDIGENOUS POPULATION	PARTICIPATION IN TOTAL POPULATION (%)	INDIGENOUS PEOPLES (No.)
Argentina	403	1.1	21
Bolivia	5009	62.2	36
Brazil	734	0.4	222
Chile	692	4.6	9
Colombia	893	2.0	81
Costa Rica	64	1.7	8
Ecuador ¹³	830	6.8	26
El Salvador ¹⁴	126	2.0	3
Guatemala	4610	41.0	22
Honduras	428	7.0	8
Mexico ¹⁵	6102	6.4	62
Nicaragua	444	2.6	8
Panama	285	10.0	8
Paraguay	89	1.7	20
Peru	8500	32.0	72
Venezuela (Bol. Rep. of)	506	2.3	36
TOTAL LATIN AMERICA	29715		642
Belize ¹⁶	4	17.0	3
Guyana			9
French Guiana			6
Suriname			11
TOTAL CARIBBEAN			29
TOTAL LATIN AMERICA & CARIBBEAN	29719		671

Source: ECLAC. *Panorama Social de América Latina 2006*.

¹³ ECLAC quotes sources that calculate an indigenous population of among 3.1 and 4.3 million.

¹⁴ PISQUIY, LUCRECIA. Indigenous Women in Central America: Living Conditions and Challenges for their Participation. In Indigenous Women, Territoriality and Biodiversity in the Latin American Context. Universidad Nacional de Colombia. Bogota, January 2007.

¹⁵ This data could reach 14 million. See MENDEZ, GEORGINA. New Participation Scenarios: The Experiences of Indigenous Women in Mexico and Colombia. In Indigenous Women, Territoriality and Biodiversity in the Latin American Context. Universidad Nacional de Colombia. Bogota, January 2007.

¹⁶ PISQUIY, L. op.cit.

¹⁷ DE LA CRUZ, RODRIGO. Description of the Current Comprehension of Free, Prior and Informed Consent by the Indigenous Populations as a Methodological Issue, in the Activities Related to the Indigenous Populations: Meanings and Challenges. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS. Social Policy and Development Division. Secretariat of the Permanent Forum on Indigenous Issues. New York, January 17 – 19, 2005.

10

2. Genetic Patrimony in Latin America and the Caribbean

There are numerous authors who have attempted to show the importance of biodiversity and traditional knowledge linked to biodiversity in Latin America and the Caribbean, as well as its importance within the global context.

UNEP¹⁸ calculates that Latin America and the Caribbean concentrate 40% of the world's biodiversity, including eight of the 25 biologically richest terrestrial eco-regions of the planet. As a whole, said biodiversity contains more than 46,000 vascular plant species, 1,597 species of amphibians, 1,208 species of reptiles, 1,267 species of birds and 575 mammal species. "Unfortunately, this region is distinguished by the dangerous and rapid disappearance of endemic species which affect all the levels of the region's general development process, whether it is of an economic, social or political nature. For this reason, the management and implementation of initiatives that promote sustainable development and the conservation of the biodiversity – by improving the practices and uses of biodiversity – are today necessary and indispensable".¹⁹

The quoted UNEP report also annotates on this particular issue that the extinction of species and their habitats as well as the destruction of ecosystems are not only an ecologic tragedy but have profound implications for the social and economic development of the world. It is estimated that 40% of the world's economy and 80% of the needs of the developing countries are derived from biologic resources.

Besides, the problem is not restricted to the conservation of species, but to the entire ecosystem, in benefit of the local communities as well as humanity at large. "The loss of life diversity, among other issues, give rise to the reduced diversity of species and genes (the extinction of species and the loss of genetic material); changes in the ecosystems (alterations of the trophic chains, the degradation of soils, altered water bodies originating in basins, increased sedimentation levels, the effects on the climate); less carbon pickup and increased carbon dioxide in the atmosphere, changes in temperature/precipitation models due to deforestation. The loss of biodiversity also diminishes the chances of medical discoveries, sustainable economic development and adaptive responses to challenges such as climate changes"²⁰.

Lucrecia Pisquiy²¹ stated that Central America is characterized by its wealth of biodiversity and points out that in its 500,000 Km² of surface, 17 eco-regions and 22 zones of life have been identified. The eco-regions recorded house among 18,000 and 20,000 plant species. In Belize, 150 species of mammals, 540 bird species and 151 species of amphibians and reptiles have been identified. Nicaragua has more than 800 species of orchids, and apart from being the place of origin of many domestic species, it possesses primitive varieties of beans, corn, pumpkin, cocoa, tomato, cotton, chilli peppers and leguminous species. The forest canopy protecting the biodiversity of Central America takes up 36.5 % of the territory by 2005. Central American countries hold 8 % of the mangroves in the world and average annual pluvial precipitation levels in that Latin American sub-region are relatively high, therefore there are vast water resources in that part of the world.

¹⁸ UNEP. Access to Genetic resources and the Fair and Equitable Distribution of the Benefits derived from the Use Thereof. XIV Meeting of the Forum of Environmental Ministers of Latin America and the Caribbean. Panama City, Panama. 20 to 25 November 2003. Document UNEP/LAC-IGWG.XIV/Inf.4/Rev.1, 10 November 2003.

¹⁹ UNEP, Ibid.

²⁰ UNEP; Ibid.

²¹ PISQUIY. Ibid.

Pisquiy also stated that there are 834 million hectares of tropical forests and 130 million hectares of other types of forests in the region, covering 48% of the total surface of land. According to the FAO, the timber-producing surface in Argentina, Bolivia, Brazil, Colombia, Mexico, Peru and Venezuela encompasses a third of the world total, 56% of the regional total regional of more than 160 million m³ of timber. They also have a negative record with respect to the rate of deforestation, which reaches a yearly average of 0.48%. Between 1990 and 1995, 5.8 million hectares a year of the natural forest canopy have been lost. During the last 30 years, 190 million were lost in Latin America of a total of 418 million hectares of natural forest lost in the entire world. Between 1990 and 2000 the region's total forest area was reduced by 46.7 million hectares. (FAO, 2001).²²

Bifani²³ quoted a detailed list of more than 100 potential applications for Jamaican ethno-medical plants and the bioactivities they are capable of. Jamaica has indigenous and local communities which, throughout the generations have passed their knowledge on the various properties and uses of these genetic resources. A similar case exists in Guyana, which additionally has a very strong crossbreeding of various cultures of South America, India, Africa, China and Europe.

The Union of South American Nations (UNASUR), comprising 12 South American countries, possesses 27% of the world's sweet water; it has 8 million square kilometres of forests, it is surrounded by two oceans, and is the region that produces most foodstuffs and exports in the world.

III. CONCEPTS AND REGULATIONS

1. Concepts

With the emergence of forums and international agreements and the creation of national and regional regulations, there has occurred a broadening of the definitions regarding the content and scope of the concepts concerning traditional knowledge, traditional cultural expressions (folklore), genetic resources, and all the terminology surrounding them. So much so, that in the case of traditional knowledge and folklore, several authors prefer to indicate the type of activities they cover, or in which they are expressed.

1.1. Traditional Knowledge

After comparing the definitions in Article 8j of the CBD, Article 9.2.a) of the International Treaty on Plant Genetic Resources for Food and Agriculture, and Article 31 of the Declaration of the United Nations on the rights of indigenous peoples, for the work undertaken by the Intergovernmental Committee on Traditional Knowledge, the Secretariat of the WIPO proposed the following definition: *Traditional knowledge* shall be defined as "the content or basis of the knowledge regarding intellectual activity in a traditional context, particularly, specialized knowledge, skills, innovations, practices and teachings that form part of the traditional knowledge systems, and the knowledge involved in the traditional way of life of people or a community, or that is contained in codified systems of knowledge transmitted from one generation to the next. The term is not limited to any concrete ambit of the technique, and may include agricultural,

²² UNEP, Ibid.

²³ Bifani, op.cit.

12

environmental and medicinal knowledge, as well as all knowledge derived from genetic resources."²⁴

It must also be noted that in order to be legally protected, traditional knowledge must have an intergenerational nature, it must be linked objectively to the community of origin, and it must maintain an objective association within said community, so that it forms part of its own identity. There is a note in Table 2 regarding the challenges of legal protection.

TABLE 2
LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE AND ITS CHALLENGES

Jorge Caillaux Zazzali and Manuel Ruiz Muller
Peruvian Society of Environmental Rights (SPDA)

*As a result of a very interesting interaction process involving IP and new law disciplines, such as Environmental Law and the Law of Indigenous Peoples, indigenous peoples rights are faced with the dilemma of finding a legal formula that allows for incorporating instruments for protection of **traditional knowledge (TK) of indigenous or originating peoples** into national legislation and into international Law, as well as expressions of folklore. In effect, the recognition of the value of TK has increased, especially due to the fact that the new biotechnological inventions rely considerably on this knowledge, a fact that until recently went almost unnoticed. Additionally, the economic value attached to cultural expressions such as, for example, the designs of traditional art expressed basically in the various forms of handicrafts has opened a debate on the issue since the globalization of markets can actually affect local and traditional economies, as is already happening, especially in those countries with indigenous population, due to the illicit appropriation of designs, colours and other traditional forms contributed by the art of indigenous peoples.*

Consequently, it is a question of designing an IP system that recognizes the current and potential value of accumulated TK found and deposited in indigenous peoples, without discouraging modern scientific and technological research associated with natural resources, especially with biological diversity. The challenge is to design an IP system that respects cultural diversity and its collective expressions, always within the framework of a global economy which sustains its development by the opening of new markets.

Without a doubt, all intellectual effort is, in theory, deserving of legal protection, provided that certain specific demands and conditions of the various IP disciplines are complied with. However, due to the way in which the IP system was conceived and structured at the outset, TK does not constitute a subject eligible for protection; consequently, jurists and legislators never considered including them in the IP realm. That is why for decades (actually centuries), TK went unnoticed and unprotected, despite the fact that its continuation and development are clear proof of the existence of a great creative activity transmitted from generation to generation in constant re-creation.

The globalization process, the increase in the use of natural resources and the more direct interaction with indigenous groups, biotechnology, the organization of the indigenous movement and, especially, the Convention on Biological Diversity (CBD-1992) changed this situation. Each one of these factors, at different levels and in their own way, has had an influence on the increased political, juridical, and economic interest in developing and encouraging the search for formulas aimed at the legal protection of TK.

Source: Text published in the Andean Yearly Report on Intellectual Rights, Year 1, No.1, Lima 2004.

WIPO defines *protection* as the "legal measures that limit the possible use of protected material by third parties, either by granting the right to absolutely impede its use (exclusive rights), or by establishing conditions for its authorized use (for example, subject to fair retribution or to a right of recognition). Consequently, protection can be understood to mean protection against unauthorized use or unfair exploitation of the matter protected."

²⁴ Source: WIPO/GRTKF/IC/8/5.

(...) "Certain forms of protection of traditional cultural expressions will have the indirect effect of also protecting traditional knowledge: for example, the protection of recordings of traditional songs and narratives used to maintain and transmit traditional knowledge in a community, or handicrafts that incorporate technical methods or knowledge based on typical traditional knowledge."²⁵

The various obligations and provisions which exist for the protection of intellectual property offer several options for the protection of traditional knowledge, which may vary as to their definition and scope due to the very nature of traditional knowledge, since it is a different matter to protect a therapeutic procedure, a technique for managing ecosystems or a pharmaceutical product per se, as can be observed in Table 3. Furthermore, interested countries may adjust their IP systems according to specific protection needs, given the flexibility that is generally typical of international agreements.

TABLE 3
INTELLECTUAL PROPERTY MODELS THAT COULD BE USED TO PROTECT SOME FORMS OF TRADITIONAL KNOWLEDGE

***Invention patents**, in case traditional knowledge or its derivatives comply with the requirements of innovation, high level of creativity and industrial application. Patents protect innovations, not expressions. In this case, the requirements of innovation and high level of creativity represent important limitations to grant protection to TK.*

***Useful models** for original objects or handicrafts with a useful purpose.*

***Industrial designs** for original objects in their aesthetic aspects. Textile designs would be excellent candidates for obtaining industrial design protection.*

***Denominations of origin and certification brands** for the identification of the origin and particular qualities of various products, especially agricultural and agroindustrial products. An example of use of denomination of origin linked to TK is the case of the cocoa from Chuao in Venezuela. This type of cocoa is characterized by the use of autochthonous varieties combined with a traditional fermentation process used by the Afro-American communities of the zone.*

*Protection of **breeders of new plants varieties** that comply with the requirements of innovation, capacity to be distinguishable, homogeneity and stability. Here the requirement of innovation is less strict than when applied to patents; the main aspect is that the variety in question be accepted on the market. The 1999 law of varieties of Thailand has set up a *sui generis* system applicable to three types of vegetable varieties (including the generic, the domestic and the wild).*

***Copyright** for the protection of expressions when these have been physically set. When a work has materialized, copyright is very effective since registration is not mandatory. The mere fact of creation implies the protection of copyright for all works, be these literary, artistic, musical, dramatic, etc.*

Source: VIVAS, David. Guide and Recommendations on International Agreements and Relevant Legal Matters for Biotrade Programmes in the Andean Region and Input for the Regional Biodiversity Strategy of the CAN. Document prepared within the framework of the Joint CAN/CAF/UNCTAD Programme. Geneva, September 2001.

Nonetheless, and taking into consideration the patents system, developing countries have expressed the fact that it is necessary to have a system adapted to the characteristics of traditional knowledge and genetic resources; consequently, they support a *sui generis* system. In the Andean case, the indigenous communities prepared a proposal called

²⁵ WIPO. Project on Analysis of Needs in matters concerning the Protection of Traditional Knowledge. Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, Switzerland, 30 May 2008.

14

“Elements for the *sui generis* protection of collective and integral traditional knowledge from the indigenous perspective.”²⁶

1.2. Traditional Cultural Expressions (folklore)

According to WIPO, a broad definition of *Traditional Cultural Expressions (TCE) or Folklore*, might be as follows:²⁷

a) *Traditional cultural expressions or folklore expressions* are all the tangible or intangible forms in which traditional knowledge and culture are expressed, appear or are manifest. They include the following forms of expression or combination of same:

- i) verbal expressions, such as stories, epic poems, legends, poetry, enigmas and other narratives; words, signs, names and symbols;
- ii) musical expressions, such as songs and instrumental music;
- iii) corporal expressions, such as dances, plays, ceremonies, rituals and other interpretations or performances, regardless of whether they are set or not on any type of support; and
- iv) tangible expressions, such as works of art and, in particular, drawings, paintings (including body paintings), wood carvings, sculptures, pottery, terra cotta, mosaics, cabinet work, iron works, jewellery, basketry, embroidery, knitting, textiles, glassware, tapestries, clothing; handicrafts, musical instruments; and architectural works, which are:
 - the result of intellectual creative activity, in particular the creativity of the individual and the community;
 - characteristic of the cultural and social identity of a community, as well as of its cultural heritage; and
 - maintained, used or developed by that community or by individuals who have the right or responsibility of doing so, according to the laws and general practices of said community.

b) The concrete choice of the terms that describe the matter protected should be determined within the regional and national ambit.”

The “intellectual property systems applicable to the TCE are copyright and related rights. Traditional designs are eligible for protection as industrial designs. As regards names, signs and symbols, the IP systems that protect brands and geographical directions could be

²⁶ DE LA CRUZ Rodrigo et al. Elements for the *sui generis* protection of collective and integral traditional knowledge from the indigenous perspective. Andean Development Corporation, General Secretariat of the Andean Community. Caracas (Venezuela), May 2005.

²⁷ WIPO. Protection of Traditional Cultural Expressions/Folkloric Expressions. Reviewed Objectives and Principles. Ninth session of the Intergovernmental Committee on intellectual property and genetic resources, traditional knowledge and folklore, Geneva, April 24 to 28, 2006. Document WIPO/GRTKF/IC/9/4, 9 January 2006.

applied, as could the norms referring to unfair competition."²⁸ Nonetheless, one of the aspects most criticized is that copyright laws consider folklore expressions as public property (in the traditional sense of the WIPO) and that protection is granted to known authors and not to communities.

"The protection of TCE may refer to i) expressions that are of themselves distinctive and creative; and/or ii) the reputation or distinctive character associated with such expressions; or iii) their manufacturing method (in the case of handicrafts, musical instruments and textiles, for example). Examples of the first two categories are:

- i) literary and artistic productions, such as music and the plastic arts;
- ii) interpretations and performances of TCE;
- iii) designs in handicrafts and other creative arts;
- iv) secret TCE; and
- v) indigenous and traditional names, words, and symbols

The third category which refers to the manufacturing method of TCE, as in the case of handicrafts, musical instruments and textiles, refers particularly to what is called *traditional knowledge* (TK) *stricto sensu*."²⁹

1.3. Genetic resources

In Article 1 of Decision 391, the Andean Community defines *genetic resources* as "all materials of a biological nature that contains genetic information of actual or potential value or use".

In dealing with this topic there are three types of technical aspects regarding the conditions for a fair and equitable participation in the benefits derived from the use of genetic resources: a) the preventive protection of genetic resources; b) the requirements as to the disclosure of information concerning the genetic resources and/or traditional knowledge used in the claimed invention subject of a patent request; and c) matters pertaining to IP.

In the case of genetic resources, the definition of a property system is complicated due to the fact that it has tangible and intangible components. Thus, it is a common occurrence that the owner of the physical or tangible component of a genetic resource may not be the owner of its intangible component. This is the reason why the participation of the benefits is a crucial purpose for the CBD (Article 15.7), especially because the latter is from a developing country, for example, a local community, and the former is a scientific entity from a developed country.

The Bonn Guidelines of the CBD, referring to access to genetic resources and a fair and equitable participation in the benefits derived from their use raise certain specific questions which should be taken into consideration when granting patents that utilize genetic resources or traditional knowledge, such as the disclosure of the origin of the genetic resources and the prior informed consent of the local community owner of the genetic resource or traditional knowledge.

In order to improve preventive protection of genetic resources, thought has been given to preparing a broad spectrum of publications, data bases and other information

²⁸ WIPO/GTRKF/IC/9/4

²⁹ WIPO/GTRKF/IC/9/4.

16

resources where the known genetic resources can be classified, so that they become the subject of analysis on the part of patent examiners.

One critical matter is the CBD provision regarding the obligation of the contracting parties to create conditions that will facilitate access to genetic resources and not impose restrictions (Article 15.2). This regulation is in effect even if the country to which access to the genetic resource is required has as yet not decided how the ownership of the rights will be granted. In fact, the majority of the developing countries have still not issued any legislation on this matter.

There are three agreements directly related to the issue of access to genetic resources: The WTO Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), the CBD, and the FAO's International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) (Resolution 3/2001).

2. National Regulations in Latin American and Caribbean countries

During the last decade, there has been an evident increase in the value given to local communities, especially indigenous peoples or communities, as population groups representative of the society that require recognition of their social characteristics. In fact, several countries such as Brazil, Bolivia, Ecuador, Costa Rica, Panama, Peru, and Venezuela have explicitly reclaimed their rights in their regulatory system, starting out with their national constitutions.

Nonetheless, in the Model Provisions for National Laws on the Protection of Expressions of Folklore against their Illicit Exploitation and Other Detrimental Actions drafted by UNESCO-WIPO in 1985, TCE or those related to Folklore are treated as public property, except when they comply with the protection requirements of the regulations on copyright and related rights.

In matters concerning the Protection of Traditional Knowledge, existing advancements are linked to certain systems having to do with the protection of access to genetic resources, particularly the countries forming part of the Andean Community (Bolivia, Colombia, Ecuador, and Peru), in addition to Brazil, Costa Rica and Panama (Table 2).

In Brazil, Provisional Measure 2.186-16 (temporarily) regulates access to genetic resources, the protection of related knowledge, among other elements. This measure deals with access to genetic heritage, protection of access to related traditional knowledge, the distribution of benefits and access to technology and transfer of technology for the preservation and use of biological diversity. As occurs with the CAN (Decision 486), prior to the concession of intellectual property rights (particularly, biotechnological patents), the national authority (Genetic Heritage Management Council) may require proof of origin of the genetic material incorporated in the invention, as well as of the knowledge associated with said invention.

In Costa Rica³⁰, Law 7788/98 on Biodiversity establishes provisions for the preservation and use, in a sustainable manner, of the biodiversity resources, as well as for the fair and equitable distribution of the benefits derived from their use (through mechanisms of access, contracts or licenses, and a *sui generis* plan based on registrations). It also provides general guidelines for access to genetic and biochemical resources and creates the National Commission for Biodiversity Management (CONAGEBIO). Subsequently, by way of Executive Decree N° 31-514 published in December 2003, the General Regulations

³⁰ Ruiz (2006), op.cit.

for Access to Genetic and Biochemical Elements and Resources of the Biodiversity were approved in this country. These regulations establish the procedures for the granting of access permits that include prior informed consent of whoever provides the resource. It likewise considers the main terms for establishing conditions mutually agreed upon and the monetary and nonmonetary benefits considered advisable.

Panama³¹ regulates the protection of traditional knowledge by means of Law 20/2000 – Special Regulation of Intellectual Property on the Collective Rights of Indigenous Peoples, eligible for commercial use. The intention of the law is to protect the cultural heritage of indigenous peoples; consequently, it mentions inventions, models, drawings and designs, innovations contained in the images, traditional knowledge, figures, symbols, graphs, petroglyphs, customs, beliefs, spirituality, cosmovision, etc.

TABLE 4
REGULATIONS IN LATIN AMERICAN COUNTRIES
ON ACCESS TO GENETIC RESOURCES, TRADITIONAL KNOWLEDGE
AND BENEFIT SHARING

COUNTRY	NORM AND ITS STATUS	ÁMBIT	ISSUES ADDRESSED
Brazil	Provisional Measure 2.186-16 on access to genetic heritage (2001)	Access to genetic heritage (genetic information, in the form of molecules, extracts, etc.)	Access, distribution of benefits, protection of Traditional Knowledge
Costa Rica	Law 7788, Biodiversity Law (1998)	Biodiversity elements	Preservation, sustainable use, access to components of biodiversity, Traditional Knowledge
Panama	Decree 257 on access to genetic resources (2007)	Genetic Resources	Access, distribution of benefits, institutional framework
Panama	Law 20 on protection of indigenous knowledge (2001)	Indigenous knowledge related to art, designs, folklore, etc.	Protection and registration of Indigenous Knowledge
Peru	Law 27811 on protection of collective knowledge of indigenous peoples	Collective knowledge associated with biodiversity	Access, use, distribution of benefits, registrations

Taken from: SPDA. Development of an International Regulation of Equitable and Efficient Access to, and Distribution of, Benefits within a Context of New Technological Developments, prepared by Santiago Pastor Soplín and Manuel Ruiz Muller. Research Documents Series. Lima, May 2008.

It is forbidden to grant exclusive rights such as those provided for in the intellectual property system (copyright, industrial models, brands, etc.) to third parties not related to indigenous peoples (unless they possess due authorization). Indigenous peoples are encouraged to register their collective rights themselves and the Registry of Collective Rights was created for this purpose. Furthermore, the law sets forth that the rights of use and commercialization of art, handicrafts and other cultural manifestations must be governed by the regulation of use of each indigenous community.

In Peru,³² Law 28216/04 on Protection of Access to Peruvian Biological Diversity and Collective Knowledge of Indigenous Peoples established the National Commission for the

³¹ Ruiz (2006) op.cit.

³² Ruiz (2006) op.cit.

18

Prevention of Biopiracy associated with the irregular and illegal use of genetic resources and TK. Among its functions are the following: create a registry of biodiversity and TK; evaluate possible acts of biopiracy through the use of the intellectual property system; file administrative and judicial actions against intellectual property rights unduly granted and that imply the use of genetic resources and TK; establish communication channels with intellectual property offices in other countries, among others. This Commission is of a multisectoral nature and is led and coordinated by the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI). It is worth mentioning that in addition to Decision 391 of the CAN, Peru issued Law 27811 on the Regulation for the Protection of Collective Knowledge of Indigenous Peoples associated with biological resources.

Additionally, in the document by Paolo Bifani which is cited, it is mentioned that “although Guyana has legislation on indigenous knowledge, it has been considered (...) inadequate for the protection of local and indigenous knowledge and to guarantee the equitable distribution of benefits derived from the use of the knowledge, innovations and practices of the local communities...” In this regard, this author states that “in fact, access and use of traditional knowledge is regulated through the mechanism of permits to travel to Amerindian areas. The mechanism, in his opinion, is clearly unsatisfactory and not comprehensive enough for the effective protection of traditional knowledge.”

IV. REGIONAL INSTRUMENTS AND ACTIONS

Latin American and Caribbean subregional and regional organizations have launched many regional initiatives to preserve, promote and protect both traditional knowledge and access to genetic resources. In parallel, multilateral agencies and other regional organizations such as the Inter-American Development Bank (IDB) and the Organization of American States (OAS) have engaged in similar activities.

Consequently, for purposes of minimizing efforts, enhancing policy efficiency and fostering institutional and international negotiation capabilities, it may be advisable to review the agendas and work schedules jointly, from a Latin American and Caribbean standpoint. Many of the issues addressed in this field are common to the countries in the region, including biological resources, traditional knowledge, traditional cultural expressions (folklore) and local communities.

1. Integration groups by subregions

In Latin America and the Caribbean, the achievements made by the Andean Community of Nations (CAN) and, over the last few years, by SICA and CARICOM, are the role models as to the protection, preservation and promotion of traditional knowledge, folklore, and genetic resources within the framework of integration and cooperation organizations.

a) Andean Community (CAN)

Bolivia, Colombia, Ecuador, and Peru are members of the Andean Community. The national laws of these four countries include six community regulations that are mandatorily and automatically enforced, as evidenced in Table 3. Further, the Consultative Council of Indigenous Peoples recently joined the existing Andean institutions.

Since they are an important reference of the introduction of regulations in other countries, Decisions 391 and 486 are highlighted below.

Decision 391 was issued in 1996. Given the expertise built upon enforcement of this decision, a debate is under way on its likely improvement. Regarding traditional knowledge, under Article 7, the member countries shall draft supplementary legislation. Article 7 also "acknowledges and values the rights and capacities that the indigenous, Afro-descendant and local communities have in connection with their knowledge, innovations, and traditional practices related to genetic resources and its derivative products".

Some articles of Decision 391 read as follows:

- Article 16: "Any access process requires filing, admission, publication and approval of an application, the signing of an agreement, the issuance and publication of the relevant Resolution on the acts related to such access..."
- Article 34: "The access agreement shall bear in mind the rights and interests of the suppliers of the genetic resources and their derivative products."
- Article 35 (...) "The access agreement shall include an attachment that is a full part thereof and which provides for the fair and equitable distribution of benefits."

Among other activities, the creation of a special regime or harmonization standard aimed at strengthening the protection of knowledge, innovations, and traditional practices of the indigenous, Afro-descendant and local communities is envisaged, as provided for under Article 7 of this Decision, the Convention 169 of the International Labour Organization (ILO) and the CBD. A training program is also to be designed for indigenous, Afro-descendant and local communities in order to reinforce their negotiation capabilities in connection with the intangible component and within the framework of the access to the genetic resources.

Under Decision 486, licensing of the inventions developed from the material of the biologic and genetic heritage, as well as the traditional knowledge of their indigenous, Afro-descendant or local communities, "is subject to whether such material has been acquired or not in accordance with the international, community and domestic laws." Applications shall be filed with the relevant domestic offices and, if appropriate, a copy of the access agreement, a copy of the document certifying that the use of the traditional knowledge has been licensed or authorized, the deposit certificate for the biological material, and a copy of the document certifying the transfer of the invention patent to the applicant shall be enclosed.

Noteworthy is that great strides have been made to allow for the dynamic participation of the indigenous peoples and their representative organizations, not only within the framework of the activities of the Regional Strategy on Biodiversity (Decision 523) and the activities related to the mechanisms of protection of the traditional knowledge and the access to genetic resources, but also within the framework of the meetings of high-level authorities who are actually the lawmakers in the subregion, i.e. the Council of Foreign Ministers and the Committee of Trade Ministers.

TABLE 5
ANDEAN REGULATIONS ON ACCESS TO GENETIC RESOURCES AND PROTECTION
OF TRADITIONAL KNOWLEDGE

Decision 674 (2007)	Consultative Council of Indigenous Peoples of the CAN
Decision 596 (2004)	Creation of the Council of Ministers of the Environment and Sustainable Development of the CAN
Decision 523 (2002)	Regional Strategy on Biodiversity
Decision 435 (1998)	Creation of the Andean Committee of Environmental Authorities
Decision 391 (1996)	Common Regime on Access to Genetic Resources
Decision 345 (1993)	Common Provisions on the Protection of the Rights of Breeders of New Plant Varieties
Decision 182 (1983)	"José Celestino Mutis" Andean System on Agriculture, Food Security and Environmental Conservation

Source: CAN Web site.

The Consultative Council of Indigenous Peoples of the CAN comprises a delegate from each member country of the CAN. Further, the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean, the Coordinator of the Indigenous Organizations of the Amazonian River Basin (COICA), the Andean Coordinator of Indigenous Organizations (CAOI), and the Continental Network of Indigenous Women of South America³³ take part in the Council as Observers.

b) Caribbean Community (CARICOM)

In many member countries of CARICOM, the concepts of *traditional knowledge* (TK) and *folklore* are used as synonyms. In fact, some of the art expressions of the traditional knowledge and folklore are the major components of the traditional knowledge. The World Intellectual Property Organization (WIPO) identified the areas related to the TK as follows

- Traditional use of fruits, trees and animals for medicinal purposes
- Spiritual healing
- Traditional fishing methods
- Traditional labour and delivery methods
- Cultural heritage
- Songs, dance, and traditional plays
- Rites and rituals
- Traditional psychiatry
- Religion
- Hunting ornaments and fishing techniques
- Handicrafts
- Traditional environmental protection and conservation methods
- Language

³³ <http://www.fondoindigena.org/>, <http://www.coica.org.ec/>, <http://www3.minkandina.org/>

On 18 and 19 March 2008, under the aegis of the WIPO, a Regional Expert Meeting on the Creation of a Caribbean Framework for the Protection of Traditional Knowledge, Traditional Cultural Expressions (TCE) and Genetic Resources was held. The meeting was intended to ponder the possibilities to draft a regional proposal for the protection of traditional knowledge and traditional cultural expressions.

At the conclusion of the meeting, five main issues that needed to be addressed were outlined as follows:

- i) Identify what subject matter should be protected
- ii) Define the global objectives
- iii) Survey policy, legal and practical options
- iv) Coordinate with regional and international processes
- v) Establish a programme for effective implementation

Experts suggested addressing these issues as listed below:

- i) Review TK and TCEs in the region.
- ii) Identify IP-related needs through actual cases of misappropriation.
- iii) Develop non-binding working definitions of TK and TCE.
- iv) Conduct an audit of legal and non legal expertise / holders and stakeholders.
- v) Conduct a survey of existing IP and non IP legislation and other measures relevant to meeting needs as identified.
- vi) Identify any gaps in existing IP systems with reference to specific examples, when possible.
- vii) Examine policy consideration relevant to whether gaps should be filled.
- viii) Explore which options exist or might be developed to fill gaps.
- ix) Identify and explore options for a "regional approach" (in three possible senses: legal, administrative and sharing of information/documentation).
- x) Develop and propose a roadmap / action plan and / or awareness-raising programme.

c) Common Market of the South (MERCOSUR)

MERCOSUR lacks special provisions for the protection of the TK, the TCEs and the access to genetic resources. The bloc, however, has developed a series of supplementary regulations and with a wider scope than the World Trade Organization's TRIPS Agreement. Such provisions, which are applicable under specific circumstances, address at least three relevant areas, namely Decision 08/95 with Respect to Trademarks and Indications or Denominations of Origins; Decision 16/98 on industrial designs, and Decision 1/99 on the protection of plant breeders.

As noted above, Brazil adopted advanced regulations on the access to genetic resources.

d) Central American Integration System (SICA)

The Central American Commission on Environment and Development (CCAD) was created in 1989. Its goals include assessing and promoting the natural heritage of Central America, which features a high biological and ecosystem diversity. In 1994, the Alliance for Sustainable Development was founded as a comprehensive initiative aiming at regional development and focusing on four main areas, namely democracy, social and

22

cultural development, economic development and sustainable management of natural resources, and environment quality improvement.

It is worth mentioning that in the Central American isthmus, the regulations governing the protection of genetic resources, TK and TCEs have made great strides in Costa Rica and Panama.

e) **Union of South American Nations (UNASUR)**

This regional group comprises 12 South American countries. With the exception of Argentina, Chile, Paraguay and Uruguay, all the member countries are Amazonian and are rich in biodiversity, TK and TCEs. Some of the objectives outlined in UNASUR's Founding Charter are the following: "g) the protection of biodiversity, water resources and ecosystems, as well as cooperation to prevent disasters and in the fight against the causes and effects of climate change; o) the promotion of cultural diversity and the expression of the memories and knowledge of the peoples in the region, in order to strengthen their identities."

2. **Integration and cooperation organizations**

To a large extent, these organizations are a means to channel the activities of conservation and promotion of traditional knowledge, traditional cultural expressions and genetic resources. These activities are supplementary to the intellectual property-related activities. They help improve knowledge about these values, develop sustainable practices of conservation and promotion, and channel their economic benefits to the direct stockholders, such as the indigenous peoples.

a) **Latin American Integration Association (ALADI)**

Under Resolution 59 (XIII), in 2004, the 12 member countries³⁴ decided to take part in negotiations to create a large trade zone called Free Trade Area (FTA). One of the goals of the FTA is the protection of traditional knowledge. However, except for some surveys conducted by the General Secretariat in 2006 and 2007 and a forum held with the WIPO in April 2007, ALADI has made no major progress in this subject matter, as the Council of Ministers has not prioritized this issue. The related negotiations are yet to be launched, and therefore this topic may be addressed when intellectual property-related issues are dealt with.

b) **Andrés Bello Convention (CAB)**

The Organization of the Andrés Bello Convention on Educative, Scientific, Technological and Cultural Integration is an intergovernmental International organization intended to help spread and strengthen the dynamic process of integration among its 13 member countries.³⁵ The Convention has consolidated as an integration mechanism faithful to its Andean origins. However, it does extend integration initiatives throughout Latin America and the Caribbean and has built up links with other blocs and integration initiatives outside the region. The Convention keeps the doors open for integration of any interested country.

³⁴ As of mid 2009, the number of countries will increase to 13, following the adhesion of Panama.

³⁵ Argentina, Bolivia, Colombia, Cuba, Chile, Ecuador, Spain, Mexico, Panama, Paraguay, Peru, the Dominican Republic and the Bolivarian Republic of Venezuela.

The CAB comprises a number of specialized bodies, including the Ibero-American Institute of Cultural and Natural Heritage (IPANC), which focuses on culture, particularly on people's arts. The objectives include fostering the sense of identity and intercultural interaction, as well as implementing natural and cultural heritage projects, bolstering the academic affairs, providing information and technical assistance, hosting forums, seminars and cultural events, and preparing cultural information for education systems. The IPANC just held a Forum on the Traditional Cultures of the Indigenous, Afro-descendant and Migrating Peoples in Otavalo, Ecuador.

For years, as a contribution to sustainable development, the Area of Science and Technology of the CAB, conducted comprehensive studies of the Andean subregion's native flora and non-domesticated fauna. Both have great food, medicinal and economic potential. The Regional Programme for Support of the Rural Populations of African Descendants in Latin America (ACUA), is a newly-developed initiative of the CAB and the International Fund for Agricultural Development (IFAD). The Programme is founded on the diversity and social, cultural and territorial wealth of these peoples as the strategy to overcome poverty in the region.

c) Andean Development Corporation (CAF)

This financial organization bolsters business activities providing social and environmental benefits and focusing on innovation, replicability, sustainability and territoriality. The Vice Presidency's initiatives help strengthen alliances between the public and private sector. Some of the strategic goals of the Vice Presidency include reinforcing government and institutional policies to help improve social and environmental practices, and granting loans and other financial facilities to such institutions.

The CAF Biodiversity Program (BIOCAF), comprises four subprogrammes:

- i) Supporting international negotiations on trade and environment.
- ii) Bolstering development of mechanisms and tools to promote biodiversity-related products and services.
- iii) Creating a framework that favours leverage of biodiversity through the use of biotechnology.
- iv) Promoting conservation initiatives for species and ecosystems.

CAF has extensive documentation about environmental management, including documents in the areas of environmental and social management, biotrade in the Andean subregion, elements for sui generis protection of collective and integral traditional knowledge from the indigenous perspective, biotechnology for sustainable development of biodiversity, sustainable finances in Latin America, finance and sustainable development, environmental sustainability and financial performance, globalization and sustainable development and new financial actions in the race for sustainability.

d) Amazon Cooperation Treaty Organization (ACTO)

In the Strategic Plan 2004-2012, the second strategic axis is called Knowledge Management and Technology Transfer. According to such strategic axis, "it would be essential to recognize the contributions and existing skills originating from traditional knowledge of the local and Indigenous Amazon populations that, for hundreds of years, have developed relevant regional knowledge encompassing many aspects of the local ecosystems and species of the Amazon. This knowledge, as considered by ACTO, is

24

indispensable and is to be taken advantage of within the scope of respecting cross-cultural dialogue and allowing for a commonly agreed intervention in biodiversity and culture, in light of the rights and interest of the people of the Amazon region."

Further, ACTO considers highly relevant to create alliances and strengthen technical and legal support to face the common threats of bio-piracy, the illegal trade of wild fauna and flora, as well as the protection of rights to intellectual property and patents on names, products and goods of Amazon origin, and the associated traditional knowledge.

Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname are members of ACTO.

3. Multilateral forums and instruments

There are different multilateral forums dealing with topics concerning the access to genetic resources and the protection of traditional knowledge. They include the Convention on Biological Diversity (CBD), which comprises the Cartagena Protocol on Biosafety; the Bonn Guidelines, which are the framework for the Ad Hoc Open-ended Working Group on Access and Benefit-sharing; the WIPO, whose Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was created in 2000; the WTO's TRIPS Agreement;³⁶ the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, and the FAO's Commission on Genetic Resources for Food and Agriculture. Further, other environmental forums include the 1971 Ramsar Convention on Wetlands, the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), the 1997 Kyoto Protocol on Climate Change, the 1995 Intergovernmental Panel on Forest (IPF), the 1994 International Tropical Timber Agreement, the Migratory Bird Agreement, as well as agreements related to maritime law and fisheries.

The base for any treatment intended to protect the access to genetic resources and TK are the Bonn Guidelines on Access to Genetic Resources, which were adopted in 2002 within the framework of the Sixth Conference of the Parties to the CBD, for the purposes listed below:

- Guarantee legal certainty and clarity.
- Minimize the costs incurred in connection with the transactions related to access procedures.
- Guarantee that access transactions are transparent, based on legal grounds, and do not endanger the transfer of traditional knowledge or traditions themselves.

The Prior Informed Consent that is recommended under the Guidelines suggests applying for a permit with the relevant domestic authorities of the host country, and with the indigenous and local communities, as appropriate. This process shall abide by the domestic legislation governing the use of genetic resources and the related traditional knowledge.

In short, according to the Guidelines, the person applying for a patent on biological material or TK shall produce the following documents as a prerequisite for granting:

³⁶ Article 27.3.b., currently under scrutiny at the WTO, states that, among other things, "plants and animals, except for microorganisms, and the basically biological processes for the production of plants or animals that are not non-biological or microbiological processes" can be excluded.

- Disclosure of the source and country of origin of the biological resource and TK used in the invention;
- Proof of the prior informed consent, in the form of the approval by authorities within the framework of the relevant domestic regimes; and
- Evidence of fair and equitable distribution of the benefits, in accordance with the domestic regime of the country of origin.

International agreements on intellectual property protection for TK include the following:

- i) Protection by means of patents: The World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Patent Cooperation Treaty (PCT).
- ii) Preventive protection of traditional knowledge under the system of patents: Patent Cooperation Treaty (PCT) and International Patent Classification.
- ii) Non-disseminated traditional knowledge: Paris Convention for the Protection of Industrial Property (Paris Convention), Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).
- iii) Unfair competition: Paris Convention, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement).
- iv) Distinctive signs: Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), Madrid Agreement Concerning the International Registration of Marks and related Protocol, Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.
- v) Legislation on industrial design: Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), Berne Convention for the Protection of Literary and Artistic Works, Hague Agreement Concerning the International Deposit of Industrial Designs, Paris Convention.
- vi) Copyright and related legislation: Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), Berne Convention for the Protection of Literary and Artistic Works, WIPO Performances and Phonograms Treaty (WPPT).

The main international conventions and agreements for the protection of intellectual property related to traditional cultural expressions as included in this analysis are listed below.

- a) International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on October 26, 1961 (known as the 1961 Rome Convention);
- b) Paris Convention for the Protection of Industrial Property (Paris Convention), adopted in 1967 (known as the 1967 Paris Convention);
- c) Berne Convention for the Protection of Literary and Artistic Works, adopted in 1971 (known as the 1971 Berne Convention);
- d) Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, adopted in 1971 (known as Phonogram Convention);
- e) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), adopted in 1994;
- f) WIPO Copyright Treaty adopted in 1996 (known as 1996 WCT); and
- g) WIPO Performances and Phonograms Treaty (WPPT), adopted in 1996 (known as 1996 WPPT).

26

V. GLOBAL INITIATIVES AT MULTILATERAL FORUMS

After the creation of the CBD, especially after 2000, certain international forums, based on proposals and requests from developing countries, have guided efforts toward analyzing existing conditions and improving benefits that may be attained by developing countries based on their genetic resources, folklore and traditional knowledge. A few recommendations, grouped from expert consultations, follow.

Even if the subject matter and the approach tend to be repetitive, the adoption of these recommendations will be shaped by both the progress and the specific work of international and regional organizations and the individual policies of those countries.

1. United Nations Environment Programme (UNEP)

UNEP has performed numerous activities aimed at improving the institutional capacities of countries in Latin America and the Caribbean. However, the options listed in the document prepared in light of the Forum on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising from Their Utilization³⁷ must be taken into account:

58. Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization is a theme that presents numerous thorny problems, which makes integrated and coordinated activities indispensable at the national, sub-regional and region levels in Latin America and the Caribbean.

59. Factors unique to each country, such as the legal and institutional framework, as well as the framework for international cooperation, are of vital importance, since through them it is possible to help improve conditions for access to genetic resources and the fair and equitable sharing of benefits arising from their utilization, so as to protect the environment and humankind, while, at the same time, respecting the sovereignty of States over their natural resources.

60. Having appropriate legal tools, as well as specific institutional structures and arrangements in this field, is indispensable. Furthermore, the possibility of harmonizing genetic resource access and benefit-sharing systems is an option that warrants serious consideration in a region such as Latin America and the Caribbean, where there are many factors in common, including biodiversity, ethnic groups, traditional knowledge, legal systems and even language in each of its two sub-regions (Latin America and the Caribbean), in addition to sub-regional integration agreements that have given rise to organizations that carry out activities of a sub-regional scope.

61. One – or several – harmonized systems in this field would allow standard treatment in the region, which would give us equal power for negotiating with companies of the pharmaceutical, food and cosmetic industry that wish to explore and exploit our biodiversity and would free us from being concerned about the existence of differing systems in countries that share the same biodiversity. It would prevent cases in which one country that shares genetic resources with another allows indiscriminate access to such resources and

³⁷ XIV Meeting of the Forum of Ministers of the Environment of Latin America and the Caribbean. Panama City, Panama. 20-25 November 2003. Document UNEP/LAC-IGWG.XIV/Inf.4/Rev.1, 10 November 2003.

cancel out any regulation that countries may have diligently established in relation to the access to their genetic resources also found in other countries with more permissive regulations. Shared legal frameworks among the nations in the region can make measures to protect genetic resources more efficient, reverse environmental deterioration and mitigate poverty.

62. Such systems would also enable the countries of the region to negotiate with greater weight and firmness at international forums, and achieve greater success in protecting the vast biodiversity in our region.

63. These measures could be carried out by compiling existing national and sub-regional legislation in order to determine the need for amendments to such legislation or for the preparation of new regulatory frameworks based on a related examination of lessons learned. Sub-regional or regional workshops should also be held to allow the exchange of experience on how such regulatory frameworks have been working.

64. Latin American and Caribbean positions on becoming parties to international environmental conventions should also be defined. These positions and consequent decisions must necessarily be followed by concrete commitments. If several countries of the region jointly decide to become parties to a multilateral environmental agreement after having considered the benefits that it entails, it will certainly improve the possibilities of its success in the region as a whole.

65. To attain that objective, provisions can be made to facilitate consultations aimed at adopting common regional positions on genetic resource access and benefit-sharing negotiations in related international forums (i.e. CBD, WTO/TRIPS, WIPO, FAO).

66. In particular, it should be noted that one of the most important challenges in Latin America and the Caribbean lies in full compliance with and enforcement of environmental regulations when they exist and are appropriate. If they are incipient, a previous and priority step is to examine the legislation in force in order to adapt or adopt the necessary legislative instruments at the national level. The challenge facing us in the present decade is to advocate the enforcement of legal regulations on environment as appropriate tools to meet the demands for modern environmental management at high rates of efficiency on the basis of the objectives and goals in the environmental policies of the countries of the region and in the context of their own realities and priorities. Although several countries in the region already have appropriate institutional, public policies and legislation for environment and the protection of natural resources, many of these countries lack sufficient resources and appropriate institutional capacity to amply achieve the objectives of their legal mandates.

67. It will be necessary to continue providing support through studies on genetic resource access and benefit-sharing, together with studies on the conservation and sustainable use of biodiversity and the development of pertinent legislative expertise.

68. Environmental awareness-building and training are also key activities that should not be left out of related follow-up plans. These activities should benefit

28

not only the executive branch, through the respective ministries, councils or commissions entrusted with implementing the law, but also the legislative branch, since the parliaments are where the agreements are ratified and the laws take shape, and the judicial branch, since the courts are responsible for enforcing the legal regulations.

69. Initiatives such as those jointly advocated in the international community by the members of the Group of Like-Minded Megadiverse Countries on issues such as the access to genetic resources and the sharing of benefits arising from their utilization, also need to be supported and strengthened.

70. The region's efforts in the specific matter of genetic resource access and benefit-sharing should also be aimed at conducting an analysis of alternatives for an international system to promote and protect the fair and equitable sharing of benefits arising from the utilization of genetic resources, as established in the Johannesburg Plan of Implementation (Paragraph 42 o).

71. It is also important for the region to explore the possibilities of becoming part of projects to build capacities in the field of genetic resource access and benefit-sharing. The Group of Like-minded Megadiverse Countries already has a UNEP/GEF proposal, which requires the endorsement of the beneficiary countries in order to initiate the preparatory stage of a project for the entire Group or concrete sub-regional projects.

72. A large part of the activities suggested above form part of the UNEP Initiative on access to genetic resources and equitable sharing of benefits arising from their utilization. Other activities included in the initiative refer to the promotion and recognition of traditional knowledge under any "type" of "formal" system of "intellectual property rights"; the harmonization of agreements related to biological diversity - and other environmental agreements - with pertinent sub-regional, regional and world trade agreements, including the WTO Agreement on Trade-Related Plant Genetic Resources (TRIPS), which also makes it necessary to carry out capacity building and strengthening programmes in this field.

73. There is also an expected need for coordinating activities with the Capacity 2015 Programme to support local capacity-building to protect and develop the traditional knowledge of local communities and indigenous peoples for fair and equitable sharing in the benefits arising from the use of genetic resources."

2. Convention on Biological Diversity (CBD)³⁸

By virtue of this Convention, governments agree to preserve and use biological diversity in a sustainable manner. Biological diversity strategies and action plans must be prepared and integrated into broader national environment and development plans. This course of action bears greater significance in sectors such as forestry, agriculture, fishing and energy, as well as transportation and urban planning.

Some of the main issues in implementing the CBD and promoting sustainable development are the following:

³⁸ Source: CBD's Web site.

- Meeting growing demand of biological resources caused by demographic growth and greater consumption and, simultaneously, analyzing the long-term effects of the measures applied.
- Increasing our capacity to document and understand biological diversity, its value and the threats it faces.
- Gaining the proper knowledge and experience for planning biological diversity.
- Improving policies, laws, guidelines and fiscal measures to regulate the use of biological diversity.
- Adopting incentives to promote more sustainable utilization of biological diversity.
- Fostering trade standards and practices promoting sustainable use of biological diversity.
- Strengthening coordination within governments and between governments and interested parties.
- Obtaining sufficient financial resources for preservation and sustainable utilization of both domestic and foreign sources.
- Using technology better.
- Garnering political support for the necessary changes to ensure preservation and sustainable use of biological diversity.
- Improving education and public awareness about the value of biological diversity.

3. United Nations Conference on Trade and Development (UNCTAD)

The recommendations made during the two Expert Meetings held between 2000 and 2005 are summarized by the UNCTAD Secretariat as follows³⁹:

- To prepare a National Action Plan for TK, based on discussions with the interested parties.
- To support *in situ* preservation, through the different communities, as well as *ex situ* preservation through TK records.
- To provide official instructions on TK, conservation of the natural environment of local communities, protection of rights over their lands and improvement of their means of subsistence.
- In the area of protection, to avoid unauthorized or improper utilization of TK, unauthorized commercial utilization and IP rights requested without prior informed consent of the respective owners and without the sharing the benefits with the latter. Under the CBD, disclosure of the source or origin of the genetic resources and related TK in the IP rights requests, acknowledgment that the knowledge is owned by communities, recognition of common law and customs. The conventional IP instruments would be used on a case-by-case basis.
- To foster the exchange of experiences among communities, support the development of business competencies of autochthonous and local communities, access to funding and markets and partnering with more important companies.
- The international community must support developing countries through technical cooperation and facilitate market entry of products obtained with TK, such as non-timber forestry, ethnic foods, traditional medicine and handicrafts.

³⁹ UNCTAD. Trade, Environment and Development, Background Note prepared by Secretariat. TD/B/COM.1/79 - , 20/01/06.

30

- At an international level, the protection of TK to address the flaws in the current IP system, by recognizing rights in which the owners are generally entities of developed countries. With regards to TK, which is undeniably under public domain, patent reviewers must strive to avoid IP rights on TK being improperly granted to third parties. These patent requests should require information about the source or origin of genetic resources and TK.
- To avoid doubtful patents.
- To avoid unauthorized or improper commercial utilization (without IP rights), implementation of a protection system with a broader scope, an international *sui generis* system recognizing national systems for TK protection, prior informed consent and benefit sharing, based on CBD proposals and recommendations.

VI. ELEMENTS FOR A REGIONAL PROGRAMME ON PROTECTION, PRESERVATION AND PROMOTION OF TRADITIONAL KNOWLEDGE, CULTURAL EXPRESSIONS AND GENETIC RESOURCES WITHIN THE FRAMEWORK OF SELA

1. Guidelines

The protection of traditional knowledge, folklore and genetic resources has been fully established as part of the international environmental and intellectual property agenda, as well as development policies aimed at integrating conservation of biological diversity and cultural diversity to national strategies intended to promote economic development on a sustainable basis to ensure the well-being of future generations.

In Latin America and the Caribbean, this is a recurring topic in multiple events held for analysis and search of recommendations, supported by international organizations such as WIPO, UNCTAD, CBD, UNESCO, ACTO and, especially, SICA, CAN and CARICOM. CAN has developed the first legal instruments used as reference for adoption of legal instruments or policy guidelines at a global level.

As a whole, however, a large imbalance is evidenced between national and subregional protection policies and the international treatment that countries in Latin America and the Caribbean assign to this issue.

Activities linked to biopiracy and loss of traditional knowledge, caused by lack of legal and institutional instruments for their timely prevention and solution, are increasingly being detected.⁴⁰ For example, after a patent infringing upon CBD standards and guidelines is granted in an industrialized country, it is practically impossible to have it reversed whenever there is misappropriation of genetic resources or traditional knowledge.

Furthermore, properly managed genetic resources, traditional knowledge and folklore may turn out to be productive ways to generate resources, resulting in improved living conditions for local communities, usually affected by extreme poverty. If these communities or their genetic resources disappear or if they are forced to migrate, their traditional knowledge also vanishes.

Evidently, the responsibility of promoting the defence of traditional knowledge and genetic resources falls on their recipients. Nevertheless, they represent only a fraction of the responsibility since user countries should also establish defence efforts in their own laws and in international forums along with those recipient countries. The negotiating powers

⁴⁰ For example, the Peruvian Society of Environmental Rights (SPDA) has published several studies on its Web site.

and proposal capacities of the latter group of countries must improve to make this possible.

The WIPO Intergovernmental Committee believes that no means of protection or policy should be discarded. In general terms, existing IP instruments, such as patents, breeder's rights, and copyrights, are not, at least not in their current condition, the most suitable instruments to ensure that the interests and rights of indigenous peoples are properly represented and protected. Therein lies the importance of negotiating Article 27.3.b of the TRIPS, even in opposition to the stance of developed countries.

In certain cases, a few spaces may be found within the flexibility of the IP agreements that may be adjusted in line with the objectives of local communities. For example, in the field of copyrights, moral rights do not expire and the protection term currently used is minimum (50 years), but may reach 100 or 1,000 years. Also, the protection of trade secrets, trademarks or origin denominations and Farmers' Rights (under FAO) may be used, as enacted and subject to the changes deemed appropriate by local communities.

Furthermore, UNESCO, FAO, CBD and WIPO are preparing new instruments and guidelines to be introduced to countries in Latin America and the Caribbean, including FAO's Farmers' Rights and Guidelines for Protection of Folklore, UNESCO's Convention for the Safeguarding of Intangible Heritage, CBD's Bonn Guidelines; the flexibility of the WTO's TRIPS and WIPO Agreements, and future recommendations by CBD on Fair and Equitable Benefit Sharing.

As national, subregional and regional laws (if applicable) become more uniform, the negotiating and proposal capacity, as well as mutual cooperation, of countries in Latin America and the Caribbean improves against that of developed countries.

It is evident that simply improving the standards and institutional capacity of states does not suffice. Local communities must receive training and, in many cases, current processes must be changed so that protection, promotion and prevention meet existing demands.

Political will and concrete institutional support are required to improve the protection of TK, folklore and genetic resources. In Latin America and the Caribbean diagnoses, governmental and non-governmental institutions and agencies already exist, specializing on these issues, yet specific actions are missing to improve areas where progress has been made (for example, CAN does not have specific standards on TK access) and, in other cases, to launch processes (CARICOM and certain countries).

In light of the above, mutual cooperation with a regional scope is important to strengthen the capacities of local authorities and communities and improve coordination and cooperation so that the region's negotiating power may improve in international forums such as WTO and WIPO.

The Cuzco Declaration of Like Minded Megadiverse Countries (2002) includes the following recommendation for regional action: "To establish a strategy and action plan containing goals, objectives, activities and means, including financial resources to pursue joint efforts toward the necessary consolidation that will enable us to meet our objectives."

32

2. Suggestions

SELA's Regional Programme for protection, preservation and promotion of traditional knowledge, traditional cultural expressions and genetic resources is summarized below. This proposal entails actions in six areas of competency: i) Institutional framework, ii) Analysis and Information, iii) Capacity Building, iv) Legal Issues, v) Trade Issues, and vi) International Relations.

To avoid unnecessary duplication of efforts, the Regional Programme contemplates coordination of activities, exchange of information, initiatives and experiences, as well as promotion of joint activities between integration proposals and specialized organizations with regional scope and support from multilateral entities and donors.

For information purposes, please use the recommendations made by UNEP during the XIV Meeting of Ministers of the Environment in Panama City of 2003, which are still in effect and could imply that a new undertaking may be required to improve policies and regional coordination in this area.

Annex I includes a recent analysis of SPDA on the effects of new technologies on policies concerning access and fair benefit sharing, especially under the new International Regime for Equitable and Efficient Access and Benefit Sharing that would likely be adopted under the CBD. Emphasis is placed on the fact that the region is still discussing ways to protect TK and access to genetic resources, based on the same vision applied in the early 1990s, but new technological developments have been implemented requiring urgent adoption and adaptation of protection and strengthening of essential technological capacities for technology transfer processes required as part of the access and benefit sharing agreements.

These six areas are described below:

i) Institutional framework:

This area requires the creation of consultation tools and systematic and permanent coordination with the government authorities responsible for national policies, regional organizations governing this matter and regions of the interested countries, through the following:

- **Regional Authorities Forum for Protection of Traditional Knowledge** to review progress at the national, subregional, bilateral and multilateral levels, with an integral approach and a holistic vision. It may suggest legal and institutional action, as well as cooperation, for sustainable utilization, defence against piracy, improper utilization and illegal access to genetic resources and TK and fair and equitable benefit sharing.
- **Regional Forum for Consultation among Regional and Multilateral Integration and Cooperation Secretariats**, aimed at developing strategic alliances to avoid duplication of efforts, foster mutual cooperation and specialization, as well as channeling international cooperation with a regional, subregional and local vision, in accordance with the specific needs of local communities of the region or issue to be discussed.

- **Regional Forum for Local Indigenous, Afro-American and Peasant Communities of Latin America and the Caribbean**, offering innovative elements for the agendas and action plans of the authorities of SELA Member States.
- **Institutional Mechanism for Assistance to Local Communities**, efficiently bringing the IP protection system closer to those communities and providing training to utilize those systems, supporting execution of access and benefit-sharing agreements, promoting respect for common law and customs and encouraging application of the prior informed consent as well as utilization of ICTs.

ii) **Analysis and Information:**

This area will enable exchange of information on standards and application experiences, reports on global and multilateral progress, creation of a site in SELA's Portal on protection of traditional knowledge and a Specialized Forum of Experts at SELA for analysis of specific issues, with the following competencies:

- Evaluation of regulation and experience in application of the CBD Bonn Guidelines.
- Exchange of information on the adoption of *sui generis* protection regimes for TK, TCEs and access to genetic resources.
- Follow up on advances of WIPO and CBD on *sui generis* protection regimes for TK (including TCEs and folklore) and access and benefit-sharing contracts.
- Analysis of legal and institutional mechanisms for compliance with standards on TK protection, access to genetic resources and TK and informed prior consent and benefit sharing.
- Creation of a **Specialized Forum of Experts at SELA** for analysis of subjects of interest for formulation of policies, negotiating capacity of member countries in international forums and local communities in access and benefit-sharing contracts. Some specific issues to be addressed would include the following:
 - Ways of implementing the prior informed consent concept by local communities and national authorities.
 - Origin denominations.
 - Legal recognition of common law and customs.
 - Certification of origin of handicrafts and other physical expressions of folklore and TK.
 - Advances and results of forums of interest for local communities.
 - Exchange of experiences on criteria, alternatives, regulations, institutional framework and verification and disciplinary measures of access and benefit-sharing agreements.
 - Criteria for defining the form and scope of benefit sharing among local communities.
 - Exchange of experiences on misappropriation, piracy or improper utilization of traditional knowledge and folklore, as well as genetic resources.
 - Mechanisms for compliance with national laws.
 - Influence of biotechnology, bioinformation, nanotechnology and other technologies on the standards for access to genetic resources and related traditional knowledge.

34

- Creation of a site in SELA's portal on protection of TK, which should include the following elements:
 - National advances on standards and subregional and regional organizations.
 - Texts of international multilateral and regional instruments.
 - Directory of national institutions responsible for policies on protection of traditional knowledge, folklore and access to genetic resources.
 - Calendar of regional events.
 - Follow up on work of regional and international organizations.
 - Electronic bibliography.
 - Definitions used in national laws and international agreements.
 - Directory of Research Centres and Non-Governmental Organizations (NGOs) of the region specializing in the subject matter.

iii) Capacity Building:

This area would be comprised of training programmes and experience exchanges targeted at both local communities and national authorities with support from international organizations. This training is aimed at bringing information and communication technologies (ICTs) closer to local communities for linking with other communities and preserving their knowledge under their direct control. The following responsibilities would be included:

- Cooperation with the CBD Secretariat for organization of regional workshops to provide assistance to local communities on training and updating, in accordance with COP 8.
- Training programmes for local communities.
- Exchange of experiences between authorities and local communities on negotiation and preparation of access and benefit-sharing agreements.
- Exchange of information between authorities and local communities on public domain TK.
- Exchange of information between authorities and local communities on regulation and utilization of prior informed consent.
- Promotion of official training on public-domain TK.
- Programmes for access by local communities to information technologies to develop mechanisms for education, training, preservation of knowledge and inventory of controlled resources under their own practices for handling information and communication with other local communities and access to national authorities, among other benefits: to complement oral communication and knowledge, improve the negotiating capacity and control of its own resources and knowledge in an autonomous manner and under its own control and handling.

iv) Legal Issues:

This area will follow up on legal instruments adopted in countries of Latin America and the Caribbean on protection of TK, folklore and access to genetic resources. Because of the diversity of TK and national policies, as well as common law practices and customs of local communities, principles and disciplines introduced multilaterally must be documented at both national and regional levels through mechanisms and processes in accordance with the standards and internal institutionality of each country. The following tasks should be included:

- Follow up on Adoption of Legal Instruments for Protection of Access to Genetic Resources, TK and Folklore, as well as fair benefit sharing.
- Adoption of the obligation to require the origin or source of genetic resources and related TK in patent applications.⁴¹
- Exchange of information on the scope of common law and customs of local communities of member countries.

v) Trade issues:

This area includes a regional list of biodiversity assets and services and preparation of inventories of market access restrictions; promotion of biotrade in Latin America and the Caribbean, and elimination of trade restrictions at all levels, regionally and bilaterally. The following aspects are taken into account:

- Definition of biodiversity assets and services.
- Preparation of inventory of access restrictions on biodiversity assets and services.
- Promotion of Biotrade in the region, based on the Biotrade Initiative of UNCTAD. Promotion of Commitments at the WTO to facilitate market access, especially for non-timber forestry products, ethnic foods, traditional medicine products and handicrafts.

vi) International Relations:

The declarations of policies, analyses of international agreements and their advances must be made in a suitable forum for countries of Latin America and the Caribbean, intensify their coordination, negotiation and proposal capacities in forums such as CBD, WIPO, FAO and WTO. In this connection, the adoption of common policies and their implementation would give rise to greater negotiating capacities, but even more importantly, to utilization of trade and development opportunities.

This circumstance may imply the organization of previous forums and preparation of explanatory documents facilitating analysis and fostering dynamic participation of countries in Latin America and the Caribbean, with support from the respective international organizations.

VII. CONCLUSIONS AND RECOMMENDATIONS

- Overall, there are more coincidences than discrepancies among the countries of the region regarding the need to address the core issues in protection of TK and TCEs, as well as protection of access to genetic resources.
- Both at the multilateral level and in the region of Latin America and the Caribbean, the treatment of the subject of protection of TK and folklore, as well as access to genetic resources, is a matter of utmost importance for over 30 million indigenous people (in addition to Afro-American and peasant communities), and for the development of pharmaceutical, food and cosmetics industries, as well as climate change and the planet's survival.

⁴¹ At the request of the CP7 of CBD, UNCTAD prepared a document on Options for application of the disclosure requirements on the origin of IP rights applications, document UNCTAD/DITC/TED/2005/14.

36

- The looting of biological resources and the loss of significant TK has led, in international forums such as CBD and WIPO, to discussion of instruments that may enable countries wealthy in biodiversity and TK to avoid or offset those practices through strengthening of standards, institutions, local communities and negotiating capacities.
- Nevertheless, in the region, this process has been relatively slow in contrast to several countries of the Amazon region and certain Central American countries.
- As indicated above, the diagnoses and proposals have been prepared, and the work of CBD and WIPO relating to standards to guide access and benefit sharing policies is at a highly advanced phase.
- The region needs to advance in the design and implementation of national and regional policies and instruments, as the case may be, for promotion, preservation and protection of its TK, folklore and genetic resources. These actions would result in the wellbeing and development of its people, with emphasis on local communities affected by poverty and exclusion from development.
- Therefore, the challenge for the countries in Latin America and the Caribbean is to concentrate their interest through significant elements for coordination, exchange of initiatives and positive experiences, development of efficient legal instruments, stronger institutionality to strengthen the negotiating capacities of local communities, apply mechanisms for defence, protection and sustainable utilization of resources with the support of SELA and other regional instances.
- SELA is capable of providing support to Member States in developing action plans for protection, preservation and promotion of TK and TCE's, as well as support in access to genetic resources, conceived under a new instrument aimed at fostering inclusive and sustainable development in Latin America and the Caribbean.

BIBLIOGRAPHY

- BIFANI, Paolo. CARICOM Interests in Relation to Biodiversity and Intellectual Property Rights in the Context of FTAA Negotiations. August, 2001.
- CABRERA, Jorge. El Régimen Internacional de Acceso a Recursos Genéticos y Distribución de Beneficios: Avances, Elementos y Recomendaciones. Prepared for the World Union for Nature. Quito, Ecuador, 2006.
- CAILLOUX, Jorge and Manuel Ruíz. La protección Jurídica de los Conocimientos Tradicionales y sus Desafíos. Anuario Andino de Derechos Intelectuales, Year 1, No. 1, Lima 2004.
- CAN. Web page.
- ECLAC, Panorama de la Inserción Social de América Latina – 2006. Santiago, Chile
- DE LA CRUZ, RODRIGO. Descripción de la Comprensión Corriente del Consentimiento Libre, Previo e Informado de los Pueblos Indígenas como un Asunto Metodológico, en las Actividades Relacionadas con Pueblos Indígenas: Significado y Desafíos. DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS Division for Social Policy and Development. Secretariat of the Permanent Forum on Indigenous Issues. New York, 17 to 19 January 2005.
- DE LA CRUZ Rodrigo, et al. Elementos para la protección sui generis de los conocimientos tradicionales colectivos e integrales desde la perspectiva indígena. Andean Development Corporation, Andean Community General Secretariat. Caracas (Venezuela), May 2005.
- MENDEZ, GEORGINA. Nuevos escenarios de participación: Experiencias de mujeres indígenas en México y Colombia. In Mujeres Indígenas, Territorialidad y Biodiversidad en el Contexto Latinoamericano. Universidad Nacional de Colombia. Bogota, January 2007.
- WIPO. Proyecto de Análisis de Carencias en materia de Protección de los Conocimientos Tradicionales. Comité Intergubernamental sobre Propiedad Intelectual y Recursos Genéticos, Conocimientos Tradicionales y Folclor. Geneva, Switzerland, 30 May 2008.
- WIPO. Proyecto de Análisis de Carencias en materia de Protección de las Expresiones Culturales Tradicionales. Comité Intergubernamental sobre Propiedad Intelectual y Recursos Genéticos, Conocimientos Tradicionales y Folclor. Geneva, Switzerland, 30 May 2008.
- PISQUIY, LUCRECIA. Las mujeres indígenas en Centroamérica: condiciones de vida y retos para su participación. En Mujeres Indígenas, Territorialidad y Biodiversidad en el Contexto Latinoamericano. Universidad Nacional de Colombia. Bogota, January 2007.

38

- UNEP Informe sobre la Iniciativa Latinoamericana y Caribeña para el Desarrollo Sostenible (ILAC) a cinco años de su adopción. DOCUMENTO DE TRABAJO PARA LA REUNION PREPARATORIA DE EXPERTOS DE ALTO NIVEL Y DEL SEGMENTO MINISTERIAL. XVI Meeting of the Forum of Environment Ministers of Latin America and the Caribbean. Santo Domingo, Dominican Republic. 27 January 2008. UNEP/LAC-IG.XVI/3/Rev.2; 9 January 2008.
- UNEP Acceso a Recursos Genéticos y Distribución Justa y Equitativa de los Beneficios derivados de su Utilización. XIV Meeting of the Forum of Environment Ministers of Latin America and the Caribbean. Panama City, Panama. 20 to 25 November 2003. Document UNEP/LAC-IGWG.XIV/Inf.4/Rev.1, 10 November 2003.
- RUIZ, MANUEL. La Protección Jurídica de los Conocimientos Tradicionales: Algunos Avances Políticos y Normativos en América Latina. UICN, BMZ, SPDA. Lima (Peru), 2006.
- SPDA El Desarrollo de un Régimen Internacional de Acceso y Distribución de Beneficios Equitativo y Eficiente en un Contexto de Nuevos Desarrollos Tecnológicos, drafted by *Santiago Pastor Soplín y Manuel Ruiz Muller*. Series Documentos de Investigación. Lima, May 2008.
- UNCTAD. Manual Explicativo sobre Mecanismos para la Protección del Conocimiento Tradicional de las Comunidades Indígenas en la Región Andina. Drafted by David Vivas and Manuel Ruiz for UNCTAD's Biotrade Initiative. Geneva, 2001.
- UNCTAD. Comercio, Medio Ambiente y Desarrollo. Nota de antecedentes. TD/B/COM.1/79, 20/01/06.
- VIVAS, David. Guía y Recomendaciones sobre Acuerdos Internacionales y Asuntos Legales Relevantes para los Programas de Biocomercio en la Región Andina e Insumo para la Estrategia Regional de Biodiversidad de la CAN. Document drafted within the framework of the CAN/CAF/UNCTAD Joint Programme. Geneva. September 2001.

ANNEX 1

SPDA. Development of an Equitable and Effective International Regime on Access and Benefit Sharing within the Context of New Technological Breakthroughs, prepared by Santiago Pastor Soplín and Manuel Ruiz Muller. *Documentos de Investigación Series*. Lima, May 2008.

Conclusions

1. Genetic resources are basically information. The legal protection of such information responds to basic economic principles. That is, genetic resources display non-rivalry, low reproduction costs and market shortcomings.
2. Thinking about genetic resources as *information* has a number of hardly appreciated effects as to the availability of such resources and the possibility of regulating their access and use. The world of accessibility and protection of information – including the genetic information – is located in the field of the protection of databases, copyrights, business secrets and even invention patents, and not necessarily in the options offered by the current standards on Access and Benefit Sharing (ABS) around the world.
3. Genetic resources are not discrete entities and living beings share much of the genetic information – depending on their proximity and branch in the evolution tree. This means that the availability of these entities is not linked with the particular or specific nature of a given species. This, in turn, has effects on the notion of “country of origin” and could affect the way of understanding of relations among countries as to the ABS principles.
4. The current ABS standards and the talks on the International Regime are not bearing in mind the informational features of genetic resources. In this regard, there is a wide gap between the scientific and technological reality, on the one hand, and genetic resources and political and regulating approaches, on the other hand.
5. It is of vital importance to relax the tension between those who propose including “byproducts” in the field of the ABS principles, that is, natural products directly taken from biodiversity and industrially processed or semi-processed – or directly marketed – and those who think that such activities are based on some other principles, that is: supply, demand, prices, fair trade and certification. The information approach solves the problem, because in most cases of value added to a biological product – for instance: grinding herbs – it does not involve a new or underlying process. There is indeed added value – resulting in something new and with inventiveness being subject to patent – where the ABS principles apply. Solving such differences in perceptions could help to better focus on the debate and deal in detail with some of the items proposed in this research.

Recommendations

- a) Countries rich in biodiversity and traditional suppliers of energy resources should ensure that the ABS legislation – in the national sphere and eventually during the negotiation of the International Regime – will include principles on the informational nature of genetic resources and related know-how, with a view to an effective and efficient ABS system.
- b) These countries should enforce the existing regulations, such as copyrights, *sui generis* protection of databases or the patents systems, to protect their interests in their genetic resources.

42

c) The debates on ABS should bear in mind that biodiversity is a short-term undertaking, because its deconstruction in informational units goes at a fast pace. Therefore, it is difficult to be regulated by providing countries – particularly mega-diverse countries. Growing threats of massive extinction could be a significant incentive to preserve habitats and counter the risk of changing use.

d) The foregoing shows that any country intending to get economic benefits from its biodiversity should build or strengthen capacities in the new technologies, with an emphasis on information biotechnology. In this context, training of national researchers and investment of public funds in technological research and development is a strategy to get benefits beyond valuable consideration for raw materials, the natural information source. The point at issue is to produce comparative advantages.

e) Taking part in the development of domestic regulations on ABS and the negotiations on the International Regime is advisable, starting from the following premises:

- State sovereignty *per se* and individual national actions actually prevent from effective regulation of the flow of genetic resources at the level of *controls*.
- Technology helps to conduct research and development on deconstructed genetic resources *without the need to have access, necessarily, to physical samples*.
- Most genetic resources *are not discrete units and are widespread in terms of the contained genetic information*.
- *Ex situ* preservation sites –e.g.: hydrothermal vents on the seabed and Arctic and Antarctic ecosystems- and the world of microorganisms *provide an almost inexhaustible source of molecules, genes, DNA, etc.* that allow for undertaking and continuing innovation and development processes.
- Intellectual property from the economic view is barely appreciated in the ABS discussions; *however, it makes a significant impact on innovation and development processes of genetic resources*.
- In the field of direct, continued use of resins, oils, shells, flour and bulk, semi-processed or processed natural products, *there is a commercial world with a major role in preservation of biodiversity, which should be paid better attention with regard to the CDB principles – this does not mean that current models or proposed standards on ABS should necessarily apply to such activities*.

f) Knowledge, innovation and practices of indigenous peoples and communities in general should be protected in a field *different* from the International Regime. While references to such knowledge should be made, effective, operational protection mechanisms should be developed from other legal instruments, not necessarily in the CBD context, but, for instance, by seizing the spaces and new agendas of the World Intellectual Property Organization, particularly the Development Agenda and the activities of the Inter-Governmental Committee.

ANNEX 2 TRADE IN INTANGIBLE GOODS

By David Vivas⁴²

Trade in intangible goods, including traditional knowledge, benefit sharing mechanisms, intellectual property, services and carbon emissions quota trading.

A. Traditional knowledge

Traditional knowledge (TK) does not belong to the State, as in the case of genetic resources (GRs), but to indigenous, Afro-American and local communities that have developed and kept such knowledge through generations. Therefore, it is an individual right of these communities. TK is regulated by the CBD, upon acknowledgment of its valuable role in the preservation of biological diversity. Also, the CBD binds the Parties under Article 8 j) to respect, preservation and maintenance of TK. In this regard, and in accordance with said articles, the Parties to the CBD shall ensure the equitable sharing of the benefits resulting from the use of TK.

Decision 391 of the Andean Community acknowledges the significance of TK linked with GRs and provided by indigenous, Afro-American and local communities. This regulation provides for an appendix to the access agreement to ensure the willingness of the provider of the intangible component and fair apportionment of the benefits. TK is a component of cost reduction in research as it helps find solutions to existing problems in the field of plant use, agricultural methods, medicines, food, bio-pesticides, etc. The CAN Member States have faced several practical troubles when implementing Decision 391 provisions, including, among others, troubles to get the communities consent, the cultural gap at the time of holding talks, lack of writing in some communities and existing problems in the relation between public and private rights.

TK is related not only to the intangible component associated to GRs, but also, there are many practices linked with the use of biological resources, mineral resources and even creations and expressions of folklore which are not regulated by Decision 391. As a result, different, alternative or parallel choices to the access agreement started to be assessed, including the use of intellectual property or *sui generis* systems.

For the Biotrade Initiative, TK may be a very important source of technological innovation and cultural expressions. Most of this knowledge has not been protected by intellectual property (IP) for multiple reasons, such as lack of existence of the communities as a legal entity; lack of material settlement or physical establishment; mixed up use – including religious, technical and cultural use; difficult, complex IP systems; high standards required to get IP rights; high cost of protection of intangibles, etc. Also, once defined and cleared, TK may form part of useful products and processes in the modern world and, therefore, they could be tradable. From the legal viewpoint, some issues could be ascertained by the national biotrade programmes in consultation with different parties, in order to allow for the process of protection and trading of byproducts, as well as the management of biotrade projects in an effective, productive way for communities. These may include, for instance, the following:

42 VIVAS, David. GUIDE AND RECOMMENDATIONS ON INTERNATIONAL AGREEMENTS AND LEGAL ISSUES RELEVANT TO BIOTRADE PROGRAMS IN THE ANDEAN REGION AND INPUT TO THE CAN REGIONAL STRATEGY ON BIODIVERSITY. Document prepared within the Framework of the CAN/CAF/UNCTAD Joint Programme. Geneva, September 2001.

44

- Development of legal mechanisms to enable communities to act as a legal entity. Such mechanisms should be flexible enough to adjust to the internal decision-making procedures of each community.
- Creation of permanent national consultation systems with indigenous communities.
- Provision of authorization and attached agreements forms to indigenous communities and parties interested in having access to associated TK.
- Possibility of including any type of knowledge related or not to GRs in the Andean draft regulations on TK, in accordance with the eighth transitory provision of Decision 391.
- Creation of voluntary records that help identify and describe the TK contents. The deposit of such knowledge could be protected, according to the case, by the IP, or by *sui generis* systems. The Peruvian bill is a good example. (*This item will be elaborated in another chapter*).
- Outlining of schemes to facilitate the issuance of health permits and authorization of trading of TK byproducts. Eco-labeling for biodiversity friendly goods could also apply in this case.
- Analysis of the protection costs and legal observance of the potential mechanisms to be designed.
- Design of administrative and legal guides to educate the indigenous communities on their rights and the process needed for protection and trading of their knowledge in an easy, clear way.

B. Mechanisms on sharing of benefits from the sustainable use of GRs and TK

One of the greatest concerns of countries rich in biodiversity is how to get benefits from the use of GRs and TK, and concomitantly foster preservation of biodiversity and investment. The first benefit from the systems to access GRs is a minimum control over the kind of activity, use and environmental impact as a result of such access.

Noteworthy, the benefits from bioprospecting, research and development, and the practical use of GRs, its byproducts and TK, are not the only ones. There are also substantial economic and social benefits from sustainable production of goods and upstream services. This is the case of collection of regular or environmental taxes for sustainable economic activities, job creation and decentralized organization of companies throughout the territory. The benefits from the sustainable use of GRs and TK could be based on the following four fundamentals:

General classification of the types of benefits according to the use of GRs and TK
Short-term and medium-term benefits

	Medium-term	Short-term
Monetary	<ul style="list-style-type: none"> - Startup of economic and investment activities. - Funding of research, training and pilot projects. 	<ul style="list-style-type: none"> - Contractual monetary benefits from multiple economic activities. - Pay per use. - Tax payment. - Collection of royalties for intellectual property rights. - Funding of trading activities. - Establishment of trust funds for apportionment of benefits.
Non-monetary	<ul style="list-style-type: none"> - Regulation of the environmental impact. - Application for licit access. - Conditioning of bioprospecting, research or economic activities according to the criteria on environmental sustainability. - Design of projects on production of goods and services. - Research into national flora and fauna. - Basic scientific data collection. - Cultural reevaluation of communities. - Some technical training to undertake pilot projects. 	<ul style="list-style-type: none"> - Environmental preservation. - Protection and sustainable use of resources. - Organization of decentralized small and medium-sized businesses. - Job creation. - Registry of intellectual property rights or sui generis rights of communities. - Technological transfer and information exchange. - Creation and/or development of new biodiversity friendly goods. - Creation of databases. - Provision of environmental and eco-tourism support services. - Discovery and adaptation of new environmentally friendly production processes. - Technical and negotiation training both for national officials and communities. - Community involvement. - Better education. - Better physical infrastructure.

Note that in the absence of economic activity, States and local communities can hardly get tangible benefits. Therefore, the promotion of the sustainable use of biodiversity is a must. Likewise, management, sustainable use and preservation of resources should be first and foremost considered in any economic use or development of GRs or TK. Decision 391 provides for multiple general sustainable mechanisms, such as absorption and/or transfer of technology through the involvement in any research; strengthening of the institutional and community capacities, etc. Sure enough, direct or indirect financial outlays; royalties for intellectual property rights; physical or environmental improvements, and technical and educational cooperation, among others, could be added to these benefits. Also, trust funds could be established for particular purposes, such as environmental preservation or other, pre-defined purposes.

46

If benefit sharing is to be effective, it should start with a balanced negotiation intended to satisfy all the parties to the process of access to GRs or TK. Most domestic or transnational companies interested in lawful access have expressed that they are much more comfortable and willing to cooperate when the benefits go straight to preservation of the ecosystem, education, capacity building and establishment of infrastructure to better the quality of life of residents and communities located in the area designated for the access or neighbouring areas. Finally, it would be advisable to stress the need that governments explore ways to somewhat relax their defensive stance; speed up the processes of access to GRs, and loose the issuance of TK licenses; provided, however that the requirements on environmental, social and economic sustainability are met. If too many obstacles are put to the processes of lawful access or the decisions on the applications are not promptly made, there is the risk of encouraging the opposite to what is desired, that is, biopiracy and illicit use. Where law enforcement is more burdensome than non-observance, there is a trend toward deviations and deformation in private and administrative actions. As a result, the initial purpose of protection will be missing.