

Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience

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I. Introduction

The present work tries to find a solution to the questions originating around the idea of the protection of traditional knowledge, genetic resources and folklore developed by indigenous peoples. Protection of the traditional knowledge of indigenous peoples and communities is necessary for two reasons. First, it is important for the conservation and maintenance of diversity; and second, the knowledge contributes to the industrial innovation process.

“It is known that traditional knowledge has been used in many industries as starting point for new product development, in sectors such as food and beverages, pharmaceuticals, agriculture, horticulture and personal care and cosmetics, and it remains a significant resource for many commercial research and development programs.”¹

These industries have used it without giving a compensation or obtaining authorisation and, or even worse, in many cases, they have obtained intellectual property rights, without having fulfilled the inventive or novelty requisite.

Cases such as the neem tree, ayahuasca, or quinoa are good examples to show how intellectual property rights are granted to individuals or research companies, in spite of the fact that the use and knowledge about these plants was originally developed by indigenous communities in developing countries. In most cases, there was no rigorous assessment regarding novelty and inventiveness, and the research institutions appear as the owners of such knowledge, and make money out of it, without sharing the benefits with the respective communities.

Furthermore, the knowledge, innovations, and practices of indigenous and local communities, developed and passed on for centuries through traditional culture, are also closely linked to the protection of the biodiversity. The communities know how to use their resources without deprecating them. In fact the *Convention on Biological Diversity* recognises the importance of traditional knowledge for enhancing the conservation and sustainable use of biodiversity. Article 8 (j) of the Convention requires countries to respect, preserve and maintain the

¹ G. Dutfield, “Developing and Implementing National Systems for Protecting Traditional Knowledge: Experiences in Selected Developing Countries”, in: S. Twarog/ P. Kapoor (eds), *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimension*, 2004, 141 et seq.

knowledge, promote its wider application and encourage the equitable sharing of benefits derived from the use of such knowledge.

Article 8 (j) is considered to be of a very broad scope and in fact “does not recognize, and even less create, a property right in favour of indigenous peoples over their traditional knowledge.”² It does, however, establish a number of underlying principles of respect, responsibility and equity, which are guiding the implementation of article 8 (j).

The protection of traditional knowledge, genetic resources and folklore has provoked a long and interesting debate between developed and developing countries. Developed countries have used arguments such as, traditional knowledge is in the public domain and there is no such thing as “biopiracy”. They consider that developing countries use these arguments for getting concessions under the TRIPS agreement. On the other hand, developing countries argue that the actual intellectual property rights system leads to unfair situations, such as misappropriation of traditional knowledge, “biopiracy” and an unsustainable use of biodiversity. They claim the requisite of disclosure of origin, benefit sharing and even the necessity of an amendment of the TRIPS agreement.

The respective parties have started to work at national and regional levels, and, in many cases, the search for a new system to protect possible rights stemming from traditional knowledge has its main focus on the general framework of the intellectual property rights regimes. However, it is widely recognised that the prevailing intellectual property rights regime is not sufficient in order to protect traditional knowledge, or provide a means to ensure that the benefits from the use of such knowledge are shared equitably. Therefore, efforts to protect indigenous peoples’ rights over traditional knowledge are now increasingly focusing on the development of alternative or *sui generis* rights regimes.

WIPO has become actively involved in the protection of traditional knowledge. In 2000 it created the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) with the mandate of discussing a.) access to genetic resources and benefit sharing b.) protection of traditional knowledge and c.) protection of expressions of folklore. WIPO’s work has focused on the possible development of a *sui generis* regime for traditional knowl-

² B. Tobin/ K. Swiderska, *Speaking in Tongues: Indigenous Participation in the Development of a sui generis regime to Protect Traditional Knowledge in Peru*, 2001, 11 et seq.

edge, but no serious analysis has been made in respect of the standards for the patentability applied by WIPO members (for example the standard applied in the United States with regard to inventions disclosed in non-written form within and outside the country), which allow the patenting of genetic resources and traditional knowledge.

According to Rosemary Coombe, “intellectual property rights are not merely technical matters.”³ And in the present authors opinion they involve crucial questions concerning not only economic questions but also the environment, food security, ethics and international human rights issues. It is necessary to use the issue of intellectual property to reduce the poverty and to balance unfair situations. National and international recognition of traditional knowledge is very important for many developing countries, especially Peru, whose geographical setting places it among the ten countries with the most extensive biodiversity in the world, also known as “mega diverse country”, because of its range of ecosystems, species, genetic resources and indigenous cultures with valuable knowledge. The Peruvian government, along with those of other “mega diverse” countries⁴ is concerned about the existing patent system, which gives rise to unfair situations by granting intellectual property rights for inventions based directly or indirectly on genetic resources of Peruvian origin or traditional Peruvian knowledge. As a consequence in Peru national as well as regional legislation has been developed in order to protect genetic resources and traditional knowledge of Peruvian origin.

At the national level, Peru has developed Law 27811, establishing a protection regime for the collective knowledge of indigenous people derived from biological resources. At the regional level, the Andean Community (Peru, Bolivia, Colombia, Ecuador) has adopted Decision 391, which requires the prior informed consent of indigenous, afro-American and campesino communities as a condition for access to, and use of, their knowledge. Peru consistently advocates mandatory inclusion of disclosure of origin and legal provenance of traditional knowl-

³ R.J. Coombe, “The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law”, *St. Thomas Law Review* 14 (2001), 275 et seq.

⁴ The Group of Like-Minded Megadiverse Countries was officially set up in February 2002 as a policy coordination area for the main megadiverse countries (Cancún Declaration, Mexico). The Group has the following members: Brazil, Bolivia, China, Colombia, Costa Rica, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, Venezuela.

edge in the patent system and has maintained its position in the different intergovernmental negotiating fora, where the subject has been addressed, i.e. the CBD, the WTO and WIPO.⁵ The Peruvian experience provides a salutary lesson for any national authority or regional organisation seeking to develop legislation for the protection of traditional knowledge and genetic resources.

II. General Issues Relating to the Protection of Traditional Knowledge, Genetic Resources and Folklore

1. Definitions

Traditional knowledge is a very broad term referring to various knowledge systems, encompassing a variety of areas, held by traditional communities or to knowledge acquired in a non-systematic way. They embrace different aspects and forms of information's expressions, making it difficult to agree on a legally and scientifically acceptable definition. For that reason there is no official or agreed definition of the term. For Carlos Correa "the different types of knowledge could be distinguished by the elements involved, the knowledge's potential or actual applications, the level of codification, the individual or collective form of possession, and its legal status."⁶

From the interest generated by these items, much literature and many proposals, both for regulation and for action at the national and international level, have emerged.

Precisely how the term traditional knowledge is defined has important implications for the kind and scope of a possible protection regime. According to Christoph Beat Graber and Martin A. Girsberger, there are several characteristics that can be attributed to this knowledge, de-

⁵ Doc. IP/C/W/447 of 8 June 2005, Communication from Peru to the WTO TRIPs Council.

⁶ C. Correa, *Traditional Knowledge and Intellectual Property. Issues and Options surrounding the Protection of Traditional Knowledge*. A discussion paper commissioned by the Quaker United Nations Office (QUNO), 2001, 4 et seq.

spite the lack of a clear terminology.⁷ These characteristics, also used in the WIPO papers are⁸:

- Traditional knowledge consists in innovations, creations and practices originated and used by indigenous and local communities
- It is transmitted from generation to generation
- It is transmitted in oral form
- It is usually held in common by the community
- It is constantly being improved and adapted to the changing needs of its users

WIPO referred to traditional knowledge as:

“... tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”⁹

“Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medical knowledge, including related medicines and remedies; biodiversity-related knowledge; expressions of folklore in the form of music, dance, songs, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.

From the definition given above it can clearly be seen that the concepts of traditional cultural expressions/folklore and traditional knowledge are mixed. However, in discussions about intellectual property and

⁷ C. Graber/ M. Girsberger, “Traditional Knowledge at the International Level”, *Recht des ländlichen Raums* 11 (2006), 243 et seq.

⁸ Doc. WIPO/GRTKF/IC/3/7 of 6 May 2002, Document of the WIPO Intergovernmental Committee on Intellectual Property, Traditional Knowledge, Genetic Resources, and Folklore. Doc. WIPO/GRTKF/IC/4/8 of 30 October 2002, Document of the WIPO-Intergovernmental Committee on Intellectual Property, Traditional Knowledge, Genetic Resources, and Folklore.

⁹ Doc. WIPO/GRTKF/IC/3/9 of June 2002.

its rights both terms have to be analysed in a distinct way, in order to facilitate better and more efficient discussions. This experience has shown that different tools are needed to protect specifically traditional knowledge and traditional cultural expressions or expressions of folklore; the latter one for example involves a cultural policy and, unlike the more technical traditional knowledge, involves legal doctrines close to copyright and related rights systems.

According to WIPO, traditional knowledge “focuses on the use of knowledge such as traditional technical know-how, or traditional ecological, scientific or medical knowledge. This encompasses the content or substance of traditional know-how, innovations, information, practices, skills and learning of traditional knowledge systems such as traditional agricultural, environmental or medical knowledge. These forms of knowledge can be associated with traditional cultural expressions (TCEs) or expressions of folklore, such as songs, chants, narratives, motifs and designs.”¹⁰

On the other hand, *traditional cultural expressions/expressions of folklore* mean items consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community, in particular:¹¹

- Verbal expressions, such as folk tales, folk poetry and riddles, signs, words, symbols and indications; musical expressions, such as folk songs and instrumental music;
- Expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and,
- Tangible expressions, such as:
 - productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
 - crafts;
 - musical instruments;
 - architectural forms.

¹⁰ WIPO Booklet No. 2, *Intellectual Property and Traditional Knowledge*, 17.

¹¹ WIPO, *ibid.*

Professors Lowenstein and Wegbrait have given more precise definitions¹² of the three main items which encompass the general term traditional knowledge, including: traditional knowledge, genetic resources and expressions of folklore. *Traditional knowledge* is understood as the group of practices acquired by a community through the observation and coexistence with the ecosystem in which it lives. (Free translation from Spanish). *Genetic resources* are the existing biological materials in a certain ecosystem, that are used, for example, in agriculture and medicine. It is possible to emphasise that these resources are related to a traditional knowledge. *Expressions of folklore* are understood as the accumulation of fixed and unfixed cultural expressions of a community, such as artistic works, handicrafts, designs, dances and musical and dramatic performances (Free translation from Spanish).

But, one important characteristic of this traditional knowledge is, that although it has been developed in the past, it still continues to develop. "Traditional knowledge is not static, it evolves and generates new information as a result of improvements or adaptation to changing circumstances."¹³

To summarise: it is possible to identify a general tendency to characterise traditional knowledge as information which has been developed in ancestral times among indigenous people from generation to generation, and actually is subject to improvement and adaptation, without necessarily being codified, and as being primarily collective in nature. It may possess commercial value depending on its potential or actual use. An important aspect to be taken into account, which makes the definition of traditional knowledge even more complex, is the distinction between traditional knowledge and what has been termed indigenous knowledge. Indigenous knowledge has been defined as knowledge "that specifically belongs to indigenous peoples." On the other hand, traditional knowledge is defined more broadly and includes the knowledge held by both indigenous peoples and non-indigenous peoples or local communities living within a geographical boundary or region.¹⁴

¹² V. Lowenstein/ P. Wegbrait, "La Protección de los conocimientos tradicionales, recursos genéticos y folklore", *Cuadernos de Propiedad Intelectual* 2 (2005), 149 et seq.

¹³ Correa, see note 6.

¹⁴ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge*, (1998- 1999), 2001, 23.

These kinds of distinctions are very important and relevant in order to confer rights, seek prior informed consent for the use of traditional knowledge, deal with benefit-sharing arrangements and commercialisation activities. “This may imply a need to establish a classification system of traditional knowledge to distinguish indigenous or traditional knowledge and other categories of information entered into any database or register.”¹⁵

2. An Overview of the International Debate

The *Convention on Biological Diversity* (CBD) is the only international treaty that directly recognises the value of traditional knowledge, establishing a general requirement of protection for the parties of the Convention.

Article 8 (j) of the CBD specifically provides that each Contracting Party shall, as far as possible and as appropriate:

“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”¹⁶

The CBD was a first step to take into consideration the protection of traditional knowledge and since it entered into force in 1993, this topic has been acknowledged as an important factor in the search for sustainable development. However, this knowledge, including grain species, traditional medicines, traditional art images, music, rituals among others, has been part of an international debate, which has focused primarily on the need to control the actions of the scientific and commercial sector and particularly the unapproved and uncompensated use of such knowledge. This has especially been the case with regard to the use that the pharmaceutical and agricultural industries have made of traditional knowledge (and biological and genetic resources) in their re-

¹⁵ Report of the United Nations University – Institute of Advanced Studies, *The Role of Registers and Databases in the Protection of Traditional Knowledge*, 2004.

¹⁶ Convention on Biological Diversity of 5 June 1992.

search and development processes, most particularly when intellectual property rights have been granted for the product of such research and development activities.¹⁷ In this context, the concept of “biopiracy” emerges, and it is articulated “as the process through which the rights of indigenous cultures to genetic resources and knowledge are erased and replaced by those who have exploited indigenous knowledge and biodiversity.”¹⁸ The protection of traditional knowledge, genetic resources and folklore has provoked wide and interesting debate between developing and developed countries. A number of particular points will be analysed in the following.

a. Developed Countries’ Arguments

aa. *Traditional Knowledge in Public Domain*

Some objections to the protection of traditional knowledge with regard to the public domain are not necessarily motivated by bad faith. “To some critics, the creation of a traditional knowledge regime would represent the removal from the public domain of a very large body of practical knowledge about the biosphere including solutions to health, agricultural and environmental problems affecting many people. Since the existence of a large public domain is good for everybody such removal, it is argued, would be a bad thing.”¹⁹

Actually, there exists the presumption that traditional knowledge is in the public domain, encouraging the idea that nobody is harmed and no rules are broken when research institutions and corporations use it freely. “In fact this presumption is not only false but the implications of its wide acceptance may be detrimental for traditional peoples and communities.”²⁰ According to Coombe²¹ traditional knowledge is threatened, but when it is supported, rewarded, and encouraged, a revitalisation of it can be seen. Many of these communities when they are not protected, tend to migrate and as a logical consequence there exists

¹⁷ United Nations University – Institute of Advanced Studies, see note 15, 10.

¹⁸ S. Vandana/ J. Afsar/ B. Gitanjali / R. Holla Bhar, *The Enclosure and Recovery of the Commons*, 1997, 31 et seq.

¹⁹ G. Dutfield, *Protecting Traditional Knowledge. Pathways to the Future*, 2006. 8 et seq.

²⁰ Id., “TRIPS related Aspects of Traditional Knowledge”, *Case W. Res. J. Int’l L.* 13 (2001), 238 et seq.

²¹ Coombe, see note 3, 279.

the possibility of the disappearance of an important source of traditional knowledge and of biological diversity.

bb. Developing Countries Use Traditional Knowledge for Obtaining Concessions under the TRIPS Agreement

Many developing countries use the protection of traditional knowledge, as an argument against developed countries in the WTO, promoting its recognition as a TRIPS related issue, but, they do very little at the national level (with notable exceptions).²² In fact, many commentators consider that developing countries use this argument for wielding pressure over developed countries without a legitimate interest in the protection of traditional knowledge. According to Dutfield²³ the possible explanations for developing countries pursuing this issue at the WTO could be either that developing countries have identified several problems with the TRIPS agreement, namely that it promotes the piracy of traditional knowledge. They propose ways to be found to eradicate the problems. Or developing countries are using this issue to look for concessions in regard to the TRIPS agreement from developed countries, without a true sense of justice on behalf of their traditional peoples and communities.

cc. The Disincentive Effect

The industry is also of relevance. Indeed, it has been stated that since the emergence of synthetic chemistry, natural products are not necessary for the development of drugs. It has also been said, in a very contemptuous way, that pharmaceutical industries have little, if any, interest in the “jungle pharmacy”, and alternative drug discovery might be more promising, if researchers did not have to comply with complex traditional knowledge protection regimes and benefit sharing. According to Dutfield, “it is hard to know if these concerns are genuine or are groundless scaremongering.”²⁴

One publication by the Pacific Research Institute deserves notoriety. This paper purports to scientifically determine the losses of the pharmaceutical and biotechnology industries in 27 countries up to 2025 in

²² Dutfield considers the following countries as notable exceptions: The Philippines, Peru, India and Costa Rica.

²³ Id., see note 20.

²⁴ Id., see note 20, 23 et seq.

terms of reduced capital stocks resulting from declining research and development investments caused by the establishment of what the authors call – without any clarification whatsoever – a “patent-based ABS regime” (access and benefit sharing regime).²⁵ The US government and US biotech industry have openly promoted this propaganda, which gives its opinions little credit.

b. Developing Countries’ Arguments

According to Document IP/C/W/370/Rev.1 drawn up by the Secretariat of the Council for Trade Related Aspects on Intellectual Property Rights,²⁶ the principal concerns expressed about the protection of traditional knowledge and folklore at the international level made by developing countries as owners of these kinds of resources are:

- concern about the granting of patents or other intellectual property rights covering traditional knowledge to persons other than those indigenous peoples or communities who have originated and legitimately controlled the traditional knowledge;
- concern that traditional knowledge is being used without the authorisation of the indigenous peoples or communities who have originated and legitimately controlled it and without proper sharing of the benefits that accrue from such use. The reasons why international action should be taken to remedy these problems can be summarised as follows:

aa. Equity

Many proposals which emerge for the protection of traditional knowledge are based on equity considerations. It is said that, given the important economic value of traditional knowledge, the holders of this should be considered in the economic benefit sharing derived from that knowledge. Also it is said that if the TRIPS agreement requires developing countries (with traditional and indigenous communities) to provide intellectual property rights for a broad range of subject-matters including biological material and computer software, it is equitable that tradi-

²⁵ T.A. Wolfe/ B. Zycher, *Biotechnological and Pharmaceutical Research and Development Investment under a Patent-based Access and Benefit Sharing Regime*, 2001.

²⁶ Doc. IP/C/W/370/Rev.1 of 9 March 2006. Note made by the Secretariat of the WTO TRIPS Council, 3.

tional knowledge should have legal recognition.²⁷ An example can be found in genetic resources linked to traditional knowledge. Traditional farming developed varieties of genetic resources through planting, seed production and selecting the best adapted varieties. In addition to these efforts, these people know the qualities of the product, which could be very useful in different fields such as medicine. However, this knowledge is collected by researchers or investigators who can obtain intellectual property rights for this knowledge and benefit from its commercial use. The farmers, on the contrary, who contributed to the developing of the resource are not compensated. The basic point is that traditional/indigenous peoples are not paid for the value they deliver, nor is there any later compensation or sharing of benefits with them. A similar argument applies to other intangible components of traditional knowledge.²⁸

bb. Environment

The traditional knowledge of indigenous peoples and local communities is central for their ability to operate in an environmentally sustainable way and to conserve genetic and other natural resources. Protection of traditional knowledge is therefore closely linked to the protection of the environment.²⁹

cc. Avoiding “Bio-Piracy” and ensuring Benefit Sharing

According to Christoph Beat Graber,³⁰ the term “bio-piracy” encompasses a variety of circumstances, including:

- The acquisition of genetic resources or traditional knowledge without permission of their holder;
- Cases where benefits arising from the commercial use of genetic resources or traditional knowledge are not shared with the provider of these resources or knowledge;

²⁷ Doc. IP/C/W/165 of 3 November 1999, Communication from Bolivia, Colombia, Ecuador, Nicaragua and Peru to the WTO TRIPs Council.

²⁸ Correa, see note 6, 5.

²⁹ Doc. IP/C/M/30 of 1 June 2001, Communication from the Secretariat of the WTO TRIPs Council.

³⁰ Graber/ Girsberger, see note 7.

- Cases where traditional knowledge is protected by intellectual property rights, primarily patents. The holders of these rights have not been innovative themselves, but have simply copied this knowledge.

In some cases the recognition of positive rights in respect to traditional knowledge is not the only objective. Rather, the prevention of unauthorised appropriation (“bio-piracy”) and ensuring benefit sharing, as provided under arts 8 (j), 15, 16 and 19 of the CBD are the main objectives of the protection. The granting of patents, which cover traditional knowledge, may be prevented by improving the information available for patent offices with regard to the examination of novelty and inventiveness.

dd. Coherence of International and National Law

International recognition of traditional knowledge should be in conformity with the obligation “to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities,” provided for in article 8 (j) of the CBD.³¹ Without the existence of an international mechanism, national and regional laws, which acknowledge the collective rights of indigenous and local communities over their traditional knowledge and folklore, could be undermined.³² Moreover, legal protection of traditional knowledge would improve confidence in the international intellectual property system.³³

ee. National Economies Benefit

The trade with traditional knowledge and traditional cultural expressions, as handicrafts, medical plants, agricultural products and non wood forest products in both domestic and international markets is an important source of profit for exporter countries. It is a fact that traditional knowledge is frequently an input into modern industries such as pharmaceuticals, botanicals, cosmetics among others, but, in most cases, companies based in developed countries that are capable of scientific,

³¹ Doc. IP/C/W/165 of 28 May 2003, Submission by Brazil, Bolivia, Cuba, Dominican Republic, Ecuador, India, Thailand, Peru and Venezuela to the WTO TRIPs Council.

³² Doc. IP/C/W/404 of 24 June 2003, Communication from Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand, Venezuela to the WTO TRIPs Council.

³³ See note 26.

technological and marketing evolution capture much more of the added value. This situation must be addressed so that developing countries can benefit more of the added value.

According to Dutfield “it seems that protecting traditional knowledge has the potential to improve the performance of many developing country economies by enabling greater commercial use of their biological wealth and increasing exports of traditional knowledge related products.”³⁴ It is important not to overestimate the economic potential of traditional knowledge, because as we have seen, research institutions claim that they can develop drugs with synthetic chemistry and they are not interested in natural products. In the long run, this would reduce the interest in natural product research. The value of traditional knowledge must not be measured in purely economic terms; however, there are other important reasons, such as environmental or cultural factors that emphasise the importance of its protection.

c. Other Points of the Debate

aa. Existing Intellectual Property Rights and sui generis Systems

On the one hand, there is a continuing controversy over whether intellectual property could be a tool to protect traditional knowledge of indigenous and local communities. On the other hand, “many indigenous people’s representatives and commentators complain that existing intellectual property systems are inadequate to protect indigenous intellectual and cultural property rights ... there is a concern that IPRs systems encourage the appropriation of traditional knowledge for commercial use without the fair sharing of benefits.” But, many commentators consider that the conventional intellectual property systems “create effective incentives for innovative use of biodiversity, which in turn creates profits on which innovators can draw in negotiating benefit sharing arrangements with the holders of traditional knowledge and biodiversity.”³⁵

According to WIPO there are many examples of traditional knowledge that are or could be protected by the existing intellectual property rights system. However, there have been many suggestions that modify

³⁴ Dutfield, see note 1, 143.

³⁵ D. Downes, “How Intellectual Property could be a Tool to Protect Traditional Knowledge,” *Columbia Journal of International Law* 25 (2000), 253 et seq. (257 et seq.).

and use new property right tools to improve the actual intellectual property system in order to protect traditional knowledge in a better way.³⁶ These debates have in turn prompted international and national efforts to find appropriate legal mechanisms through which traditional knowledge can be provided with the respective recognition and protection.

bb. International or National Actions?

Currently there has been much discussion about the necessity of international protection of traditional knowledge and folklore. Many countries, like Peru, consider it necessary to amend the TRIPS agreement.³⁷ National action is not enough as it only creates rights, which cannot be claimed and enforced in third countries. On the other hand the European Community, for example, sees “no reason to amend article 27.3(b) as it now stands. The TRIPS Agreement allows Members sufficient flexibility to modulate patent protection as a function of their needs, interests or ethical standards.”³⁸

Authors, like Carlos Correa consider that efforts to develop an international framework may deviate attention from the resolution of important domestic problems. He also considers that is better to develop a national regulation first in order to have better negotiations at the international level with large countries. Nothing, however, prevents the search for an international framework at an early stage.³⁹

III. The Actions of WIPO

1. The World Intellectual Property Organization (WIPO)

Since 1998, WIPO has taken actions and has been involved in the protection of traditional knowledge. In that year a Global Intellectual Property Issues Division was created, and its duty was to undertake several studies on traditional knowledge and, in particular, to organise

³⁶ WIPO, see note 14.

³⁷ See note 26.

³⁸ Doc. IP/C/W/383 of 17 October 2002, Communication from the European Community.

³⁹ Correa, see note 6, 17

fact finding missions to identify concerns of traditional knowledge holders.⁴⁰

The creation of the already mentioned Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC)⁴¹ was an idea suggested by the WIPO Secretariat at its 25th session. The document that was prepared by the Secretariat invited all Member States to constitute a forum with three themes which it had envisioned during the consultations. Many developing countries supported the idea, which then was approved without formal opposition from any member. The IGC met for the first time on 30 April – 2 May 2001, with the mandate of discussing:

- access to genetic resources and benefit sharing;
- protection of traditional knowledge, whether or not associated with those resources;
- the protection of expressions of folklore.

During the first few years following its inception, this committee focused on defensive protection, principally the improvement of the availability of patent examiners of traditional knowledge. In addition, many discussions developed in regard to the disclosure of origin of genetic resources and/or related traditional knowledge in patent applications. This topic will be analyzed further.

However, in the past few years, positive protection has been considered an important matter because many countries have found that defensive protection is not enough and it is necessary to confer some rights to traditional knowledge holders in order to give them an effective protection. In this regard, in 2002, WIPO prepared a paper focusing on the developing of *sui generis* systems.⁴² In 2003 the WIPO General Assembly decided that IGC would focus on the international rec-

⁴⁰ Doc. WIPO/RT/LDC/1/4 of 30 September 1999, *High-Level Interregional Roundtable on Intellectual Property for the Least Developed Countries (LDCs)*.

⁴¹ Doc. WIPO/GA/26/6 of 25 August, *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*.

⁴² Doc. WIPO/GRTKF/IC/3/8 of 29 March 2002, *Complete Document made by the Secretariat of the WIPO-Intergovernmental Committee on Intellectual Property, Traditional Knowledge, Genetic Resources, and Folklore*.

ognition of the subject.⁴³ The United States questioned the desirability of establishing international rules on genetic resources, traditional knowledge and folklore, while other delegations indicated the need for further analysis of the subject. Many delegations have presented measures that have been taken at a national level to protect traditional knowledge and TCEs. Generally, these countries do not agree with the idea of using current intellectual property rights and many of them have developed *sui generis* systems (Peru, Panama, Costa Rica, Venezuela, among others).

Throughout the various sessions, developed and developing countries have had several discussions about the international recognition and amendment of the TRIPS agreement; but in the fifth session of the IGC (7–15 July 2003), both groups discussed the committee's mandate. On the one side, developed countries aimed to prolong the current mandate, which was limited to technical analysis, for another two-year period or more. The United States in particular, proposed to prolong the current mandate unchanged for another four years. On the other side, the African Group demanded an immediate start of negotiations for legally binding international instruments on genetic resources, traditional knowledge and folklore. Developing countries from Asia and Latin America suggested an action-oriented agenda, "aiming at 'norm-setting' of some kind, in particular about biopiracy and misappropriation of traditional knowledge."⁴⁴

The WIPO General Assembly (22 September – 1 October 2003) decided to prolong the mandate of the committee. The new tasks of the committee would be to focus on the international dimension of intellectual property and genetic resources, traditional knowledge and folklore. Pressure by developed countries caused the agreed-upon language to be vague, without the establishment of clear objectives. The new mandate also foresaw the possibility that the discussions by the committee should be conducted without prejudice, and go to another forum, particularly the WTO. This was a concession made to the developing countries to avoid blockades by relying on the argument that studies on these issues are still pending in the WIPO. With this new mandate, developing countries have the opportunity to examine the provisions in

⁴³ Doc. WIPO/GA/30/8 of 1 October 2003, Report made by the WIPO General Assembly.

⁴⁴ C. Correa, *Update on International Development relating to the Intellectual Property Protection of Traditional Knowledge including Traditional Medicine*, 2004.

patent laws which allow misappropriation, and many of them have noted that “IGC has become very useful for developed countries that wish to confine these subject to a single forum well away from those forums and processes dealing with intellectual property rule-making and standard-setting.”⁴⁵

2. Provisions for the Protection of Traditional Knowledge

These are the provisions for the protection of traditional knowledge,⁴⁶ and the provisions for the protection of TCEs⁴⁷ developed by the IGC.

The text of the provisions is as follows:

“I. POLICY OBJECTIVES

- (i) Recognize value
- (ii) Promote respect
- (iii) Meet the actual needs of traditional knowledge holders
- (iv) Promote conservation and preservation of traditional knowledge
- (v) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems
- (vi) Support traditional knowledge systems
- (vii) Contribute to safeguarding traditional knowledge
- (viii) Repress unfair and inequitable uses
- (ix) Concord with relevant international agreements and processes
- (x) Promote innovation and creativity
- (xi) Ensure prior informed consent and exchanges based on mutually agreed terms
- (xii) Promote equitable benefit-sharing
- (xiii) Promote community development and legitimate trading activities

⁴⁵ Dutfield, see note 19.

⁴⁶ Doc. WIPO/GRTKF/IC/9/5 of 9 January 2006, Document made by the Secretariat of the WIPO-Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

⁴⁷ Doc. WIPO/GRTKF/IC/9/4 of 9 January 2006.

- (xiv) Preclude the grant of improper intellectual property rights to unauthorized parties
- (xv) Enhance transparency and mutual confidence
- (xvi) Complement protection of traditional cultural expressions

CORE PRINCIPLES

II. GENERAL GUIDING PRINCIPLES

- (a) Responsiveness to the needs and expectations of traditional knowledge holders
- (b) Recognition of rights
- (c) Effectiveness and accessibility of protection
- (d) Flexibility and comprehensiveness
- (e) Equity and benefit-sharing
- (f) Consistency with existing legal systems governing access to associated genetic resources
- (g) Respect for and cooperation with other international and regional instruments and processes
- (h) Respect for customary use and transmission of traditional knowledge
- (i) Recognition of the specific characteristics of traditional knowledge
- (j) Providing assistance to address the needs of traditional knowledge holders

III. SUBSTANTIVE PRINCIPLES

1. Protection against Misappropriation
2. Legal Form of Protection
3. General Scope of Subject Matter
4. Eligibility for Protection
5. Beneficiaries of Protection
6. Fair and Equitable Benefit-sharing and Recognition of Knowledge Holders
7. Principle of Prior Informed Consent
8. Exceptions and Limitations
9. Duration of Protection

10. Transitional Measures
11. Formalities
12. Consistency with the General Legal Framework
13. Administration and Enforcement of Protection
14. International and Regional Protection.”

3. Provisions for the Protection of Traditional Cultural Expressions

The text of the provisions is as follows:

“I. OBJECTIVES

- (i) Recognize value
- (ii) Promote respect
- (iii) Meet the actual needs of communities
- (iv) Prevent the misappropriation of traditional cultural expressions/expressions of folklore
- (v) Empower communities
- (vi) Support customary practices and community cooperation
- (vii) Contribute to safeguarding traditional cultures
- (viii) Encourage community innovation and creativity
- (ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms
- (x) Contribute to cultural diversity
- (xi) Promote community development and legitimate trading activities
- (xii) Preclude unauthorized IP rights
- (xiii) Enhance certainty, transparency and mutual confidence

II. GENERAL GUIDING PRINCIPLES

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance

- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and other traditional communities
- (h) Respect for customary use and transmission of TCEs/EoF
- (i) Effectiveness and accessibility of measures for protection

III. SUBSTANTIVE PRINCIPLES

1. Subject Matter of Protection
2. Beneficiaries
3. Acts of Misappropriation (Scope of Protection)
4. Management of Rights
5. Exceptions and Limitations
6. Term of Protection
7. Formalities
8. Sanctions, Remedies and Exercise of Rights
9. Transitional Measures
10. Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion
11. International and Regional Protection.”

IV. Strategies for Protecting Traditional Knowledge and TCEs/ Folklore

Given the diversity surrounding traditional knowledge and TCEs/ folklore, there is no form of legal protection that can replace the complex social and legal systems that sustain traditional knowledge and TCEs/folklore within the indigenous communities. One form of protection is the application of laws to prevent the unauthorised or inappropriate use of traditional knowledge by third parties beyond the traditional circle. This is a sort of recognition of the need to prevent third

parties from misusing traditional knowledge. This has been achieved in many different ways by the use of national laws though not necessarily by creating property rights, although this approach has been taken in some cases. A common threat has been the need to refocus existing laws or to create new ones to clarify and strengthen the legal constraints against various forms of misuse or misappropriation of traditional knowledge.

1. Protection of Traditional Knowledge and TCEs/Folklore

As we have already seen, some indigenous communities have felt outraged by the appropriation of parts of their traditional knowledge, including plant materials for agricultural and pharmaceutical purposes, by big companies and corporations under the intellectual property rights system. The cases of the neem tree (US Patent 5124349), ayahuasca (US Plant patent 5751) and quinoa (US Patent 5304718), among others, illustrate situations where the communities have claimed for protection against misappropriation. “Although the Convention on Biological Diversity acknowledges the rights of indigenous communities to their knowledge, there are no regulations to enforce the protection of these rights.”⁴⁸ Many proposals made by academics and NGOs respond to such demands, while some go further in seeking the development of more comprehensive systems of protection. These proposals include options like the disclosure of origin and legal provenance of traditional knowledge, among others, which have been the most controversial issues in international discussions, especially the political and legal viability of these requirements. Despite the continuing controversy there are several areas where useful work could be done to enhance the sharing of benefits related to intellectual property rights with indigenous and local communities and could meet the objective of article 8 (j) of the CBD. On the other hand, article 27.3 of the TRIPS agreement establishes a life patenting exception and a *sui generis* clause for developing *sui generis* systems to protect plant variety.

Commentators like Downes consider “that it is necessary for governments to maintain and extend the flexibility provided in this article in order to protect and promote traditional knowledge, and to experi-

⁴⁸ A.M. Pacón, “The Peruvian Proposal for protecting Traditional Knowledge”, in: Twarog/ Kapoor, see note 1, 176 et seq.

ment with *sui generis* regimes.”⁴⁹ This provision allows countries to exclude plants and animals from patenting and provides for the development of *sui generis* systems for plant variety protection. Downes is of the opinion that “maintaining this discretion is essential to preserve the flexibility needed to experiment with various approaches to the protection of traditional knowledge, and to allow for further evaluation of other complex ethical and socioeconomic issues. In contrast, requiring all countries to uniformly recognize life patenting and mandating uniform systems of plant variety protection would block countries from gaining the experience needed to implement article 80 of the CBD effectively.”⁵⁰

2. Forms of Protection

The two important demands on traditional knowledge protection that have arisen with the debate are:

- First, the call for recognition of the rights of traditional knowledge holders relating to their traditional knowledge, and,
- Second, concerns about the unauthorised acquisition by third parties of intellectual property rights over traditional knowledge. In this regard, two forms of protection have been developed and applied. These two approaches should be undertaken in a complementary way.
- Positive protection: giving traditional knowledge holders the right to take action or seek remedies against certain forms of misuse of traditional knowledge; and
- Defensive protection: safeguarding against illegitimate intellectual property rights being taken by others over traditional knowledge subject matters.

⁴⁹ Downes, see note 35, 266.

⁵⁰ Downes, see note 35.

3. Positive Protection – Recognition of Intellectual Property Rights in Traditional Knowledge

“Positive protection requires legal recognition of rights over traditional knowledge, either under existing IPR regimes or sui generis regimes.”⁵¹

As we have already seen, the existence of a diversity of knowledge within traditional communities makes it impossible to have a single solution which fits with all the needs of these communities in all countries. Instead, effective protection may be found in a co-ordinated “menu” of different options for protection. These options could be underpinned by international common objectives and principles which could form part of a legal framework. The key is to provide traditional knowledge holders with an appropriate choice of forms of protection, in order to let them participate in their own interests and choose their own directions for the protection and use of their traditional knowledge. The definition of the objectives at international level would define and shape the protection system inside a country, and for that reason the implementation of such objectives would require a degree of flexibility at the national level, in order to satisfy the diversity and the needs of traditional knowledge holders. Protection of traditional knowledge, like the protection of intellectual property in general, is not undertaken as an end in itself, but as a means to broaden policy goals.

The kind of objectives that traditional knowledge protection is intended to serve include:

- Recognition of value and promotion of respect for traditional knowledge systems
- Responsiveness to the actual needs of holders of traditional knowledge
- Repression of misappropriation of traditional knowledge and other unfair and inequitable uses
- Protection of tradition-based creativity and innovation
- Support of traditional knowledge systems and empowerment of traditional knowledge holders
- Promotion of equitable benefit-sharing from use of traditional knowledge
- Promotion of the use of traditional knowledge for a bottom-up approach to development.

⁵¹ United Nations University – Institute of Advanced Studies, see note 15.

The options for positive protection include:

- Existing IP laws and legal systems (including the law of unfair competition),
- Extended or adapted IP rights specifically focused on traditional knowledge (*sui generis* aspects of IP laws), and
- New, *sui generis* systems which give specific rights.

Other non-intellectual property options could form part of the overall menu, including trade practices and labelling laws, the law of civil liability, the use of contracts, customary and indigenous laws and protocols, regulation of access to genetic resources and associated traditional knowledge, and remedies based on such torts as unjust enrichment, rights of publicity, and blasphemy.⁵² Peru and Panama e.g. have recognised rights over traditional knowledge holders in a different way. The declaratory regime established in Peru, recognises that rights over traditional knowledge derive from ancestral rights rather than an act of government. Rights over traditional knowledge do not stem from the inclusion in declarative registers. However, registration may provide the benefit of giving notice to the authorities of the existence of such knowledge for benefit-sharing purposes and for the purposes of challenging patents, etc.

In Panama, the situation is different because relevant legislation establishes a regime granting exclusive property rights over traditional knowledge. A constitutive register is part of such a regime, and registration puts the public on notice of the existence of rights over traditional knowledge.

Both Panama and Peru in their respective legislation on folklore and collective traditional knowledge of biological diversity have recognised traditional knowledge to be the cultural patrimony of indigenous peoples. This kind of recognition, as cultural patrimony being recognised as inalienable and indefeasible establishes obligations between the state and the indigenous peoples, and creates an effective measure of protection against third parties. As cultural patrimony may not be alienated, it cannot be commercialised in a manner giving monopolistic rights to third parties. Furthermore, it requires, that all benefits received, be util-

⁵² Doc. WIPO/GRTKF/IC/5/7 of 7 May 2003, Document prepared by the Secretariat of the WIPO-Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

ised by the recipient indigenous peoples in order to strengthen and protect their knowledge in a manner which secures equitable sharing.⁵³

a. Application of Existing Intellectual Property Rights

The possibility of applying the existing modes of intellectual property rights protection to different components of traditional knowledge has been extensively explored. The policy debate about traditional knowledge and the intellectual property rights system has underlined the limitations of the existing intellectual property rights laws in meeting all the needs and expectations of traditional knowledge holders. Even so, the already existing laws have been successfully used to protect against some forms of misuse and misappropriation of traditional knowledge, including the use of patents, trademarks, geographical indications, industrial designs, and trade secrets. Some of the drawbacks of the use of the actual intellectual property rights system to protect traditional knowledge and traditional cultural expressions are:

- traditional knowledge is often held collectively by communities, rather than by individual owners – this is often cited as a drawback in protecting traditional knowledge
- Communities' concerns about traditional knowledge typically span generations, a much longer timeframe than the duration of most intellectual property rights
- There are also concerns that the costs of using the intellectual property rights system is a particular obstacle for traditional knowledge holders. This has led some to explore capacity building, evolution of legal concepts to take greater account of traditional knowledge perspectives, the use of alternative dispute resolution, and a more active role for government agencies and other players.

⁵³ Peruvian Law No. 27811, 2002, *article 9. Role of Present Generations*: The present generations of the indigenous peoples preserve, develop and manage their collective knowledge for their own benefit and that of future generations.

Article 10. Collective Nature of the Knowledge: The collective knowledge protected under this regime belongs to one or several indigenous peoples. It does not belong to any specific individual who is a member of any such towns. These rights are independent from those that might be generated inside the indigenous peoples in which case traditional systems can be enforced in the distribution of benefits.

In the next few sections possible applications of the actual intellectual property rights system and its principal drawbacks will be discussed.

aa. Unfair Competition and Trade Practices Laws

This system permits actions against false or misleading claims that a product is authentically indigenous, or has been produced or endorsed by, or otherwise associated with, a particular traditional community.

bb. Copyright

As is known, for many years indigenous peoples and communities have claimed that outsiders frequently neglect to ask permission to reproduce their fixed and unfixed cultural expressions such as artistic works, handicrafts, designs, dances, and musical and dramatic performances. They also fail to acknowledge the source of the creativity, passing off the works as authentic. At an international level there has been concern about these matters since 1960, when the idea of applying copyright law to protect traditional knowledge emerged. At that time the term applied to traditional knowledge was "folklore". "The possibility of protecting folklore by means of copyright was raised at the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention. While this issue was not fully resolved, some unsatisfying provisions were included in the Stockholm Act of the Convention, and retained in the most recent revision adopted in Paris in 1971."⁵⁴

In the case of unpublished works where the identity of the author is unknown, but where there is every reason to presume that he is a national of a country of the Union (in respect of article 1 of the Berne Convention), it shall be a matter for legislation in that country to designate the competent authority, which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.⁵⁵ In a document presented to WIPO, a group of countries from Latin America and the Caribbean, considers that copyright can be used to protect the artistic manifestations of traditional knowledge holders, especially artists who belong to indigenous and native communities, against unauthorised reproduction and exploitation.

⁵⁴ Dutfield, see note 19, 249.

⁵⁵ Article 15 (a) of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1986.

“It could include works such as: literary works, (tales, legends and myths), traditions, poems; theatrical works; pictorial works; textile works (fabrics, garments, textile compositions, tapestries, carpets); musical works; and, three-dimensional works (pottery and ceramics, sculptures, wood and stone carvings, artefacts of various kinds). Related rights to copyright, such as performing rights, could be used for the protection of the performances of singers and dancers and presentations of stage plays, puppet shows and other comparable performances.”⁵⁶

However, copyright has some fundamental limitations in the folklore context, since it excludes some expressions from eligibility for copyright protection,

- as Copyright requires an identifiable author, and the notion of authorship is a problematic concept in many traditional societies.⁵⁷ Traditional knowledge and practices are often handed down from generation to generation, and have no clearly identifiable author. For that reason intellectual property rights are considered as not being suitable. They do not recognise collective rights, they just protect knowledge created by individuals. In this sense, copyright law emphasises the role of individuals in knowledge creation and fails to reward those communities which provided the raw material for the later protected work. According to this view, one might think that copyright might undermine the interests of indigenous peoples rather than promote them, but although this is probably true, some authors consider that this is not a reason to discount copyright completely. Downes thinks that the problems regarding traditional knowledge, especially those arising from collective authorship, are generalisations. In reality, he argues, there are more complicated circumstances. He considers that “within a communal system, individuals in local or indigenous communities can distinguish themselves as informal creators or inventors separate from the community, so discussion of IPRs and traditional knowledge should draw more on the diversity and creativity of indigenous approaches to IPRs issues.”⁵⁸ In the works of UNESCO and WIPO, there are Model Provisions for National Laws for the Protection of Expres-

⁵⁶ Doc. WIPO/GA/26/9 of 14 September 2000. *Documents prepared by the Group of Countries of Latin America and the Caribbean (GRULAC)*, Annex II, 3.

⁵⁷ Dutfield, see note 19, 250.

⁵⁸ Downes, see note 35, 259.

sions of Folklore against Illicit Exploitation and other Prejudicial Actions.⁵⁹ This framework provides a possibility for the protection of traditional knowledge. The Model Provisions attribute rights not only to individuals, but also to communities, and allow the protection of ongoing or evolutionary creations.

- *Copyright just gives temporary protection and has a time limit.*⁶⁰ But for many communities their knowledge is an important element of their identity and history. They think that this knowledge should not be released into the public domain, at least not to the extent that others are free to do with it whatever they like.
- *Copyright normally requires works to be fixed.*⁶¹ However, most traditional knowledge expressions are not fixed and are passed on orally from generation to generation.

All these arguments exclude such expressions from eligibility for copyright protection, although, as we have seen there were some efforts from WIPO and developing countries for protecting them through the current intellectual property rights system.

Ricardo Antequera, in his recent work, considers that “despite the attempts to safeguard folklore in a legal way through copyright, none of them has satisfied the expectations,”⁶² because, as we have seen, traditional cultural expressions have their own characteristics, especially in terms of collective property, which is opposed to the classical principles of copyright.

cc. Patents

The patent system could be used for the protection of technical solutions that are industrially applicable and universally new and involve an inventive step. For example, patents may be given for products isolated, synthesised or developed from genetic structures, micro-organisms and plants or animals or organisms existing in nature. Carlos Correa considers that some elements of traditional medicine may be protected under patents. Patents have been granted for natural components, as well

⁵⁹ Dutfield, see note 19, 250.

⁶⁰ Id., see note 19, 251.

⁶¹ Id., see note 19.

⁶² R. Antequera, “*La tutela del Folklore en el marco de los derechos intelectuales*”, (*algunas reflexiones sobre la protección Sui Generis*), 2007, 505 et seq.

as on combinations of plants for therapeutic use⁶³ for example the European Patent EP 0519777 on formulations made from a variety of fresh plants.⁶⁴ There are, however, several major obstacles to afford patent protection to existing traditional medical knowledge. Some such obstacles stem from the legal standards established to acquire patent rights in national laws. An invention usually needs to meet the requirements of absolute novelty (previously unknown to the public), inventive steps, and being capable of industrial application (or being useful for it). Patents may be granted for all types of processes and products, including those related to primary production, namely agriculture, fishing or mining. However, since most of the traditional knowledge is not contemporary, but rather has been used for long periods, the novelty and/or inventive step requirement of patent protection may be difficult to meet. As for the novelty requirement, it is considered that patent law cannot be used to protect community knowledge acquired and shared over several generations. It is virtually impossible to call such knowledge new, for one cannot say which part is new. One could argue that all the discrete components of the knowledge were new when they were created, but one can think of a holistic body of knowledge extant at a given point in time, none of which is new. Dutfield⁶⁵ lists the main objections for a patent regime over traditional knowledge as follows:

- *Traditional knowledge is collectively held and generated while patent law treats inventiveness as an achievement of individuals*

Traditional knowledge is, in many cases developed and spread throughout the indigenous community, which makes it very difficult, if not impossible, to identify unequivocally the inventor. According to Dutfield⁶⁶ the treatment of inventiveness as an achievement of individuals does not easily fit for patents, because lately research corporations have considered the idea of a unique inventor to be inconvenient. As a consequence, nowadays it is difficult to get a “one man invention”.

- *Patent specification must be written in a technical way that examiners can understand*

⁶³ Correa, see note 6.

⁶⁴ C. Correa, “Protection and Promotion of Traditional Medicine: Implications for Public Health in Developing Countries”. Paper prepared for WIPO, 2000.

⁶⁵ Dutfield, see note 19.

⁶⁶ Id., see note 19, 250.

It is difficult for an indigenous group to complete a patent specification; they do not have the ability to describe the phenomenon in e.g. the language of chemistry or molecular biology.

- *Applying for Patents and enforcing them once they have been awarded is expensive*

The poverty often surrounding indigenous groups and communities could make it very difficult to register a patent. Likewise, the costs of litigation make it almost impossible to enforce patent rights. In the words of Ana María Pacón,⁶⁷ another consideration is that patents confer only temporary protection. Once the time frame expires, inventions are in the public domain and freely available. Given the unique characteristics of traditional knowledge, such as its transgenerational nature, not only present but also future generations should benefit from meaningful protection. The type of protection available under patents would lead to communal and intercommunal tensions arising from inexorable competition for the commercial benefits deriving from the knowledge. Another concern with regard to patents is that the United States for example does not recognise undocumented knowledge. Therefore, it is legal to copy this knowledge and apply for a patent. A good example for this is the Ayahuasca case.⁶⁸

Ayahuasca (*Banisteriopsis caapi*) is a plant used for many medical and ritual purposes. Ayahuasca is the vernacular name among the Amazon Quichua people, in whose language ayahuasca means “vine of the spirits”. It is a sacred plant for many indigenous peoples of Amazonia. In 1986, after research in Ecuadorian Amazonia, a US scientist was granted a patent on ayahuasca (US Plant patent No. 5751). The US Patent and Trademark Office (USPTO) revoked it in November 1999. It based its decision on the fact that publications describing *Banisteriopsis caapi* were “known and available” prior to the filing of the patent application. The USPTO’s decision came in response to a request for re-examination of the patent by the Coordinating Body for the Indigenous Organisations of the Amazon Basin, the Coalition for Amazonian Peoples and their Environment, and lawyers at the Center for International Environmental Law.⁶⁹ But on appeal the patent was re-established. Later, the USPTO revoked the patent again on the basis that documents presented by the Indigenous Organisations of the Amazon Basin

⁶⁷ Pacón, see note 48, 176.

⁶⁸ See under <<http://www.ciel.org/Biodiversity/BiodiversityIntellectualProperty.html>>.

⁶⁹ Correa, see note 6, 18.

showed that the plant was not distinctive or new. However, if that body had been unable to present written evidence refuting the patent, then the USPTO would not have cancelled the ayahuasca patent. As long as it seems normal to assume that indigenous knowledge has always been free for taking until its “discovery” and subsequent “privatization” by explorers, scientists, governments, corporations, etc. there will be no sufficient protection for the indigenous communities.

dd. Trade Secrets

Trade secrets have been used to protect non-disclosed traditional knowledge, including secret and sacred traditional knowledge. Under this modality, all information is protected against unauthorised acquisition or use by third parties.⁷⁰ In many societies it is normal for some healers or shamans to protect through secrecy the knowledge they do not want to share. Holders of this knowledge may be protected against disclosure through registration or other formalities but very often this is not asked for. Most laws require, as a condition for protection, that the person in control of the information adopts the steps necessary, under the relevant circumstances, to keep the information confidential. In other words, there should be deliberate acts aimed at protecting, as secret, the relevant information. The principal criterion for this system is that the information needs to be confidential and, as the knowledge of the communities is diffused among various members of a community, it is difficult to gain protection through this method. But if the information is kept only by one person, as in the case of shamans, then this system may work.

ee. Geographical Indications

Geographical indications may, in some cases, be a suitable mechanism to enhance the value of agricultural products, handicrafts and other traditional knowledge-derived products. Several developing countries within the WTO have indicated their interest in an enhanced protection. Geographical indications, however, do not protect a specific technology or knowledge as such, but only prevent the false use of the geographical indication.

Geographical indications, especially appellations of origin, may be used to enhance the commercial value of natural, traditional and craft

⁷⁰ Pacón, see note 48, 176.

products of all kinds, if their particular characteristics may be attributed to their geographical origin. A number of products that come from various regions are the result of traditional processes and knowledge implemented by one or more communities in a given region. The special characteristics of those products are appreciated by the public, and may be symbolised by the indication of the source used to identify the products. A better exploitation and promotion of traditional geographical indications would make it possible to afford better protection of the economic interests of the communities and regions where such products originate from.

*ff. Trademarks/Trade Names and Industrial Designs*⁷¹

Trademarks may also be used to protect signs or symbols of commercial interest for local and indigenous communities.

Industrial designs could protect the design and shape of utilitarian craft products such as furniture, receptacles, garments and articles of ceramics, leather, wood and other materials.

Trademarks may protect all goods manufactured and services offered by manufacturers, craftsmen, professionals and traders in native and indigenous communities. Similarly, the bodies that represent them or in which they are grouped (cooperatives, guilds, etc.), may be differentiated from each other with trademarks and service marks. The *trademark* is an essential element in the commercial promotion of goods and services both at national and international level.

Trade names may protect any manufacturer, craftsman, professional person or trader in a native or indigenous community, and may also be used to identify the bodies that represent such persons or in which they are grouped (cooperatives, guilds, etc.). The trade name is also used to promote the activities of the person or entity that it identifies, both within and beyond the borders of the country of origin.

Nevertheless, in conclusion, taking into account the reality of these communities, whether intellectual property rights exist or not, indigenous communities are likely to face serious obstacles in the process of acquiring and enforcing such rights when protecting a certain component of traditional knowledge. The cost of acquisition of rights (when registration is required such as in the case of patents, industrial designs and trademarks) and, the costs of enforcement of the relevant rights

⁷¹ See note 57.

might preclude these people from taking advantage of these rights. Administrative and judicial procedures are often long and costly. “The availability of IPRs protection for traditional knowledge may be, therefore, of little or no real value to those who may claim rights in traditional knowledge.”⁷²

b. Adaptations of Existing Intellectual Property through *sui generis* Measures

Many countries have adjusted existing intellectual property rights systems to the specific needs of their communities through *sui generis* measures. For example “New Zealand’s trade mark law has been amended to exclude trademarks that cause offence, and this applies especially to Indigenous Maori symbols. India’s Patent Act has been amended to clarify the status of traditional knowledge within patent law. The Chinese State Intellectual Property Office has a team of patent examiners specializing in traditional Chinese medicine.”⁷³

- Use of sui generis Exclusive Rights

Many countries, such as Peru, have considered that the actual intellectual property rights system, even with some modifications, is not adequate to protect the unique character of traditional knowledge. This is the reason for the adoption of a *sui generis* regime. “What makes an IP system a *sui generis* one is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system.”⁷⁴

The *sui generis* regime of Peru established by Law No. 27811, has positive and defensive protection. The objectives are to promote fair and equitable distribution of benefits, to ensure that the use of the knowledge takes place with the prior informed consent of the indigenous peoples, and to prevent misappropriation. Protection is afforded for collective knowledge of indigenous peoples associated with biological resources. The law grants indigenous peoples the right to consent to the use of traditional knowledge. The law also foresees the payment of equitable compensation for the use of certain types of traditional

⁷² Correa, see note 6, 13.

⁷³ See note 10.

⁷⁴ See note 10.

knowledge into a national Fund for Indigenous Development or directly to the traditional knowledge holders.

4. Defensive Protection

Defensive protection is used to prevent the granting of patents over traditional knowledge, although this does not amount to a recognition of actual rights of ownership over traditional knowledge in favour of indigenous peoples. According to WIPO defensive protection can be valuable and effective in blocking illegitimate intellectual property rights, but it does not stop others from actively using or exploiting traditional knowledge.⁷⁵ Some form of positive protection is needed to prevent unauthorized use. Carlos Correa proposed a misappropriation regime which would allow national laws to determine the appropriate measures to avoid the misappropriation (including the obligation to stop using a knowledge or to pay a compensation for such use). “This regime should have three important points: documentation of traditional knowledge, proof of origin or materials, and prior informed consent”.⁷⁶ This will be analysed further.

According to Carlos Correa, two United Nations documents implicitly support the misappropriation proposal: Decision V/16 of the CBD’s Conference of the Parties, and the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples. Paragraph seventeen of the first document states,

“Request[ed] Parties to support the development of registers of traditional knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity through participatory programmes and consultations with indigenous and local communities, taking into account strengthening legislation, customary practices and traditional systems of resource management, such as the protection of traditional knowledge against unauthorized use.”⁷⁷

The second document, Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, elaborated in 1995 by Erica-

⁷⁵ See note 10.

⁷⁶ Correa, see note 6, 18.

⁷⁷ Decision V/16 of the Fifth Conference of the Parties to the Convention on Biological Diversity. Nairobi, Kenya (15-26 May 2000).

Irene Daes, then Special Rapporteur of the former UN Sub Commission on the Prevention of Discrimination and Protection of Minorities,⁷⁸ establishes in paras 26 and 27 the following,

“National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples’ heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits.

National laws should ensure the labelling and correct attribution of indigenous peoples’ artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorized by the peoples or communities concerned.”

The WIPO Intergovernmental draft provisions for the protection of traditional knowledge contain an article on protection against misappropriation.⁷⁹ It states as follows,

“*Article 1*

Protection against Misappropriation

1. Traditional knowledge shall be protected against misappropriation.
2. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.
3. In particular, legal means should be provided to prevent:
 - (i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception,

⁷⁸ ECOSOC, Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples of 21 June 1995.

⁷⁹ Doc. WIPO/GRTKF/IC/8/5 of 8 April 2005, Document prepared by the Secretariat of the WIPO- Intergovernmental Committee on Intellectual Property, Traditional Knowledge, Genetic Resources, and Folklore.

misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;

(ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;

(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matters when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;

(iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and

(v) wilful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge and is contrary to *ordre public* or morality.

4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in article 10bis of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge. It also includes acts of such a nature as to create confusion with a product or service of traditional knowledge holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including deter-

mination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.”

Paragraph 1 of the following article states that,

“1. The protection of traditional knowledge against misappropriation may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; or any other law or any combination of those laws. This paragraph is subject to article 11(1).”⁸⁰

Arguably, such a misappropriation regime could and probably should incorporate: (1) the concept of unfair competition; (2) moral rights; and (3) cultural rights.⁸¹

a. The Disclosure of Origin and Legal Provenance of Traditional Knowledge

The disclosure of origin as an option to protect the misappropriation of traditional knowledge can be defined as “the obligation to identify, where necessary, the origin of resources covered by IPRs claims.”⁸² This would allow protection of any rights of the countries supplying the materials and the application, if appropriate, of the benefit-sharing principle contained in the CBD. For example, Decision No. 391 of the Andean Community establishes that any intellectual property rights or other claims to resources shall not be considered valid if they were obtained or used in violation of the terms of a permission for access to biological resources situated in any of the Andean countries, as regulated under that Decision.

⁸⁰ “Eligibility for protection of traditional knowledge against acts of misappropriation should not require any formalities.”

⁸¹ Dutfield, see note 19.

⁸² Correa, see note 6, 19.

There are several reasons for considering disclosure of origin and legal provenance an important question,

- *Economic* (genetic resources and traditional knowledge have economic significance and it is necessary to ensure the possibilities of their commercial exploitation and industrialisation),
- *Legal* (the need to grant “good” patent rights and the need for complementarities between legal regimes at the international level),
- *Cultural* (the need to respect the beliefs and rights of indigenous peoples) and
- *Political* (the need to safeguard countries’ interests with regard to sovereign rights over their resources).⁸³

The group of megadiverse countries rich in biodiversity, which have historically been suppliers of genetic resources (and traditional knowledge), takes the view that the only way to enforce disclosure requirements is to ensure that they are recognised by the authorities of the countries in which most patents are granted.

Diverse international fora, such as the CBD, WTO and WIPO have been scenes of interchange of opinion between the developed, developing and megadiverse countries, which have been discussing the subject of the disclosure of genetic resources origin and its relation or entailment with intellectual property. Thus within the framework of the CBD the megadiverse countries, among them Peru, raised the suggestion of tying the disclosure of origin of the genetic resource and the right to equitable distribution of the benefits to the intellectual property question. Countries opinions are divided between:

- those that oppose the inclusion of this type of requirement in the patent system (at the international or national level) represented by the TRIPS agreement,
- those that are considering the possibility of such inclusion, albeit on a voluntary basis and one that is limited (to disclosure of origin) and
- those including Peru, which advocate mandatory inclusion so as to guarantee the more efficient and secure implementation of TRIPS itself and generate a situation of positive synergy between TRIPS and the CBD.⁸⁴

⁸³ See note 5.

⁸⁴ See note 5.

b. Prior Informed Consent (PIC)

This principle establishes that traditional knowledge holders should be consulted before their knowledge is accessed or used by third parties and an agreement should be reached on appropriate terms. Given the close relationship between genetic resources and some forms of traditional knowledge, this same principle is also used in a number of national laws concerning access to and use of traditional knowledge (like in the case of Peru, where the presentation of a written agreement with a community is necessary to use a certain knowledge). It is important to point out that the concept of disclosure of origin and legal provenance presupposes the existence of prior informed consent and of fair and equitable benefit-sharing.

c. Documentation of Traditional Knowledge

One mechanism with much potential as a tool of protection for traditional knowledge is its documentation in databases and registers. Once published in this format, novelty in respect of the disclosed information could not be claimed.

Within WIPO and the IGC, databases and registers have been discussed as mechanisms for both defensive and positive protection of traditional knowledge. These databases demonstrate the wide variety of objectives, scopes, procedures, rights, benefits and enforcement mechanisms which have been employed by different actors in order to secure varying levels of protection of traditional knowledge. The studies show a tendency for all databases and registers to play a role in the preservation of traditional knowledge. This may be primarily the case for the benefit of indigenous peoples themselves. Although, databases and registers have been used in an interchangeable way when describing existing experiences in documenting traditional knowledge, there is a substantial difference between the two, which is necessary to avoid confusion for all those trying to find mechanisms to protect traditional knowledge from misappropriation. According to Downes a registry is not merely a list or database designed to provide information to users. It is a list or database into which people put information in order to gain legal rights relating to that information. "Registering something in

a registry, puts it on the record and puts the public on notice that the registrant asserts a claim.”⁸⁵

Databases would be an important source of information for authorities reviewing patent applications in order to determine whether they achieve the required levels of novelty and inventiveness. This has led to proposals for incorporating traditional knowledge already in the public domain into more accessible databases for the purpose of aiding patent authorities. Despite the potential of defensive protection provided by compilation of traditional knowledge into open access databases, there exists some criticism which considers that a database increases access to traditional knowledge for the private sector, without increasing indigenous peoples’ rights. These circumstances have led to the establishment of confidential registers. As a result important sources of prior art including local community registers, indigenous peoples and other confidential registers including the confidential register under the Peruvian legislation, as well as the registers for oral traditional knowledge maintained by elders, wise men and women, are effectively excluded from the remit of prior art investigations.

Placing traditional knowledge in the public domain as a condition for recognising it as prior art has positive and negative consequences. It may be seen as requiring a renunciation by indigenous peoples of their rights to control their traditional knowledge by placing it in the public domain in order to prevent weakness in the intellectual property rights regimes.

“Strict application of the principle of the public domain to traditional knowledge may therefore lead to inequities for indigenous peoples. To attempt to redress these inequities measures may be sought of to provide some form of compensatory scheme for use of traditional knowledge in the public domain. In Peru, for instance, legislation on collective knowledge requires payment of compensation for use of traditional knowledge in the public domain.”⁸⁶

This tool could act in connection with the disclosure of origin because the requirement of disclosure of origin in patent applications would assist patent authorities in their direct searches of prior art in the country of origin. Incorporating local and indigenous peoples’ registers within the framework of a national register of traditional knowledge

⁸⁵ D. Downes/ S. Laird, *Community Registers of Biodiversity related Knowledge: Role of Intellectual Property in Managing Access and Benefit Sharing*, 1999.

⁸⁶ United Nations University – Institute of Advanced Studies, see note 15, 6.

would extend the remit of potential sources of evidence of prior art for the purposes of defensive protection.

5. The *sui generis* Protection of Folklore

On this point, it is interesting to note that the existing legislative formulas are not uniform when they refer to the object of a “*sui generis* protection”. Some of them talk about the protection of single literary and artistic works,⁸⁷ others extend it to the folklore that includes musical instruments, languages, traditions or beliefs. However, although in the beginning copyright constituted a way for the protection of folklore, the reality has demonstrated that the problems arising considerably exceed those benefits. It has also been indicated that copyright should acknowledge the principles of the rights of authors to safeguard folklore.⁸⁸

The Panamanian Law of 2000 and the related Decree of 2001 establish a special intellectual property regime in respect of the collective rights of the indigenous peoples. This law aims at protecting the collective intellectual property rights and knowledge of indigenous communities through the registration, promotion, commercialisation and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice. Another key objective is the protection of the authenticity of crafts and other traditional artistic expressions (Preamble and article 1 of the Law; Preamble of the Decree). This law gives the indigenous communities a preponderant role concerning the defence of the use and cultural commercialisation of the art, crafts and other manifestations.

⁸⁷ For example the Copyright Law from Bolivia. In Bolivia, the Copyright Law of 1992 provides, in article 21, that “... folklore being understood in the strict sense of the body of literary and artistic works created within the national territory by unknown or unidentified authors presumed to be nationals of the country or of its ethnic communities, which are handed down from generation to generation and thereby constitute one of the fundamental elements of the traditional cultural heritage of the nation.”

⁸⁸ Antequera, see note 62.

V. From Theory to Practice: The Peruvian Experience

1. The Peruvian Position

In June 2005, Peru proposed a modification of article 27.3 of the TRIPS agreement, advocating mandatory inclusion of disclosure of origin and legal provenance of genetic resources within the patentability exceptions. Peru suggests that TRIPS should include a new type of exception (27.3.c) for patents or products, which include genetic resources which do not fulfil the international and/or national legislation. This would guarantee a positive synergy effect between TRIPS and the CBD.⁸⁹ In the Communication No. IP/C/W/441 before the Council for Trade-related Aspects of Intellectual Property Rights, the Peruvian government manifested its position that “ensuring protection at the domestic level is not sufficient, and therefore the international recognition of traditional knowledge as protectable intellectual property will give the beneficiaries legal standing to assert their rights in other countries.”

Peru’s main suggestions are:

- i) the disclosure of origin and the legal provenance of genetic resources (or traditional knowledge) as a condition for the patent request; and
- ii) the genetic resources and the traditional knowledge must be incorporated in a database system which allows a correct evaluation of the novelty requirements. One of the reasons of this exposition is to prevent “biopiracy”.

From the Ministerial Declaration of Doha to that of Hong Kong, ample debates have taken place regarding the obligatory requirement of disclosure of origin for genetic resources. On 29 May 2006, Peru and other countries proposed a draft that would establish a new article 29B in the TRIPS agreement. This proposal contains 5 parts. According to it a request for a patent referring to genetic resources and traditional knowledge, has to state i) the name of the country which provides the resources or knowledge, ii) the name of the person from whom it is obtained in the supplier country and iii) the fulfilment of the prior informed consent principle and the right to equitable distribution of the benefits. A further requirement is that the Member States establish procedures for the effective observance of their legislation in this respect. This proposal will not be discussed until 2009, as the negotiations have been suspended because of discrepancies in the agriculture sector.

⁸⁹ See note 5.

2. The Peruvian Regime

a. Introduction

The Peruvian government has been concerned with traditional knowledge for a long time. In 1993, it mentioned the necessity to regulate, at an Andean level, the access to genetic resources. This was obtained in 1996, through the Andean Community of Nations, Decision 391.⁹⁰ Later, in 2003 and 2004, together with other countries, Peru proposed the obligation of disclosure of origin for biological resources, including the uses associated with traditional knowledge. Additionally, in 2005, Peru sustained the necessity of introducing the subject of disclosure of origin. Already in 1996 Peru, responding to calls from national interest groups and mindful of its obligations under the Andean Community's regional legislation, tried to explore possible options for protecting and regulating traditional knowledge and controlling access to genetic resources. In that year, the government formed five consultation groups, whose tasks were to:

- Determine the forms of organisation used by indigenous communities in Peru and the mechanisms they used for benefit sharing
- to compile an inventory of genetic resources in Peru
- Regulate access to genetic resources
- Protect traditional knowledge
- Develop information material; and a strategy for training indigenous communities.⁹¹

Members including representatives of the government, from NGOs, the academia and the indigenous communities decided that a “sui generis” protection would be suitable. Although in the first and formative phase, indigenous people's participation was minimal, it became increasingly clear that many complex issues could be addressed only with indigenous participation. Despite its shortcomings, the process surrounding the elaboration of a proposal and a law to protect traditional knowledge has been successful, and Peru has rightly obtained an influential voice in international fora, where measures are being sought of to protect the rights of indigenous peoples over their traditional knowledge.

⁹⁰ Decision 391 of the Andean Community of 2 July 1996, *Common Regime on Access to Genetic Resources*.

⁹¹ Pacón, see note 48, 176.

Drafts were discussed at a first meeting in Lima (26-27 April 1999) with the leaders of the indigenous communities, and at a second in Cusco (10-12 May 1999) with the leaders and representatives of groups of indigenous communities. Finally, an international seminar (19-21 May 1999) was organised by the National Institute for the Defence of Competition and the Protection of Intellectual Property and WIPO. Representatives of the government, the private sector, NGOs, the academia and indigenous communities also participated, as well as representatives from other countries, in particular Brazil and other Andean countries. After these talks, the National Institute published a proposal in October 1999 to invite comments from all interested parties. Through national and international workshops and seminars, it had been possible to disseminate the proposal widely. In August 2000, a second proposal reflecting comments, obtained so far, was published.⁹²

The Peruvian government has been concerned about the protection of traditional knowledge, as well as the avoidance of “biopiracy”. Its proposals and the regime adopted within the country cover only traditional knowledge associated with biodiversity, different from “Panama for example, which has an interesting legislation for protecting collective intellectual property rights and traditional knowledge of indigenous peoples over creations such as inventions, models, drawings and designs, innovations contained in images, symbols, graphics and others; and cultural elements of their history, music, art, traditional artistic expressions, all of which might be susceptible to commercial use through a special system of registers.”⁹³ In Peru, all these items mentioned, are out of the regime’s scope. The government continues to work closely with the indigenous communities and has successfully introduced a law concerning a protection regime for the collective knowledge of indigenous peoples derived from biological resources.⁹⁴

⁹² El Peruano newspaper of 21 October 1999.

⁹³ The Law No. 20 of 26 June 2000 from Panama creates the Special Regime for Intellectual Property over Collective Knowledge of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge.

⁹⁴ Law No. 27811 of 24 July 2002.

b. Developments in Respect of Public Policy and Legislation in the Andean Region

At the Andean level, all member countries that have subscribed to the CBD have been concerned about the protection of biological diversity and its sustainable use, regulating access to genetic resources to ensure equitable benefit-sharing. In 1993, in Decision 345, the Third Transitory Disposition, established a term to regulate access to genetic resources, which was confirmed in Decision 391 in 1996. In 2000, Decision 486 established a legal industrial property framework applicable in the countries of the Andean region.

aa. Decision 391 – Common Regime on Access to Genetic Resources (2 July 1996)

As a result of formal proposals made by Peru and Colombia at the negotiating meetings on the Andean regime on access to genetic resources, Decision 391 provided for the adoption of legal requirements at a regional level. It directly linked the access regime to intellectual property.⁹⁵ This decision just makes general regulations, which means, that every country has to adopt its own legislation. The regime incorporated provisions which link the authorities of intellectual property with those with access to genetic resources. It applies only when it is certain that an invention, is the subject of an intellectual property right (the decision does not refer specifically to patents), has been obtained or developed through genetic resources or products derived from such resources and denies intellectual property rights in the absence of compliance with regulations on access. The second and third supplementary provision establish as conditions for granting an intellectual property right that there be compliance with requirements under the access to genetic resources regimes.

The second supplementary provision of Decision 391 provides that:

“The Member Countries shall not acknowledge rights, including intellectual property rights, over genetic resources, by-products or synthesized products and associated intangible components [including traditional knowledge], that were obtained or developed through an access activity that does not comply with the provisions of this Decision. Furthermore, the Member Country affected may request nullification and bring such actions as are appropriate in

⁹⁵ See note 5.

countries that have conferred rights or granted protective title documents.”

In more specific terms, the third supplementary provision provides that, “The competent national offices on intellectual property shall require the applicant to give the registration number of the access contract and supply a copy thereof as a prerequisite for granting the respective right, when they are certain or there are reasonable indications that the products or processes whose protection is being requested have been obtained or developed from genetic resources or their by-products originating in any one of the Member Countries. The competent national authority and the competent national offices on intellectual property shall establish systems for exchanging information about the authorized access contracts and intellectual property rights granted.”

*bb. Decision 486 – Common Industrial Property Regime
(14 September 2000)*

This decision establishes the legal industrial property framework (patents, designs, utility models, marks, etc.), linking biodiversity with industrial property. Thus, article 3 of Decision 486 assures that industrial property rights granted by members will be made in a way that respects and protects the biological and genetic patrimony of its indigenous, Afro-American or local communities. Specifically, in the patents system, these rights will only be granted in case of proper acquisition of genetic resources in accordance with international, communitarian and national legal ordering.

“This article ties the principles of the CDB with traditional knowledge and genetic resources; joining these orderings with the patents.”⁹⁶ (free translation from Spanish). Consolidating the idea of disclosure of origin and legal provenance, this decision incorporated the rules on this subject for the first time in a standard-setting intellectual property enactment of regional scope *per se*. Article 26 (h) and (i) of the Decision provides that applications for patents shall contain:

“(h) if applicable, a copy of the access contract, where the products or processes for which a patent application is being filed were ob-

⁹⁶ M.C. Arana, *La propiedad intelectual y la protección de la diversidad biológica en los convenios internacionales y la ley nacional*. 2007. Available at <www.latn.org.ar>.

tained or developed from genetic resources or by-products originating in any one of the Member Countries;

(i) if applicable, a copy of the document certifying the licence or authorization to use the traditional knowledge of indigenous, African American or local communities in the Member Countries, where the products or processes whose protection is being requested were obtained or developed from such knowledge originating in any one of the Member Countries, in accordance with the provisions of Decision 391 and the amendments and regulations thereto currently in force.”

Article 75 (g) and (h) of Decision 486 goes a little further by providing that a patent shall be declared null and void if the applicant has failed to submit a copy of the access contract or the document certifying the licence or authorisation for the use of traditional knowledge.

cc. Peruvian Legislation

Peru has its own legislative framework with respect to Intellectual Property and Biodiversity. It only covers traditional knowledge associated with biodiversity. It does not cover other kinds of traditional knowledge. This legislative framework is an indicator of the enormous importance that genetic resources have for Peru. The Peruvian legislator has been incorporating principles and obligations contained in the CBD, establishing a legal institutional base both for taking advantage of genetic resources, and for protecting them in the best possible way.

Law 27811 – Regime for Protection of the Collective Knowledge of Indigenous Peoples relating to Biological Resources

Law 27811, published on 10 August 2002, which establishes the Regime for Protection of the Collective Knowledge of Indigenous Peoples related to Biological Resources, is the first comprehensive effort by a developing country with a large indigenous population to establish a *sui generis* regime for the protection of rights over traditional knowledge. “Through a system of registers, licenses and compensatory mechanisms it is hoped to achieve a degree of legal protection of the traditional knowledge of Peru’s indigenous peoples.”⁹⁷

The law was the product of a protracted development process spanning almost six years, which adopted a range of strategies to engage in-

⁹⁷ See note 5.

indigenous peoples, and incorporated the participation of national and international experts in its preparation.⁹⁸ The Protection Regime recognises that the traditional knowledge of the indigenous peoples helps to conserve and make sustainable use of the components of biodiversity. It establishes a *sui generis* system to give adequate protection to those possessing traditional knowledge.

The present law, besides offering definitions of “Collective Knowledge” and “Biological Resource” in article 2,⁹⁹ establishes in article 5 as one of its objectives, the avoidance of the granting of patents for inventions obtained or developed from collective knowledge of the indigenous communities of Peru, without taking into account the pre-existence of this knowledge when examining the novelty and inventive level of the inventions. The proposed regime recognises the indigenous people’s ownership and associated rights over their traditional knowledge, as well as their right to decide how it should be used. A voluntary register is to be set up within the National Institute for the Defence of Competition and the Protection of Intellectual Property. The law also states that indigenous peoples may enter into “knowledge licensing contracts”, which specify the terms for the use of their knowledge. One requirement for access to knowledge that is not within the public domain is prior informed consent by the people possessing the knowledge. An innovative and extremely important feature of the regime is the creation of a Fund for the Development of Indigenous Peoples. It will receive 10 per cent out of the sales resulting from the marketing of products, developed on the basis of traditional knowledge.¹⁰⁰

The existing law has been recognised as being merely the first step in adopting an effective regime for traditional knowledge protection; moreover there exist some proposals for the modification of the law by indigenous peoples “including calls to broaden its scope to include not only knowledge, but also their innovations and practices relating to

⁹⁸ United Nations University- Institute of Advanced Studies, see note 15, 24.

⁹⁹ Article 2 – Definitions:

b) Collective knowledge - Accumulated and trans generational knowledge developed by the towns and indigenous communities with respect to the properties, uses and characteristics of the biological diversity;

e) Biological resources - Genetic Resources, organisms or parts of them, populations, or any other type of the biotic component of the ecosystems of real or potential value or utility for the humanity.

¹⁰⁰ Doc. WTO/CTE/W/176 of 27 October 2000. Communication from Peru to the WTO.

biodiversity and for increased protection over traditional knowledge in the public domain.”¹⁰¹

dd. Main Points of the Peruvian Law

– Scope of Protection

This legal regime focuses on the protection of traditional knowledge as it specifically relates to the characteristics, uses and properties of biodiversity.

– Objectives of the proposed regime (article 5)

The objectives of the Peruvian regime are very ambitious:

- To promote respect for the protection, preservation, wider application and development of the collective knowledge of indigenous peoples;
- To promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge;
- To promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general;
- To ensure that the use of the knowledge takes place with the prior informed consent of indigenous peoples;
- To promote the strengthening and development of the potential of indigenous peoples and of the machinery traditionally used by them to share and distribute collectively generated benefits under the terms of this regime;
- To avoid that patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of the fact that this knowledge is prior art, and not having undertaken any examination of the novelty and inventiveness.

– Title holding

The rules and regulations of the proposal will apply only to collective knowledge. In cases where two or more communities possess specific knowledge, they will become co-holders (article 10).

¹⁰¹ Tobin/ Swiderska, see note 2.

– Prior Informed Consent

As a basic principle, any interested party who seeks to use traditional knowledge for scientific, commercial or industrial purposes needs the prior informed consent of the respective organisation of indigenous peoples (article 6). Traditional knowledge will be protected through a series of inter-related instruments: contracts (licences for the use of traditional knowledge for commercial or industrial ends), trade secrets, registers and unfair competition administrative regulations. Authorisation for research is different from authorisation for exploitation. For the former, prior informed consent is required; for the latter, additionally a licensing agreement must be obtained.

– Traditional Knowledge in the Public Domain

Traditional knowledge is considered to be in the public domain when it has been established that people not belonging to the indigenous community have acquired this knowledge through media sources (e.g. newspapers or television broadcasts) and perhaps personal contacts with the indigenous community (article 13). Once this knowledge has been disseminated, even if unintentionally, it is considered to be in the public domain, so that its exploitation does not require either intellectual property rights or a licensing agreement. The law establishes an important precedent in recognising rights of indigenous peoples in order to share the benefits derived from the use of such traditional knowledge in the public domain. This right is limited in two aspects, first it relates only to traditional knowledge which entered the public domain in the last twenty years, and second, it only allows for a right to compensation and not to restrict or otherwise control access to or use of such traditional knowledge.

– Duration of rights

These rights are not limited. They are the property of the National Patrimony and will be passed on from generation to generation. (arts 11 and 12).

– Registers

The registers are intended to preserve the knowledge of the communities. They are created basically to preserve traditional knowledge and safeguard existing rights of communities over them, as well as to provide the National Institute with information which might allow to de-

fend indigenous peoples' interests in respect of their traditional knowledge (article 16). These registers are not compulsory. However, it brings about certain advantages: the patenting of traditional knowledge listed in the registers is only permitted upon application for and granting of authority from the National Institute. The Institute is also of assistance to potential bioprospectors in order to locate various sources. The Peruvian law provides for three types of traditional knowledge registers: a National Public Register, a National Confidential Register and local registers. The National Registers will be administered by the National Institute, the National Authority for Consumer Affairs, and the respective intellectual property rights do apply.

– The National Public Register

The National Public Register will incorporate traditional knowledge which is in the public domain (article 15). It will basically serve to assist in providing centralised and organised information relevant for patents prior art searches and to challenge patents and other intellectual property rights granted in conflict with rights over traditional knowledge. The public register will be open and available to interested parties.

The National Public Register of Collective Knowledge lists the knowledge in books as well as the Internet. According to article 17 this information is accessible to any user who enters the National Institute's website.¹⁰² Giving the name of the entries, and their equivalent in the original languages or other usual denominations. Further information can be asked for, like for example the description of the resource or its use (nutritional, medical, etc.), but this additional information is only accessible if it is requested by the National Institute in order of investigation or, a patents office needs to know the status of a technique or to determine the novelty of the patent that is in transaction.¹⁰³

The information which appears in the National Public Register can be seen in the next examples:

¹⁰² See under <www.indecopi.gob.pe>.

¹⁰³ See note 96.

Maca ¹⁰⁴
<u>Other denominations:</u> Maca, maka, maca-maca, maino, ayak chichira, ayak willku ; English: maca, Peruvian ginseng.

Uña de gato ¹⁰⁵
<u>Other denominations:</u> Uña de gato, Garabato, Samento, Uganangui, Garabato amarillo, Kug Kukjaqui, Paotati - mosha, Misho-mentis, Tua juncara (Colombia), Bejuco de agua (Colombia).

– The National Confidential Register

This register contains detailed information of the knowledge, but, according to article 18, this is not accessible to the public. Information may not be disclosed, and only those who have authorisation from the communities can access it. The knowledge for this register is obtained from these communities, which through a representative of their organisation can register it at the National Institute. The exact role of this kind of register is still unclear. Some commentators consider that a local register for a confidential valuable secret of traditional knowledge might be safer and better than a national register because it is difficult to envisage the incentives that indigenous peoples would have to register traditional knowledge confidentially.¹⁰⁶

– The Local Registers

According to article 24, the indigenous communities can organise their own collective local registers, according to their uses and customs. The local registers will be developed and administered by the communities themselves (article 15). The law provides that the National Institute may provide technical assistance, if required, to assist with design, development, and implementation of these registers. The law makes no specific provisions for the recognition of such local registers as sources of prior art and it is unclear what exactly the relationship, if any, will be between the local registers and the national one.¹⁰⁷

¹⁰⁴ See under <<http://www.indecopi.gob.pe/portalctpi/RegistrosExistentes.jsp?pLetra=M&lng=1>>.

¹⁰⁵ See above.

¹⁰⁶ United Nations University - Institute of Advanced Studies, see note 15, 25.

¹⁰⁷ The national registers and their protective nature are closely related to the Andean Community Decision 486 on Common Industrial Property, which

– Procedure for Registration

Indigenous peoples, through their representative organisation will register their traditional knowledge in the public or confidential register administered by the National Institute. Applications for registering traditional knowledge will include: identification of indigenous peoples, identification of representatives, indication of the biological resource to which traditional knowledge is related, uses of biological resource, clear description of traditional knowledge subject to registration, formal agreement by which indigenous people agree to register their traditional knowledge. The application could include a sample of the relevant biological resource or, if this is not possible in practice, photographs which enable the National Institute to identify the resource under consideration and submit it to a taxonomical analysis (article 20). In terms of procedure, the application should be registered within ten days after its entry. If a prerequisite is missing, indigenous peoples are given up to six months to complete the application form. In case they do not, the whole procedure has to be restarted (article 21). To further promote the registration of traditional knowledge, the National Institute will send out officials in order to register traditional knowledge (article 22).

Registration in either the public or confidential register may be cancelled by the National Institute if the registration does not comply with the overall provisions of the law or if the information and data included are proved to be false or not being exact (article 34).

– Licensing Agreement

The representative organisation of indigenous peoples will be able to grant licences for the respective traditional knowledge to third parties but only in written form, in their native as well as in the Spanish language. The period covers a term of no less than one year and no more than three years (article 26). The agreement must stipulate the payment of royalties to the communities for the use of their knowledge (article 27 C). The registration of the licensing agreement at the National Institute is obligatory (article 25).

requires patent applicants to provide evidence for legal access to genetic resources and traditional knowledge, used in the development of inventions. INDECOPI could use these registers to assess patent applications in relation to their novelty and inventiveness.

– Justifiable Compensation

The first money has to be paid once the licensing agreement is entered into. This payment is obligatory and can take the form of money or goods (e.g. building schools, clinics, communication centres and so on). The moment benefit has been obtained from the exploitation of traditional knowledge further money has to be paid. The minimum payment is 10 per cent of the gross sales (article 8).

– Development Fund

Given that a large part of the knowledge is shared by more than one community, and given that it is impossible for all of them to consent to the execution of the licence to use the respective knowledge, a Development Fund should be created. The details have to be sorted out by a committee existing of representatives from the respective communities and the government. The law establishes so far an indigenous fund to be managed by indigenous peoples. The fund will take ten per cent of all transactions involving traditional knowledge. The purpose of the fund is to promote more equitable sharing of benefits amongst the nation's indigenous peoples (article 37).

– Disclosure of origin and legal provenance

In the matter of disclosure of origin and legal provenance, the Second Supplementary Provision of Law 27811 provides that:¹⁰⁸

“In the event that an invention patent - related to products or processes obtained or developed from certain collective knowledge - is required, the applicant must present a copy of the license contract as a previous requirement to be granted the corresponding right, unless it is a collective knowledge in the public domain. Non compliance with this requirement will provide grounds for denial or for nullity for the patent at issue.”

This provision supplements at the national level the provisions of Decision 486, specifically with regard to the disclosure of origin and legal provenance of traditional knowledge that could form part of an invention.

¹⁰⁸ Law establishing the Regime for the Protection of the Collective Knowledge of Indigenous Peoples Relating to Biological Resources.

LAW 28216. Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples
(1 May 2004)

Article 1 establishes the objective of the law, which is the protection of access to Peruvian biological diversity and to the collective traditional knowledge of the indigenous people.

Article 2 establishes the creation of the National Commission for the Protection of Access to Peruvian Biological Diversity and to the collective knowledge of the indigenous peoples (hereinafter the National Anti-Biopiracy Commission) whose functions are defined in article 4.

The National Anti-Biopiracy Commission has the task of developing actions to identify, prevent and avoid acts of “biopiracy” with the aim of protecting the interests of the Peruvian state. Its main functions are:¹⁰⁹

- a) to establish and maintain a register of biological resources and traditional knowledge;
- b) to provide protection against acts of “biopiracy”;
- c) to identify and follow up patent applications made or patents granted abroad that relate to Peruvian biological resources or collective knowledge of the indigenous peoples of Peru;
- d) to make technical evaluations of the above-mentioned applications and patent grants;
- e) to issue reports on the cases studied;
- f) to lodge objections or actions for annulment concerning the above-mentioned patent applications or patent grants;
- g) to establish information channels with the main intellectual property offices around the world;
- h) to draw up proposals for the defence of Peru’s interests in different forums.

The third and final supplementary provision of the law defines “biopiracy” as access to and unauthorized use of biological resources or traditional knowledge of the indigenous people by third parties without compensation, without the necessary authorization and in contravention of the principles established in the Convention on Biological Diversity and the existing rules on the subject. This appropriation may

¹⁰⁹ See note 5.

come to light through physical inspection, through ownership rights in products incorporating such illegally obtained elements or, in some cases, through the invocation of such rights.

Since its creation, the Commission has developed a series of actions to identify and to prevent acts of “biopiracy” with the purpose of protecting genetic resources. Its efforts began in August 2004 and still continue to date. One of its main activities has been to identify potential cases of “biopiracy” involving genetic resources and traditional knowledge.

According to a report produced by the Commission, it is known that 149 patents linked to Peruvian biological resources have been requested or granted in the United States, the European Union and Japan. The following table shows the number of requested or registered patents linked to six resources of Peruvian origin:¹¹⁰ Hercampuri, Camu Camu, Yacón, Caigua, Sacha Inchi and Chancapiedra.

¹¹⁰ This table was made with information obtained from Doc. IP/C/W/441.

NUMBER OF REQUESTED OR REGISTERED PATENTS LINKED TO RESOURCES OF PERUVIAN ORIGIN			
Countries	USA	EU	JAPAN
Resources	N° of linked patents	N° of linked patents	N° of linked patents
Hercampuri <i>Gentianella alborosea</i> (Gilg) Frabris	1	2	11
Camu – Camu <i>Myrciaria dubia</i>	2	1	16
Yacón <i>Smallanthus sonchi-</i> <i>folius</i>	15	--	50
Caigua <i>Cyclanthera pedata</i> L	1	--	--
Sacha Inchi <i>Plukenetia volúbilis</i> L	8	--	--
Chancapiedra <i>Phyllanthus niruri</i>	22	6	14
Total of Patents per country	49	9	91

As a final remark, it is important to note that the regulation of the rights of the indigenous communities does not in any way hamper the obtaining of intellectual property rights. “The two systems of protection must be linked. For this reason, the Peruvian Protection Regime stipulates that if an invention has been developed based on the knowledge of an indigenous community, its patenting is not possible unless authorisation for its use is given. A similar disposition regarding access to genetic resources can be found in the norms on access to Andean genetic resources (Decision 391) and in the regulation law for Peruvian access. At the same time, a norm with the same terms has been included in the Andean Decision on IP.”¹¹¹

c. The US-Peru Trade Promotion Agreement

The United States – Peru Trade Promotion Agreement was signed on 12 April 2006. It has not entered into force because it is still pending ratification by the US government. The chapter concerning intellectual property was one of the toughest to negotiate. However, an important understanding between both countries regarding biodiversity and traditional knowledge was reached.

Before the negotiations, there was some fear about a clear position of the United States with regard to traditional knowledge and genetic resources. The United States insisted on the live organisms’ patents favouring the American companies that are developing biotechnology programs and as a logical consequence need patents on genetic resources. In order to obtain their objectives the companies need the genetic resources of other countries and will try to obtain them. Consequently Peru had a certain strategy and achieved some of its aims with regard to this issue.

Next to the principal text of the agreement, there is a specific document annexed regarding traditional knowledge and biodiversity. This Understanding recognises the importance of traditional knowledge and biodiversity and their potential contribution to cultural, economic and social development. The parties also recognise the importance of the following:

(1) Obtaining prior informed consent from the appropriate authority prior to accessing genetic resources under the control of such authority;

¹¹¹ A.M. Pacón, *The Peruvian Proposal for Protecting Traditional Knowledge*, 2004. And page 178 in Twarog/ Kapoor, see note 1.

(2) Equitably sharing of benefits arising from the use of traditional knowledge and genetic resources; and

(3) Promoting quality patent examination to ensure that the conditions for patentability are satisfied.

The parties recognise that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from the use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers. Each party shall endeavour to seek ways to share information that may have an impact on the patentability based on traditional knowledge or genetic resources by providing (a) publicly accessible databases that contain relevant information; and (b) an opportunity to give written notice, to the appropriate examining authority of existing prior art that may have an influence on patentability.¹¹²

This Understanding represents an important step forward for the Peruvian government which has always tried to protect these items, because the United States government undertakes to respect and collaborate now in the protection of traditional knowledge and genetic resources.

VI. Conclusions

- Traditional and indigenous knowledge has been used for centuries by indigenous and local communities, and the importance of its protection has been recognised by the CBD. Nevertheless, diverse forms of traditional knowledge have been appropriated under intellectual property rights by researchers and commercial enterprises, without any compensation.
- The protection of traditional knowledge has become a very complex matter, since there are broad discrepancies regarding the definition of the subject matter, the rationale for protection, and the means for achieving this. However, the difficulty in defining it should not be an obstacle for developing some form of protection.
- The current intellectual property rights system can be useful for the protection of some forms of traditional knowledge, such as TCEs

¹¹² This understanding can be found in English and Spanish on the following websites <http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Section_Index.html> and <<http://www.tlcperu-eeuu.gob.pe>>.

through copyright law. However, it has been demonstrated that this alone is not enough. It is necessary to develop *sui generis* forms of protection in order to satisfy the different needs of the respective communities, each with their own characteristics. Given the diversity of cultures and resources, it is impossible to have a single system of protection; there must be a diversity of options to protect traditional knowledge.

- WIPO, through the IGC has established principles to guide the development of *sui generis* regimes, and has formed fact-finding missions on intellectual property and traditional knowledge. However, given the limited mandate of WIPO as an organisation aiming to promote intellectual property protection, it failed in respect of undertaking a serious analysis of the standards for patentability applied by WIPO members.
- Peru, as one of the most megadiverse countries, advocates mandatory inclusion of disclosure of origin and legal provenance, to guarantee the more efficient and secure implementation of TRIPS itself and generate a situation of positive synergy between TRIPS and the CBD.
- At the regional level, the Andean Community (Peru, Bolivia, Ecuador, Colombia) has adopted two important decisions (Decisions 391 and 486), that take into consideration the disclosure of origin and legal provenance as requisites to undertake research and make use of Andean origin's resources and related knowledge. Both of them are highly controversial issues in international discussions on the relationship between biodiversity, traditional knowledge and intellectual property.
- The Peruvian government is one of the few that has developed a *sui generis* system for the protection of collective traditional knowledge of indigenous peoples derived from biological resources. It has been considered an important example and a lesson for governments looking for models from which they can develop their own traditional knowledge protection system. However, the scope of such regime does not include expressions of folklore, which have been considered in other national law undertakings, such as in the Panamanian law.