

Participation in Access and Benefit-Sharing Policy
Case Study no 2

**Speaking in Tongues:
Indigenous participation in the
development of a *sui generis*
regime to protect traditional
knowledge in Peru**

Brendan Tobin and Krystyna Swiderska

December 2001

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**SPEAKING IN TONGUES: INDIGENOUS
PARTICIPATION IN THE DEVELOPMENT OF A *SUI
GENERIS* REGIME TO PROTECT TRADITIONAL
KNOWLEDGE IN PERU**

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CONTENTS

Executive summary	6
1. Introduction	11
1.1 Background and objectives	11
1.2 Methodology	12
1.3 Why protect traditional knowledge?	13
Protecting traditional knowledge for community use	13
Protecting rights over TK for commercial or scientific use	15
1.4 The importance of Indigenous participation in TK policy	16
1.5 Interpreting ‘participation’	17
2. The growth of indigenous political influence	18
3. The impetus for developing a TK law	20
3.1 Decision 391 on Access to Genetic Resources in the Andes	20
3.2 The influence of biodiversity prospecting	22
3.3 Recognition of rights over TK under existing law	24
4. Participation in development of Peru’s <i>sui generis</i> law	26
4.1 Introduction	26
4.2 Drafting Phase (1996-1998)	27
Indigenous participation in the TKWG	28
The role of NGOs	30
Enhancing participation and securing funding	30
4.3 Consultative Phase (1998-1999)	32
4.4 Post-Publication Phase (1999-2000)	33
Roundtable on Indigenous Participation	33
4.5 The Working Group on Indigenous Participation	37
Preparing user-friendly materials	37
Capacity building for indigenous facilitators	39
4.6 Action by NGOs	39
4.7 Participation in the review of the proposal	40
4.8 Evaluating participation based on the content of the proposal	41
4.9 Wider impact of the process	44
4.10 Towards a global system to protect traditional knowledge	46
5. Conclusions and recommendations	50
5.1. General conclusions and recommendations	51
5.2. Recommendations for Peru	56
Annex I – Possible elements of <i>sui generis</i> legislation to protect the knowledge, innovations and practices of indigenous people	59
Annex II – List of people interviewed	60
Annex III- List of participants, Roundtable on Indigenous Participation	61

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EXECUTIVE SUMMARY

In October of 1999, a draft legislative proposal for a Regime to Protect the Collective Knowledge of Indigenous Peoples was published in the official Peruvian press. This proposal, the first of its kind, was the product of over three years of preparatory work by a Working Group chaired by INDECOPI, the national authority responsible for intellectual property and consumer rights. INDECOPI invited comments on the proposal and published a revised draft in August 2000. Following receipt of comments from indigenous organizations indicating that they did not support the proposal, INDECOPI decided not to send the draft regime to the national Congress for approval. However, the proposal and the process for its development has generated a national debate on mechanisms for the protection of traditional knowledge from which much can be learnt.

This study reviews the participatory process for developing the proposed regime in order to identify guiding principles for securing participation in the preparation of law and policy to protect traditional knowledge.

Towards a national regime for the protection of traditional knowledge

Since entry into force of the Convention on Biological Diversity, recognition has grown of the need for the adoption of policy, administrative and legislative measures to protect the rights of indigenous and local communities over their traditional knowledge (TK). Contrary to popular belief, the Convention itself does not recognize, and even less create, a property right in favor of indigenous and local communities, over their traditional knowledge. However, a tendency is emerging to include obligations requiring the prior informed consent of such communities as a condition for access to, and use of, traditional knowledge in national and regional measures on access to genetic resources and benefit-sharing. To this end, the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) adopted provisions in regional legislation (Decision 391), requiring the prior informed consent of indigenous, Afro-American and campesino communities as a condition for access to, and use of, their knowledge.

In 1996, the Peruvian authorities, responding to calls from national interest groups, and mindful of their obligations under the Andean Community's regional legislation, began a process to develop a *sui generis* legislative proposal for the protection of traditional knowledge. The process went through a number of distinct phases with varying degrees of participation by government authorities, indigenous peoples and civil society organizations (CSO). In the first and formative phase, indigenous peoples' participation was minimal in what national authorities saw as primarily a technical drafting process. However, as the process unfolded it became increasingly clear that many complex issues could only be addressed with indigenous participation.

During a second consultative phase, attempts were made to secure greater involvement of indigenous peoples. Two consultative workshops were held with indigenous representatives, which helped to raise awareness about the proposal. But shortage of

funding, tight legislative time-frames, and a lack of existing collaboration with indigenous organisations hindered efforts to fully engage indigenous people. A third phase began with the publication of a draft proposal in October 1999, after which indigenous peoples started to play a more pro-active role in the process. Since then, there has been a growing acceptance of the need for a wide consultative process, organised and implemented with the full participation, and, where possible, leadership of indigenous and local communities' representative organisations.

A Working Group on Indigenous Participation (WGIP), involving indigenous organisations and the relevant authorities was established in October 1999, mandated to facilitate a country-wide consultation process with indigenous people. To this end, the WGIP has coordinated the preparation of information materials and the training of indigenous facilitators to undertake consultations at regional level. However, sufficient funding was never secured for the WGIP's activities, including the publication of information materials, preparation of explanatory videos, and implementation of a regional and local level consultation process.

Indigenous peoples and NGOs also expressed concern that, even after the establishment of the WGIP, no mechanism existed to secure the direct participation of indigenous representatives in the official process for revising the draft proposal. It was feared that, unless indigenous representatives were present to guide the authorities in the interpretation of their comments and consequent decision-making, this might result in the adoption of a regime which did not fully reflect the concerns of indigenous people. Indeed, it was widely felt amongst indigenous peoples organizations and those working with them, that the proposal was overly focused on the commercial use of traditional knowledge, and paid insufficient attention to its environmental, social and cultural values and the importance of its protection and strengthening for local use.

Despite its shortcomings, the process surrounding the development of the proposal has built capacity amongst government, indigenous and non-governmental sectors to debate the issues, and Peru has rightly obtained an influential voice in international forums where measures are being sought to protect the rights of indigenous peoples over their traditional knowledge.

The Peruvian experience provides a salutary lesson for any national authority or regional organization seeking to develop legislation for the protection of traditional knowledge. Despite a clear commitment and intent to establish legislation to protect the rights of indigenous peoples over their knowledge, the promoters of the proposal have not gained sufficient support from indigenous peoples' organizations, NGOs and other government departments to enable them to send the proposal to the Congress for consideration. The Peruvian experience therefore signals the dangers of seeking to develop legislation which affects the rights of indigenous peoples without adequate participatory processes, which have been collectively developed, and of the possible misinterpretations which may arise when participants do not have a clear understanding about the nature and objectives, including any intended product, of the process. Unless these issues are communicated in a manner which ensures understanding, participatory opportunities can become

meaningless exchanges, often resulting in increased confusion and decreased confidence in the process, in which, for all intents and purposes, participants may as well be speaking in tongues.

Conclusions

Examination of the Peruvian experience has helped us to identify some guiding principles regarding the role and nature of participatory processes in the development of legislation affecting the rights and interests of local and indigenous peoples over the product of their intellectual effort.

1. The rights of indigenous peoples and local communities over their traditional knowledge stem from the existence of the knowledge itself, and not from any act of government. The role of the government in the development of *sui generis* legislation for its protection must therefore be that of facilitator and not of arbiter of rights. In other words, governments should assist indigenous peoples and local communities to articulate the means for protection of their knowledge based upon their declared concerns, interests and desires, and should avoid adopting measures which do not meet with the full and informed approval of the custodians of traditional knowledge.
2. Any process to develop measures for the protection of traditional knowledge must commence with a clear definition of the objectives, scope and modalities for the recognition of rights. The active participation of indigenous peoples must be ensured from the very outset to ensure that any programs, projects, law or policy are based on their aspirations and priorities with regard to the protection of their knowledge.
3. To address the complex legal, social, economic and cultural issues involved in development of regimes for protection of traditional knowledge, there is a need to draw upon the skills and knowledge of both the custodians of such knowledge and those whose professional expertise can assist in developing innovative legal and other mechanisms conducive to strengthening of local use and control over TK.
4. The development of mechanisms for the protection of traditional knowledge must respond to the customary laws and practices of indigenous and local peoples. Care must be taken to avoid the development of external solutions which could become instruments for legitimizing the historic expropriation of TK, or reducing community control through commoditization of TK undermining its role as the basis of indigenous culture, identity, livelihoods and self-determination.
5. Innovative legal mechanisms will be required to bridge the gap between the often diametrically opposed customary laws and practices of indigenous peoples and dominant legal regimes, based on concepts of law which may be totally alien, inappropriate and insensitive to the reality of indigenous and local communities,

their perceptions of property and their underlying philosophy of life or ‘cosmovision’.

6. Obtaining the confidence of indigenous and local communities is one of the most crucial challenges for national and international authorities seeking to develop *sui generis* legislation. Confidence may be built by demonstrating respect and awareness of indigenous peoples’ customs and traditional authorities, and ensuring their full involvement in design of the participatory process itself, as well as in the definition of its goals and anticipated products.
7. To build confidence, it is fundamental that invitations to participate clearly explain the proposed nature of the process, the intended outcome and products, as well as the opportunities which will be afforded to indigenous peoples to affect the outcome. To this end, participants must be informed as to whether the process is one of consultation, negotiation, joint decision-making etc., and how their input will be considered, accepted, rejected or incorporated in any final decision.
8. Participation is both a right and a responsibility, and may imply both costs and opportunities. Therefore, representatives of indigenous peoples and local communities will need to assess carefully the implications of accepting or refusing to respond to opportunities to participate, taking into account their responsibility for ensuring wider awareness and heightened levels of participation of their communities in decision-making processes, as and when possible. Indigenous and local communities should be aware that their rights over their traditional knowledge cannot be protected by customary law alone once that knowledge has been disclosed to outside parties, and that collaboration with government is crucial to ensure protection of their interests, both nationally and internationally.
9. NGOs can play a potentially catalytic and bridge-building role through timely use of resources and opportunities to foster greater dialogue between legislators and custodians of TK. However, NGOs should also carefully consider the benefits and drawbacks of participating in, and potentially legitimizing, processes which have not secured the full and effective involvement of indigenous peoples’ representative organizations.
10. Preparedness to learn from experience, modify processes and develop collaborative working practices, based on respect for the ancestral and human rights of indigenous and local communities, is a prerequisite for the development of functional regimes.
11. Government agencies, indigenous organizations and non-governmental organizations should develop a commitment to collaboration and seek to overcome jealousies, mistrust, competition for resources and power struggles between and amongst them. To this end, it is crucial that all those participating

- recognize that indigenous peoples alone are entitled to define the nature of the protection to be granted to their knowledge.
12. Efforts to protect traditional knowledge have tended to focus on preventing its unapproved commercial use. In fact, this is only one of many reasons for its loss, and in Peru it has been seen that internal and external threats to traditional knowledge arise from many facets of government activity in the fields of education, health, agricultural extension and development policy. Similarly, the activities of researchers, aid workers, organized religion, the private sector and non-governmental organizations can all contribute to the loss of traditional knowledge. Therefore, protection of traditional knowledge requires the adoption of a multi-sectoral response, promoting cultural and religious tolerance, respect for cultural diversity and the active discouragement of all forms of racism.
 13. In Peru, a need has been identified for the establishment of a National Commission on Traditional Knowledge and Folklore, bringing together governmental, indigenous and non-governmental representatives with a formal mandate to propose national policy and legislative measures for the implementation of national and international obligations relating to protection of traditional knowledge.
 14. It is suggested that any future working group entrusted with the development of law or policy relating to the protection of traditional knowledge in Peru should commence by identifying the objectives and scope of a regime with the full participation of indigenous peoples, and only then start to examine potential mechanisms for their realization. Any new process to develop legislation to protect traditional knowledge would be advised to take fully into account the draft regime prepared by the TKWG, as revised by INDECOPI, with a view to avoiding duplication of effort and rescuing its positive elements.
 15. The development of a regime to protect traditional knowledge is likely to be time consuming and costly since national authorities will need to allow for appropriate consultation and provide funding to support the process, which may require external financial support. While awaiting the development of a *sui generis* regime in a truly participatory national process, it may be advisable to adopt interim legislation to prevent continuing unapproved access to, and use of, TK.
 16. While there now exists a growing consensus that protection of rights over TK requires the development of some form of *sui generis* (meaning ‘of its own kind’) legislative regime, there is also recognition that such regimes are only part of a range of legislative and policy measures which together may provide a comprehensive international regime for the protection of traditional knowledge. These include: customary law, legislation on access to genetic resources, *sui generis* regimes for protection of TK, legislation in user countries (including certificates of origin), codes of conduct and an international framework to govern relations between providers and users of genetic resources and related knowledge.

1. INTRODUCTION

1.1 Background and Objectives

The 1992 UNCED Convention on Biological Diversity (CBD) recognizes 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 knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles, relevant for the conservation and sustainable use of biodiversity;
- Promote their wider application with the approval and involvement of the holders of such knowledge; and
- Encourage the equitable sharing of benefits derived from the use of such knowledge, innovations and practices.

Despite a widespread belief to the contrary, Article 8 (j) does not in fact recognize, and even less create, a property right in favor of indigenous peoples over their traditional knowledge. It does, however, establish a number of underlying principles of respect, responsibility and equity, which are guiding the implementation of Article 8 (j) by CBD Parties, thereby promoting the progressive development of an international regime for the protection of rights over TK. Work to date at the national, regional and international levels, has tended to focus primarily on the commercial use of traditional knowledge, rather than on the issue of strengthening traditional knowledge and innovation systems. And, in many cases, the search for a system to protect rights over TK has focused within the general framework of intellectual property rights regimes.

However, it is widely recognized that the prevailing intellectual property rights system does not recognize the rights of indigenous and local communities over collectively owned 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* (meaning 'unique' or 'of its own kind') regimes. It is also increasingly recognized that in order to reflect indigenous concepts of ownership, responsibility, reciprocity and rights of access and use, any such *sui generis* regime must be developed with full respect for the customary law and practices of indigenous and local communities.

The importance of ensuring the 'full and effective' participation of indigenous and local communities in the implementation of Article 8(j), including the development of national policy and legislation, was strongly emphasized in Decision V/16³, agreed at the Fifth Conference of the Parties to the CBD. COP V also called for mechanisms and guidelines to promote such participation.

³ UNEP/CBD/COP/5/23

This case study examines the nature, extent and effectiveness of indigenous peoples' participation in the process to develop a *sui generis* law to protect collective traditional knowledge in Peru, which has been ongoing since 1996. It draws a number of conclusions and recommendations based on this experience, which may serve others developing similar regimes. While the proposed law itself warrants in-depth examination, the purpose of this report is not to review its content, but rather the manner in which it was developed⁴. However, Section 4.8. looks at some of the provisions of the proposal as an indicator of the extent of indigenous participation, and Section 4.10 presents elements of a comprehensive global system to protect traditional knowledge. Copies of Peru's draft regime can be accessed at www.indecopi.gob.pe.

The study forms part of an IIED research project, conducted with partners in developing countries, to examine experience with participation in the development of policy on access to genetic resources and traditional knowledge. The project also involved case studies of the Philippines' Executive Order 247 on access to genetic resources, South Africa's Biodiversity Policy, and India's Biodiversity Bill and Community Registers. An overview report has been prepared to present the main findings of the case studies, together with recommendations for securing effective participation⁵.

1.2 Methodology

For the preparation of this report, interviews were held in October 1999 with members of the Working Group established by INDECOPI (National Institute for Competition and Intellectual Property) and the Ministry of Agriculture to draft the proposed regime, as well as other State bodies, indigenous peoples' organizations and NGOs. The research process also involved a Roundtable on Indigenous Participation, convened by the Secretariat of Indigenous Affairs (SETAI), with support from ADN and IIED, in October 1999. The event brought together the relevant national authorities and indigenous organizations to review participation to date and identify priorities for enhancing participation. The study also draws on the experience gained by the lead author's involvement in INDECOPI's Working Group and in the Working Group on Indigenous Participation, established at the Roundtable.

The authors have endeavored to provide a balanced assessment of the process, but recognize the limitations of their capacity given the complexities of the process and the multiplicity of different players, personalities and agendas at work, which makes any attempt to analyze and assess them fraught with the dangers of misinterpretation. Considering the diversity of actors and opinions, there will undoubtedly be some which are not sufficiently reflected in the final work. We also recognize that the proximity of the lead author to all stages of the Peruvian process while advantageous, could have affected the objectivity of the analysis.

⁴ For more detailed commentary on the proposed regime see: Tobin B. (2001). Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru. *RECIEL*, 10 (1).

⁵ Swiderska, K. (2001). Stakeholder Participation in Policy on Access to Genetic Resources, Traditional Knowledge and Benefit-Sharing. IIED.

Sections 1, 2 and 3 of this report provide background information on the protection of traditional knowledge, the political context in Peru, and the impetus for developing Peru's proposed regime to protect TK. Section 4 provides a description and assessment of the participatory process for developing the regime, and Section 5 identifies general conclusions and recommendations on participation that may be useful for similar processes (5.1), as well as specific recommendations for Peru (5.2).

1.3 Why protect traditional knowledge?

Protecting traditional knowledge for community use

Perhaps the most obvious reason to protect traditional knowledge (TK) is that it continues to provide the majority of local and indigenous communities around the world with the tools to meet their daily food, clothing, housing and health needs. For instance, it is frequently claimed that over 80% of the world's population continues to rely on traditional medicinal knowledge for their health needs (Worldwatch 1999)⁶. TK is also the very source of culture and identity for large sectors of the global population.

Despite its vital role in securing the daily survival of millions of people, TK has often been treated as unscientific, uncivilized, ungodly and ineffective, with the result that this store of knowledge is rapidly disappearing. The loss of TK and its displacement by alternatives undermines the self-sufficiency of indigenous peoples and local communities and will inevitably accelerate already disturbing levels of loss of cultural diversity, which is increasingly recognized as playing a fundamental role in the conservation and sustainable use of biological diversity. Pedro Garcia identifies both external and internal threats to traditional knowledge, and argues that if the dynamic creativity of a culture collapses or is obstructed it runs the risk of fossilizing its patrimony, turning it into a 'memory chest' with little functionality - 'a body without life'⁷.

The Peruvian experience and the debate it has engendered, substantiates Garcia's position. It shows that traditional knowledge may be threatened by numerous internal and external forces, which are changing the lives and societies of local communities, including:

- Increased contact with western society, changing work practices, assimilation of indigenous peoples into dominant cultures and migration of youth to cities.
- Promotion of external products, processes and practices by "experts", state development projects and foreign aid programs.
- Displacement of traditional medicine by state health programs and pharmaceutical products.
- Replacement of farmers' varieties with 'improved' varieties, and promotion of monoculture farming techniques, cash crops, non-traditional export crops, and exotic varieties.

⁶ Worldwatch Institute (1999). State of the World Report.

⁷ Garcia Pedro, Propiedad Intelectual, Diversidad biologica, Cultura y Desarrollo (parte 2) Comision de Emergencia Ashaninka and Raicimos de Ungurahui, November 2000, Lima.

- Educational systems, which promote belief in the inadequacy of TK and the superiority of products of industrial science and technology, and allow racist attitudes to erode cultural pride, reducing the interest of youth in learning TK.
- Political violence and displacement of local communities and indigenous peoples from their traditional territories.
- Changing religious beliefs and discouragement of traditional spiritual practices by organized religion.
- Death of knowledgeable elders without leaving record of their knowledge.
- Loss of indigenous languages.

Some of these threats may be diminished and overcome by coordinated local community action, in particular where traditional authority and decision-making systems remain in place. However, it is important to consider the extent to which external pressures, including economic inducement, perverse incentives, law and policy, over which communities have little control, may be responsible for the loss of TK.

In the face of such threats, action is needed to create incentives for the protection and strengthening of TK, as well as to prevent or control activities which may lead to further loss of knowledge. Furthermore, assistance, including technical and financial support, may be required to enable communities to collect and record traditional knowledge for the benefit of current and future generations.

Box 1 – Reasons for establishing a regime to protect TK in Peru

In Peru, the possible objectives for developing a TK regime that have been most widely aired are to:

- Prevent the unapproved use of traditional knowledge.
- Ensure equitable sharing of benefits derived from use of traditional knowledge and prevent acquisition of monopoly rights over it.
- Strengthen the capacity of indigenous peoples to negotiate agreements related to their knowledge.
- Maintain the source of cultural identity and diversity.
- Strengthen traditional knowledge and innovation systems.
- Promote a reevaluation of traditional knowledge, and provide incentives for its use.
- Maintain knowledge which provides alternatives to unsustainable farming practices.
- Promote the wider use of traditional knowledge for conservation and sustainable use of biological resources.
- Strengthen traditional medicinal practices.
- Promote development opportunities for indigenous peoples.

Protecting rights over TK for commercial or scientific use

Much interest over the years has led to the collection, documentation and use of traditional knowledge by scientists, anthropologists, missionaries, researchers and others. In many instances it may have been for altruistic purposes, to strengthen local use of TK, but perhaps more often it has been to meet the scientific or commercial ends of the collectors.

For example, when medicinal plants are sought to develop new pharmaceutical drugs, traditional knowledge is sometimes used to identify potentially valuable leads. Traditional crop varieties with valuable traits, which may be used to develop improved crops, are themselves often the product of years of selective breeding and experimentation by indigenous and local communities.

Historically, TK has tended to be collected in unregulated environments, most often without the approval or compensation of indigenous and local communities. In recent years, however, there has been a growing tendency for collectors to seek communities with which to enter into agreements for the use of traditional knowledge. While this is a welcome trend, it is now recognized that the objectives of the CBD with regard to access to genetic resources and benefit-sharing⁸, cannot be guaranteed in the absence of national law to regulate access (CBD Expert Panel on Access and Benefit-Sharing, 1999)⁹ and to protect rights over related knowledge (Tobin 2002, Laird and Noejovich 2002)¹⁰. Furthermore, experience in countries of the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) tends to show that access to genetic resources cannot be effectively administered without clear regulation of rights over TK.

The CBD does not establish or recognize a right of indigenous peoples over their knowledge. At most it creates an obligation on Parties to promote the wider use of TK, with the consent of local and indigenous communities. However, Decision 391 of the Andean Pact establishing a Common Regime on Access to Genetic Resources recognizes that indigenous, Afro-American and local communities are entitled, subject to national legislation, to decide over access to and use of their traditional knowledge, innovations and practices.

Adopting a national *sui generis* regime to protect TK provides a means to ensure that the commercial use of TK is subject to the approval and compensation of local and indigenous communities, as well as creating legal certainty for the scientific and commercial use of TK and genetic resources. Although this may, in fact, be of lesser

⁸ The CBD's third objective requires "the fair and equitable sharing of benefits arising out of the utilisation of genetic resources".

⁹ UNEP/CBD/COP/5/8.

¹⁰ See Tobin, Brendan. Biodiversity Prospecting Contracts: The Search for Equitable Agreements., and Laird, Sarah and Flavia Noejovich, Building Equitable Research Relationships with Indigenous Peoples and Local Communities: Prior Informed Consent and Research Agreements. In Laird, Sarah (editor) (2002). Biodiversity and Traditional Knowledge, Equitable Partnerships in Practice. A People Plants Conservation Manual, Earthscan Publications, London.

importance for the short-term survival strategies of local and indigenous communities, it has tended to receive greater attention than protection of TK for community needs.

1.4 The importance of indigenous participation in TK policy

International Labor Organization Convention 169 concerning Indigenous Peoples in Independent Territories, which was ratified by Peru in 1993, is currently the most advanced legally binding international agreement for the protection of indigenous peoples' human rights. Article 6 of ILO Convention 169 requires Parties to consult with indigenous peoples, "...whenever consideration is being given to legislative or administrative measures which might affect them directly". The same article requires that consultations be carried on in good faith, with the objective of "achieving agreement or consent to the proposed measures", and "through appropriate procedures, and in particular through their representative institutions".

ILO Convention 169 also establishes a number of specific obligations on governments, which must be considered when carrying out consultations, including the need to:

- Develop coordinated and systematic action to protect the rights of indigenous peoples and guarantee respect for their integrity, with the participation of the peoples concerned (Article 2);
- Recognize and protect their social, cultural, religious and spiritual values and practices (Article 5.1);
- Give due regard to their customs or customary laws when applying national laws and regulations (Article 8.2); and
- Respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories they occupy or otherwise use, and in particular the collective aspects of this relationship (Article 13.1).

The right to participate in TK policy does not only stem from the fact that indigenous people are affected directly by it, but is inherent because, unlike genetic resources, traditional knowledge owes its existence solely to indigenous and local communities. The right over traditional knowledge is an ancestral right of the local communities and indigenous peoples, which have developed, maintained and inherited it over generations.

The active involvement of indigenous and local communities in the development of TK policy is also important to ensure that such policy is designed in accordance with their knowledge systems, practices, perceptions and concerns, which are often fundamentally different to those of western society. For instance, whereas the protection of western inventions is based on individual rights, traditional knowledge is often collectively owned, its maintenance depending on the continuous, informal exchange of knowledge and resources according to traditional beliefs and practices. Privatizing these delicate knowledge systems runs the grave risk of undermining and destroying traditional cultures, lifestyles and innovations (Wynberg, 1998)¹¹. Furthermore, by securing the

¹¹ Wynberg, R. (1998). Indigenous Knowledge at Risk. Monitor, Mail and Guardian (South Africa)

participation of indigenous and local communities, a policy will gain the acceptance and legitimacy necessary for its implementation, and in some cases, approval.

1.5 Interpreting ‘participation’

Participation is a buzz-word, one of those friendly terms which trips lightly off the tongue meaning nothing or everything depending upon the user’s intent. It is the sort of term used in different situations to either demand rights, justify projects or deflect criticism. A standard tool of the sustainable development politically correct dictionary, it is much abused, variously interpreted and only rarely realized.

‘Participation’ can be used to describe information distribution, dialogue, consultation, negotiation or the transfer of decision-making. It may be centralized, decentralized, interdepartmental, multi-sectoral or intercultural. It may include decision makers, representatives, stakeholders, rights holders, parties in conflict, or monocultures of the mind. It may be written, oral, ‘dot.commed’ on the internet, by questionnaire, public audience, interview, or congressional hearing.

Whatever form it takes, participation will only be meaningful if its objective is to secure joint decision-making, allowing participants to influence and even modify the process and its outputs. Participation is a process, not an end in itself, and one which, through flexibility and a willingness to learn may help to break down the barriers of cultural, ideological and professional conflict. It can bring about considered debate towards the development of policy, and secure the rights and interests of indigenous peoples so that they are reflected under dominant legal regimes.

What a participatory process must avoid at all costs is the culture of professionalism, by which ideas and opinions are sought as the basis for quasi-academic research, and externally generated solutions are developed to address indigenous problems. Securing engagement of indigenous peoples implies first of all creating confidence, mutual respect and a common agenda to define the process, its expected outcome and the ground rules for its management.

The role of NGOs must also be considered to ensure that their involvement is supportive of, and conducive to, ensuring effective participation of indigenous peoples and local communities. In no event should the participation of NGOs be deemed to serve as a substitution for the direct participation of local communities and indigenous peoples. State bodies, the private sector and the NGO community should avoid presuming that the interests of indigenous peoples and local communities can be secured by national or international NGOs, in the absence of indigenous representative organizations and grassroots organizations.

Box 3 – Principles of meaningful participation

To be meaningful, a participatory process should adhere to a number of basic guiding principles. It should be:

- carried out in good faith,
- significant (provide opportunities to influence the outcome),
- at local level,
- supportive of traditional processes for consultation and decision-making,
- facilitated by indigenous people,
- continuous,
- informed,
- respectful,
- equitable (decisions should reflect concerns), and
- non-coercive.

Source: Tobin, Noejovich and Yanez: *Petroleros, Estado y Pueblos Indigenas*. Working Paper on participation of indigenous peoples in decision-making processes regarding hydrocarbon activities on their territories. Defensoria Del Pueblo, Lima 1998.

2. THE GROWTH OF INDIGENOUS POLITICAL INFLUENCE

Since 1990, Peru has adopted an economic policy designed to secure reintegration within the dominant global economic order. During the same period the Peruvian armed forces have overcome the threat to national security posed by the Shining Path and The Tupac Amaru Revolutionary Force. As a result, Peru has seen a major influx of foreign investment, in particular in the telecommunications, oil and mining sectors. Investments in oil and mining have for the most part involved activities in territories traditionally occupied by indigenous peoples.

Until the mid 1990s indigenous peoples, who had suffered the brunt of political violence, had focused their attention on the defense of basic civil and political human rights. Since then, increased security has augmented opportunities to play a more active role in the promotion, revision, negotiation and implementation of policy and law relating to the recognition and protection of their economic and social human rights, in particular those relating to land and natural resources. This period has also seen the strengthening of organizations representing both Andean and Amazonian communities.

Although ILO Convention 169 became part of national law in Peru in 1994, mechanisms for securing meaningful participation of indigenous peoples are still under-developed. However, significant advances have been made in the last two to three years.

The perceived differences between Andean and Amazonian peoples, and the internal politics which have often acted as a divisive force within the indigenous movement, now appear to be giving way to an increased awareness of common interests and shared grievances. Increased mining, timber and oil activity in indigenous territories, erosion of constitutional rights over the inviolability of community lands and the promotion of a proposed national law for indigenous peoples, have helped to forge new alliances.

Coordination amongst organizations, at both the Andean and Amazonian level, as well as between these two broad groups, culminated in the establishment of a Permanent Commission of Indigenous Peoples of Peru (COPPIP) in the late nineties. Such collaboration promises greater opportunity to influence national policy in the future.

At the same time, there is increased awareness amongst investors and the State alike that failure to involve indigenous peoples in decision-making processes is counter productive, bringing legal uncertainty, delayed project implementation, and reduced possibilities for financial support from funding organizations. Thus, there is a growing perception that participation is not only necessary, but also desirable.

This has led to a number of practical experiences to engage indigenous peoples in the development of national legislation relating to their interests. Amongst the most important has been an extensive participatory process to review proposals for national legislation governing the rights of indigenous peoples. Also of interest was a process of direct negotiation between the State and indigenous organizations on the development of consultation mechanisms, and relevant regulation, for the oil industry's activities on indigenous territories. Although these processes have not yet led to the adoption of binding regulations, they have helped to strengthen calls for increased participation by indigenous peoples in all relevant decision-making processes.

These incremental advances in providing for indigenous participation during the later years of the Fujimori government do not, however, appear to reflect the existence of a specific national policy, as much as innovative actions on behalf of individual government departments, such as the Ministry for Energy and Mines. Or, as in the case of the proposed law on indigenous rights, the commitment of individual Congressmen and Congressional committees, in particular the Commission on the Environment.

Since 2000, there has been a major shift with the adoption of legislation to strengthen recognition of the need for increased indigenous participation in decision-making processes by the interim government of President Paniagua. Furthermore, commitments made by the government of President Toledo, who came to power in July 2000, with regard to securing the right of indigenous peoples to participate in decision-making over law or policy which may affect them, bodes well for the progressive implementation of obligations arising under ILO Convention 169.

Thus, the right of indigenous people to participate in decision-making is becoming better established. What is less clear is the nature and extent of such participation; the mechanisms required to achieve it; the moment during the preparation of a law or policy at which participation should commence; and the right of indigenous people to modify or impede the adoption of legislation which does not, in their opinion, reflect their interests, rights or concerns.

Box 4 – Factors contributing to increased recognition of indigenous rights

Major influences leading to improved recognition and protection of indigenous peoples' rights in Peru include:

- Pacification of the country.
- National, regional and international legislation on environment and indigenous peoples' rights.
- Institutional strengthening and increased professional capacity of the public sector.
- Heightened concern for international reputation.
- Emergence of an organized indigenous movement.
- Increased influence of Civil Society Organizations.
- Development of consultation processes for oil and mining industry activities on indigenous lands.
- Election of President Toledo.

3. THE IMPETUS FOR DEVELOPING A TRADITIONAL KNOWLEDGE LAW

3.1 Decision 391 on Access to Genetic Resources in the Andean Community

Debate on the need for adoption of legislation to protect the rights of indigenous peoples over TK in Peru, and other countries of the Andean Pact (now the Andean Community), commenced in earnest in early 1993, as pressure for the adoption of a plant breeders' rights regime in the region became more intense. Decision 345 of the Pact, which eventually implemented the proposed regime, is a veritable hybrid of the various UPOV Conventions, and includes provisions requiring Pact countries to develop a Common regime on access to genetic resources. This led to the adoption in 1996 of Decision 391, a common regime governing access to genetic resources. The Decision, which is directly binding on Member States, goes far beyond the provisions of Article 8 (j) of the CBD, by recognizing, subject to national law, indigenous peoples' rights to control the use of their knowledge, innovations and practices.

The process for preparation of Decision 391 was in itself precedent setting, being the first time civil society was invited to participate in the development of Andean Community legislation. This remains the only occasion in which the Community has called upon CSOs to provide a draft proposal for consideration by Member States. An initial proposal, in the form of "Proposed Elements for a Common Regime on Access to Genetic Resources" (Caillaux and Ruiz 1999)¹², was prepared by the Environmental Law Center of IUCN and the Peruvian Environmental Law Society (SPDA). The proposal was the product of a drafting program which included a participatory process involving governmental, non-governmental and international experts, as well as representatives of indigenous peoples and local communities.

¹² Caillaux Jorge, Manuel Ruiz, eds. 1999 – Acceso a Recursos Genéticos. Propuesta e instrumentos jurídicas. Lima: Sociedad Peruana de Derecho Ambiental (SPDA)

This participation played an important part in defining the content and emphasis within the IUCN/SPDA proposal. It also helped to secure recognition in Decision 391 that use of indigenous knowledge associated with genetic resources is subject to the rights of indigenous peoples, including their right to grant or refuse permission for its use.

Decision 391 calls upon national governments to inform the Community of the steps being taken to ensure that these rights are recognized. There are currently activities, in various stages of development, within all countries of the Community to identify the most appropriate mechanisms for the development of regimes to protect TK.

In Peru, a country renowned for its mega-biodiversity, preparation of national legislation on access to genetic resources to implement Decision 391 of the Andean Community has been the subject of a protracted national consultation process. During this process, it became evident that effective implementation of any access legislation, would be dependent upon the prior or parallel adoption of legislation to regulate access to and use of TK.

Box 5 - Peru's Megadiversity

Peru has been categorized as one of 17 countries of mega-diversity, having high levels of wild and cultivated biological diversity. The Andean and Amazon regions are both of significant importance, the Andes being one of the 14 centers of crop diversity identified by Vavilov. The Puna region, home to more than 6 million people, is perhaps the largest threatened ecosystem in the world. This wealth in both wild and cultivated biological diversity is a source of national pride, and Peru, aware of its importance for ensuring the protection of the national interest, was amongst the first countries to ratify the CBD. Peru has also considerable cultural diversity, with over 64 indigenous groups of Amazonian and Andean descent.

Adapted from : Russell Mittermeir, Patricio Robles Gil, Cristina Goettesch Mittermier, 1998, Megadiversity: Earth's Biologically Wealthiest Nations. COMAX.

In October 1999, a draft regulation for implementation of Decision 391 was published together with the proposed regime for the protection of the rights of indigenous peoples over their collective knowledge, evidencing awareness on the part of the national authorities in Peru that these issues are inextricably linked. However, since then the process for development of national legislation on access to genetic resources has become divorced from the process for developing legislation to protect traditional knowledge. The National Institute for Natural Resources (INRENA) has developed an updated access proposal, which has been submitted to the Ministry for Agriculture for approval. The proposal recognizes that indigenous peoples have the right to decide over use of their traditional knowledge associated with biological and genetic resources and derived products, and requires the prior informed consent of indigenous peoples for the collection of genetic resources on their territories.

The development of the proposed access law has been the subject of widespread discussion, and a fairly extensive consultation process. The final proposal has varied only slightly from the provisions of Decision 391 with regard to the recognition and protection of rights of indigenous peoples, and does not establish mechanisms for protecting TK and ensuring benefit-sharing with TK holders. Furthermore, the proposed law does not address the issue of whether TK relating to biological resources within which genetic resources are sourced may be subject to regulation, and leaves unresolved the issue of ownership of genetic resources in landraces (farmer's varieties). While this could be seen as a weakness, it has also been argued that the development of a system to define rights over landraces may be achieved by ensuring compliance with existing national and regional law and establishing the necessary legal framework to ensure respect for customary law and practice of indigenous and local communities.¹³

This is the position taken by the NGOs Andes and SPDA which are currently directing a collaborative research project with the aim of developing a proposal for a national system for the recognition of rights over landraces. The project has involved a number of workshops with local communities, regional organizations representing Andean communities, government bodies, international research institutions and NGOs. It has led to proposals for the establishment of a national Roundtable on Native Crops to assist with the development of a system for protecting rights over landraces, including relevant policy measures.

3.2 The influence of biodiversity prospecting

During early 1996, as the Andean Pact was in the process of finalizing Decision 391, negotiation of an international biodiversity prospecting agreement for the use of medicinal plants and traditional knowledge was receiving much attention in Peru. The agreement was negotiated within the framework of the International Cooperative Biodiversity Group Program (ICBG). It involved Washington University, Searle & Co. (the pharmaceutical arm of Monsanto), three local federations representing Aguaruna communities of the Peruvian Amazon, their national representative organization the Confederation of Nationalities of the Peruvian Amazon (CONAP), the Museum of Natural History of the University of San Marcos, and the Cayetano Heredia University of Peru.

The negotiations were opposed by the largest Aguaruna federation, the Consejo Aguaruna y Haumbisa (CAH), and their national representative organization, the Interethnic Association for Education and Development of Peru (AIDSESEP), supported by some well known international NGOs. Despite this opposition, at the time of the negotiations there existed no functional mechanism under either customary or national law for determining the right of any community, federation or group of federations to negotiate, or to prevent the negotiation of, an agreement for the use of the Aguaruna peoples' traditional knowledge

¹³ Ruiz Manuel (SPDA) and Alejandro Argumedo (ANDES). Opciones para el Desarrollo de una Política y Normativa Sobre Protección de Cultivos Nativos en el Perú. Serie de Política y Derecho Ambiental, Sociedad Peruana de Derecho Ambiental, No.7, Lima October 2001.

The conflicts associated with the Peruvian ICBG negotiations provided ample evidence of the problems associated with the negotiation of agreements in unregulated environments.

Box 6 – Problems with negotiating the ICBG bioprospecting agreement

Amongst the most contentious issues faced in the negotiation of the Peruvian ICBG were the following:

- Identification of who is entitled to negotiate for use of collective knowledge;
- Establishment of equitable benefit-sharing measures;
- Rights over TK within the public domain;
- Protection of interests of custodians not party to the bioprospecting agreement;
- Right of communities not participating in the agreement to prevent use of their knowledge;
- Prevention of loss of control over TK and associated genetic resources, once transferred;
- Identification of national authority entitled to approve the agreement;
- Prevention of patenting of life forms; and
- Prevention of use of patents to impede traditional use and/or sale of traditional products.

Although highly controversial, the ICBG agreements provided one of the first practical experiences of indigenous peoples being directly involved in the negotiation of contractual arrangements to protect their rights over their traditional knowledge. The agreements sought to provide solutions to the question of how to develop equitable benefit-sharing mechanisms for both participating and non-participating custodians of traditional knowledge. One of their novel features was the use of know-how licensing as a tool to enable indigenous people to provide limited rights for use of their knowledge, while maintaining ownership and control over its use, and over the use of plant collections, extracts, active compounds and synthetic copies of such compounds.

The ICBG experience established a number of precedents for agreements between indigenous peoples and a multinational corporation, including: recognition of rights to share in benefits derived from use of TK, whether or not it is in the public domain; acceptance that use of extracts etc. is conditional upon holding a valid know-how license for use of TK; undertaking not to use patents to impede traditional use of TK and genetic resources; and a ban on using such resources for development of life forms (Tobin 2002)¹⁴.

The ongoing negotiation of the ICBG agreements and the conflicts surrounding them, together with the desire to ensure legal certainty for the use of traditional knowledge,

¹⁴ Tobin, Brendan. Biodiversity Prospecting Contracts: The Search for Equitable Agreements. In Laird, Sarah (editor) (2002). Biodiversity and Traditional Knowledge, Equitable Partnerships in Practice. A People Plants Conservation Manual, Earthscan Publications, London.

acted as a catalyst to prompt the national authorities to develop a regime for the protection of traditional knowledge. In February 1996, INDECOPI, which had been actively participating in the national debate on genetic resources, and the Ministry for Agriculture, established five Working Groups (WGs) with a mandate to:

- (I) Review the organizational structures of indigenous communities and their internal benefit-sharing strategies;
- (II) Carry out an inventory of wild and domesticated genetic resources;
- (III) Develop regulations for implementation of Decision 391 on access to genetic resources;
- (IV) Review the issue of TK and develop draft legislation for its protection; and,
- (V) Define mechanisms to bring to the attention of indigenous peoples the content of access and TK laws, if and when developed.

Following up this initiative, the national authorities included provisions for establishment of a TK regime in a new Peruvian Intellectual Property law adopted in April 1996. This gave to the Ministry of Industry, Tourism, International Integration and Commercial Negotiation (MITINCI), of which INDECOPI forms part, power to establish a regime for protection, and, if appropriate, registration, of the knowledge of indigenous and campesino communities.

3.3 Recognition of rights over TK under existing law

In July 1997, legislation on the Conservation and Sustainable Use of Biological Resources, Ley No. 26839, was adopted which recognized that the knowledge, innovations and practices of indigenous peoples relating to biological diversity are their cultural patrimony, and that they hold rights over it and are entitled to decide over its use. This was a very important precedent for indigenous peoples, implying a property right in favor of indigenous peoples over their traditional knowledge.

Although cultural patrimony has not been defined, it may reasonably be considered to be subject to a collective inalienable right vested in the ethnic group to which it belongs. The result in effect would appear to be the creation of a virtual legal moratorium on biodiversity prospecting activities involving the collection of knowledge, innovations and practices of communities, except where prior informed consent (PIC) has been granted by all custodians of TK, or otherwise, in accordance with customary law and practice.

The result may signify that the State has in fact recognized limitations to its sovereign power to grant access to genetic resources, where such access might involve access to TK. Access to genetic resources, deemed to incorporate traditional knowledge would now, therefore, appear to require prior informed consent of relevant indigenous and local communities. Something which may signify a need for further consideration of the issue of landraces and their treatment in the proposed law on Access to Genetic Resources, prior to its adoption and implementation, given the intellectual contribution of indigenous and local communities to their development.

While appearing to provide a large measure of protection to indigenous peoples, this interpretation has not been tried before the courts. Experts at INDECOPI have expressed the opinion that the ambiguity of existing legislation may leave indigenous rights unprotected. In the face of such distinct interpretations, caution calls for the adoption of clear regulations to implement the relevant provisions of national, regional and international law. Implementation which, in order to accord with the interests of indigenous peoples, must first identify those interests, and must seek to establish a mechanism for protection which conforms with their customary law and practices.

Box 7 – Rights over TK under International, Regional and National Law.

Article 8 (j) of the Convention on Biological Diversity requires that the State respect preserve and maintain the 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. However, the Convention only requires the State to obtain the approval of indigenous peoples for the use of their knowledge where the State has promoted its use.

Convention 169 of the ILO requires States to consult with indigenous peoples in good faith, before granting any rights for exploration or exploitation of natural resources on their traditional territories (Articles 15 and 6). The Convention does not refer to rights over traditional knowledge explicitly

At the regional level, Decision 391 of the Andean Community recognises the rights of indigenous, Afro-American and local communities to control access to their knowledge, innovations and practices, subject to national law (Article 7). States are free to establish national law governing the extent to which communities may control access to their knowledge.

Under national law, indigenous peoples are entitled to control access to their knowledge, innovations and practices, which is their cultural patrimony (Articles 23 and 24, Law on the Conservation and Sustainable Use of Biological Diversity).

The Constitution of 1993 recognizes the rights of indigenous peoples to apply customary law within their territories. This may provide indigenous peoples with the opportunity to apply customary law relating to access to, and use of, traditional knowledge, within their territories.

4. PARTICIPATION IN THE DEVELOPMENT OF PERU'S *SUI GENERIS* LAW

4.1 Introduction

This section describes the process of indigenous peoples' participation in the development of Peru's *sui generis* regime to protect traditional knowledge, and reviews the strengths and limitations of the process, drawing on the views of a range of actors. The process is reviewed in three phases:

1. Drafting Phase (1996 – 1998):
 - February 1996: TK Working Group established to prepare draft legislation.
 - June 1996: First draft prepared.
 - August 1997: Second draft prepared.
2. Consultative Phase (1998 –1999):
 - June 1998: Questionnaire circulated at the Consultation with Indigenous Peoples organized by SETAI/World Bank in Iquitos.
 - Mid-1998: Copies of the proposal sent to Andean communities for comment.
 - April 1999: Consultative workshop for indigenous people held in Lima.
 - May 1999: Consultative workshop for indigenous people held in Cuzco.
 - May 1999: International Seminar in Lima hosted by INDECOPI and WIPO.
3. Post-Publication Phase (October 1999-2000):
 - October 1999: Official publication of the proposed regime.
 - October 1999: Roundtable Meeting on indigenous participation convened by SETAI; Working Group on Indigenous Participation established.
 - March 2000: Information document prepared for indigenous consultation.
 - 31st August 2000: Official publication of a revised proposal.
 - 25th October 2000: Capacity building workshop for indigenous facilitators.

In order to determine the efficacy of any process to secure the participation of indigenous peoples in decision-making, it is necessary to determine the extent to which opportunities to participate signify a real possibility to affect the outcome of the process. The commitment of national authorities to securing participation must be viewed in tandem with the commitment of indigenous peoples to take up opportunities to participate. This offer and acceptance will determine the measure of engagement of indigenous peoples, which in turn will determine the likelihood that any law or policy will be implemented at the local level.

The following are suggested criteria, which may be taken into consideration when seeking to assess the effectiveness of any participatory process:

- level and breadth of indigenous participation;
- preparedness of participants;
- participation in drafting and revision of the proposal;

- extent to which the rights, interests and concerns of indigenous people are reflected in the output;
- effectiveness of the output in achieving the intended objectives;
- level of participation in decision-making processes relating to implementation, benefit-sharing and monitoring the effectiveness of legislation.

These criteria have guided the analysis of indigenous participation in the development of Peru's *sui generis* regime. Sections 4.3-4.7 review the steps of the process largely on the basis of the first three criteria, while section 4.8 looks at the extent to which the latest draft of the proposed regime addresses indigenous concerns. Section 4.9 considers the wider influence of the process on indigenous participation in the implementation of Article 8(j).

4.2. Drafting Phase (1996-1998)

In February 1996, INDECOPI and the Ministry of Agriculture established a Working Group on Traditional Knowledge (TKWG) to prepare draft legislation to protect the rights of indigenous and local communities over their collective knowledge. The Group included INDECOPI, the Ministry of Industry, Tourism, International Negotiations and Commerce (MITINCI), the National Institute for Natural Resources (INRENA) and the Peruvian Indigenous Institute (IIP). It also included two NGOs, DESCO, with experience of working with Andean communities, and the Peruvian Environmental Law Society (SPDA), with expertise in access to genetic resources and traditional knowledge. Indigenous peoples were not initially invited to form part of the TKWG.

In establishing the first official effort to protect rights over collective knowledge relating to biological resources, Peru took a step into the unknown, in a highly controversial area of law. At a time in which intellectual property rights regimes were being literally forced upon often unwilling developing countries, INDECOPI seized the opportunity to respond with a demand to protect the rights of indigenous peoples. This presented a profound and interesting challenge.

It is evident from the original format of the TKWG, which did not include indigenous representatives, that the challenge was at first perceived to be a technical one, which could be resolved through the establishment of a new form of IPR legislation. Indeed, some members of the TKWG felt that the complexity of the issue warranted a technical response to prepare a coherent proposal, which could then be presented to indigenous peoples for wider discussion. The inappropriateness of working on the issue of TK without involving indigenous people was highlighted by some members of the Group, and it was agreed that national organizations representing indigenous peoples should be invited to future meetings.

Invitations were sent to AIDSESEP and CONAP, the two national organizations representing Amazonian peoples which had already participated in other forums relating to access to genetic resources and benefit-sharing. The Working Group did not identify Andean representatives for participation in its work at this stage because, although

Andean indigenous peoples are more numerous, their organizations had a lower profile in national debates on indigenous rights. Representatives of each indigenous organization attended a couple of meetings of the TKWG, but did not continue to participate at this stage of the process. This left only two CSOs, SPDA and DESCO, participating in the development of the first draft.

The TKWG commenced work by reviewing existing material on the protection of TK, including work by Gurdial Nijar Singh and the Third World Network, Darrell Posey, GRAIN, RAFI, John Barton and Carlos Correa. Particular attention was paid to the experience of the Peruvian ICBG bioprospecting agreement, which had established a contractual arrangement to protect indigenous rights through the adaptation of licensing contracts.

In June 1996, the first draft was finalized and circulated to members of the five Working Groups, who were instructed not to circulate it more widely at this stage. The Traditional Knowledge Working Group continued to meet regularly, and prepared a second draft in August 1997, which was circulated to selected experts (including researchers in indigenous affairs, anthropologists, sociologists, biologists, etc.). The Group continued its work based on their comments, but no further invitation was extended to indigenous peoples to attend the TKWG until early 1998.

Indigenous participation in the TKWG

The decision to invite indigenous organizations to participate in the Working Group's activities taken at the first meeting of the TKWG demonstrated an early acceptance of arguments that indigenous peoples must be at the table. Although representatives of indigenous organizations did not attend further meetings, some members of the Group felt that, by extending the original invitation they had fulfilled their obligations with regard to indigenous participation, and that it was now the responsibility of indigenous organizations to ensure their representation in the Working Group. The Group therefore continued its work to prepare a draft technical proposal.

A number of reasons have been suggested for the lack of continued attendance of meetings of the TKWG by indigenous organizations. Some people felt that this could have been because the appropriate protocol for making invitations to indigenous organizations was not used. Furthermore, the fact that indigenous organizations were not invited from the outset of the process to participate in defining the objectives and composition of the Working Group, and the lack of clarity regarding the role that indigenous people were being asked to play in the process, may have added to the already low level of confidence of indigenous people in their ability to influence State policy. Thus, the indigenous organizations may have been reluctant to participate in a process over which they felt they had little influence.

The national patent office (INDECOPI) had had little contact with indigenous peoples prior to the commencement of the TKWG's activities. It is therefore not surprising that they were not at the outset fully aware of the protocol and modalities necessary for

developing a working relationship with indigenous organizations. Limited time and human resources also made it difficult for the authorities to engage indigenous people more actively in the process. When the TKWG started its work, it had a deadline of June 1996 to produce a first draft, and INDECOPI had not committed even one full time person to work on the proposal.

At the same time, it must be recognized that the ability of indigenous organizations to ensure continuous attendance may have been affected by the need to address the more immediate and multiple concerns of their communities, in the aftermath of ten years of violent internal conflict and in the face of ever increasing oil and mining activities in their territories. In recent years, indigenous organizations have been faced with an immense burden in trying to find the human and economic resources necessary to maintain a presence in the multiplicity of participatory processes to which they are being invited. These and other possible reasons why indigenous peoples' organizations did not continue to participate in the TKWG are listed in Box 7.

Box 7 – Possible factors limiting indigenous participation in the TKWG

- Low level of confidence amongst indigenous peoples in the government's commitment to protect their rights.
- TKWG was established without prior consultation with indigenous representative organizations.
- Indigenous organizations were not officially included as members of the TKWG or invited to participate in its work from the outset.
- The appropriate protocol for inviting indigenous organizations was not used.
- The rules for decision-making by TKWG the nature of the intended product, and the extent to which indigenous peoples might be involved in its development were not clearly defined.
- Indigenous peoples did not want to legitimize a process over which they felt they had little influence.
- Indigenous organizations had limited human and economic resources to attend meetings, and had to deal with the immediate concerns of the communities they represent.
- There was no unified national indigenous movement, and a lack of confidence between indigenous organizations and NGOs.
- The complexity of the issues, limited awareness amongst indigenous organizations at the time, and the fact that most of the material on protection of TK was only available in English at the time.

Whatever the reasons, it is generally recognized that greater progress would have been made during the first two years of the drafting process if indigenous peoples had participated actively in discussions regarding basic issues such as the scope of the proposal, objectives, prior informed consent, benefit-sharing, registration of knowledge and resolution of conflicts, all of which required knowledge of the desires, concerns and

practices of indigenous peoples. However, lessons were learnt from this early experience, which ensured greater indigenous participation later in the process.

The role of NGOs

Throughout the TKWG's activities, the authorities were cautious about circulating the proposal more widely. The first draft was considered to be too preliminary to circulate, and there was an obvious desire to avoid conflicts over what was a potentially controversial issue, both nationally and internationally. The highly charged nature of the debate on access to genetic resources in the development of a proposed regime at the level of the Andean Community led to the adoption of a cautionary approach (Caillaux and Ruiz, 1999)¹⁵. However, this impeded NGOs from broadening the consultative process and holding workshops to facilitate inputs from indigenous organizations. It also led to strained relations in the Group since some NGO representatives felt that there was a need for greater transparency.

Conversely, some NGOs could have been more active in using the opportunity to participate in the process in order to provide alternative viewpoints and promote the need for a wider participatory process. The support of NGOs in Peru for indigenous peoples' rights, and, most importantly, their right to participate in decision-making processes affecting them, has been slow to evolve. Indeed, strong collaborative working relationships between NGOs and indigenous organizations have tended to be the exception rather than the rule. During the last five to ten years, as oil and mining companies have pushed further into indigenous territories, lack of trust has begun to give way to a better understanding of shared goals and mutual dependence. At the same time, the lack of a unified and coherent indigenous voice on many issues has tended to hinder efforts to promote greater respect for indigenous organizations amongst the wider NGO community.

It is worth noting that, prior to the publication of the draft legislative proposal, indigenous organizations did not themselves put any noticeable pressure on the authorities to open up the process to allow for broader participation. This may be an example of the use of the tactic of non-engagement, with the hope of withdrawing all legitimacy from the process. While such an approach has proved successful in certain circumstances, it may on occasion prove counter productive and, as in this case, lead the authorities to believe that lack of participation demonstrates a lack of capacity or interest with regard to the issue.

Enhancing participation and securing funding

By early 1998, the TKWG realized that it was not in a position to finalize its work without greater input from indigenous people. A number of questions had emerged which could only be answered by them, such as: what is 'equitable' benefit-sharing? How should benefits be shared between different communities and ethnic groups which share the same knowledge? What mechanisms should be used to implement the regime in practice? Should a register of TK be established? How should it be managed?

¹⁵ See Footnote 9.

Thus, indigenous peoples' organizations were invited to participate in the TKWG once again. The desirability of holding a wider national consultation amongst indigenous people was also recognized, but lack of funding meant that such a process was not possible without external financial support. Due to the precedent setting nature of the initiative and the high profile it received in international fora, some aid agencies expressed an interest in supporting a national consultation process, on the condition that it was developed in coordination with indigenous organizations and directed by them at the regional and community level. However, the necessary project proposal was never developed. Possible reasons for this are as follows:

- lack of coordination and clearly defined competence for TK between the relevant government departments, and competition for leadership of the process;
- lack of coordination and trust between the authorities, NGOs and indigenous organizations, and differing visions of the kind of process required;
- lack of coordination amongst NGOs;
- absence of a clearly defined agenda and timeframe for participation;
- concern about delaying the process because of the need to stick to legislative timeframes; and
- lengthy donor procedures for the approval of grants.

There also appears to have been some reluctance on the part of INDECOPI to relinquish control over the process at this stage. This may have reflected concern that its ability to prepare and present a legislative proposal within the designated timeframe might be lost if it entered into a collaboratively led participatory process. In later years, INDECOPI was to show a more open attitude and it is now believed that the conditions exist in which a collaborative participatory process could be developed.

Box 8 – Strengths and limitations of the participatory process

Strengths:

- The process involved the relevant authorities from the start, securing commitment to the adoption of legislation.
- It included NGOs in TKWG.
- It secured preparation of a technical proposal for protection of TK around which wider discussion could occur.
- It built a core group of experts on the legal issues relating to protection of TK.
- Involved international experts on intellectual property rights.
- Included liaison with other countries to discuss the need for adoption of international legislation to protect TK.
- Developed working relationships between the Ministries responsible for trade and commerce and those responsible for indigenous affairs and environment and agriculture.

Limitations:

- The process did not secure the active and informed participation of indigenous people.

- The scope of the legislation was defined without a prior participatory process.
- Lack of transparency during the early years of the process.
- Insufficient emphasis on achieving a balance between technical expertise and understanding the nature of TK and its management by indigenous communities.
- Limited number of NGOs participated in the TKWG.
- Lack of a strong working relationship between NGOs and indigenous peoples organizations; and between government authorities.
- Insufficient emphasis on planning, time, and fund-raising to facilitate participation
- Lack of collaboration with indigenous peoples is thought to have resulted in over-emphasis on the commercialization of TK.
- Failure to address the underlying causes responsible for the loss of TK.
- Tendency to adopt existing precepts of public domain, without adequate consideration of potentially negative impacts for indigenous peoples.

4.3. Consultative Phase (1998 –1999)

Despite the shortage of funding, a number of steps were taken to consult indigenous people. The Technical Secretariat of Indigenous Affairs (SETAI) of the Ministry for Women's Affairs (PROMUDEH), in collaboration with the World Bank, held a meeting in Iquitos in June 1998, to consult indigenous leaders of the Amazon region on indigenous rights and development issues. At the meeting, INDECOPI circulated a questionnaire to obtain opinions on general issues relating to the development of a legal regime to protect TK. Although, on its own, this did not provide an adequate mechanism for consultation, it did assist in providing an indication of the extent to which the issues were understood, and demonstrated that the defense of rights over TK was a collective priority for indigenous people. It also helped to reaffirm that many of the issues arising in the proposal needed to be defined by indigenous people. (Flavia Noejovich, pers. comm.)

In order to obtain feedback from indigenous people of the Andean region, INDECOPI then sent copies of the proposed regime to 30 campesino communities. Only three responses were received, and these indicated that the proposal had not been well understood. INDECOPI was aware that this was not the best approach, but faced with financial and time constraints, it was unable to find a more effective means of communicating with distant communities at the time. Consulting indigenous people from the Amazon region was much easier than with those from the Andes because of the existence of national representative organizations (AIDSESEP and CONAP). However, comments received from these organizations also showed the need to provide a more detailed explanation of the purpose and potential implications of the proposed regime, as well as greater opportunity for development of a considered response.

Conscious of the need to engage indigenous people more fully, INDECOPI, in collaboration with PROMUDEH (SETAI) and UNDP, sponsored two Consultative Workshops in 1999. The first was held in Lima, in April, involving 16 representatives of indigenous peoples and campesino communities, mainly from organizations based in

Lima. A second workshop held in Urubamba, Cuzco, in May, brought together 36 representatives from indigenous and campesino organizations from around the country. The Workshop lasted for three days: the first was spent explaining the proposal, the second involved working groups to examine key issues in the proposal, and the third discussed the results of the working groups.

The workshops were a welcome step, which helped to generate awareness amongst indigenous people about the proposal and the broader issues surrounding it. However, many participants felt that they had not been sufficiently well informed before the events to be able to participate effectively. They also had little opportunity to discuss the proposals with their communities and organizations in advance of the meetings, which meant that they could only speak on a personal basis. Furthermore, these workshops did not involve indigenous rights activists, who could have helped to highlight the possible negative, as well as positive, implications of the proposal.

The proposal was then presented at an International Seminar held in Lima, in May of 1999, hosted by INDECOPI and the World Intellectual Property Rights Organization (WIPO). The seminar brought together a number of national and international experts, including representatives from the intellectual property rights authorities of the other Andean Community countries, business and the scientific community. However, with an attendance fee of US\$ 200, the seminar was beyond the means of all but a small number of invited indigenous organizations and NGOs. During the Seminar, invited experts demonstrated a broad consensus with regard to the fact that, for any regime to be effective, it must be developed with full and informed participation of indigenous and local communities.

4.4. Post-Publication Phase (October 1999 - 2000)

On the 21st of October 1999, a proposed regime for the protection of the collective knowledge of indigenous peoples was published in the official press in order to elicit wider national consideration and comment. The period for receipt of comments was 60 days from the date of publication.

Roundtable on Indigenous Participation

On the 26th of October 1999, just five days after official publication of the draft regime, a Roundtable on Indigenous Participation was held, providing a timely opportunity for dialogue between the framers of the proposal and those most affected by its provisions. It was attended by relevant national authorities and major organizations representing Amazonian and Andean indigenous peoples and campesino communities, as well as leading NGOs working on the issues.

The Roundtable was planned and organized by ADN, in collaboration with IIED, and officially convened by SETAI. It was originally designed to review past indigenous participation, but was broadened to allow participants to propose future actions to promote wider participation in the review of the published draft regime.

Indigenous organizations welcomed the opportunity to discuss the process of indigenous participation with the relevant authorities. Views were exchanged openly and constructively, and the practical steps for establishing a participatory process were agreed, largely on the basis of suggestions of indigenous people.

Assessment of the process to date

Indigenous participants at the meeting felt that the extent of participation to date had not been sufficient to enable indigenous peoples to effectively understand and review the content of the proposed regime, and provide an informed response. They stressed the need for an in-depth consultation process with indigenous people throughout the country, given the importance of the proposal, which affects “the basis of indigenous culture and cosmology”, “the future of our children” and “all humanity”.

As mentioned earlier, indigenous people felt that the consultative workshops convened by INDECOPI and SETAI in Lima and Cuzco in 1999 had been useful to raise awareness, but had not enabled them to provide effective feedback, due to lack of information and opportunity for consultation amongst their communities prior to the workshops. This highlights a distinction between occidental perceptions of representation, based upon the holding of an elected position, or institutional responsibility, and indigenous peoples’ collective decision-making practices, which require continual approval and participation by community members. Questions were also raised about the selection of participants, given that some sectors of the indigenous population were better represented than others.

It was, however, recognized that the preparation of the technical legislative proposal had certain merits. In the first place, it had secured acceptance of the viability of developing a legal regime for protection of collective property rights. While the principle that indigenous peoples have the right to control access to, and use of, their knowledge, innovations and practices is now enshrined in national legislation, there existed some skepticism amongst both the State and private sector that this could in fact be achieved. Therefore, whatever misgivings existed regarding the process for developing the proposed regime, and its content, there was little opposition to the initiative itself. The focus of attention was therefore directed towards the future, and the potential for wider participation in subsequent review of the proposal.

Identifying priorities for enhancing participation

While welcoming the initiative to publish the proposal for broader review, there was an almost unanimous recognition by participants that a 60-day period would not be enough to allow meaningful dialogue on the proposal amongst indigenous people. INDECOPI explained that the time limit had been set because of the need to get the legislation approved before the forthcoming election in April 2000, and that the usual period for public commentary was only thirty days.

Box 10 – Publication as a participatory tool

Publication of a legislative proposal in the press provides a useful tool to stimulate broader debate and consultation, but this alone is unlikely to offer an effective mechanism for indigenous participation. The following factors have been identified as limiting the effectiveness of publication as a participatory tool:

1. Limited circulation of the official press, and the inclusion of the proposal in a separate section on official proposals, reduces possibilities that indigenous peoples, NGOs etc, will become aware of the proposal.
2. Publication in Spanish alone means that many indigenous peoples who are not familiar with the language cannot review the proposal.
3. High levels of illiteracy amongst indigenous peoples limits the effectiveness of distributing information in written form alone.
4. Indigenous peoples are concentrated in remote areas of the country. Therefore a 60 day period for receipt of commentaries on the proposal may effectively exclude the majority of indigenous peoples from having the opportunity to make comments.
5. Complexity of the issue implies the need for user-friendly documents to explain the law.
6. Lack of a clearly defined process to ensure that comments are taken into consideration may discourage indigenous peoples from expending effort to comment on proposed laws.

Participants at the Roundtable drew attention to two national participatory processes for the development of laws relating to indigenous peoples' interests in which indigenous peoples and the State have closely collaborated. The most wide-ranging involved consideration by indigenous peoples of a proposed law on indigenous rights, through numerous workshops around the country arranged by indigenous peoples. Congressmen who had been involved in the preparation of the proposal were invited to attend, creating opportunities to hear at first hand the commentaries of community members. The second process involved the development of national regulations to govern consultation processes for oil exploration on indigenous land. This exercise involved a more traditional form of negotiation between the State, the private sector and indigenous peoples. Proposals were interchanged and commented upon separately within each group, and then discussed at multi-stakeholder roundtable meetings.

Both these processes have been ongoing for over three years. Many participants felt that, although these were lengthy processes, the time-scale was appropriate to allow active participation in the drafting of legislation. Participants also signaled the need to ensure that the objectives of any law responded to their *declared* interests, rather than their perceived interest, to avoid what an indigenous representative referred to as "denaturalizing the essence of collectivity". Furthermore, the need to view participation as a process, rather than an information gathering exercise, was emphasized frequently.

In terms of specific priorities for enhancing participation, indigenous representatives at the Roundtable identified the need to build the capacity of indigenous facilitators who could facilitate consultation with different ethnic groups by distributing information and collecting inputs from local communities. The idea would be to create a ripple effect, through which an ever-wider percentage of indigenous peoples might be effectively given the opportunity to participate in the revision of the proposed regime. Indigenous participants also identified the need for NGOs to assist this process by providing information and advice on legal and technical issues. The priorities identified at the Roundtable are listed in Box 11.

Box 11 - Roundtable proposals regarding future indigenous participation

- Extension of the period for submission of comments on the published proposal.
- Adoption of an interim regime to protect indigenous rights while a wider participatory process is implemented.
- Establishment of a working group to promote wider participation by indigenous peoples.
- Development of user-friendly materials, translated into major indigenous languages, including Quechua, Aymara, Ashaninka, Shipibo-Conibo and Aguaruna, to enhance possibilities for informed participation.
- Capacity building workshop for selected indigenous facilitators, responsible for facilitating consultations at regional and local levels.
- Regional workshops at the Amazonian and Andean level to bring together the results.
- Development of financing proposals for the realization of the foregoing activities.

The Roundtable had two important immediate impacts. Firstly, a Working Group on Indigenous Participation (WGIP) was established to promote and facilitate a country-wide process to consult indigenous people on the proposed regime. The WGIP was chaired by SETAI and included COPPIP, representatives of ten organizations representing Amazonian and Andean communities (including women's groups), the National Commission on the Environment (CONAM), INDECOPI and the Public Defender's office. At the request of indigenous organizations, ADN was invited to become a member of the WGIP and to provide technical assistance to the group.

Secondly, in response to the calls for extension of the period for receipt of comments, INDECOPI extended the period from 60 to 120 days, up to the end of February 2000. This period was subsequently extended for a further three months to the 20th of May. While these extensions were welcomed, it was felt that there was still not enough time for ample consideration of the proposal by indigenous peoples, and that making only small extensions tended to impede possibilities to obtain funding for the consultation process.

INDECOPI received a number of written submissions on the published proposal, having invited comments from anyone interested at both national and international level, and placed a copy on the internet. In August 2000, a second version of the proposal, modified to take into consideration comments received, was published in the official press.

4.5. The Working Group for Indigenous Participation

In the week following the Roundtable meeting, the Working Group for Indigenous Participation (WGIP) was convoked by SETAI. One of its first tasks was to prepare a project proposal to raise finance for:

- Preparation of user friendly materials to assist indigenous peoples to participate in the review of the proposed regime;
- A capacity building workshop for indigenous facilitators; and
- Andean and Amazonian consultation seminars.

The project proposal was widely distributed, but the tight timeframe for making comments, coupled with the lengthy procedures of many funding organizations, hampered the search for funding for a wider participatory process. In the end, the WGIP never managed to raise the necessary funding for the participatory process, though some funding was obtained for a capacity building workshop for indigenous facilitators and for the preparation of information materials.

The WGIP may be seen as one of the most positive outcomes of the process, establishing as it did a forum composed primarily of indigenous organizations and governmental bodies with a responsibility for issues relating to biodiversity, indigenous rights and administrative overview. Unfortunately its work was hampered by a number of factors, including:

- Heavy workload of SETAI staff and lack of support from SETAI's leadership restricted the capacity of the chair to effectively co-ordinate the group.
- Jurisdictional conflicts between government bodies, leading to irregular participation by certain relevant authorities.
- Voluntary nature of the WGIP.
- Lack of funding to assist the continuing participation of indigenous peoples representatives, including transportation costs.

Preparing User-Friendly Materials

As a first step towards increasing the accessibility of indigenous peoples to information regarding the proposed law, an information document was prepared which simplified the reading of the draft regime. This document was intended for use by indigenous facilitators to aid in the diffusion of information regarding the proposal. During review of the document, COPPIP suggested that the WGIP should highlight the following areas of importance:

- Objectives and scope of the law
- Rights over material in the public domain
- Prior informed consent
- Distribution of benefits
- Registration of knowledge
- Resolution of conflicts

COPPIP also pointed out that indigenous peoples did not need a document which merely paraphrased the proposal, but one which also placed it within the context of a more expansive consideration of the protection of traditional knowledge and directed indigenous peoples towards key questions to be considered. To do so, the document needed to:

1. Promote consideration of local and external values of traditional knowledge, threats to such knowledge, and potential strategies for its protection, including legal and community-based measures.
2. Indicate the extent to which rights over collective knowledge are already protected under national and international law.
3. Identify the scope of the proposed regime, including both what it seeks to protect, and the extent to which the knowledge, innovations and practices of indigenous and local communities is not protected.
4. Facilitate understanding and examination of concepts such as public domain, prior informed consent and equitable distribution of benefits.
5. Stimulate consideration of both positive and negative impacts, which the proposed regime may have for the protection of indigenous knowledge.
6. Promote discussion of local case studies involving access to, and use of, collective knowledge.
7. Provide indigenous peoples with a useful questionnaire to assist them in preparing their opinions with regard to key elements of the law, its scope and utility.

Preparation of the document drew attention to the complexities of developing a general tool for a diverse audience, involving indigenous peoples with common interests but often widely divergent priorities. Particularly notable was the difference in emphasis given by Andean and Amazonian communities to medicinal plants, local cultivated plant varieties and domesticated animals. Andean communities appeared more concerned in many cases with protection of land-races, while Amazonian peoples tended to highlight the importance of their medicinal plants.

In March of 2000, funding was secured for finalizing the information document, and for a workshop for the capacity building of indigenous facilitators. During the workshop, participants were invited to revise and comment upon the information document, which had been prepared to assist in their work in the field. It was clear that although the document was seen as a potential aid to their activities, it was still too detailed for many people to understand, and that other materials, including video and radio scripts, needed to be developed. The importance of involving social communicators in the development of all relevant materials was stressed. The information documents have been completely revised in the light of this workshop, and an introductory section on the international debate on the protection of traditional knowledge has been included. Subject to funding, the information documents should be available for distribution during the second quarter of 2002.

Capacity building for indigenous facilitators

A capacity building workshop for indigenous facilitators was held in October 2000, with a view to preparing 30 indigenous facilitators, whose role it would be to help identify the opinions of local communities regarding the proposed regime. These facilitators were to have been selected by indigenous peoples' representative organizations, on the basis of criteria established by the WGIP. The WGIP emphasized the importance of ensuring geographical coverage and gender balance, with candidates selected by organizations with the greatest presence in the relevant area. It also highlighted the need to select facilitators on the basis of relevant experience, youth, level of education and preparedness to travel amongst their communities to share information on the issue of protection of TK. Approximately ten people from the Andean region and ten from the Amazon region were invited, as well as representatives of Coastal communities and national organizations.

Unfortunately, inadequate coordination between the workshop coordinators and the nominating institutions with regard to the event and to ensuring compliance with the selection criteria resulted in almost half the invitees arriving late. Many were unaware of the process to which they had been invited, others had little interest in the theme, and some claimed there was no point in participating as money had not been allocated for carrying out workshops at the local level. Despite these drawbacks there was considerable interest amongst the majority of participants in the workshops, though there was much concern as to how they were to apply their knowledge without further support.

The selection process was designed to promote confidence building with representative organizations and ensure indigenous peoples and campesino communities from across the country would be represented in any future consultation. It is, however, worthy of note that the selection of facilitators did not include two sectors of society whose rights over their collective knowledge, though recognized under existing legislation, are not referred to in the draft regime. These are local communities other than those registered with the State as being either campesino communities or native communities, and Afro-American communities, which make up more than 5% of the national population.

By April of 2001, funding for consultative workshops at the local level had still not been secured, and although interest had been shown in financing a project to be administered by COPPIP, political instability in Peru during late 2000 and the first quarter of 2001 had led potential funders to place all future projects on hold.

4.6 Action by indigenous organizations and NGOs

A number of workshops have been convened by indigenous organizations and NGOs in different parts of the country to coordinate responses to the publication of the proposed regime. The first of these was a meeting coordinated by OBAAQ, an organization dedicated to promotion of community interests, where representatives of both Amazonian and Andean communities considered the merits or otherwise of seeking legislative protection for TK. While, in the mountains above Cuzco, the NGO Andes held two

workshops for campesino communities, where participants considered the importance of TK and the relevance of the proposed regime for the protection of their interests. The presence of the chair of the TKWG at both events provided a rare opportunity for direct contact between local community members and the main force behind the preparation of the proposal. These were the only workshops of this kind held between the first and second publications of the draft proposals, and therefore the only ones to have had an influence on the latter proposal.

Since publication of the second draft proposal, there have been many more local workshops organized by indigenous peoples themselves, regional federations and NGOs. Amongst these, the Ashaninka people have been perhaps the most active, with numerous workshops organized by community groups, student bodies and regional organizations. Publications are also starting to appear for communities, which include reference to and, in some cases, a brief analysis of the proposed regime, within documents giving more general information relating to the protection of traditional knowledge, intellectual property rights and cultural integrity.

4.7 Indigenous Participation in the revision of the proposal

Following publication of the draft regime, the TKWG was disbanded, and consideration of comments and revision of the proposal was carried out by INDECOPI alone. The WGIP had responsibility for coordinating the consultation process, but not for revising the proposal.

Although requested to provide opportunities for participation in the revision of the proposal, INDECOPI made no commitment to share this task with indigenous peoples and other experts. It indicated that the concerns of indigenous people identified through any participatory process would be considered, and that their interests would be given equal consideration as those of potential users of traditional knowledge.

However, indigenous peoples feared that unless they were directly involved in the revision process, it would not be possible to guarantee that their concerns would be fully incorporated in the proposal, and that their real interest, not only their perceived interests, would be taken into account. Furthermore, indigenous people felt that greater emphasis should be given to protecting their rights, than to safeguarding the interests of potential users, and that they should be present when drafting decisions were taken so that, as *rights*-holders, they could ensure that their rights were protected before any balancing of stakeholders interests took place.

Nevertheless, INDECOPI provided an explanation for their acceptance or otherwise of comments made in writing to them. And it is clear from analysis of their explanation that they did in fact pay close attention to all the comments they had received. At the same time, it is worth noting that INDECOPI's review process only formally considered written submissions and those made at its workshops, but did not include informal commentaries made by indigenous representatives at the WGIP and other fora.

Having twice extended the period for provision of commentaries, INDECOPI felt that the responsibility then fell upon indigenous peoples to formally present their position regarding the proposal. Furthermore, its intention was to present the proposal for consideration and adoption by the National Congress, rather than promote its adoption as an administrative decision, thereby transferring responsibility to Congress for its final content and providing a further opportunity for the concerns of indigenous peoples to be raised.

Following the publication of the second draft proposal in August 2000, INDECOPI adopted a resolution to send the proposal to Congress. Shortly afterwards, the Director of INDECOPI resigned and their successor, upon the advice of those responsible for developing the proposal, declined to exercise the resolution on the basis that further consultation was warranted. However, this decision was never made known to SETAI or other sectors with a legitimate interest in the issue, and, in response to concerns expressed by indigenous organizations, SETAI promoted the adoption of a Supreme Decree calling on INDECOPI to rescind its resolution to send the proposal to Congress. The Supreme Decree also called for the establishment of a new working group with a mandate to develop a new legislative proposal. As a result, the proposed regime developed under INDECOPI's guidance has been put on hold.

One of the consequences of the decision to promote a new process and of the criticism directed towards the proposal and the process for its development, has been to alienate INDECOPI. As the first national intellectual property rights authority in the world to work on this issue, there appears to exist a feeling in INDECOPI that critics should seek to be constructive and understanding of the obstacles which have been encountered. Conversely, there are those amongst indigenous commentators who feel that it has been a struggle to get the authorities to listen to them and that greater sensitivity should have been shown to their concerns, as the holders of traditional knowledge.

It would be ironic if, having led the international debate on protection of TK, Peru now found that its efforts to develop a national regime were to return to square one. Although there are clearly fundamental issues to be addressed with regard to the objectives and nature of such a regime, it is equally clear that significant advances have already been made, given the precedent setting nature of many of the provisions in the proposal. Indigenous peoples would be advised to consider carefully the draft regime with a view to rescuing from it the more positive elements of the proposal and incorporate them into any future regime for the protection of their intellectual heritage.

4.8 Evaluating participation based on the content of the proposal

The content of a legal proposal can speak loudly about the effectiveness of a participatory process and the extent to which the interests of those consulted have been taken into account. When considering the content of legislation for the protection of rights over traditional knowledge, it is appropriate to focus on the extent to which it establishes mechanisms for strengthening traditional knowledge and innovation systems. Legislation, which focuses primarily on the protection of knowledge for the purposes of

commercialization is unlikely, in the majority of cases, to reflect the real aspirations of indigenous peoples.

Amongst the elements for consideration are the extent to which a TK law:

- Defines objectives which reflect the declared interests of indigenous peoples.
- Embraces a holistic interpretation of collective knowledge.
- Provides incentives for strengthening the local use of traditional knowledge.
- Establishes incentives for the wider use of traditional knowledge with the prior informed consent (PIC) of indigenous and local communities.
- Recognizes that protection of TK requires a multi-sectoral approach, involving the education, health, agriculture, and fisheries sectors, amongst others.
- Seeks to promote the importance of cultural respect, and reduce religious intolerance.
- Adopts PIC processes which respect traditional decision-making authority of indigenous peoples and local communities, strengthen collective decision-making and promote equitable distribution of benefits.
- Establishes a capacity building program for indigenous and local communities in the protection and management of their TK, including negotiation of commercial and other agreements.
- Creates mechanisms to support indigenous and local communities in the negotiation of commercial agreements.
- Establishes support programs for registering traditional knowledge, both at the national and local level.
- Recognizes customary law and practice in the decision-making processes relating to implementation.
- Articulates rights over TK, which has been collected, published, commercialized or otherwise distributed outside the relevant indigenous people or community, prior to the adoption of legislation.

The draft proposal adopts a number of the most far-reaching suggestions of leading commentators on the protection of TK, such as Darrell Posey, Gurdial Nijar Singh and others (Tobin 2001)¹⁶, and offers much that other countries can learn from. It recognizes that traditional knowledge is subject to ancestral rights, which do not derive from any act of government. Therefore, the purpose of the proposed law is declaratory in that it recognizes rather than grants rights. Furthermore, the proposal recognizes that traditional knowledge is cultural patrimony and therefore inalienable, is collectively owned and requires prior informed consent for its use.

The draft law also proposes a right to compensation in the form of a percentage of profits derived from the commercialization of products developed using TK, even where that knowledge is in the public domain. These benefits would be allocated to a fund for indigenous people, to be managed by indigenous people. The proposal identifies the need

¹⁶ See Tobin, Brendan (2001). *Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru*. RECIEL, 10 (1). Oxford.

to develop a confidential register of TK, and allows for both national and local registers. A role for customary law and practice in conflict resolution and in determinations of prior informed consent has also been envisaged.

However, some serious concerns have been raised regarding what have been termed conflicts of perspective, legal vision and interest between indigenous peoples' cosmovision and the draft proposal (see box 12). For instance, it would entitle an individual community to enter into an agreement for the use of traditional knowledge subject to seeking the opinion of other communities which share the same the knowledge, but without requiring their approval. This could undermine the collective decision-making practices which underpin many indigenous knowledge systems, thereby threatening cultural integrity, and lead to conflicts between communities.

The proposal recognizes the rights of indigenous peoples to share in the benefits derived from the use of their TK whether or not such knowledge is in the public domain. It does not, however, recognize their right to control the use of knowledge which has fallen into the so-called public domain, and may therefore serve inadvertently to legitimize the historical expropriation of traditional knowledge¹⁷.

While the Convention on Biological Diversity refers to the knowledge, innovations and practices of indigenous and local communities, the scope of the proposed regime only extends to knowledge relating to the characteristics and properties of biological resources. It is unclear whether this definition covers, for example, recipes and formulas used to produce medicinal products. Although the authorities take the position that it does, the wording of the relevant provisions does not appear to support this interpretation, thereby leaving unprotected some of the most valuable elements of TK. This has led some commentators to express the opinion that, in its present form, the proposed regime will respond more to the interests of commercial users than to those of indigenous people.

A number of significant modifications have been made to earlier drafts on the basis of input received during the consultation process. One of the most important was the recognition that the term "indigenous people" should be used in place of the term "native communities". This was a major step forward in acceptance of the status of indigenous people as a distinctive sector of society, with specific needs and rights. The term had been resisted for a long time due to historic reluctance to recognize indigenous people as a distinct community, and the tendency towards assimilation rather than coexistence. It is noteworthy that this amendment came about after indigenous peoples themselves commented on the issue. It was the first time the term has been included in a national legislative proposal, and this has subsequently become the norm rather than the exception to the rule.

¹⁷ Ibid.

Box 12 - Conflicts of perspective, legal vision and interest

One of the most important outcomes of the Peruvian experience has been the identification of the conflicts which must be overcome in order to ensure understanding between the framers of legislation and the communities whose interests must be protected. These include conflicts of perspective, legal vision and interest:

- *Conflicts of Perspective* arise with regard to the nature of traditional knowledge as cultural patrimony of a people or property of a community. National authorities must refrain from defining mechanisms for granting prior informed consent which conflict with ownership patterns and consultation requirements established in customary law and practice. The draft proposal also highlights the difficulties national authorities have in recognizing the jurisdiction of customary law and practice over TK, other than as a tool for resolution of conflicts amongst communities.
- *Conflicts of Legal-vision* include issues such as the definition of knowledge and the applicability of concepts such as public domain. The Peruvian proposal, which only deals with knowledge relating to the properties and characteristics of biological diversity, has been charged with denaturalizing TK by arbitrarily dismembering it, showing the potential difficulties arising from the categorization of TK into knowledge, innovations and practices, as in the CBD. Redefining the moment at which traditional knowledge is deemed to become part of the public domain is also a crucial element toward recuperating rights over expropriated traditional knowledge.
- *Conflicts of Interest* arise between indigenous peoples as rights holders and national authorities, researcher institutions and private sector actors as stakeholders. These can arise at the stage of defining objectives, scope, and modalities for protection, including provisions governing access and use, where the interests of users are sometimes considered as equivalent to the rights of custodians of TK. The benefits and drawbacks of local and/or national registration systems will also depend upon the level of control which relevant parties have over such registers.

Source: Brendan Tobin, Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru, RECIEL 10 (1) 2001

4.9 Wider impact of the process

A welcome result of the process has been the noticeable transformation of the debate on protection of TK from a closed, technical “expert” led process, to a more inclusive one, based on awareness of the need to be guided by the cosmovision of indigenous peoples and campesino communities. The intellectual and political challenge which has captured the interest of the relevant authorities, coupled with the increasing confidence of indigenous peoples in their ability to influence legislative decision-making, has created a climate for closer working relationships between the State and indigenous peoples.

Attention is now turning to the development of a national strategy for the implementation of Articles 8 (j) and 10 (c)¹⁸ of the CBD, to provide a more comprehensive approach to the protection of TK. The strategy would include both legal and non-legal measures to preserve and maintain TK, promote its wider application and promote the customary use of biological resources.

Following experience with the TK law, it was quickly realized that the strategy for Article 8(j) should be prepared in a participatory fashion, and that a number of basic principles would have to guide the process. Amongst these were the need for a coordinating body, which can bring together the State, indigenous peoples and other stakeholders. This body, it has been suggested, should have power to prepare policy proposals for consideration by national authorities. Its composition and role should be decided in a participatory fashion, as should the ground rules for its functioning, and its agenda. The coordinating body should serve as a form of clearing-house for information pertinent to the debate on Article 8 (j), and have responsibility for preparing user-friendly materials for diffusion of information to indigenous peoples and campesino communities.

In recognition of the fact that TK belongs to indigenous peoples and local communities, an indigenous representative might appropriately chair such a coordinating body. This would help to gain the confidence and commitment of indigenous peoples to the process, a prerequisite to obtaining their full participation in any process to define law or policy. There is already experience with such a body in the form of a sub-committee of the National Commission on Biological Diversity (CONADIB) with responsibility for matters relating to Article 8(j) of the Convention. This has been coordinated by AIDSESEP, the largest national organization representing indigenous peoples of the Peruvian Amazon.

The sub-committee was influential in developing Peru's coordinated position for the meeting of the CBD Working Group on Article 8(j), held in Seville in March 2000, and the Peruvian delegation to that meeting included indigenous, NGO and government representatives. The delegation met in advance within the framework of the sub-committee, and agreed to portray a common, though not necessarily a consensual, position with regard to the protection of indigenous peoples' rights in Peru, and the fundamental role of participatory processes in establishing functional legislation. Following the Seville meeting, the head of the national delegation pointed out that the success of Peru's participation was in no small part due to the make-up of the delegation, and suggested that the national delegation for COP V should seek to maintain this working relationship.

After the Seville meeting, the sub-committee on Article 8 (j) met on a number of occasions and proposed that a long-term participatory program to develop a national strategy for the implementation of Article 8 (j) should be commenced as soon as possible. Based on experience with developing the TK law, it was decided to develop a collaborative working relationship to identify needs and existing resources, and to

¹⁸ Article 10 (c) recognizes the need for Parties to promote customary use of biological resources.

develop a joint project proposal involving indigenous organizations, State actors and NGOs.

The sub-committee decided that it would be necessary to prepare a baseline study and feasibility report as background material for any major project. An outline of the elements to be considered in these studies was prepared by the Permanent Commission of Indigenous Peoples of Peru (COPPIP), and submitted to the sub-committee for approval. This was in turn presented to a special meeting of the National Commission on Biological Diversity (CONADIB), and approved as the national position for COP V. The national delegation to COP V was charged with bringing the proposal before potentially interested funding organizations.

The inclusive nature of the process has important ramifications for the promotion of any national project. In the first place, it came as the result of indigenous peoples' proposals to the sub-committee, thereby recognizing the legitimacy of the sub-committee, chaired by an indigenous representative, to make proposals for policy development. Approval by CONADIB secured the support of a large number of government departments and NGOs and ensured their cooperation in the preparation of baseline studies and project proposals. The gestation of the project proposal in an open, transparent and inclusive fashion marked a new form of cooperation in this area. By generating support from the ground up, potential competition, rivalry and organizational jealousies were put aside for the common good.

Unfortunately, with the restructuring of CONADIB, the sub-committee was disbanded, leaving the issue of protection of traditional knowledge without a home. While the issue is being dealt with in many different forums, there is no single working group bringing together all interested parties to develop appropriate legislative and policy proposals. This has led to calls for the establishment of a National Commission for Traditional Knowledge and Folklore.

4.10. Towards a Global System to Protect Traditional Knowledge

Peru's proposal on traditional knowledge is both innovative and controversial, considering some of the challenges it makes to existing principles of intellectual property rights legislation, including the redefinition of rights over knowledge in the public domain. Having taken a bold step in the search for the defense of the interests of its indigenous peoples, Peru should ensure that its experience is not lost from international fora where efforts are currently underway to develop mechanisms to protect the rights of indigenous peoples over their traditional knowledge. At the same time, key international bodies, such as WIPO, should pay particular attention to Peru's unique experience.

In October 1999, Peru, together with Colombia, Ecuador, Bolivia and Nicaragua, submitted a joint proposal to the World Trade Organization calling for action at the international level to develop a global system for the protection of traditional knowledge. Peru has also played an influential role in highlighting the potential role for intellectual property rights regime to serve as a means to ensure prior informed consent for use of

traditional knowledge. It was the first country to adopt legislation requiring evidence of PIC as a condition for the granting of plant breeders' rights. This system, sometimes called a certificate of origin system, has now been adopted at the level of the Andean community in Decision 486, which requires evidence of the right to use genetic resources and traditional knowledge as a condition for the granting and maintenance of intellectual property rights. The system has also become one of the principal proposals for user measures to enhance realization of the CBD's access and benefit-sharing objectives. In the first meeting of the Ad-hoc Working Group on Access and Benefit-Sharing, held in Bonn, in October of 2001 a draft decision was adopted which will bring the certificate of origin idea before the next Conference of the Parties to the CBD for consideration.

The call for *sui generis* legislation to protect traditional knowledge, and the parallel call for *sui generis* legislation to implement a regime for protection of rights over new plant varieties under the WTO TRIPS agreement, has led to a certain level of confusion. It must be remembered that '*sui generis*' is a generic term signifying any special regime. Unfortunately, commentators do not always make a clear distinction as to their subject matter. Therefore, a discussion of *sui generis* legislation to protect traditional knowledge may refer to a system to implement Article 8 (j) of the CBD or Article 27.3 (b) of TRIPS. And in some cases a discussion of protection of traditional knowledge may apply to material common to both as in the case of landraces (farmers varieties) which are both plant varieties which may be the subject of protection under TRIPS and are products of traditional knowledge. .

Similarly, there is a tendency to view any discussion regarding the establishment of *sui generis* regimes to protect the wider body of traditional knowledge, as meaning the development of a new form of intellectual property right regime. In fact a *sui generis* regime might be any one or none of the foregoing.

One thing that is clear, however, is that at the present time the rights of indigenous peoples and local communities over their traditional knowledge are not secured by international law, and there is very little recognition of such rights under national legal regimes. Furthermore, as may be seen from the experience in Peru, customary law and practice may not provide a readily available solution to disputes over rights relating to traditional knowledge.

The role of a *sui generis* regime could, therefore, be to establish a bridge between indigenous/local community, and national and international legal systems, in order to secure the effective recognition and protection of rights which derive from customary law and practice . Under such a view, *sui generis* legislation may be seen as the glue which binds together the components of a package of measures, providing functional interfaces between them, in order to secure the protection and strengthening of traditional knowledge, and its wider use for conservation and sustainable use of biodiversity¹⁹. Potential components of such a comprehensive system for protecting and strengthening traditional knowledge and rights relating to it are presented in Tables 1 and 2 below.

¹⁹ Tobin B. (2001). Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru. RECIEL, 10 (1).

Table 1 COMPREHENSIVE LEGAL REGIME TO REGULATE ACCESS AND BENEFIT-SHARING WITH REGARD TO TRADITIONAL KNOWLEDGE	
INDIGENOUS PEOPLE OR LOCAL COMMUNITY	Maintenance or revitalization of traditional decision-making authority and customary law and practice Adoption of Community Protocols on Access and Benefit-sharing Preparation of Indigenous <i>sui generis</i> legislative proposals Identification of Indigenous principles of equity Development of contract negotiation skills Investigation of potential utility of existing IPR for protection of TK
PROVIDER/SOURCE COUNTRY	Adoption of Access Measures Requiring PIC of indigenous peoples in accordance with customary law and practice. Establishment of participatory process to develop <i>sui generis</i> regime Adoption of <i>sui generis</i> regime with monitoring and review process Establishment or maintenance of conflict resolution mechanisms Amendment of national IPR laws to allow for oral evidence of prior art
RECIPIENT/USER COUNTRY	Adoption of laws to regulate importation and use of TK Adoption of requirements to show evidence of PIC as a prerequisite for receipt and/or processing of IPR applications Adoption of legislative, administrative or policy measures to comply with obligations under article 15, 16 and 19 of the CBD. Disclosure of existing legal measures which may be utilized to prevent or mitigate the unapproved commercial or scientific use of TK
SCIENTIFIC OR COMMERCIAL END USER	Require evidence of PIC as a condition for receipt of and use of TK Require compliance with the customary law and practice of the custodians of TK and the laws of the source country. Maintain record and copies of all contracts evidencing PIC Adopt codes of conduct, recognizing the interests of indigenous peoples over of all their TK whether or not in the public domain
CONFERENCE OF THE PARTIES TO CBD, CLIMATE CHANGE, DESERTIFICATION, UNESCO, WIPO, INTERNATIONAL BODIES	Development of framework international regime for the recognition and protection of the rights of indigenous peoples and local communities over their traditional knowledge, such regime to: <ul style="list-style-type: none"> • promote compliance with customary law and practice, • promote adoption of measures by recipient/user countries to secure PIC for importation and use of TK, • develop mechanisms for conflict resolution to be guided by principles of equity gleaned from a comparative study of indigenous and local community customary law and practice, and existing bodies of Equity. Establish an Ombudsman's office to oversee equitable realization of international legal obligations Revise national and international regimes to ensure IPR supports the objectives of the CBD and complies with UN Human Rights Covenants
Adapted from Tobin B. (2001). Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru. RECIEL, 10 (1).	

Table 2: STRENGTHENING TRADITIONAL KNOWLEDGE AND INNOVATION SYSTEMS (TKIS)	
INDIGENOUS PEOPLE OR LOCAL COMMUNITY	Auto-diagnostic of reasons for loss of TK Preparation of Community action plan to protect and develop TK Community action programs, e.g. apprentice healer/shaman program Community Bi-lingual education programs Awareness building on potential impacts and benefits of genetic resource trade Community registration of TK (oral, written etc.)
PROVIDER/ SOURCE COUNTRY	Diagnostic on the role of TK, and threats to TKIS Develop incentives for use and development of TK by communities Provide incentives for research institutions and private sector to support community programs to strengthen TKIS. Revision of national curriculum and teacher training to include promotion of the value of TK, and of cultural diversity Promote integrated health programs drawing upon both traditional and occidental medical systems Establish a national Institute of traditional knowledge and innovation systems, designed in collaboration with and managed by indigenous peoples to promote the wider use by indigenous peoples of their TK. Include traditional knowledge in bi-lingual education programs.
RECIPIENT/ USER COUNTRY	Carry out inventory of national databases of TK, gene banks holding farmers' varieties, medicinal plants and other TK. Establish requirements for disclosure of TK held in databases etc. Develop TK repatriation programs in collaboration with indigenous peoples representatives Develop in collaboration with indigenous peoples education programs regarding the historic and ongoing use of TK in user countries.
SCIENTIFIC OR COMMERCIAL END USER	Establish codes of conduct regarding collection and use of TK Promote benefit-sharing with the custodians of TK Exchange information regarding the use and benefits of TK with local communities and indigenous peoples Train employees and sub-contractors in code of conduct for showing respect to local communities and for their customs beliefs and traditions
CONFERENCE OF THE PARTIES TO CBD, CLIMATE CHANGE, DESERTIFICATION, UNESCO, WIPO, INTERNATIONAL BODIES, GEF	Fund international Programs and incentives for strengthening TKIS Provide financial and technical support to ensure full and informed indigenous participation in decision-making processes to define <i>sui generis</i> regimes for protection of TK. Promote and fund study of customary law and practice and its role in protecting TK. Promote comparative analysis of best practices in developing functional interfaces between national legal regimes and customary law and practice. Support development of indigenous peoples clearing house mechanism Investigate conflict of laws and recognition of customary laws of indigenous peoples.
Adapted from: Tobin B. (2001). Redefining Perspectives in the Search for Protection of Traditional Knowledge: A Case Study from Peru. RECIEL, 10 (1).	

5. CONCLUSIONS AND RECOMMENDATIONS

Peru's experience highlights the critical importance of active indigenous participation in the decision-making process to develop *sui generis* legislation to protect traditional knowledge. Any process to develop such legislation must first identify the threats to TK and the interests and concerns of the people whose rights it aims to protect. Furthermore, effective protection of traditional knowledge requires measures which are sensitive to, and promote compliance with, the customary law and practices of indigenous peoples. This cannot be achieved through the application of externally developed technical solutions.

Peru's experience also underlines the need to build trust in order to secure indigenous participation, particularly where indigenous people have historically been marginalized from the decision-making process. Lack of confidence in the process probably contributed to the reluctance of indigenous organizations, to attend meetings of the TKWG during the early phase of the process. This might have been avoided if greater care had been taken to invite indigenous representatives to participate from the outset, engage them in defining the composition of the working group and the objectives of the proposed regime, and inform them fully about the issues being addressed.

Time constraints have also been an impediment to indigenous participation. The period for review was extended a number of times, but on an incremental basis, making it difficult to plan and raise funds for a broad participation process. Those leading the drafting process were evidently under pressure to finalize the proposal from senior officials, who perhaps did not appreciate why the process should take longer than for other laws. One way to get around this problem could be to introduce an interim regime, which would impede access to, and use of, TK which does not comply with customary law and practice, while a truly collective indigenous proposal is developed.

Concern also existed that there was no mechanism in place to ensure that the results of any consultation process would be fully incorporated into the review of the proposal. The current draft proposal, developed without such a mechanism, contains some important provisions for protecting traditional knowledge, but nevertheless contains some areas of concern. Certain provisions could favor commercial interests over those of indigenous people, while others could undermine the collective decision-making practices that underpin indigenous culture and knowledge systems.

A number of conclusions and recommendations can be drawn from Peru's experience, which may provide general guidance for securing participation of indigenous peoples in the development of *sui generis* regimes for protection of TK. They are particularly relevant for countries with a similar situation to Peru - a large indigenous population that has historically been marginalized. They may also be broadly relevant for any participatory process involving indigenous people. Section 5.2 identifies some specific recommendations for Peru.

5.1 General conclusions and recommendations

1. Countries may consider introducing *sui generis* legislation in order to:

- Ensure that the ancestral rights of indigenous and local communities over their traditional knowledge, innovations and practices are fully recognised and protected, and that the use of such knowledge is subject to their approval.
- Protect and strengthen traditional knowledge and innovation systems for spiritual, cultural, social, environmental, economic, nutritional, health and other subsistence needs of indigenous and local communities, above and beyond any market value it may have.
- Establish incentives for the development of programs, projects and collaborative initiatives for protecting and strengthening traditional knowledge and innovation systems, and in order to prevent its rapid disappearance.
- Ensure that countries, and in particular their traditional knowledge holders, are empowered to take advantage of opportunities to secure benefits from the scientific and commercial use of traditional knowledge.
- Promote compliance with customary decision-making practices on which the maintenance of traditional knowledge depends.
- Provide legal protection for knowledge which is already in the public domain, including that which has been documented or otherwise shared (unless there exists clear evidence to the contrary, it should be assumed that indigenous people did not intend to permit commercial or scientific use of their knowledge).
- Provide mechanisms for articulating rights amongst and between indigenous peoples and/or local communities, which jointly or severally hold the same or substantially similar TK, and to facilitate the resolution of disputes relating to access and use of such TK.
- Provide indigenous peoples and local communities with mechanisms for securing increased protection for new and individual innovations.
- Avoid legal uncertainty and associated difficulties with the negotiation of contractual agreements for the use of genetic resources and related knowledge

2. A rights regime alone cannot prevent the continued loss of TK - this will require local and national strategies for the implementation of Articles 8(j) and 10 (c) of the CBD, which identify both legal and non-legal measures, developed with the full participation of indigenous and local communities.

Box 12 - Any participatory process to develop a legal mechanism for the protection of traditional knowledge should:

1. Be based upon respect for customary law and practice.
2. Maintain a broad definition of traditional knowledge.
3. Consider the communities holding traditional knowledge as the primary beneficiaries of the legislation.
4. Involve the primary beneficiaries at all stages of conceptualisation and drafting of the legislation.

5. Reflect understanding of the extent as well as the limits of commercial and scientific interest in traditional knowledge.
6. *Not* assume rights are extinguished when traditional knowledge falls into the public domain.

3. Indigenous people should participate actively in the design of TK laws to ensure that their rights are fully protected, and not compromised to serve the interests of users of TK. To do so would be to place a commercial or scientific interest above an ancestral and, in some cases, legal right. As TK owes its existence to the local and indigenous communities that have developed it over generations, only they can claim to have rights over traditional knowledge, and only they should decide how, why, when and by whom it may be accessed and used. This implies a role for government not so much as the protagonist or the adjudicator of rights between various interest groups, but rather as the facilitator to enable indigenous peoples' rights and interests to be recognized by dominant legal regimes.

At the same time, the potential interests of the scientific and commercial sectors should also be considered when designing legislation. This will help to ensure that the legislation will not impede indigenous and local communities from taking advantage of development opportunities which may arise, nor hinder beneficial scientific research carried out with the approval of communities.

4. To be effective, TK laws need to be based on a sound understanding of the specific nature of traditional knowledge, innovations and practices, and their intrinsic, cultural, spiritual, social and economic values for local and indigenous communities. Government representatives and technical experts who are not themselves indigenous people will need to gain understanding of traditional knowledge systems, customs and decision-making practices to assist in the design of effective and appropriate measures.

Innovative legal mechanisms will be required to bridge the gap between the often diametrically opposed customary practices of indigenous peoples and dominant legal regimes, based on concepts of law which may be totally alien, inappropriate and insensitive to the reality of indigenous and local communities, their perceptions of property and their underlying philosophy of life or 'cosmovision'.

5. Indigenous participation is important to ensure that the legislation will be implemented effectively. Indigenous people are unlikely to support, or be willing to implement, a law that has been developed without their participation.

6. Participatory processes must be more than mere fact-finding missions, consultations on specific provisions of legislative proposals, or opportunities for sounding off. Meaningful dialogue and close collaboration will be required to build the understanding necessary to develop a common vision and strategy to protect TK.

7. For participation to be meaningful, it must provide participants with a real possibility to influence the outcome of the process. Indigenous peoples should be

included in drafting groups, be empowered to play a full and informed part in the adoption or rejection of a decision, and remain free to withdraw from the process at any time. Indigenous peoples should be empowered to prevent the adoption of decisions which may negatively impact upon their environmental, social, cultural or spiritual well-being.

8. A fundamental first step in any participatory process will be to obtain the confidence of indigenous and local communities. If this confidence is not gained, indigenous peoples may refrain from participation in order to avoid granting legitimacy to a process over which they feel they have little influence. In order to gain the confidence of indigenous peoples it is important to:

1. Provide a real opportunity for indigenous people to participate in decision-making.
2. Secure participation as early as possible, and allow indigenous people to participate in determining the composition of any drafting group, the ground-rules for participation, the process for engaging indigenous people, and the objectives of the legislation.
3. Work through indigenous representative organizations, and make invitations to participate in accordance with their traditional practice or organizational protocol.
4. Help indigenous participants to develop a good understanding of the issues to be addressed.
5. Ensure that transparency is a guiding principle.
6. If decisions are made in the absence of indigenous people, indicate the relative weight given to their suggestions and provide explanations where these have not been addressed.

As a minimum, the nature of the process should be explained to indigenous people, including whether it is for information exchange, consultation or negotiation, the extent to which they may influence the outcome, and what the intended product is. This will allow indigenous peoples to make informed decisions regarding the value of participating.

9. Indigenous participation in the design of the consultation process is important to ensure that the process is effective, sufficiently extensive and conducted in accordance with traditional decision-making authorities and processes.

10. Clear technical proposals can facilitate participation – but indigenous people should participate in defining the objectives. A clearly defined technical proposal can help stakeholders to focus on the issue and prioritise it, facilitate the identification of interests, and promote the consideration of alternatives. As a prerequisite for preparation of a technical proposal it will be crucial to identify the priorities and perceptions of indigenous peoples. Where indigenous peoples are not involved in the process from the start, there is a danger that the objectives of any decision, including policy and law may tend to reflect their perceived interests rather than their true concerns.

11. Capacity building is a fundamental part of participation. Indigenous people need to have the capacity to make informed decisions in order to participate effectively, and to be motivated to participate actively. Any capacity building process should:

- begin as early as possible in the drafting process, and well in advance of any formal consultation event;
- allow sufficient time for the issues to be understood and discussed amongst indigenous people - this may take time, particularly when the issues are new and complex;
- secure full understanding of the issues and of the rights of indigenous and local communities;
- disseminate information and documentation in local languages and user friendly formats to secure the widest possible understanding;
- use appropriate forms of communication – written form may not be effective if there is a low level of literacy;
- provide a simplified version of the law, highlight key questions that need to be considered, and include a broader explanation of the issues and their implications, as well as comparative experiences in the development of relevant law and policy from around the world;
- provide information on areas identified by indigenous people; and
- provide opportunities for indigenous and local communities to hear the opinions of critics as well as proponents of any proposal.

12. Participatory processes should take account of ethnic diversity and differing levels of power. There may be a diversity of peoples and communities, whose interests must be respected and reflected in any regime over collective knowledge. Political power and access to decision-making processes is not necessarily based on numerical superiority. Amazonian peoples have dominated the indigenous debate in Peru, and are relatively well represented at national level, though far less numerous than the indigenous peoples of the Andes. Afro-American communities have been totally excluded from the process, being neither part of the dominant population, nor indigenous to Peru. Any participatory should ensure that no sector of the population is left behind as the democratization of decision-making advances.

13. Early attention should be given to securing financial support for participation, taking account of the timeframes of funding organizations. Wide ranging participatory processes can be costly. Indigenous peoples and local communities will probably lack the funds and information required to engage fully in a participatory process. Funding may be required for dissemination of information, capacity building, regional and national workshops, compilation of reports, etc. Obtaining funding will be facilitated when there is a clearly defined agenda for participation, extended time for legal drafting, a transparent drafting process and close collaboration between the different stakeholders.

14. Limited human resources can act as a constraint to securing participation. Human and institutional resources, which may be provided by the State, indigenous organizations, NGOs, research institutions and the private sector, should be identified. A register of relevant organizations, researchers and experts should be created, including

projects and studies on indigenous organizations and decision-making practices, capacity building, the protection and use of TK, and relevant national and international law.

15. A government body responsible for indigenous affairs and participation can play an important role in promoting participation. Although its political influence and institutional capacity are still somewhat limited, SETAI, established in 1998 to replace the Peruvian Indigenous Institute (IIP), has provided a stronger basis for promoting indigenous participation from within government. Where the size of the indigenous population is significant, as in Peru, a stand-alone ministry with adequate economic and human resources, staffed by indigenous people, may be warranted

16. The design of a TK law is likely to require a country-wide consultation process. In view of the importance of protecting TK, indigenous people in Peru identified the need for the consultation process to be conducted throughout the country and at local level, engaging the main ethnic groups in each region, and including indigenous leaders, elders (the main repositories of TK) and women. Government representatives responsible for drafting a TK law should aim to be present at consultation meetings to hear at first hand the views of indigenous people.

17. The consultation process should be facilitated by indigenous people of the same ethnic group, who understand traditional decision-making processes and are trusted by their people. The selection of facilitators should be made by indigenous organisations in each region. As a first step, it may be necessary to hold a workshop to build the capacity of the facilitators to undertake the consultation process. At the end of the process, regional and national workshops should be held to discuss the results and develop a common indigenous and local community proposal. The government, NGOs and legal experts should provide technical support for awareness and consultation activities.

18. Policymakers should be sensitive to indigenous decision-making processes and allow ample time for such processes to be concluded. Developing the necessary legislation in a fully participatory fashion may take a number of years. For this reason, **there may be advantages in the adoption of interim legislation,** developed in close coordination with organizations representing indigenous peoples. Such legislation would need to be flexible in nature, provide for frequent monitoring and allow modification. It might also usefully establish a supervisory body, including indigenous representatives, to review any bioprospecting agreements involving traditional knowledge, innovations or practices. Adoption of interim legislation should be linked to a parallel long-term program of information dissemination, capacity building and development of an indigenous and local community proposal on defense of their collective interests.

19. Indigenous peoples would be advised to pay close attention to invitations to participate in decision-making processes. Indigenous organizations, desirous of strengthening their capacity to defend community rights, should consider the merits of participation not only on the basis of that individual process, but also in the light of a wider institutional strategy to gain credibility with national authorities and develop

capacity on TK issues. If uncomfortable with the level of participation offered, the agenda, timescale, or work program, they should request modifications to the process.

20. Effective indigenous participation requires political commitment. In Peru, the limited participation in the early stages of the process was partly due to a lack of appreciation of the need for indigenous participation. A culture of closed decision-making, dominated by professionals, had prevailed in Peru, as elsewhere, for many years. Efforts to secure indigenous participation in the development of the TK proposal increased as awareness of the need for such participation grew amongst the relevant authorities. This also coincided with a growing awareness across government, as a result of increased commercial activity on indigenous lands, international law on indigenous rights, pressure from financial agencies and the growing strength and political influence of national organizations representing indigenous people.

Box 13 - Key steps of an effective participatory process

From Peru's experience, the following possible steps can be identified for a participatory process:

1. Convene a meeting of indigenous organisations, relevant authorities and other experts to discuss the need for the proposed legislation and agree the process for its development, including the composition of a drafting group.
2. Establish a drafting group, which includes representatives from major indigenous ethnic groups and enables them to participate fully in the decision-making process.
3. Develop a preliminary legal proposal in close collaboration with indigenous people.
4. Secure the necessary funding for a broader indigenous consultation process.
5. Prepare information materials in local languages, in collaboration with indigenous people.
6. Identify indigenous facilitators from different ethnic groups to undertake consultations at local level, in accordance with traditional decision-making processes.
7. Hold regional workshops to discuss the results of the consultations.
8. Hold a national workshop to help indigenous people develop a common proposal.
9. Call meetings of the drafting group to revise the proposal, incorporating the results of the consultation process.

5.2 Recommendations for Peru

1. There is a demonstrable need to **establish a mechanism which allows indigenous people to participate fully in decision-making processes to develop national TK law and policy.** This could help to prevent conflict, which may otherwise arise if it is felt that legislation is being developed contrary to the desires of indigenous and local communities. A National Commission on Traditional Knowledge could provide such a mechanism.

2. The new process to develop a legal proposal to protect traditional knowledge **should re-consider the objectives and scope of such a regime, whilst also reviewing the existing proposal** to identify useful elements that could be rescued.

3. **A participatory process to develop a national strategy on traditional knowledge with a focus on Articles 8(j) and 10(c) of the CBD should be initiated.** Effective realization of the objectives of 8(j) and 10(c) in Peru will require that local and indigenous communities be fully incorporated in the development of national strategies and laws for their implementation. What now remains to be seen is whether the collaboration which helped to identify the need for such strategies can work to secure a truly participatory process, and the necessary financial support. A preliminary step in such work might usefully involve the identification of relevant ongoing projects, collaborations or other initiatives at the local, regional and national level which aim to promote debate, research and analysis of issues relating to protection of traditional knowledge in Peru.

4. **In order to maximize the benefits of a program to develop a national strategy on traditional knowledge, it would be advisable to ensure:**

- close ties to activities for the adoption of a regional regime to protect TK in the Andean Community;
- links with similar projects in other countries to enable interchange of experience; and
- preparation of comparative case studies of national experiences in developing mechanisms for the protection of TK, which could also be presented to the Ad Hoc Open-ended Working Group on Article 8(j).

5. Processes to develop policy, law and strategies on traditional knowledge should **ensure adequate participation of all indigenous ethnic groups**, relative to their population size. This means that particular emphasis will need to be placed on the participation of Andean and Afro-American communities, as well as Amazonian communities.

6. As in excess of 1/3 of the Peruvian population are descended from pre-colonial communities, **establishment of a stand-alone National Institute or Ministry of Indigenous Affairs**, with increased economic and human resources, would appear to be warranted. It is considered important that indigenous peoples should to the greatest extent possible staff any such government authority.

Box 14 – Factors affecting indigenous participation in Peru’s TK law

Constraints:

- Lack of time and funding.
- Lack of transparency and collaboration between stakeholders.
- Limited government capacity for, and commitment to, participatory decision-making, particularly at the early stages of the process.
- Historical mistrust between the government and indigenous people.
- Limited representation of some ethnic groups (e.g. Andean) at national level.
- Complexity of the issues.
- Limited preparedness and understanding of the legal issues amongst indigenous people.
- High level of ethnic diversity.
- Differing levels of political power amongst different ethnic groups.
- Large and dispersed indigenous population, coupled with weak communication infrastructure and feedback mechanisms from local levels.

Facilitating Factors:

- The difficulty of designing a *sui generis* law without active indigenous participation.
- Increased political commitment to indigenous participation.
- Increased experience with participatory processes.
- The existence of national representative indigenous organisations.
- Increased understanding of issues amongst indigenous people.
- Inviting indigenous people to participate in the design of a participatory process and in a Working Group on Indigenous Participation to coordinate the process.
- Advocacy for indigenous participation and the provision of technical support to indigenous organisations by committed individuals and NGOs.

Annex I

Possible elements of *sui generis* legislation to protect the knowledge, innovations and practices of local and indigenous communities

1. Recognition of ancestral community rights over knowledge, innovations and practices related to genetic resources.
2. Recognition that such rights exist even where information may be in the "public domain".
3. Establishment of the principle that such rights may be collective in nature.
4. Distinction between rights over genetic resources (where vested in the State) and rights over knowledge associated with such resources (vested in local and indigenous custodians.)
5. Presumption that use of genetic resources implies use of associated knowledge, innovations and practices.
6. Establishment of administrative and judicial review processes to resolve disputes regarding the granting of access on the basis of potential environmental, economic, cultural or social impacts.
7. Creation of benefit-sharing mechanisms/obligations to ensure equitable distribution of benefits amongst custodians, whether parties to access agreements or not.
8. Establishment of local and centralised registers of traditional knowledge, innovations and practices of local and indigenous communities.
9. Creation of programmes and processes for the strengthening of traditional knowledge systems.

Source: Annex VI, Report of the Panel of Experts on Access and Benefit-Sharing. UNEP/CDB/COP/5/8, November 1999, San Jose, Costa Rica.

Annex II

List of people interviewed by Krystyna Swiderska (October 1999)

Begona Venero, INDECOPI
Antonio Brack-Egg, UNDP
Cesar Argumedo, Asociacion Andes
Jose Luis Silva, Hersil S.A.
Tarcila Rivera, Chirapaq
Manuel Ruiz, SPDA
Maria Margarida Goncalves, Consultant
COICAP
Juan Chavez, Inter-American Institute for Agricultural Cooperation
Gil Inoach, Aidesep
Edgar Barrientos, SECONAMA
Mercedes Manriquez, legal advisor, CONAP
Rafael Suarez, Andean Community Secretariat
Luisa Elena Guinand, Andean Community Secretariat
Maria Luisa del Rio, INRENA
Victoria Elmore V., MITINCI
Jose Antonio de la Puente, MITINCI
Javier Aroca, Defensoria del Pueblo

Annex III

List of participants, Roundtable on Indigenous Participation, October 1999

(Chair) Antonio Brack-Egg
Begona Venero, INDECOPI
Alejandro Argumedo, IPBN/Andes
Cesar Argumedo, Andes
Tarcila Rivera, Chirapaq
Manuel Ruiz, SPDA
Maria Margarida Goncalves, Consultant
Juan Reategui, AIDSESP
Javier Aroca, Defensoria del Pueblo
Cecilio Soria, FECONAU
Milagros Chia SETAI
Shapion Nuningo, AIDSESP
Hildebrando Ruffnet, COICAP
Policarpo Sanchez, COICAP
Hebert Baca, FENAMAD
Celia Acasio, Chirapaq
Jorge Agurto, COPPIP
Nicolas Santander, CONACCAN
Nazario Choque, COPPIP
Pablo Licetti, COPPIP
Gladys Luque, COPPIP
Jose Mendivil, CNA
Julio Ortega, CONACCAN
Gladis Vila, Andean Women's Group
Ricardo Suarez, OBAAQ
Carmen Ninamango ADN
Tito Cueva, CCDDCB
Sonia Davalos, SETAI
Jose Luis Iberico, IMT
Aristides Melendez, SETAI
Ana Maria Pacon, INDECOPI
Marina Rosales, INRENA
Doris Rueda, CONAM
Jorge Vega, SETAI
Krystyna Swiderska IIED
Brendan Tobin ADN