

# Sharing Benefits or Enclosure of the Commons? Investigating the Compatibility of Global, National and Local Access and Benefit Sharing (ABS) Mechanisms in Peru

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## Abstract

The Convention on Biological Diversity (CBD) declared that genetic resources, considered for centuries to be the common heritage of mankind, would become the property of the sovereign state in which they are contained. The Convention also contained a special provision expressing respect for the rights of indigenous communities over their traditional knowledge. In 2002 Peru (a signatory of the CBD) became the first country in the world to enact a national law for Protection of Traditional Knowledge. Prior to this legal regime, customary governance mechanisms of Andean communities have been the primary means of governing the conservation, use and sharing of genetic resources and traditional knowledge. The objective of this research project is to understand from the perspective of policy makers involved in the development of this law, as well as from the perspective of community members and a small grassroots NGO, how this law creates both opportunities and constraints for local governance mechanisms.

**Key Words:** *Access and Benefit Sharing, Traditional Governance, Customary Governance, Traditional Knowledge, Genetic Resources, Peru, Biodiversity*

## Introduction:

For centuries, customary law practices have been used to govern the conservation, use, and sharing of genetic resources and traditional knowledge. As a result of these practices at the community level, and its unique geographical context, among other factors, Peru remains one of the most bio-diverse countries in the world. Not only have communities been successful in preserving large amounts of biological diversity, but they have also been successful in using community knowledge to create new and valuable variations of traditional crops. The objective of this research project is to understand how the Peruvian law for the Protection of Traditional Knowledge, enacted in 2002, will impact customary governance mechanisms of indigenous communities in Peru. More specifically the perspectives of policy makers involved in the development of this law will be compared with that of community members and a grassroots NGO to gain further understanding of how this law creates both opportunities and constraints for traditional governance mechanisms. Fieldwork was carried out in Peru in order to investigate the following research questions:

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- In what ways does the Law for the Protection of Traditional Knowledge create opportunities to strengthen customary governance of traditional knowledge and associated biodiversity?
- In what ways does the Law for the Protection of Traditional Knowledge threaten customary governance of traditional knowledge and associated biodiversity?
- How could this compatibility of the Law for the Protection of Traditional Knowledge and community governance mechanisms be improved?

This paper will first provide some background information on the legal context, development and content of the Law for Protection of Traditional Knowledge in Peru. The significance and role of customary governance mechanisms will then be introduced using the example of the Potato Park, an indigenous agricultural collective in Peru. Finally the methodology and findings of the field research will be summarized.

### **Origins of the International Debate on Access and Benefit Sharing**

For hundreds of years, traditional knowledge and genetic resources were considered the common heritage of humankind, freely transferable across borders without consent from the country of origin and without any obligation to share the benefits resulting from their use. Developing countries have always been and are still the source of the majority of the world's valuable traditional knowledge and biodiversity. Because biodiversity is primarily concentrated in areas populated by indigenous and local communities (Ruiz et al, 2004), these communities are vital to the study, use and preservation of biological diversity and traditional knowledge (TK). At the same time the culture, livelihoods and well being of these communities are also intrinsically linked to these resources (ibid). While the genetic resources and traditional knowledge of developing countries have been dispersed freely around the world for centuries, the issue has become increasingly controversial over the last several decades.

Sentiments on the sharing of genetic resources have become increasingly divided along the lines of developed and developing countries, as plant breeders in developed countries have been granted intellectual property rights over improved varieties of plants. Developed countries were pressing for intellectual property rights on plant varieties, recognizing the enormous economic potential of the biotech industry. At the same time these countries also had a renewed and heightened interest in ensuring that there would be continued access to genetic resources and TK of the South, which had become important inputs for technology development.

Developing countries, on the other hand, were concerned about the technological divide, and the lack of reciprocity in the sharing of valuable genetic resources. Also, as the Northern demand for genetic resources and traditional knowledge increased, biopiracy<sup>2</sup> became a more significant threat. Addressing these concerns, the Convention on Biological Diversity (CBD) became the first International Agreement

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<sup>2</sup> Biopiracy is commonly referred to as the appropriation of the knowledge or genetic resources of indigenous or local communities by external actors seeking exclusive monopoly control over these resources usually in the form of patents or plant breeders' rights.

regulating the access and benefit sharing of traditional knowledge and genetic resources.

### **International Access and Benefit Sharing Legislation: Convention on Biological Diversity**

The Convention on Biological Diversity was adopted at the Earth Summit in 1992. The stated objective of the convention is to promote the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (CBD, 1992). The signing of the CBD was monumental in that it reversed hundreds of years of free and unregulated access to traditional knowledge and genetic resources. The Convention declared that the nation state was the legal *owner* of all genetic resources contained within its boundaries. The state would thus have sovereign authority to regulate access and benefit sharing of genetic resources.

The logic behind the Convention was that sharing financial benefits with countries that provide genetic resources would offer these countries an economic incentive to conserve these resources for the benefit of (hu)mankind. The Convention was meant to address the tension between developed and developing countries by strengthening the South's efforts to conserve the majority of the world's biodiversity (contained within their borders), and to have Northern countries share in the costs and benefits resulting from these conservation efforts (Zedan, 2005).

The Convention contained a special provision related to the protection and conservation of traditional knowledge. Article 8j of the convention requires that signatory countries (CBD, 1992):

- Respect, preserve and maintain the knowledge, innovation and practices of indigenous and local communities related to the conservation and sustainable use of biodiversity;
- Promote the wider application of Traditional Knowledge 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.

While the Convention does establish principles of respect and equity with regards to the traditional knowledge of indigenous peoples, it falls short of creating a property right for indigenous peoples over their knowledge (Tobin & Swiderska, 2001). Further, the Convention is unclear as to how this will affect the rights, practices and the ability of communities to govern genetic resources. There is no doubt that the CBD will have profound implications (both intended and unintended) and offers tremendous opportunities and risks for nations, communities and individuals. However, many of these outcomes and impacts will be unpredictable, highly debated amongst stakeholders, and dependant on how these international guidelines are transferred into national legislation.

### **Peruvian ABS Legislation: The Law for the Protection of Collective Knowledge of Indigenous Peoples**

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

A signatory to the CBD, in 2002 Peru formally introduced a law for “Protection of the Collective Knowledge of Indigenous Peoples”. This national *sui generis*<sup>3</sup> legislation is the first legal regime in the world intended specifically to protect the traditional knowledge of indigenous peoples (Ruiz et al, 2004). The law defines traditional knowledge as “the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity” (Law 27811, article 2).

The declared objectives of this law are to: protect, preserve and develop collective knowledge; to ensure fair and equitable distribution of benefits derived from the use of collective knowledge; to use collective knowledge to benefit indigenous peoples and mankind; to assure that any use of collective knowledge requires the prior informed consent of indigenous peoples; to promote indigenous capacity to distribute collectively generated benefits; and finally to prevent patents on inventions based on the collective knowledge of indigenous peoples without proper consent (Law 27811, 2002).

In order to meet these broad objectives the following principles were established: Prior informed consent is required from the relevant community or peoples before collective traditional knowledge can be used for scientific, industrial or commercial purposes. The law stipulates that present generations of indigenous communities are responsible for preserving, developing and administering collective traditional knowledge for their own benefit and that of future generations. Finally protection under the law applies only to traditional knowledge belonging collectively to one or more indigenous peoples, but not that belonging to individual members. Collective traditional knowledge is regarded as part of the cultural heritage of the indigenous peoples (WIPO, 2000).

An indigenous community in possession of collective traditional knowledge is legally protected against any unauthorized or unfair disclosure, acquisition or use of that knowledge, insofar as such traditional knowledge is not in the public domain. This protection extends to third parties having obtained the information under obligation of confidentiality (WIPO, 2000). In the case that community’s rights to traditional knowledge are infringed, the law permits Indigenous communities to take legal action where the burden of proof will be placed on the defendant (WIPO, 2000).

Several mechanisms for protecting indigenous rights to traditional knowledge are utilized in the law. It is proposed that a national system of registers should be established offering varying levels of confidentiality (Ruiz et al, 2004). These registers are intended to provide both defensive protection against outside patents aiding in prior art search requests, while at the same time offering positive protection facilitating the maintenance and transmission of indigenous peoples’ knowledge. The law therefore

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<sup>3</sup> Legislation that is “of one’s own kind”, that is not derived from or based on any existing legislation such as national or international ABS legislation or intellectual property rights.

proposes three different types of registers: a Public National Register; a Confidential National Register; and Local Registers. The former would be implemented by INDECOPI<sup>4</sup> and would inform patent granting decision-making. The Private National Register would be used for the same purpose but would provide indigenous communities with the ability to choose to keep some information strictly confidential and inaccessible by third parties. Finally, local registers are proposed as local initiatives to document and maintain control of collective knowledge of each community (Ruiz et al, 2004).

Licensing contracts are also relied on heavily in this national effort to protect traditional knowledge. Specifically, they are promoted in the legislation as an effective mechanism for ensuring that fees and royalties are paid to indigenous communities for the use of their collective traditional knowledge (WIPO, 2000). The law sets out a framework of rules and regulations for negotiations with indigenous communities, when third parties are seeking access to traditional knowledge and genetic resources. Applications for licences would be overseen by INDECOPI and would be mandatory and subject to minimum requirements. Communities would be free to enter into an agreement individually for knowledge that is shared with other communities, but their agreement would not preclude other communities possessing such resources from entering into a similar agreement (Ruiz et al, 2004).

Licensing contracts would require the prior informed consent of indigenous peoples. The law has established that prior informed consent for the access and use of TK by a third party will be granted not by communities themselves, but by representative organizations of indigenous peoples. The rationale is that since many communities who share similar resources and knowledge may have very different views about outsider use of their knowledge and resources. Representative organizations of indigenous peoples are thus relied upon in order to reduce conflict between communities (Ruiz et al, 2004).

Finally, the Law establishes a Fund for the Development of Indigenous Peoples. The Fund would receive payments from the State, international bio-prospecting agreements, and a percentage of the profits obtained from inventions and technologies based on community traditional knowledge. The Fund would be used toward the overall development of indigenous peoples by financing projects and activities (WIPO, 2000).

### **Customary Governance<sup>5</sup> Mechanisms in Peru**

It is important to understand not only how national ABS legislation protects traditional knowledge but also to reflect upon how this legislation will impact customary practices and the customary laws of traditional communities. In order to address this concern some traditional communities have begun to formalize local *sui generis* governance mechanisms. Advocates of this approach argue that *sui generis* systems should not be based on existing intellectual property models, individual rights, and commercial

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<sup>4</sup> INDECOPI is the Peruvian National Institute for the Defense of Competition and Intellectual Property

<sup>5</sup> Customary governance refers to the traditional mechanisms for making community decisions. Such mechanisms are based on indigenous cultural and spiritual beliefs, have evolved over centuries and are passed down from generation to generation. Customary governance mechanisms are used to make decisions at the community level regarding the preservation, use, exchange and innovation of genetic resources and traditional knowledge.

incentives, but instead they should reflect the knowledge systems, innovative processes, customary governance mechanisms of traditional communities themselves (Swiderska, 2006).

Swiderska argues that communities must protect their rights to their knowledge at the local level. From this perspective it is through strong local governance mechanisms that communities will remain in control of their natural resources, maintain their biodiversity and traditional knowledge and at the same time improve their livelihoods (Swiderska, 2006). However, in cases where customary law and domestic laws conflict, it is most often the formal national law that dictates policy and practice (Tobin, no date). Tobin argues that the interface between community governance mechanisms and national policies must be examined in order to understand how both of these governance mechanisms may simultaneously support protection of traditional knowledge within the larger framework of community biocultural heritage<sup>6</sup>. In other words, how can customary laws be used to shape the development and implementation of National ABS legislation?

### **ANDES NGO and the Potato Park**

The Potato Park, located outside of Cusco, Peru is an agricultural collective that was developed in 2002 under the coordination of ANDES NGO. ANDES is a locally based NGO that facilitates the efforts of indigenous communities to develop innovative landscape-based conservation models, based on traditional management practices and indigenous knowledge, and to formalize these methods through *sui generis* legislation.

The Potato Park brings together six Quechua settlements for the purpose of establishing a preserve where Quechua crops coveted by outsiders could be protected from threats of biopiracy, conserved, exchanged and developed according to customary law. The Park's Council has regulatory control over the genetic diversity in the park, and are in the process of developing *sui generis* governance mechanisms based on customary law to govern the conservation of Andean biodiversity and ecosystems and Quechua culture, including the access and benefit sharing of genetic resources and traditional knowledge (Koerner, 2007).

For centuries the communities of the Potato Park, as well as many other indigenous communities, have been adapting to new challenges and opportunities to maintain the biocultural heritage of the region. Quechua values provide the framework for the Park's approach to protecting the communities' biocultural heritage. Three values in particular are guiding the development and implementation of the local governance mechanism: these are the values of reciprocity<sup>7</sup>, equilibrium<sup>8</sup>, and duality<sup>9</sup>

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<sup>6</sup> Biocultural Heritage is defined as "knowledge, innovations, and practices of indigenous peoples and local communities which are collectively held and inextricably linked to traditional resources and territories; including the variety of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities" (Swiderska, 2006).

<sup>7</sup> Reciprocity: what is received must be given back in equal measure. It encompasses the principle of equity, and provides the basis for negotiation and exchange between humans, and with Mother Earth.

<sup>8</sup> Duality: everything has an opposite which complements it; behaviour cannot be individualistic, for example, in the union between man and woman; and that other systems or paradigms can be used.

<sup>9</sup> Equilibrium: refers to balance and harmony, in both nature and society- (e.g. respect for the nature and mountain gods; resolving conflicts to restore social harmony; and complementarity e.g. between ecological niches).

(Argumedo, no date). Customary Laws developed based on these values and principles regulate use, access and decision making regarding agro-biodiversity in the Potato Park.

A number of activities have taken place to date to develop and implement a *sui generis* regime reflecting current conditions, and drawing on the principles of traditional customary law within the Potato Park. These include the signing of a historic agreement with the International Potato Centre (CIP) for the repatriation of native crops; the development of an inter-community agreement for equitable benefit sharing; and finally the development of a community register to provide both positive and defensive protection for community resources.

The communities of the Potato Park are now in the process of developing a *sui generis* system for governing genetic resources and traditional knowledge. The *sui generis* system is holistic in its approach, in that it seeks to protect the biocultural heritage of the communities, including not only biodiversity and traditional knowledge, but also the right to continued community management.

### **Methodology:**

Research questions were investigated and analyzed from two broad perspectives: First, from the perspective of national policy makers and legal experts involved in the development of this law; and second, from the perspective of a grassroots NGO and community representatives of the Potato Park. Field-research consisted of data collection with two major stakeholder groups: policy-makers and legal experts; Asociación Andes and community representatives of the Potato Park.

#### *Stage One: Policy Makers and Legal Experts*

The first set of interviews were conducted in Lima with individuals who were involved in the development of the Law for the Protection of Traditional Knowledge, and/or are currently involved in the implementation of its principles, and/or have significant expertise regarding this piece of legislation. The purpose of these interviews was to understand: 1) how these individuals interpret the strengths and weaknesses of this law; 2) how these strengths and weaknesses are likely to impact customary governance mechanisms, and lastly; 3) how this law might be adapted or implemented to be more compatible with local systems of governance.

Semi-structured, open-ended interviews were held with eight individuals. Six of these individuals were participants in the Working Group on Traditional Knowledge. This working group consisted of various stakeholders who had been involved to various degrees in the development of the Law for the Protection of Traditional Knowledge. Interviewees represented various institutions including the National Institute for Natural Resources (INIA), the Peruvian Environmental Law Society (SPDA), and the International Potato Centre (CIP) and the National Commission against Biopiracy.

#### *Stage Two: ANDES NGO, and Community Representatives of the Potato Park*

The second stage of data collection approached the same basic questions from the perspective of representatives of a grassroots NGO, and the six communities of the

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Potato Park. The purpose was to understand: 1) customary approaches to governing traditional knowledge and genetic resources; 2) how the Law for the Protection of Traditional knowledge is likely to strengthen or weaken these approaches; and 3) what could be done to make the two systems of governance more compatible.

The communities in the park are among the few (if not the only) communities in Peru who are actively developing local *sui generis* protocols for the protection of traditional knowledge and genetic resources. Closely related to the conservation goals of the Potato Park is the effort to strengthen and adapt traditional governance mechanisms through participatory practices to respond to external threats and opportunities. As a result the level of awareness of the relevant national laws, and the opportunities and threats posed to traditional governance of these resources, is much greater than that of other communities. It is important to note that while the Potato Park may not be representative of other communities in Peru, it provides an extremely useful example through which to compare the compatibility of local and national governance mechanisms.

Semi-structured, open-ended interviews were conducted with the director and a senior staff member of ANDES NGO. Following community norms, data collection with community members was participatory in nature including one focus group, and two community assembly meetings.

### Findings:

The general findings from the two sets of interviews are summarized in the following table, separated by the three specific stakeholder groups.

**Table 1**

<b>ANDES NGO</b>			
<b>Why are Customary Governance Mechanisms Important?</b>	<b>How is this Law likely to strengthen customary governance mechanisms?</b>	<b>How is this law likely to undermine or threaten customary governance mechanisms?</b>	<b>How can the compatibility of the two legal regimes be improved?</b>
Protect complex local political, economic, ecological and cultural systems	The law is not likely to strengthen customary governance mechanisms	The law does not correlate with communities' view of "protection"	Top down nature of policy making should be reversed
Allow communities to maintain equilibrium		The law fails to protect the complex systems at the local level in which these resources are embedded	External actors should recognize that communities are rich in their own capacities to govern their resources

Allow communities to benefit from positive aspects of globalization and resist negative ones		Overly focused on protecting these resources as commercial products	External actors need to appreciate the local vision of the world
Allows communities to remain flexible and dynamic over time		The problem begins at The International level, with the misguided approach of The CBD	Community development of a <i>sui generis</i> system for the protection of their resources in accordance with customary governance mechanisms
Steer and guide community engagement with external actors		The process has been imposed from The top down, and has not involved indigenous peoples	Seek International support for this <i>sui generis</i> system
		Peruvian government's lack of respect for indigenous peoples	Possibility of emerging Potential to work with the local and regional governments
			Need to build bridges with the state political and economic processes in order to avoid conflict and total integration.

## Community Members of the Potato Park

<b>Why are Customary Governance Mechanisms Important?</b>	<b>How is this Law likely to strengthen customary governance mechanisms?</b>	<b>How is this law likely to undermine or threaten customary governance mechanisms?</b>	<b>How can the compatibility of the two legal regimes be improved?</b>
Central to the preservation of way of life	Communities are developing local registries which are also proposed and supported by the law	Deep suspicion of state-led conservation projects	Much of the responsibility for the conservation of these resources falls within the community itself
This is the mechanism which governs their conservation model	On the whole, community members were skeptical about the intentions and impacts of the law	Scope of the law is far too narrow	Efforts should be made to strengthen internal governance systems in order to protect these resources internally

Through these mechanisms communities ensure that their resources are not overly exploited and are conserved for future generations	The effort to prevent biopiracy will require external support	Does not offer protection for the complex and dynamic local processes that conserve these resources over time	It will be necessary to have external support to apply and enforce these mechanisms outside of the community
		May result in communities losing control of their resources	Need for greater coordination and organization across indigenous communities to minimize conflicts
		Likely to result in conflicts between communities when decisions are made regarding commonly held resources.	
		“Representative Organizations” do not truly represent indigenous communities and should not be responsible for granting prior informed consent	

## Legal Experts and Policy Makers

<b>Why is the Law for the Protection of Traditional Knowledge Important?</b>	<b>How is this Law likely to strengthen customary governance mechanisms?</b>	<b>How is this law likely to undermine or threaten customary governance mechanisms?</b>	<b>How can the compatibility of the two legal regimes be improved?</b>
The law has raised general awareness of indigenous knowledge and customary practices, both inside and outside of the community.	Requiring PIC gives communities ability to make decisions based on their customs and norms	The development of the law did not have a proper participatory methodology	The law for the protection of traditional knowledge is a work in progress that will need to be adapted as It is implemented

The law was designed to be as non-authoritarian as possible and to give as much decision making control as possible to indigenous peoples	Tools of Western law can correspond to the needs and priorities of communities, if The correct linkages are found	The law was designed under the assumption that the CBD captures national needs	Creative use of IP Tools to mend the gap between the legal systems
The general purpose of the law is to compensate indigenous peoples for the environmental services that they provide		Intellectual Property Rights are inherently inconsistent with traditional governance Mechanisms	Need for educational efforts on the part of policy makers, as well as communities
		The law may facilitate outsider patents on traditional knowledge, undermining community governance	Increased political willingness for government and indigenous communities to work together
		The law may create perverse incentives for communities to undermine their long term interests, for short term monetary benefits	New/improved indigenous institutional coordination
		Representative organizations do not truly represent indigenous communities, and are not traditional decision-making structures.	New opportunities for meaningful state-community co-management are being opened up through The decentralization process.
		No mechanism for resolving disputes that arise between communities.	

## Analysis of Findings:

**Research Question 1: *In what ways does the Law for the Protection of Traditional Knowledge create opportunities to strengthen customary governance of traditional knowledge and associated biodiversity?***

- *Necessity for Co-management*

Interviewees from both major stakeholder groups recognized that biopiracy is a significant threat that cannot be prevented by traditional governance mechanisms alone. While traditional governance mechanisms are the primary means of making decisions within communities and sometimes even between communities, it is very difficult for communities to enforce these mechanisms on outsiders and to prevent the misappropriation of their resources. Thus it is certain that in order to address these issues communities will need the support of external institutions in order to protect themselves against external threats.

At the same time, traditional governance mechanisms are integrally important to the maintenance and conservation of traditional knowledge and genetic resources within communities. Any state-led effort to conserve and protect these resources must strengthen rather than undermine the systems in which these resources are embedded and conserved including the traditional governance mechanisms. So while traditional governance mechanisms are not capable of being entirely effective on their own, they can and must play an important part in the state institutional structure for the protection of these resources.

- *Both regimes are flexible, dynamic, and capable of Adapting to New Realities*

While these two governance regimes are not yet entirely compatible, it is significant that both regimes are not static or inflexible. The law for the Protection of Traditional Knowledge is a work in progress and policy makers recognize that it will need to be modified in a process of trial and error as it is being implemented. It is also widely recognized by policy makers that the level of indigenous involvement in its development was minimal and thus what is on paper now may be nothing more than a starting point to jump off from. On the other hand, the very nature of customary law is a system of governance that is dynamic and changes over time to adapt to new realities internal and external to the community. The communities of the Potato Park recognize that it is possible to benefit from outside opportunities and that it is not in their benefit to remain in isolation.

- *Mutual Recognition of the Importance of Local Control*

Policy makers explained that the Law for the Protection of Traditional Knowledge was designed to be as non-authoritarian as possible, and to give as much decision making control as possible to indigenous peoples through the enforcement of prior informed consent. While it was the “representative organizations” rather than the communities themselves that were granted the authority to provide prior informed consent, the law does demonstrate a willingness of the state to decentralize decision-making with regard to traditional knowledge.

- *Western Law and Community Governance Mechanisms are not Inherently in Conflict*

While it was evident that there was a degree of suspicion of Western legal institutions (especially externally held patents) within the community, it was also apparent that the communities were starting to use some intellectual property tools to their own advantage such as trademarks, certificate of origin and local registries within the community. If communities are educated and accepting of Western tools, they can be used creatively to bridge the gap between the two systems of governance.

**Research Question 2: *In what ways does the Law for the Protection of Traditional Knowledge threaten customary governance of traditional knowledge and associated biodiversity?***

- *Undermines Community Cosmo-Vision*

The law for the Protection of Traditional Knowledge and the Convention on Biological Diversity originates from a Western view of the world. Customary Governance mechanisms on the other hand originate from an entirely different cosmovision. Thus it is not only the principles of the particular legal regimes that will need to be bridged, but also their fundamental moral and ethical underpinnings.

- *Conservation Approach too Narrow*

There is a general sentiment amongst community members and even some policy makers that the law for the Protection of Traditional Knowledge is too narrow, and particularly overly focused on the commercialization and commodification of these resources. The law over-emphasizes biopiracy or outside misappropriation of these resources as the principle threat to the conservation of traditional knowledge and genetic resources.

- *Divergent Ideas about “Protection”*

It is evident that a wide range of opinions exist as to what it means to truly “protect” traditional knowledge. On one hand within the circles of policy makers and legal experts “protection” is commonly thought of in terms of protecting against biopiracy and protecting indigenous communities’ rights to commercialize and receive monetary benefits from outsiders’ use of their resources.

An alternative vision of protection promoted by community members as well as a number of other interviewees is much more holistic. This vision recognizes the embeddedness of these resources within complex local systems and the importance of maintaining decision-making control within the community. This vision of protection is foremost concerned with the protection of the day-to-day uses of these resources within the community. It also encompasses the right to land, the protection of the free flow of seeds, as well as maintaining control of these resources so that they can be passed on to future generations. In addition to the threat of biopiracy, other threats were identified such as Western education, agricultural extension and the introduction of modern technologies, encroaching urban centres, outward migration, and the loss of culture and language within the communities.

- *Assumes common interests across Indigenous Communities*

By granting decision making control to “representative organizations” this legal regime assumes that these organizations are capable of representing the “indigenous perspective”. This does not account for the fact that there is not one “indigenous law”, but a diverse and sometimes competing series of “customary laws” across indigenous communities. It is necessary for the law to recognize this variance, and to develop an acceptable mechanism for solving disputes amongst communities.

- *Institutional Structure for Representation and Decision Making is Inappropriate*

Evidence from this research project demonstrates that the current “representative organizations” in Peru are not appropriate institutions to grant prior informed consent and to make decisions on behalf of communities. The communities of the Potato Park contested this system, stating that these organizations do not represent them, and that they do not feel comfortable with external organizations making decisions about their resources on their behalf. This current system is likely to create conflicts between communities, with only a limited number of communities feeling “represented” by this ad hoc system of institutions. “Representative organizations” are not elected by indigenous communities, but are rather an ad hoc system of organizations, which largely receive their funding and legitimacy from external international donor organizations.

- *Deep Suspicion of Western Law and Outsider Intentions*

Any attempt at co-management will require a softening of community suspicion and resentment towards the Western legal system and the state. It was evident that the communities of the Potato Park have a deep-rooted concern and suspicion of Western tools, especially patents, as well as the intentions of policy makers to hear their voices, and represent their interests and concerns.

### **Research Question 3: How could the compatibility of the Law for the Protection of Traditional Knowledge and Customary Governance Mechanisms be improved?**

- *Greater Participation*

It is essential to the legitimacy and effectiveness of this Law that indigenous peoples meaningfully participate in the adaptation and implementation of this Law. It was evident in the background research and interviews with policy makers and legal experts that opportunities for participation have been extremely limited, and that despite positive intentions the design has largely been a top-down process beginning with the negotiations at the Convention of Biological Diversity. In order for this law to respect and correspond with customary governance mechanisms it is imperative that the pressures stemming from International agreements are balanced with the needs, interests and conservation methods of indigenous peoples of Peru. There will be a need to re-open this discussion with communities across Peru, even if this means significantly adapting the current legal framework.

- *Education and Inter-cultural Exchange*

There is a need for education and intercultural exchange between those individuals creating policy and those who will be most affected by its impacts. On one hand, it is evident that policy makers would be more effective in their roles, if they had a more vivid and nuanced understanding of what is actually happening inside of communities and what these communities have been doing for millennia to govern and manage their resources. A second benefit of establishing participatory processes would be the education of policy makers through discussions and negotiations with policy makers. In particular it is especially important for policy makers to understand the complexity of what is happening at the community level and the importance of

customary governance mechanisms in maintaining these systems as well as the diversity that sustains them.

On the part of the community there is also a desperate need for educational efforts. There is a deep suspicion of this law, and outsider intentions within these communities, and improved communication pathways in addition to education is likely to chip away at these old wounds. Not only is there a deep suspicion of outsiders, but also a deep misunderstanding and hesitancy towards Western legal institutions and tools, including intellectual property rights. While some tools resonate better with communities than others (e.g. trademarks, local registers) it is important that communities have a better understanding of other Western legal tools and how they could be utilized to support their interests and efforts in order to be empowered to make more informed decisions. At the same time, education and capacity building efforts in the importance of strengthening and traditional governance mechanisms would allow more communities to remain active in governing their resources.

- *Recognize and Enforce Traditional Customary Governance Mechanisms*

Given the integral role and function of traditional governance in the maintenance and conservation of traditional knowledge and genetic resources, it is imperative that any national law for the protection of traditional knowledge must strengthen rather than undermine these local mechanisms. Any system that does not account for these local systems is not likely to achieve the long-term objective of conserving traditional knowledge and genetic resources.

The law should make use of the fact that Andean communities are generally rich in their capacities to govern their local resources, in fact this could be thought of as a facet of traditional knowledge in itself. It is evident that at the local level, it is conceptually impossible to separate traditional knowledge and genetic resources from the landscape and the cosmo-vision in which they are embedded, developed and conserved. It is thus necessary for any effective effort for the conservation of traditional knowledge to address not only the need to conserve these particular resources but also the complex systems in which they are situated.

While it is recognized that communities themselves will play an important role in the conservation of these resources, the scope for state protection must be widened to incorporate other concerns. As the law is adapted it will need to reflect the fact that local ideas about the “protection” of these resources may differ from the Western ideas about the need to provide financial compensation for environmental services. From the perspective of these communities, protection should incorporate protecting day-to-day use of these crops, and to continue to maintain control of these resources within the community. At the very least, the Law for the Protection of Traditional Knowledge must be designed so that it does not undermine other aspects of the complex local system in its effort to protect these resources.

Given that the purpose of this law is to benefit indigenous peoples, and its approach is to be as non-authoritarian as possible, there may be a possibility for meaningful co-management whereby the state legislation aids in the recognition and external enforcement of traditional governance mechanisms for the protection of traditional knowledge.

- *Organization*

There is a need for new institutional and organizational structures to enable meaningful participation of indigenous communities in decision-making processes and to allow customary governance mechanisms to become part of the institutional structure for the protection of traditional knowledge in Peru.

#### Vertical Linkages

It can be concluded that communities are not able to protect their resources from threats such as biopiracy on their own, and that there will be need for co-management of some sort with external actors to have their governance mechanisms enforced outside of the communities. One emerging possibility is the opportunity for communities to link more closely with the local and regional governments as Peru continues to implement its decentralization process. While there are concerns about the sharing of power and distribution of local governments, there does seem to be a greater level of trust and understanding with the local governments than with the state. Further consideration should be given to developing regional indigenous protocols derived from traditional governance mechanisms that could be implemented and enforced by the regional government.

#### Horizontal Linkages

On one hand it is evident that the laws reliance on “representative organizations” to make decisions on behalf of indigenous communities is not popular with the communities of the Potato Park. At the same time in order to minimize conflicts between communities sharing the same resources, and recognizing that there is not one indigenous law operating in communities across Peru, it is necessary that communities develop some way of communicating, collaborating and making collective decisions regarding shared knowledge and resources.

Recognizing the importance of community traditional governance mechanisms in this effort, one possibility is that communities come together to form an indigenous congress, or develop indigenous protocols as collective statements about how decisions regarding their collective knowledge and resources will be made. This type of organization, like the collective governance of the Potato Park, could be derived from customary legal principles and is therefore more likely to be compatible with these mechanisms.

If communities are willing to work with the local and regional governments in this process, it may make sense for each region to develop an indigenous institution to provide this function. Communities organize across each district to create indigenous protocols, and the local government can be the link with the state in the effort to enforce these protocols.

- *Overcome Misunderstanding and Suspicion*

Given the high degree of misunderstanding and suspicion within the communities towards the state and state institutions, meaningful participation of indigenous peoples in the adaptation and implementation of this law may provide an extremely important opportunity for changing perceptions and attitudes regarding state-community collaboration.



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