REGIONAL STUDY IN THE ANDEAN COUNTRIES:

"CUSTOMARY LAW IN THE PROTECTION OF TRADITIONAL KNOWLEDGE"

FINAL REPORT REVISED FOR WIPO

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Quito, November 2006

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I: Introduction and context.

Since the entry into force of the Convention on Biological Diversity (CBD), the subject of the traditional knowledge of indigenous peoples associated with genetic resources has assumed prominence in international negotiations and has developed in terms of its implementation through three fundamental principles prescribed by the CBD itself, i.e.: the conservation of biodiversity, its sustainable use, and the fair and equitable sharing of benefits resulting from its use.

In addition to its treatment within the CBD, in its whole context, the subject of traditional knowledge is also dealt with by the United Nations Conference on Trade and Development (UNCTAD), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the United Nations Food and Agriculture Organization (FAO), the World Health Organization (WHO), the United Nations Forum on Forests (UNFF), the United Nations Permanent Forum on Indigenous Issues, and other relevant fora. Intense deliberations have generated pressure for the adoption of measures for the protection of traditional knowledge in the international, regional and national spheres. For that reason, various organizations representing indigenous peoples and local communities have signaled the need to ensure that any mechanism for access to genetic resources and associated traditional knowledge must be based on respect for their customary laws and the cultural practices specific to indigenous peoples.

In the face of these demands, international negotiations, in particular within the CBD framework and the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), have included in their agendas the treatment of customary law as one of the basic elements for the protection of the traditional knowledge associated with genetic resources and traditional cultural expressions.

Notwithstanding, it is clear that limitations exist with regard to understanding subjects such as the nature, scope, role and jurisdiction of customary law in the conservation and protection of traditional knowledge, which is a very complex subject and still not very clear for many international negotiators. However, for indigenous peoples and local communities it is obvious that their systems of own law are the most appropriate for the protection of their traditional knowledge. At the same time, they recognize the divide between the national law and their systems of own law, since the latter generally lacks adequate recognition in relation to positive national and international law.

In order to aid understanding between the systems of customary law (systems of own law) of indigenous peoples and local communities, and those of positive law (the systems codified in the national and international sphere), under the responsibility of WIPO and with the support of the World Conservation Union (IUCN – Regional Office for South America) and the Institute of Advanced Studies of the United Nations University (UNU-IAS), it has been proposed to tackle the subject from a very objective point of view in order to analyze the situation in five Andean countries (Bolivia, Peru, Ecuador, Colombia and Venezuela), and to see how these play an important role in the

conservation and sustainable use of genetic resources and in traditional cultural expressions. This regional study has been directed by indigenous experts from the region working in collaboration with non-indigenous legal experts and from other relevant disciplines, in order to identify the tasks to strengthen and/or establish the conditions necessary to ensure an effective relationship between customary law and the systems of positive law at the national, regional and international levels.

The proponents of this work know that any study of this nature must be based on an approach which reflects the interests and priorities of indigenous peoples and local communities, whose knowledge and their *sui generis* protection are the focus of this effort. They have warned therefore that:

> *Any process which examines the relations between customary law, access to genetic resources and traditional knowledge must be aimed at protecting the ethnic and cultural diversity of indigenous peoples and local communities, for the purpose of guaranteeing their physical and cultural survival, in addition to their well-being and that of humanity as a whole.*

II. Executive summary.

Undoubtedly, indigenous peoples in the Andean region are currently facing new challenges emerging from the momentum of international relations. The protection of traditional knowledge in relation to genetic resources emerges as a novel subject which is of relevance in terms of its strategic role in the conservation and sustainable use of biodiversity. For this reason, in order to protect their knowledge and avoid misappropriation – without their free prior informed consent – indigenous peoples are adopting strategic positions in multilateral fora, with a view to presenting their proposals on the most appropriate mechanisms for the protection of traditional knowledge associated with genetic resources and traditional cultural expressions.

The process of international negotiations on the measures for the protection of traditional knowledge, both within the framework of the CBD and in the WIPO IGC, have included the treatment of customary law as one of the basic elements for the protection of traditional knowledge associated with genetic resources and traditional cultural expressions.

Notwithstanding, little knowledge exists of subjects such as the nature, scope, role and jurisdiction of customary law and its true function as regards its role in the protection of traditional knowledge associated with genetic resources and traditional cultural expressions, because it is a very complex subject and still not very clear for many international negotiators, but not so for indigenous peoples and local communities which see their systems of own law as the most appropriate instruments for the protection of their traditional knowledge. This being the case, they obviously recognize the existing divide between positive national law and the systems of own indigenous law, since the latter generally lacks adequate recognition in terms of national and international legislation.

Given this situation, it has been observed that many indigenous peoples in the Andean region have made statements concerning the strengthening of the thesis on the role of customary law for the protection of traditional knowledge and traditional cultural expressions, and have thus managed to insert their proposals in the decision-making fora in the region, such as the Andean Community (CAN), which is working on a proposal concerning Elements for *sui generis* Protection of Collective and Integral Ancestral Knowledge (which will be the basis of a relevant future supranational standard), where it is stated that:

> *"... given the characteristics of the collective and integral traditional knowledge of indigenous peoples, it is recommended that for the protection of such knowledge, a choice is made of the specific ancestral systems of indigenous peoples, i.e. on the basis of customary law and specific cultural practices, thus allowing communities to have greater consolidation of their traditional internal structures…"* [1]

[1] CAN – CAF. Elements for *sui generis* Protection of Collective and Integral Ancestral Knowledge from the Indigenous Perspective. Caracas, May 2005.

Indigenous peoples from this part of the American continent appear to be placing greater emphasis on devising proposals and strategies for the protection of traditional knowledge and, to that extent, have obtained constitutional principles and secondary rules in which have been incorporated the exercise of collective rights in collective intellectual property, the free practice of traditional medicine, indigenous jurisdiction, forms of community organization, the validity of customary law as a standard regulating the coexistence of indigenous peoples, the recognition of interrelated cultures, etc.

However, at the time when the most appropriate mechanisms for the protection of traditional knowledge are established, the problem has not been so simple, owing to the existence of a large diversity of practices associated with traditional knowledge that is linked not only to genetic resources, but to a series of practices in the actual relationship of indigenous communities with their surrounding environment, as well as through the great diversity of culturally distinguished indigenous peoples, i.e. 220 indigenous peoples in the five Andean countries covered in this study. Thus, the artificial codification of these customs can result in monopolistic imposition on indigenous societies which have not been governed by written codes; additionally, insertion in positive law and protection by means of intellectual property rights may restrict their process of development and specific innovation, for which reason it is necessary to analyze the process with greater seriousness and objectivity concerning the possibilities offered by this system for protecting knowledge that is not created in a laboratory, but reproduced on different cultural codes, passed on from generation to generation, and has the characteristic of being collective and integral. Moreover, much of the traditional knowledge is secret and cannot be disclosed publicly,[2] such as that related to ceremonies in sacred sites and places.

This document is a contribution to the process, enriched with the comments and observations made by different indigenous and non-indigenous specialists from the countries of the Andean region, gathered together during the Regional Workshop on the Role of Customary Law in Regulations for Access to Genetic Resources, Benefit Sharing and Traditional Knowledge Protection, held in Quito, Ecuador, on January 9 and 10, 2006, and subsequently with major contributions from the same experts.

It is hoped that this study will contribute to the process of negotiations towards the future adoption of a *sui generis* system for the protection of traditional knowledge, which will be dealt with in the framework of the CBD and the WIPO IGC.

III. Legal context of traditional knowledge and customary law in the Andean region.

In the specific case of the Andean countries, the subject is introduced as a result of Decision 391 on Genetic Resources (July 1996), which recognizes the important role played by traditional knowledge related to the conservation and management of genetic

[2] "Revivir y volver a dar vigor a las leyes y prácticas consuetudinarias indígenas – una solución genuinamente *sui generis*", "Re-enacting and giving fresh momentum to customary indigenous laws and practices – a genuinely *sui generis* solution", in Patrimonio Indígena y Autodeterminación (Indigenous Heritage and Self-Determination). IWGIA. Tony Simpson. Copenhagen, 1997.

and biological resources (Article 7)[3]. Regrettably, nine years after this standard was implemented, only Peru has taken specific action to date, providing protection through a national standard referring to collective intellectual property rights related to biological resources.

Below general details are provided of the situation in each country:

1. Legislation on traditional knowledge and customary law in Ecuador

In Ecuador, there are 27 indigenous peoples and nationalities, with a population of approximately 4.5 million people (IADB, 2004).

The subject of traditional knowledge associated with genetic resources in this country is not fully developed, not only owing to the lack of a policy orchestrated by the State, but also because the provisions of international conventions and positive domestic legislation have not been made operational, despite the fact that instruments such as CAN Decision 391 (Genetic Resources) and Decision 523 (Regional Biodiversity Strategy) exist.

This situation has favored the misuse of genetic resources and associated traditional knowledge, without any participation by the State and indigenous peoples in equitable benefit sharing. Therefore, laying the foundations to prevent the biopiracy and cognopiracy[4] existing in the national territory, in the face of the limited capacity for supervision and monitoring by the competent national authority and the other players involved in the subject, is an emerging priority which has no precedent.

(A) Political Constitution (1998).

The most relevant aspect is the recognition of collective rights (Article 84), which contains provisions such as:

- *Maintaining, developing and strengthening their identity and traditions in spiritual, cultural, linguistic, social, political and economic terms (para. 1).*

- *Conserving the ownership of community lands, not subject to prescription, which will be inalienable, not subject to seizure and indivisible (para. 2).*

- *Conserving and promoting their practices in managing biodiversity and their natural environment (para. 6).*

- *Conserving and developing their traditional forms of coexistence and social organization, and generation and exercise of authority (para. 7).*

[3] Art. 7.- The Member Countries, in accordance with this Decision and their additional national legislation, shall recognize and enhance the rights and decision-making capacity of indigenous, Afro-American and local communities concerning their knowledge, innovations and traditional practices associated with genetic resources and their derived products.

[4] Unauthorized appropriation of knowledge, i.e. without the prior informed consent of indigenous peoples and local communities.

- *The collective intellectual property of their ancestral knowledge: its enhancement, use and development in accordance with the law (para. 9).*

- *Their traditional medicine systems, knowledge and practices, including the right to the protection of ritual and sacred places, plants, animals, minerals and ecosystems of vital interest from the point of view of traditional medicine (para. 12).*

(B) Intellectual Property Law of Ecuador

This mentions the establishment of *sui generis* systems of collective intellectual rights of (indigenous) ethnic groups and local communities (Article 377).

(C)National Biodiversity Policy and Strategy of Ecuado r

The needs and expectations for legal protection of traditional knowledge are established with emphasis being placed on the enhancement and protection of traditional knowledge, and the following results are therefore envisaged:

- The development of the corresponding standards on the collective intellectual property of ancestral knowledge.
- The registration of ancestral knowledge through *sui generis* protection systems.
- The development of capacities for the negotiation of annex contracts for access to the intangible component.
- Information systems on the forms of traditional management of biodiversity.
- Fora for participation of indigenous peoples in the implementation of Article 8(j) of the CBD.

(D) Regulations under the Law on Agrarian Development (Article 5)

This provision mentions that research programs will be developed to enhance, innovate, register and transmit traditional technologies and uses for indigenous, rural, mountain and Afro-Ecuadorian communities to maintain ancestral production systems. For this purpose, the State, through the Ministry of Agriculture and Livestock, will conclude contracts and agreements with the beneficiary organizations.

However, in accordance with this situation it may be stated implicitly that existing legislation in Ecuador has allowed:

- the recognition of indigenous peoples as such, with their own forms of organization and specific government, to exist;
- the strengthening of identity and traditions in spiritual, cultural, linguistic, social, political and economic terms to be promoted;
- their traditional practices in managing biodiversity and their natural environment to be conserved and promoted;

- their traditional forms of coexistence and social organization, and generation and exercise of authority to be conserved and developed;
- the collective intellectual property of their ancestral knowledge; its enhancement, use and development in accordance with the law;
- their traditional medicine systems, knowledge and practices, including the right to the protection of ritual and sacred places, plants, animals, minerals and ecosystems of vital interest from the point of view of traditional medicine;
- the administration of justice in accordance with their customary law and human rights standards (Article 191).

It appears in Ecuador that although the subject of customary law and traditional knowledge is not fully developed, it is clear that indigenous peoples are the ones who must assume control of their own institutions, ways of life, economic development, and strengthen their cultural identities, while ensuring that their knowledge, innovations and traditional practices are respected, preserved and maintained, and that their broader application is promoted, with the approval and participation of the owners of traditional knowledge, and the recognition by the authorities of the competence which indigenous peoples have in the effective control of traditional knowledge through their own customs or customary law (collective intellectual property recognized in the Political Constitution).

2. Legislation on traditional knowledge and customary law in the Bolivarian Republic of Venezuela

In the Bolivarian Republic of Venezuela, the indigenous population represents 1.5 per cent of the national total. In accordance with linguistic characteristics, there are 38 ethnic groups, 28 of which traditionally live in Venezuelan territory and 10 come from or are located in neighboring countries such as Brazil, Colombia and Guyana. In accordance with the results collected by the Indigenous Census of Venezuela, the population stands at 532,743 people who are located in ten states: Zulia (62.4 per cent), Amazonas (14.8 per cent), Bolívar (11 per cent), Delta Amacuro (6.6 per cent), Anzoátegui (2.2 per cent), Apure (1.9 per cent), Monagas (1.1 per cent), Sucre (0.2 per cent), Mérida (0.02 per cent) and Trujillo (0.02 per cent). Venezuela is a multicultural and multiethnic country, recognized constitutionally.

(A) Political Constitution

Article 124: The collective intellectual property of the knowledge, technology and innovations of indigenous peoples shall be guaranteed and protected. Any activity related to the genetic resources and knowledge associated therewith shall pursue collective benefits. The registration of patents for these ancestral resources and knowledge shall be prohibited.

(B) The Law on Biological Diversity

Article 13. - The State shall recognize the importance of cultural diversity and associated knowledge which local and indigenous communities have in relation to biological diversity, and shall also recognize the rights derived therefrom.

Article 39.- The State shall recognize and protect the economic rights and traditional knowledge of local communities and indigenous peoples and communities, in relation to biological diversity.

Article 42.- The capacity to dispose of knowledge, innovations and past, current or future knowledge, innovations and practices which form the collective intellectual property of indigenous peoples and communities shall constitute community rights.

Article 43.- The State shall recognize, for local communities and indigenous peoples, the right which assists them in refusing their consent to authorize the collection of biotic and genetic materials, access to traditional knowledge and biotechnology plans and projects in their territories, without having previously obtained sufficient information on the use and benefits of all that. They may also request the elimination of any activity, if it is demonstrated that the activity affects their cultural heritage or biological diversity.

Article 84.- The State shall recognize and undertake to promote and protect the rights of indigenous and local peoples and communities in their traditional knowledge related to biological diversity, as well as the right of such peoples and communities to enjoy collectively the benefits derived therefrom and to be compensated for conserving their natural environments.

Article 85.- The rights of indigenous and local peoples and communities shall be collective and shall be considered acquired rights, distinct from the right of individual ownership, where they correspond to a cumulative process of use and conservation of biological diversity.

In accordance with the constitutional provision cited, the Bolivarian Republic of Venezuela has also devised relevant secondary legislation based on the Organization Act on Indigenous Peoples and Communities (LOPCI – December 2005).

(C) Organization Act on Indigenous Peoples and Communities (LOPCI)

Within the specific framework of the Constitution, customary law is developed in the LOPCI which was approved in December 2005 and specifies the intellectual property law in the following circumstances:

- in the collective ownership of the knowledge, technologies, innovations and practices specific to indigenous peoples and communities (Article 101).

- as regards their uses and customs, they shall protect, develop and undertake sustainable use of genetic resources and the knowledge associated therewith (Article 102).

- The State shall guarantee the right of indigenous peoples and communities to establish and protect, in accordance with their uses and customs, their cultural, artistic, spiritual, technological and scientific heritage, knowledge on animal and plant life, designs, traditional procedures and, in general, all knowledge (Article

103).

- As to the administration of justice, indigenous peoples and communities may take, directly or through indigenous organizations, civil, criminal and administrative action as required, in order to determine the responsibilities of and reparation to be paid by any person who has participated directly or indirectly in the illicit use of their knowledge, technologies, innovations and practices in violation of their collective ownership rights (Article 104).

In this regard, it may be pointed out that in Venezuela customary law has two emphases: one referring to a legal framework that sustains the recognition of protection for the traditional rights of indigenous peoples and communities, and the other relating to the specific unwritten codes passed on orally from generation to generation.

As regards the positivization of customary law, this is given specific form in Venezuelan laws. A first phase under consideration must exist for its complete development, i.e. the nature of the territorial rights in the country must be specified. Thus, customary law would lie in another more general type of law, i.e. the delimitation and self-delimitation of indigenous habitats and lands (territorial rights), so that this is precisely the area in which one and the other law are given specific form.

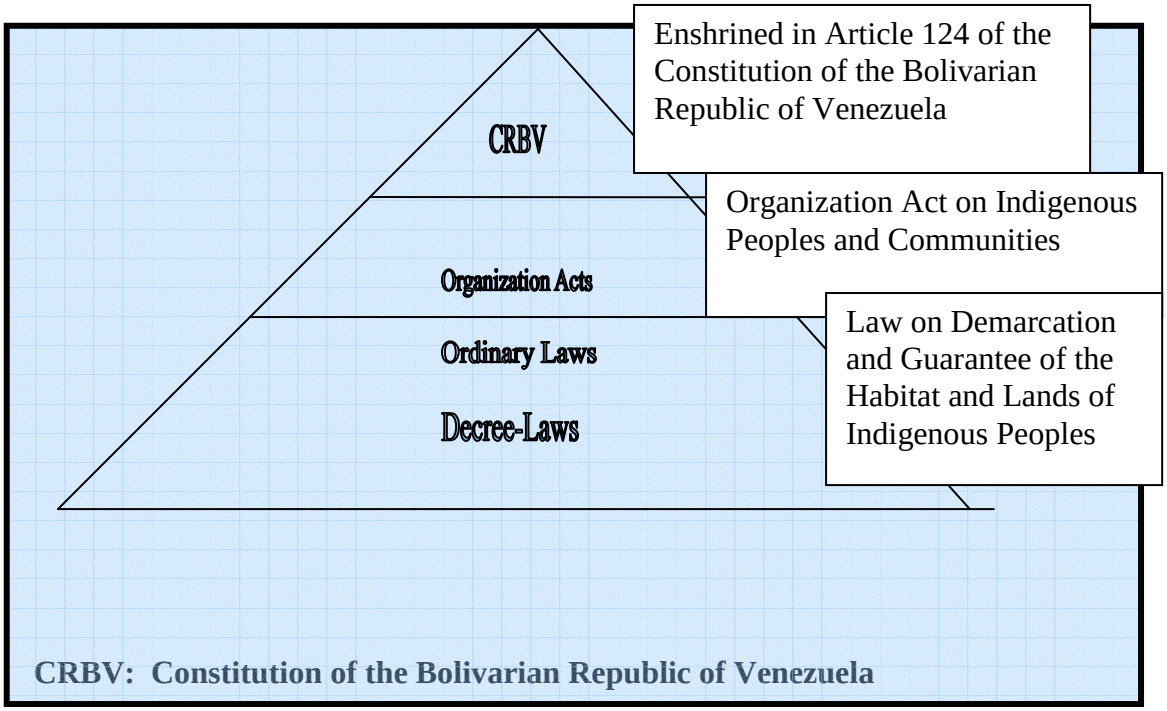
Based on the above, territorial rights would constitute the transverse right through which the applicability of other rights (including customary rights) would be achieved, as enshrined by the Constitution for indigenous peoples and communities.

A second phase should be encompassed by the compilation of the unwritten codes of indigenous peoples and communities as referred to above, but which are passed on orally from generation to generation, i.e. in accordance with their specific traditional forms and cultures. By keeping a suitable register, indigenous peoples and communities would be better able to determine how, from uses and customs, progress can be made towards the full recognition of customary law.

To sum up, the state of customary law in Venezuela is established in a:

First phase:

In the enshrinement of the recognition of territorial and other related rights such as that of collective intellectual property; traditional knowledge, cultural heritage and administration of justice (legal pluralism) of indigenous peoples and communities.



Second phase:

In the establishment of a register of unwritten (positivized) customary laws of indigenous peoples and communities.

Third phase:

In the guarantee for which, according to their uses and customs, the indigenous rights already recognized can be given specific form in the territories (habitat) of indigenous peoples and communities.

3. Legislation on traditional knowledge and customary law in Colombia.[5]

In Colombia, it is estimated that there are around 785,000 indigenous people,[6] distributed in 86 ethnic groups which are located in all the regions of the country[7]. There are approximately 64 languages, although many of them are being lost from generation to generation, which has weakened the specific identify of each people.

In Colombia indigenous peoples have their own systems of authority, social control and dispute resolution. These vary according to each people. These systems correspond to organizational structures defined as functions, hierarchies and forms of election and procedures, as is the case with town councils[8] and traditional authorities.

[5] Humboldt Institute: "Legal Aspects of the Protection of Traditional Knowledge in Colombia".
[6] Estimates, DNP 2002.
[7] The Departments with the highest number of indigenous people are: Amazonas, Vaupés, Putumayo, Córdoba, Chocó, Cauca, Guajira, Nariño and Caldas.
[8] THE INDIGENOUS PEOPLES OF COLOMBIA 1997. Raúl Arango, Enrique Sánchez. 1998

ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries and the CBD, ratified by Colombia in Law No. 21 of 1991 and Law No. 165 of 1994 respectively, recognize a series of rights for indigenous peoples – which guarantees them their survival as peoples – and oblige the State to respect and implement these rights.

In addition to this legal framework, there is the 1991 Political Constitution which recognizes indigenous peoples as a fundamental part of the Colombian nationality and, in constitutional terms, the State is declared as a multiethnic and multicultural country.

(A) Political Constitution

Article 246 states that the authorities of indigenous peoples may exercise jurisdictional functions within their territorial sphere, in accordance with their own rules and procedures, provided that they are not contrary to the Constitution and national laws.

In that regard, the Constitutional Court of Colombia has, in relation to the subject of the authorities and also own law, issued different rulings, some of which are cited below:

"Ruling No. C-139/96
INDIGENOUS JURISDICTION - Elements
An analysis of Article 246 shows the four central elements of indigenous jurisdiction in our constitutional order: the possibility that judicial authorities specific to indigenous peoples exist, the power of such peoples to establish their own rules and procedures, the subjection of said jurisdiction and rules to the Constitution and law, and the power of the legislator to indicate the form of coordination of indigenous jurisdiction with the national judicial system. The first two elements form the essence of the autonomy granted to indigenous communities – which extends not only to the jurisdictional, but also to the legislative, sphere, insofar as it includes the possibility of creating "rules and procedures", while the second two constitute the mechanisms for integration of indigenous legal systems within the context of the national system. Within the same structure of Article 246, there is therefore a value-based conflict between diversity and unity.

INDIGENOUS JURISDICTION - Validity

It is uncertain whether the validity of indigenous jurisdiction is in abeyance until the law on coordination with the national judicial system is issued. The Constitution has direct normative effects, as this Court has repeatedly stated, such that although the legislator is responsible for coordinating the functioning of indigenous jurisdiction and national jurisdiction, the actual functioning of the national system does not depend on said legislative act.

Article 286 grants indigenous communities the power to administer and govern their territories, and grants protected areas the character of "territorial entities of a political and administrative nature with autonomy, rights and functions".

Article 287 mentions that (indigenous) territorial entities enjoy autonomy in the management of their interests and, within the limits of the Constitution and the law, may be governed by specific authorities and exercise the corresponding powers.

Art.330. The exploitation of natural resources in indigenous territories, which shall be done without prejudice to the cultural, social and economic integrity of indigenous communities. In the decisions adopted in relation to such exploitation, the Government shall promote the participation of the representatives of the respective communities.

B. Secondary Legislation

Law No. 397 of 1997 (which expands on Articles 70, 71 and 72 and other concordant articles of the Political Constitution, and establishes rules on cultural heritage, promotion and stimulation) establishes the Ministry of Culture.

Article 1. Concept of culture: a "series of distinctive spiritual, material, intellectual and emotional features which characterize human groups and, in addition to the arts, include letters, lifestyles, human rights, systems of values, traditions and beliefs". The inclusion of the latter elements is essential for defining its function and, in our opinion, the relationship between culture and nature, wherein lies the knowledge of resources.

> *"Culture, in its various manifestations", as a basis of nationality and as such an integral part of the Colombian identity and culture. This process may be generated individually and collectively.*

It shall be "an obligation of the State and individuals to enhance, protect and disseminate the national cultural heritage". Subsequently, ethnic communities are recognized as having "the right to conserve, enrich and disseminate their cultural identity and heritage, and to generate knowledge thereof according to their own traditions". This means that autonomy is granted for conserving and transmitting their cultures in accordance with their customs.

Article 4. The State shall be obliged to protect the cultural heritage which consists "of all the cultural property and values that express the Colombian nationality, such as tradition, customs and habits".

Article 13 on the rights of ethnic groups, "in order to protect languages, traditions, uses, customs and knowledge, the State shall guarantee the rights of collective authorship of ethnic groups, shall support the processes of ethnic education and shall promote the dissemination of its heritage through means of communication".

Law No. 99 of 1993

Article 22 – on Promotion and Dissemination of the Environmental Experience of Traditional Cultures – states the following: the Ministry and scientific institutes shall promote the development and dissemination of knowledge, values and technologies concerning environmental management and the natural resources of indigenous cultures and other ethnic groups.

Article 76 of this Law ratifies the provisions of ILO Convention 169 and the Political Constitution: natural resources shall be exploited without prejudice to the cultural, social and economic integrity of traditional indigenous and negro communities, in accordance with Law No. 70 of 1993 and Article 330 of the National Constitution, and the relevant decisions shall be taken subject to consultation with the representatives of such communities.

Law No. 70 of 1993[9], contained the temporary Article 55 of the 1991 Political Constitution and has many references to the subject of negro communities and traditional knowledge.

Principles (Article 3):

- recognition and protection of ethnic and cultural diversity.
- right to equality of all the cultures forming the Colombian nationality.
- respect for the integrity and dignity of the cultural life of negro communities.
- participation of negro communities and their organizations without prejudice to their autonomy, in the decisions which affect them and those relating to the whole nation, on an equal footing and in accordance with the law.
- environmental protection which preserves the relations established by negro communities with nature.

Aim:

- to establish mechanisms for the protection of cultural identity and,
- rights of negro communities in Colombia as an ethnic group.

Traditional production practices:

These are agricultural, mining, forestry extraction, livestock, hunting, fishing and gathering of natural products in general activities and technologies that have customarily been used by negro communities in order to guarantee the conservation of life and self-sustainable development.

Chapter VI. Mechanisms for the protection and development of rights and cultural identity.

Article 32. The State of Colombia shall recognize and guarantee for negro communities the right to education, in accordance with their ethnic and cultural needs and aspirations.

Article 34. Education for negro communities shall take into account the environment, the production process, and the whole social and cultural life of these communities.

In conclusion, within the Constitution the most important aspects of the subject of customary law and its relationship with traditional knowledge relate to the fact that the

[9] Senate of the Republic of Colombia: legislative information at www.secretariasenado.gov.co

jurisdictional authority recognized the authorities of indigenous peoples and, as a result, redefined the new way in which the multicultural State is conceived, on the basis of the existence of legal pluralism, i.e. the decision of the State to transfer the monopoly of this authority as an excellent means of strengthening the existence of other ways of thinking and to live a good life in the broadest possible sphere of the democratic State. The authorities of indigenous peoples may exercise jurisdictional functions in relation to all subjects, including the protection of traditional knowledge, which marks another qualitative leap of great importance, in other words overcoming the colonial idea of the inability of these peoples and subjects to find solutions – in law – to the subjects classified by the State and by themselves as serious offenses or infringements". [10]

On the basis of the new Constitution, jurisdictional authority, which is transferred to indigenous authorities, as a right, represents a very significant break in the State monopoly of administering justice. A decision has been taken to reconstruct a nation, registering, recognizing and enhancing the diversity of peoples and cultures, through a new paradigm of decentralized power and based on the fact that in Colombia many of those peoples did not leave the cognitive references of a society and distinguished culture, nor specifically the use of their right, despite the obligation to do so. Partially speaking, the weakness of the State and the effective strategies of indigenous peoples to resist the process of uniformization left living conceptions and jurisdictional practices, the majority of which were not recognized as legal. The enhancement of the specific rights of indigenous peoples is a manifestation of legal pluralism which is also a consequence of the recognition and enhancement of the nation as a multicultural and multiethnic entity.

In this sense, in Colombia the application of so-called internal or customary laws, i.e. the systems of government and regulation which those communities and peoples possess in ancestral terms, corresponds to the acceptance of legal pluralism via the recognition of jurisdictional capacities, such as the imposition of laws concerning behavior and criminal laws, especially in the case of indigenous peoples.

4. Legislation on traditional knowledge and customary law in Peru.

In Peru there are approximately 48 indigenous peoples, each with its own language, with a population of 9.3 million, representing 47 per cent of the country's total population (National Institute of Statistics and Information Technology, 2000).

The legal denomination for indigenous peoples in Peru is that of rural (mountain and coastal) communities and native communities (Amazonia).

(A) Political Constitution (1993).

Article 2(19) recognizes and protects the "ethnic and cultural plurality of the Nation".

[10] Sánchez Botero Ester, Own Rights. Legal exercise of indigenous jurisdiction in Colombia, State Public Prosecutor's Office, January 2004.

Article 89. - The last part of this Article states that the State shall respect the cultural identity of rural and native communities, by virtue of which the intellectual rights of indigenous peoples shall be recognized.

Article 89. - Rural and native communities have a legal identity and are legal entities. They are autonomous in their organization, communal work, and the use and free disposal of their lands, as well as in economic and administrative terms, within the framework established by the law. Ownership of their lands is not subject to prescription, apart from in the case of abandonment provided for in the previous Article.

Article 149.- This Article provides recognition for customary law and it is stated that the authorities of rural and native communities may, with the support of rural councils, exercise the jurisdictional functions within their territorial sphere in accordance with customary law, provided that they do not infringe the fundamental rights of individuals.

(B) Law No. 27811 establishes the system of protection for the collective knowledge of indigenous peoples, linked to biological resources.

These rules are very special in Peru and in the Andean region, given that they are the only one of their kind which protects the traditional knowledge of indigenous peoples in relation to subjects concerning biological diversity. For the purposes of the focus of this study, the following provisions are highlighted:

Article 1.- The State of Peru shall recognize the right and capacity of indigenous peoples and communities to take decisions on their collective knowledge.

Article 11.- Collective knowledge and cultural heritage. Collective knowledge forms part of the cultural heritage of indigenous peoples.

Article 14.- Representatives of indigenous peoples. For the purposes of these rules, indigenous peoples shall be represented through their representative organizations, respecting the traditional forms of organization of indigenous peoples.

Article 24.- Local registers of collective knowledge of indigenous peoples. Indigenous peoples may organize Local Registers of Collective Knowledge, in accordance with their uses and customs (customary law). The National Institute for the Defense of Competition and Intellectual Property (INDECOPI) shall lend technical assistance with the organization of these Registers, at the request of indigenous peoples.

Article 46.- Settlement of disputes between indigenous peoples. In order to settle disputes that may arise between indigenous peoples within the framework of application of these rules, such as those relating to implementation, by the indigenous people that has negotiated a license contract for use of its collective knowledge, of the provisions of Article 6, second paragraph, of this Law, such peoples may have recourse to customary law and to its traditional forms of dispute settlement, and may rely on the mediation of a higher indigenous organization.

5. Legislation on traditional knowledge and customary law in Bolivia.

In the Republic of Bolivia there are 35 indigenous peoples with an approximate population of eight million people, representing 70 per cent of the national total (Ministry of Rural Affairs and Native Indigenous Peoples, 2001).

In Bolivia, there are no clear constitutional provisions referring to the intellectual property of indigenous peoples and its relationship with customary law.

Article 171 of the Political Constitution (1994) states only that the social, economic and cultural rights of indigenous peoples living in the national territory, shall be recognized, respected and protected within the framework of the law, especially the rights relating to their native community lands, guaranteeing the use of and sustainable benefit from natural resources, their identity, values, languages, customs and institutions.

The State shall recognize the legal personality of Andean and rural communities and of rural associations and trade unions.

The natural authorities of indigenous and rural communities may exercise administrative functions and apply specific rules as an alternative form of dispute settlement, in accordance with their customs and procedures, provided that they do not contravene the Constitution and laws. The Law shall make these functions consistent with the tasks of State authorities.

B. Regulations under Decision 391 on a Common Regime for Access to Genetic Resources (Supreme Decree No. 24676, June 21, 1997).

In Bolivia, the *sui generis* case is such that while the Political Constitution does not contain provisions referring to the intellectual property of indigenous peoples and customary law, the country does have Regulations implementing CAN Decision 391, which is the only one of its kind in the Andean region. However, at the same time the situation is particular in that explicit provisions relating to indigenous intellectual property and customary law do not exist either. For the purposes of this study, only two related articles are therefore cited:

Article 5(c).- Among its functions and powers, the competent national authority (National Secretariat for Natural Resources and Environment, Ministry of Sustainable Development and Environment) guarantees the recognition of the rights of indigenous peoples and rural communities as providers of the intangible component associated with genetic resources, in coordination with the National Secretariat for Ethnic Affairs, Gender and the Generations, and the organizations representing said indigenous peoples and rural communities.

Article 43(a).- For the sharing of benefits where the (genetic) resource is extracted from native community lands, or where the indigenous community or people participates as a provider of the intangible component associated with the genetic resource which has been accessed, payment shall be made to the communities through their representative organizations, in accordance with the corresponding Additional or Annex Contract,

such that the collective rights of the community in the natural resources existing in their native community lands and in the intangible component associated therewith are recognized.

In addition to these legal rules, there are others directly related to the traditional knowledge of indigenous peoples, associated with biodiversity, such as: Law 1580 which ratifies the Convention on Biological Diversity, the Law on Environment; the Law on the National Agrarian Reform Service; the Law on Popular Participation; the Forestry Law and the Biosafety Regulations.

Analysis of context in the case of Bolivia

The recognition by Bolivian legislation of the uses and customs of indigenous peoples has not become uniform and still shows various contradictions and procedural gaps which remove its legal effectiveness in terms of applicability to specific cases.

However, a number of legal mechanisms may be observed, to which customary law is attached, as in the following areas and practices:

Election of Authorities.- The State Political Constitution, the Law on Popular Participation and the Law on Administrative Decentralization are consistent in their recognition of uses and customs for the election of the natural authorities of indigenous organizations; this recognition also covers the election of delegates to the Supervisory Committee of the Municipal Government (social control mechanism). In cases of dispute concerning indigenous representation in procedures where legal personality is requested, the procedure establishes an administrative *status quo* until the same indigenous organizations resolve the matter internally based on their customs.

Distribution and Redistribution of Indigenous Lands.- Article 3, Paragraph III of the Law on the National Agrarian Reform Service determines the validity of customary law for the purposes of distribution and redistribution of lands within native community lands and communal lands owned collectively.

Administrative Functions and Application of Specific Rules.- The State Political Constitution recognizes customary law in the phrase "application of specific rules for alternative dispute settlement" with the restriction of the legal framework in force.

Management of Renewable Natural Resources.- The State Political Constitution and the Law on the National Agrarian Reform Service stipulate, as a legal guarantee, the use of and sustainable benefit from natural resources. In other words, the local management of these resources by the indigenous organizations which have recognized legal personality is guaranteed.

Exchange of Genetic Resources.- The Regulations under Decision 391 state that the conclusion of a prior access contract shall not be required in cases of exchange of genetic resources between indigenous peoples, where these resources are intended for their own consumption and based on customary practices.

Compulsory Nature of Additional Contract.- Article 32 of the Regulations under Decision 391 specifies the obligation for an applicant to sign a contract additional to the main contract with the organization representing the community(ies) where the genetic resource to be accessed is located. The Additional Contract is a prior condition for the conclusion of the Access Contract between the State and applicant. The failure to implement all or part of the Additional Contract shall lead to the main Access Contract being declared null and void.

Recognition of Collective Rights in Natural Resources and the Associated Intangible Component.- The Regulations under Decision 391 guarantee the recognition of the collective rights of indigenous peoples in their natural resources, including genetic resources; similarly, it recognizes the intangible component as a collective right of indigenous peoples.

Benefit Sharing.- The indigenous communities where the genetic resource accessed is located may receive payment for the use of such resources and the intangible component associated therewith, through their representative organizations. This direct payment mechanism consolidates the collective right exercised by the communities in their natural resources and the associated intangible component.

6. Common international and regional standards applicable to member countries of CAN.[11]

(A) ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries.

This recognizes the right of indigenous peoples to "*exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live"*.

Another basic principle recognized is the right to consultation and participation of indigenous peoples in all subjects affecting them. In this regard, the Convention states that:

"The peoples concerned shall have the <u>right to decide</u> their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall <u>participate</u> in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly" (Article. 7.1).

(B) The Convention on Biological Diversity (CBD).

[11] The four standards referred to in this section have been concluded, adopted and ratified by the five Andean countries and are therefore binding for States.

The CBD promotes the protection and encourages the customary use of biological resources in practices compatible with conservation (Article10(c)).

Article 8(j) is of greater relevance, as it states that subject to *"...its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices"*.

(C) Andean Decision 391 on a Common Regime for Access to Genetic Resources (1996).

In Chapter II, on the Recognition of Know-How, Innovations and Traditional Practices, the following is stated:

Article 7.- The Member Countries, in keeping with this Decision and their complementary national legislation, recognize and value the rights and the authority of the native, Afro-American and local communities to decide about their know-how, innovations and traditional practices associated with genetic resources and their by-products.

Mention is also made of ancestral knowledge, both in terms of the measures taken for benefit sharing, and for regulations in the case of access to traditional knowledge. Thus, it is stated that the following are excluded from the scope of this Decision, "the exchange of genetic resources, their by-products, the biological resources containing them, or their associated intangible components among native, Afro-American and local communities of the Member Countries for their own consumption, based on their customary practices" (Article 4(b)).

Also highlighted is the need to sign contracts annexed to the main contract, for the use of traditional knowledge and, if this requirement is not satisfied, the main access contract shall be declared null and void (Article 35).

Finally, it is important to know that the Eighth Temporary Provision states: "the Board (now CAN) shall draw up, within a period of three months after the Member Countries present their national studies, a proposal to establish a special regime or a harmonization regulation, as applicable, aimed at reinforcing the protection of know-how, innovations and traditional practices of native, Afro-American and local communities, in keeping with the provision of Article 7 of this Decision, ILO Convention 169 and the Convention on Biological Diversity".

Regrettably, this Andean legal provision has not been implemented to date since, in the sphere of CAN countries, a regional Andean standard on the protection of the traditional knowledge of indigenous peoples does not yet exist.

D. Andean Decision 486 on Industrial Property (2000).

Article 3.- The Member Countries shall ensure that the protection granted to intellectual property elements shall be accorded while safeguarding and respecting their biological and genetic heritage, together with the traditional knowledge of their indigenous, African-American, or local communities. As a result, the granting of patents on inventions that have been developed on the basis of material obtained from that heritage or that knowledge shall be subordinated to the acquisition of that material in accordance with international, Andean community, and national law.

The Member Countries recognize the right and the authority of indigenous, African-American, and local communities in respect of their collective knowledge.

IV. Conceptual framework and basic principles of customary law

Indigenous peoples have considered traditional knowledge to be their collective intellectual heritage, a heritage that forms part of their cultural identity and world vision, and which they have passed on and maintained, through their own cultural standards and traditions, from generation to generation. We can therefore say that traditional knowledge covers a series of ancestral practices which go much further than their association with biological resources and which are important not only for their commercial value, but above all for their value *per se* which this represents in terms of the cultural survival of culturally distinguished peoples. A concept which was adopted by the CAN Indigenous Group on Biodiversity, with a view to a future Andean decision to protect traditional knowledge, is the following:

> *"Traditional knowledge is all the ancestral wisdom and collective knowledge held by indigenous and Afro-American peoples and local communities, based on age-old practice and the process of interaction between man and nature, and passed on from generation to generation, usually orally".*[12]

In view of this concept, it can be stated that traditional knowledge is not only associated with biodiversity, but with many other practices such as:

- Natural sciences (e.g. biology, botany, zoology, indigenous taxonomy).
- Languages, songs, rituals, dances and rhythms.
- Cures, medicine and pharmacology.
- Crafts, ceramics, textiles and designs.
- Management of biodiversity, sustainable development, associated crops, agriculture and forestry, management of ecosystems, forestry management and management of hydrographic basins.
- Knowledge of current, previous or potential use of species of plants and animals, as well as of soils and minerals, known by a cultural group.

[12] Proposed Elements for *sui generis* Protection of Collective and Integral Ancestral Knowedge from the Indigenous Perspective (Caracas, May 2005).

- Knowledge of preparation, process and storage of useful species.
- Knowledge of conservation of ecosystems.
- Ceremonies and cures provided inside and outside their cultural sphere.
- Systems of customary law and moral values.

It appears that for indigenous peoples the consolidation of internal strategies for conservation and sustainable use of biodiversity resources and protection of associated traditional knowledge and traditional cultural expressions have always been subjects of high priority, since they are resources from which benefit has been gained throughout the ages in terms of their value *per se*, without it having been essential, for this purpose, to submit to rules regarding access, intellectual property and benefit sharing, although they exist in time and space and are regulated by the specific ancestral practices of the peoples themselves.

Thus, in the Andean region most indigenous peoples still conserve their own systems of community life. The principle of reciprocity – in relation to the exchange of goods and services – for example is an age-old practice that has not disappeared; therefore in relation to the subject of traditional knowledge reference cannot be made to market theories, but to the prevalence of customary social and economic relations, since systems of social and economic recycling, forms of exchange of work for work, distribution of surpluses, bartering of elements, reciprocity as regards goods and services, materials and objects of use still continue to exist; these are values which, in the final analysis, strengthen the cultural identity of indigenous peoples and their relationship with biodiversity. Biodiversity is undoubtedly an element that forms part of the integral relationship between cultural and ethnic groups and their social and natural environment, manifested in its particular spiritual conception. This property is not therefore the subject of commercial transactions. The communities themselves do not in fact identify it as a component that can be separated from their world vision,[13] for which reason links with intellectual property systems are completely alien to and unknown in the life of indigenous peoples.

However, the process of globalization and the free market operates at a different pace and traditional knowledge does not escape being included. As a result of the process, indigenous peoples make efforts to understand the momentum and interests in between, which give rise to such a complex theme as that of traditional knowledge, owing to its extraordinary importance in introducing added value, especially to biodiversity resources, but the real situation is that indigenous communities are placed at an absolute disadvantage and are unaware of the process of restriction of global policies and international standards concerning traditional knowledge and traditional cultural expressions.

Nevertheless, considering that the focus of this study is the conservation and sustainable use of biodiversity and its relationship with customary law, an approximation must be made towards a definition of customary law. In this regard, Rodolfo Stavenhagen says that "*what characterizes customary law is precisely that it is*

[13] Rules for Ownership of Biological and Genetic Resources and Tradional Knowledge. Gabriel R. Nemogá and Alejandro Chaparro. National University of Colombia. Bogota, January 2005.

a series of customs recognized and shared by a group (community, people, tribe, ethnic or religious group etc.), contrary to written laws which stem from a constituted political authority, and whose application is in the hands of this authority, i.e. generally the State. The fundamental difference therefore appears to be that positive law is linked to State power, insofar as customary law is specific to societies lacking a State, or simply operates without reference to the State (IABD: Indigenous Peoples and Constitutional Rights).

In the workshop on the Role of Customary Law in Regulations for Access to Genetic Resources, Distribution and Protection of Traditional Knowledge (Quito, January 2006), the following definition was proposed as a contribution to enriching the literature on this subject. In that regard, it was stated that:

> *"Customary law is a series of standards, uses and customs, that are passed on from generation to generation and exercised by authorities and institutions specific to indigenous peoples in their territories, and which constitute legal systems recognized, accepted and respected by a group and which incorporate the legal pluralism of countries with an indigenous population".*

In any case, as was mentioned at the above workshop, any process which examines the relations between customary law, access to genetic resources and traditional knowledge, must be aimed at protecting the ethnic and cultural diversity of indigenous peoples and local communities in order to guarantee their physical and cultural survival, as well as their well-being and that of humanity as a whole.

In line with this thinking on customary law, the following aspects of its nature and foundations can be stated and must be taken into account in order to analyze and understand it better. We can say therefore that customary law is very rich in content and importance as a key element for the protection of traditional knowledge associated with genetic resources and traditional cultural expressions, because:

- they constitute a system of knowledge originating from native law, own law or natural law (Indigenous Law).

- they are continuous in time and space, linked to the cultural identity of indigenous peoples.

- they promote reciprocity as regards the exchange of goods, services and knowledge within communities.

- they are intrinsic to the legacies of knowledge. Through customary law, the yachak, taitas (shamans) and elders pass on traditional knowledge from generation to generation, both that associated with biological resources and with traditional cultural expressions.

- they represent specific cultural standards which are in a constant state of innovation and adaptation to new realities, and make the conservation and use of biological resources possible.

- they permit cultural recycling *in situ* in specific communities, through a whole system of knowledge linked to the indigenous world vision.

- they constitute social and political claims linked to the fundamental rights of indigenous peoples such as autonomy and self-determination.

It is precisely the nature of this system, which is rooted in the very depths of indigenous peoples' world vision, that has made it possible for plant and animal species to be continuously adapted and improved for generations. For this reason, orchards for example are a permanent field of *in situ* experimentation, as a result of the creative accumulation of knowledge and traditional practices successful in the adaptation and sustainable management of species and their ecosystems.

The process of domestication and adaptation of biological species continues and extends up to the present. In this connection, indigenous societies continue contributing to humanity food, medicinal, color-producing, oil-producing, fiber, etc. plants and knowledge of wild species closely related thereto. It must not be forgotten that indigenous people in South America gave the world important foodstuffs and drugs such as tobacco, the potato, coca, rubber, yucca, cotton, quinoa, numerous varieties of maize, achote, peanut, chili, pepper, cocoa, quinine,ipecacuana, Brazil nut, etc.

Despite these relevant contributions which indigenous peoples have made, there is another reality which must be seen: a number of indigenous peoples are suffering from a clear period of deterioration in their traditional knowledge caused by external agents of all kinds, especially environmental, social and economic impacts. In addition, there is the accelerated loss of biological diversity, owing to the constant threat against the integrity of indigenous territories and protection areas, caused mainly by extractive industries of all types.

As an immediate effect, the process of cultural deterioration in indigenous communities is very strong and affects traditional knowledge and traditional cultural expressions, since new generations are less and less receptive to the passing-on of traditional knowledge between generations. This is the reason for the importance of preserving, recovering and protecting traditional knowledge, for example that related to biodiversity, through policies, strategies and practices which envisage measures such as incentives for conservation and sustainable use of biodiversity resources, the free practice of traditional medicine, the consolidation of indigenous territories and forms of traditional organization, respect for own government and customary law; as well as the different manifestations of the cultural expression of indigenous peoples.

Finally, it may be stated that customary practices, owing to their nature, contain a very broad cultural baggage of elements that may make a substantive contribution to the full protection of traditional knowledge from the specific habitat of indigenous peoples and

local communities, since it has been said that these customary practices are a whole system of knowledge that forms part of indigenous law. Therefore, in an effort designed to protect traditional knowledge and traditional cultural expressions of indigenous peoples and local communities, it is essential to consider the nature of this law as described, which is perfectly synchronized with the intrinsic elements of traditional knowledge such as:

- its collective nature.
- its essential link with the indigenous identity and territoriality.
- its inalienable character not subject to prescription.
- it is closely linked to native laws and to own, major or indigenous law.
- it goes beyond what is written in the codes and laws of positive law, as it has existed since before the formation of national States.
- traditional knowledge is not static. Innovations form part of the process of evolution of indigenous peoples.
- its expressions do not pursue an economic or commercial aim, but they are important for their value *per se*, represented in terms of the cultural reproduction of indigenous peoples.
- traditional knowledge as the heritage of indigenous peoples and exercise of their creative life forms part of fundamental human rights and the exercise of free will.

As has been observed, traditional knowledge and traditional cultural expressions form an integral part of the cultural specificity of indigenous peoples, which should not be broached from the point of view of the predominant theories of positive law. Similarly, as regards its forms of protection, which use the measures proposed through intellectual property rights in force, they must be analyzed with great rigor, since the search for their links with standards which lead to the creation of an economic and monopolistic culture may cause harm to the integral nature of traditional knowledge and to the specific cohesion of the identity of indigenous peoples. Faced with these threats, by contrast, the elements constituting customary law provide a forum for the continued cultural reproduction of indigenous peoples and therefore, on a permanent basis, of traditional knowledge and traditional cultural expressions with all their cultural baggage.

V. Traditional knowledge protection through customary law: case studies.

This chapter has been compiled on the basis of case studies identified in four countries (Peru, Ecuador, Colombia and Venezuela), where, through real practical examples of the specific habitat of indigenous communities, proof is provided of how customary law plays a major role in the government and protection of the traditional knowledge associated with biodiversity and traditional cultural expressions, which in general contribute to more sustainable use and management of the natural resources existing in indigenous territories.

For that reason, indigenous peoples have made various statements and declarations as to how to submit their proposals and ways in which they see the protection of the traditional knowledge associated with genetic resources and traditional cultural expressions; thus, they have stated for example that:

"...For the members of indigenous peoples, the knowledge and determination of the use of resources are collective and intergenerational. No indigenous population, be they individuals or communities, or government may sell or transfer the ownership of resources which are owned by the people and which each generation has the obligation to safeguard for the next.

- All the components of the intellectual property issue (determination of access to natural resources, supervision of knowledge or cultural heritage, monitoring of the use of its resources and regulation of the benefit conditions) are components of free determination.

- For indigenous peoples, biodiversity and the knowledge of a people are concepts inherent in the notion of territoriality. The subjects relating to access to resources must be seen from this perspective.

- Patents and other intellectual property rights in forms of life are unacceptable for indigenous peoples.

- The strengthening of the cultural identity of indigenous peoples and their specific forms of organization are essential elements for the conservation of traditional knowledge".[14]

The International Indigenous Forum on Biodiversity (IIFB), constitutes a forum for global positioning of indigenous peoples in international negotiations on traditional knowledge within the framework of the CBD and, during the second meeting of the Working Group on Article 8(j) and related provisions (Montreal, February 2002) and the Conference of Parties (COP6) of the CBD (the Hague, April 2002), indigenous peoples reiterated that they participated in such processes in order to:

> ".....*reaffirm and ensure that our fundamental rights for the protection of our traditional knowledge are respected, to guarantee our continuous access to and control of our lands, waters and territories, and to exercise and maintain our collective rights in practicing and preserving our knowledge and maintaining our spiritual obligations for the continuity of life and the survival of our future generations"* (IIFB, 2002).

At the same COP6 of the CBD, the indigenous peoples stated that "*we are rights holders and not mere stakeholders. We did not come here to negotiate our rights but rather to guarantee the obligations of the Parties with respect to our peoples and wish to point out that registries, databases and intellectual property systems are not*

[14] Indigenous Regional Meeting on Indigenous Peoples and Intellectual Property COICA - UNDP, held in Santa Cruz (Bolivia), September 1996.

adequate systems for protecting and transmitting our knowledge, innovations and practices. For millennia, Indigenous Peoples have had our own systems of protection and transmission under our customary law which are the most adequate for fulfilling this need and should be respected".

Subject to this premise and in line with the statements of indigenous peoples in the different global fora, below is a description of practical case studies on how customary law plays a major role in the conservation of biodiversity and protection of traditional knowledge.

Peru case study: the La Papa Park in the region of Cuzco.[15]

The La Papa Park project, carried out by the Andes Association (Cuzco) – attached – has been used as a case study and makes it clear that for the development of the customary law of the quechua people in the Andean region of Cuzco, firstly the conceptual part of customary law has been defined in the following terms:

> *It is a series of unwritten rules which govern all the aspects of community life, including family relations, sexual honor, crimes, bonds, thefts, exchange of goods and services, work, land, seeds and any collectively owned and managed resource. Although those rules are known to all the members of the community, the application thereof is the responsibility of traditional authorities at fixed times (Andes Association).*

In itself the project shows how the exercise of customary law has allowed quechua communities in the Cuzco region not only to recover their ancestral knowledge of different varieties of potato, but also to state that customary law is a body of laws which exists in the communities and, in this case, is expressed as follows:

- through practices adaptable to changing situations without these representing explicit principles.
- the fact that they are not codified or formulated in abstract terms gives them considerable flexibility where specific circumstances apply.
- the flexibility and specific place (ecosystem) ensure the continuity of their legitimacy.
- it corresponds to biocultural needs and interests.
- changes stem from various sources.
- comprehensive standards and those concerning transmission between generations, which survive in time and space.

However, as in other regions of the world, in the Peruvian Andes customary law is not constituted by traditional or immutable rules, and rules have changed continuously through time as a result of the needs that indigenous peoples had to respond and adapt to changing social, economic, cultural and ecological pressures and conditions, which are generated both inside and outside communities. Thus, the rules of customary law in Andean indigenous communities have been profoundly affected by the pre-Incan and

[15] Andes Association (Peru). The La Papa Park "a *sui generis* model for the protection of traditional knowledge through customary law". Cuzco, 2005.

Inca invasions, the Spanish invasion and the changes in the political and legal institutions of the Peruvian nation State.

Nevertheless, from the excellent results of the study it can be stated that in Peru customary law is absolutely valid as it demonstrates the age-old existence of traditional knowledge in Andean communities, based on the following principles:

- **Reciprocity (Ayni).-** A principle by virtue of which the continuous exchange of goods and services is produced between persons who know each other, institutions and nature itself, in which a particular service and its respective return (understood as payment in positive law) must occur in a specific period, constituting a compulsory social mechanism owing to the fundamentally economic interdependence generated between the parties which practice it. Other expressions include Mink'anakuy and Rakinakuy.

- **Duality (Yanantin).-** The Andean world is always divided into two parts and this implies that each half requires its other half to act as a complement. Thus, as a result of this principle situations, rights and obligations are generated in favor of two or more parties, the implementation of which is necessary as a complement in order to achieve harmony.

- **Balance (Chaninchay).-** A principle which states that Andean man has the obligation to respect and maintain the balance with (i) the other members of the community, (ii) Pachamama and (iii) the sacred world; and so it must be subject to criteria of proportionality in terms of capacities, needs and efforts. Others include "Pashminakuy" and "Tupachiy".

An additional aspect which it is important to highlight in this case and which constitutes the vital link between the conservation of biodiversity and ancestral practices for the existence of traditional knowledge is the **communal territory**, the material good which in Andean communities is considered to be the **Pacha Mama** (Mother Earth), from which material, intellectual and spiritual aspects of the indigenous quechua communities in the place have been combined, and which is complemented by other mechanisms such as local registers and collective marks which fall within the inclusive maintenance of landscapes and ecosystems in the project's area of influence.

Thus, with this project, as the author thereof the Andes Association has succeeded in revitalizing the key elements of customary law, which are the adaptable management of ecosystems, the administration of knowledge and natural resources in this case, such as the potato, which is vital for the food security of indigenous communities, the maintenance of fairness and collective systems, the maintenance of cultural and spiritual values, autonomy and self-determination.

Ecuador case study: Customary indigenous practices for the exercise of ancestral knowledge in the conservation of the biodiversity of the Mojanda Cajas Plateaux.[16]

[16] Center for Multicultural Studies (CEPCU). "The Life of the Imbakucha Plateaux – case of Mojanda". Otavalo, 2005.

Thus, the high mountain ecosystems that are located between 3,200 meters and 4,500 meters above sea level, in the North of the Andes chain (North of Peru, Ecuador, Colombia and Venezuela) are known as plateaux.

This case study focuses on the Mojanda Cajas plateaux, in the province of Imbabura, Republic of Ecuador, a place with unequaled landscape resources, including three lagoons and a high concentration of biological and cultural diversity, covering some 4,000 hectares on which the life of the Otavalo and Kayambi[17] indigenous peoples depends, with an approximate population of 15,000 people, all organized in different forms of local organizations such as communities, associations, cooperatives, a water board and unions of communities.

The role played by the ancestral practices of the indigenous peoples in this place in the conservation of biodiversity and traditional knowledge is key and, in this particular case, owing to a vital resource such as water, since the latter is the result of global warming, and the high mountain ecosystems are suffering drastic changes in their vegetation, fauna and the reduction in the flows of water stemming from this vital resource for adjacent indigenous and local communities.

To cite just one reference, 25 years ago indigenous communities were supplied with a flow of 12 liters of water per second and now they do not exceed three liters per second, with the subsequent increase in the population seeking more resources. In other words, we are faced with a phenomenon which involves conducting major environmental education activities and above all resorting to the recovery of the ancestral knowledge of specific communities to introduce certain standards and management more in keeping with the conservation of the particular ecosystem.

For that purpose, a number of guidelines for action have been established, linked mainly to the following aspects:

1. Constitution of community authorities designated by the uses and customs specific to the indigenous communities in the area, solely responsible for the use and management of the Mojanda plateaux.
2. Collective design of a plan of use and management of the Mojanda plateaux. The participation of both genders and the generations is key to this strategy, combined with the technical support of specialized institutions and above all recovering all the ancestral knowledge which, since time immemorial, has made harmonious relations between man and nature possible.
3. Environmental education at all levels, from specific indigenous communities and the population in general.

In this case study, it is important to show how all the local organizations have rescued their own ancestral practices relating to nature, which amounts to recourse to their own customary standards for the proper use of resources through indigenous traditional knowledge, based on the following aspects:

[17] People and place of origin of the author of this study.

- Recovery of the **minga** as a community work ancestral practice.

- Conservation of biodiversity with the active participation of the **yachakuna** or ancestral knowledge in the care of the plateaux, which have a major role in directing the whole strategy.

- Recovery of the Andean world vision, seeing the world as a whole in which man is not the owner and manager of resources, in this case of water and biodiversity, but is part of the **Pacha Mama** (Mother Earth). This interpretation of ancestral knowledge has led to the launch of a rapid process of recovery of ancestral knowledge and therefore great respect for any type of life existing in the plateaux, because it has been decided that the plateaux mean life.

- Within this practice, according to the Andean world view the following principles are fundamental: the **Kay Pacha,** this world in which we live; **Uku Pacha,** the world outside and which must therefore be respected; the **Hawa Pacha**, the world above containing the clouds, rain, wind, moon and sun, which are also elements that form part of the cosmogenic indigenous world and must also be respected; and finally, the **Kay Shuk Pacha**, which is the world beyond, containing dreams, the unknown and where the future of indigenous peoples is interpreted. All of this has been determined as the indigenous territory, the Pacha Mama, of these two poeples (Otavalo and Kayambi), where the resources of biodiversity are present, along with water and interrelated traditional knowledge.

- Within this combination of knowledge, there are various practices that are worth mentioning, one of them being the recovery of the ancestral practice of **Randi – Randi,** which is nothing more than giving and giving, but this giving and giving is between man and nature and vice-versa, because in this case, nature and the plateaux constitute life and indigenous man is part of that life and therefore the Mojanda plateaux provide many resources for local people, mainly water, and man must also pay what is known ancestrally as the **Wakcha Karay**, which is a very traditional request from time immemorial for the plateaux to have abundant water and other natural resources.

In diagrammatic terms, within the recovery of the ancestral practice through traditional knowledge, this is expressed as follows:

Ancestral practices	
Use of soils	Conserving and generating new soils.
Agriculture	Many crops in small cultivatable lands – diversification of crops.
Economy	Re-establishment of bartering, redistribution and solidarity, i.e. Randi – Randi (Giving and Giving).
Organization of work	Through mingas and community work.
Food	Recovery of traditional native foodstuffs which are very nutritious.
Water	This is the life blood of Pacha Mama and therefore

	must be taken care of.
Biodiversity	Conservation and recovery of species of native plants, wild animals and birds, and fish.

In the Andean world vision, all the elements of Pacha Mama appear to be united in this symbiotic relationship between man and nature, because what indigenous people want is no more than the **Sumak Kausay**, i.e. Good Living. Thus, within the efforts made to recover customary practices, traditional knowledge and traditional cultural practices survive because indigenous peoples consider themselves to be Sons of Pacha Mama, which in the local indigenous language (kichwa) is as follows: **Pachamamapak Churimi Kanchik, Chaimanta Sumak Kausayta Munanchik – We are Sons of Mother Earth and therefore we want to live well,** this being the central focus of the community effort being made in the relationship between indigenous communities and the Mojanda plateaux.

In this case, as will be observed the relationship is consistent with the principles prescribed by Articles 8(j) and 10(c) of the CBD, which refer to preservation, recognition and use of traditional knowledge, and also to customary use in the management of biodiversity resources.[18]

Colombia case study: Cultural axis as the focus of the survival of customary law in the Nam Misak (Guambiano) people.

The case cited is that of the Guampía (Guambiano) people, in the department of Cauca, which, in its Declaration on the Life and Continuity of Nam Misak,[19] concerning biodiversity and traditional knowledge, mentions that these are directly related to the Cultural Axis and Territory, elements which make the existence of own (customary) law possible, expressed as follows:

- Looking at the world as a whole, with everything that exists in nature, with all it produces, with all that is here, that is above and that is below.

- The co-existence with biodiversity is a sacred and age-old practice, because in its relationship it seeks to maintain co-existence without destruction, as it contains the sacred and ceremonial sites that must be respected: rocks, rivers, mountains, plants, animals which provide life and spirits which give form to the vision of the world.

[18] Article 8(j): Each Contracting Party shall, as far as possible and as appropriate: subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.
Similarly, Article 10(c) states that each Contracting Party shall, as far as possible and as appropriate: protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.

[19] Department of Cauca, September 24, 2005.

This particular feature is precisely reflected in how the Guambía people, from its perspective, understands what is customary to be part of its culture, as a whole, but united with the **earth** and **agricultural systems**; so if the **CULTURE** has been lost or has been badly **EDUCATED,** the **water** will be mistreated and poisoned, and the **earth** will be contaminated; in turn, this will transmit **contamination** to **food**, which will make **animals** and **man ill**, and will generate **production** problems**.** Thus, the **affected environment** will oblige indigenous man to undergo a process of **colonizing displacement,** condemned to live **without identity and therefore there will be no cultural continuity or validity of customary law.**

For this reason, this people which is firmly attached to its ancestral roots has declared that:

- No one may use Nam Misak (Guambía) thinking to make it part of their thinking in order to gain advantages and benefits alien to its collective interests. Nor has it been said that access will be permitted for researchers who go in search of data, inventories and knowledge within their territory in order to take them away subsequently. They also reject this type of activities for access to their knowledge, raising the cultural objection to such claims.

- They also express the right to defend, protect, decide, repatriate and develop all the resources existing in their territories, which must not be the subject of any activity without the express consent of our Ancestral Authority, which is the only one authorized to take decisions on the resources with the Community's support.

- Any act of use, abuse, theft, appropriation, contamination of native biodiversity by transgenic substances, patents, licensing, or any other act carried out without the express authorization of the Guambiano people will be ignored, as they have said that they have the exclusive right not only in their cultural and archeological heritage, but also in their language and ancestral traditions; in the same way as in their collective ancestral knowledge, be it in relation to *medicine and ancestral drugs, ideographical art, treatment and cure practices, native seeds, agricultural production systems, food processing, forms of conservation and consumption, genetic values, biodiversity and management of biological and natural resources.*

In view of this case, once again the link is essential and indissoluble between culture, the indigenous people and its territory, or basic elements for the continuity and protection of traditional knowledge.

Venezuela case study: Protecting and promoting the customary use of the biological resources of Alto Caura.

The reference case from Venezuela has been taken from the efforts made towards customary conservation of biodiversity among the Ye'kuana and Sanema indigenous peoples, located in the east of the country in the State of Bolívar.[20]

In this case, as was described in the legal situation of the country in relation to customary law, we know that in Venezuela there is a national legal framework which creates the conditions for the enforcement of this *right*, as a basis and support for a new legal relationship between indigenous peoples and the State.

Article 119 of the Constitution provides the legal context which may be enforced for this new legal relationship. The Articles states that "*The State shall recognize the existence of indigenous peoples and communities, their social, political and economic organization, cultures, uses and customs, languages and religions, and also their habitat and native rights in the lands which, ancestrally and traditionally, they occupy and which are necessary for developing and guaranteeing their forms of life. It shall be the responsibility of the National Executive, with the participation of indigenous peoples, to determine and guarantee the right to collective ownership of their lands which shall be inalienable, not subject to prescription or seizure, and non-transferable, in accordance with this Constitution and the law"*.

However, in this legal context, the possibility of protecting traditional knowledge through their own uses and customs is directly related to the recognition of indigenous territorial rights, since the latter constitutes not only the sphere of application but, in fundamental terms, of the practice of said knowledge.

In the reference case study, the Ye´kuana and Sanema indigenous peoples, in the same way as other peoples in this geographical area of the Amazon and Orinoco river basins, have mixed economies, based on activities of hunting, harvesting, rotation of crop fields and the use of wood products for construction and to obtain medicine, as well as other material purposes.

The system of crop rotation and its diversification are, for example, those which have attracted greatest attention and have thereby guaranteed the diet and food security of both indigenous peoples. Also important are the rotation of lands intended for agriculture which, after they have been used, must be left fallow in the case of the Yekuana for up to eight years, a period during which only fruit trees can continue to be sown; by contrast, since the Sanema are more a hunting people, they require more territory and only return to occupy their latest settlement after a period of about 50 years. Thus, in both cases the most important way of regulating and controlling demographic pressure on natural resources is during the process of selection for the new location, something which is generally chosen and decided by the shamen who obtain their guidance from the spirits through dreams, in order to settle in places where nature provides them with an abundance of natural resources.

As regards hunting, it has also been observed that these two peoples have ancestral practices of high knowledge that do not lead to the total plundering of forest animals,

[20] Forest Peoples Programme "Protecting and Promoting the Customary Use of Biological Resources: Alto Caura, Venezuela". January 2004.

but only what is necessary for food. In the case of the Yekuana, as they are a more coastal people, hunting is generally done in places close to rivers and long expeditions are made, while the Senema hunt in very distant places, but in the depths of the forest up to 20 kilometers away and for several days.

It is also important to observe the traditional cultural practices of these two peoples associated with another type of traditional knowledge such as indigenous medicine, but always compatible with the requirements of conservation and sustainable use of resources, which are associated practices owing to the specific nature of the concept which they themselves have as human beings. Thus, the value given to the spiritual aspect is key to the prevention and cure of diseases through therapeutic treatments and the use of medicinal plants.

In analyzing this case, another aspect which has been the subject of great attention is that of customary rules for the distribution of wealth. Among the Yekuana, most male adults eat together two or three times a day in the communal circular house, bringing food from familiar places to the *öttö* for its general consumption. Among the Senema it is a rule that all the hunting meat, fish and animals are shared equally between all the family groups in the household, ensuring that everyone, men, women, children, the elderly and sick, receive a part of what has been obtained. The negative aspect of any individual or family sharing its food with others is marked by a break in the society, which normally ends in the division of the community.

One of the results of this food distribution rule is that any shortage of food, particularly animals, affects the whole community equally. Consequently, in taking collective decisions with regard to organizing hunting expeditions, harvesting or relocation of peoples to a different place, these peoples usually reassess survival strategies at the community level.

Conclusions of the studies conducted:

The four studies analyzed show us how the importance of customary law is present in the good government of traditional knowledge and traditional cultural expressions of indigenous peoples, as well as in the mechanisms for countering its misuse. In specific terms, we may highlight the following aspects by way of conclusions:

- The nature of customary rules which have their roots in the very depths of the world vision of indigenous peoples has made it possible for traditional knowledge to exist and, through their traditional cultural practices, for plant and animal species to be continuously adapted and improved, together with the specific ecosystems in which the indigenous peoples live.

- Control of traditional knowledge is in the hands of indigenous peoples themselves through the different forms of local government existing in indigenous communities and which are jealously guarded by the shamen, elders and other traditional authorities.

- The existence of a people with its roots in traditional culture and of a territory with its resources where its jurisdiction and powers are clearly fixed are important and indeed vital for the continuity of traditional knowledge.

- The living continuity of traditional knowledge through customary law has allowed indigenous peoples to maintain a harmonious relationship between man and nature for good government in the use and management of natural resources.

- According to studies, it has been noted that the recovery and revaluation of traditional authorities and their specific forms of organization are the best strategy for protecting traditional knowledge against misuse by third parties. In none of the cases analyzed is the need identified for such knowledge to be protected or developed subject to the parameters set by intellectual property rights, which incidentally are completely unknown to indigenous peoples.

- The *modus operandi* of intellectual property rights, adapted for a system which has no links with them, must be studied in great detail since the application of its standards could be directly detrimental to the character *per se* of traditional knowledge that is collective, integral, intergenerational and involves permanent innovation procedures.

Thus, although it is certain that there is proof that indigenous peoples have their own systems of controlling traditional knowledge and traditional cultural expressions, there is still concern in the face of external threats which, *inter alia*, is due to the adoption of legal instruments that are devised in very different contexts and with political decision-makers that do not have the slightest knowledge of the nature of traditional knowledge and therefore the whole phenomenon of globalization is aimed at devising possible strategies for access to and commercialization of such knowledge.

In view of these studies, what indigenous peoples are seeking is precisely to strengthen their own institutions, establish better control of ancestral territories and existing resources, through their own registers and with the exercise of their own control, which in the long term will be the fundamental pillars for consolidating solid models of good government of traditional knowledge and thus avoiding their appropriation by means of cognopiracy, biopiracy or the same systems of intellectual property rights, which promote their appropriation and commercialization.

VI. Analysis of the law and policy formulated and lessons learned from the case studies.

Although the national case studies have not been developed fully, owing to financial difficulties, the information obtained to date allows us to form a political and legal reality which is in some ways favorable to the region, owing to the very fact that in the five countries mentioned the CBD, ILO Convention 169 and the specific Andean Decisions on both Genetic Resources (391) and Industrial Property (486) have been ratified. In addition, the constitutional provisions of Venezuela and Ecuador, which declare traditional knowledge to be the collective intellectual property of indigenous peoples, and also of other constitutions highlighting the exercise of indigenous

jurisdictions for the settlement of their internal disputes by means of customary law, the consolidation of their internal territorial organizational structures, such as Indigenous Territorial Entities (ITEs in Colombia), Indigenous Territorial Constituencies (ITCs in Ecuador) and Native Community Lands (NCLs in Bolivia) should be noted. Also at the national level, attention should be paid to the progress achieved in Peru with Law No. 27811 on the protection of collective knowledge of indigenous peoples related to biological resources, in which among other important aspects, the power of indigenous peoples to grant prior informed consent for the use of their traditional knowledge is highlighted. Although the region as such does not yet have a regional standard which protects and regulates traditional knowledge associated with biological resources or traditional cultural expressions, the process for the CAN to adopt an Andean decision for the protection of traditional knowledge is already in full swing.[21]

On the other hand, the Andean countries contain a high percentage of the planet's biodiversity and are the world leaders in terms of diversity and natural environment of vascular plants, birds, amphibia and all vertebrates, as well as being the subregion which is the place of origin of important Andean, Amazonian and coastal phytogenetic resources which provide about 35 per cent of the world's agricultural and industrial production. This significant natural heritage represents 25 per cent of biological diversity and is also associated with the immense wealth and cultural diversity of the Andes.[22]

However, the rules of the game for access to biological resources and the use of associated traditional knowledge have not respected the principles of equity or of the rights acquired ancestrally throughout the ages by indigenous peoples themselves, since biopiracy, cognopiracy and the folklorization of the traditional cultural expressions of indigenous peoples are recurrent phenomena, as behind this intangible wealth of indigenous peoples and local communities the following external players are directly involved:

- *Bio-Industry:* Products derived from biodiversity are sought by naturist, pharmaceutical, food, cosmetic and new biological material research companies.
- *Plant-breeding industry:* Especially for its interest in identifying and gaining access to traditional plant-breeding practices, Creole varieties and related wild cultivated species.
- *Extractive industries:* They rely on traditional knowledge to identify natural resources with high commercial value. They are also used in environmental impact studies.
- *Design industry:* The interest in all tribal designs and paintings of indigenous peoples.
- *Cultural industry:* Especially the photographic, film, literary and record industries. Identification of scenic places.

[21] More information available at "Elements for the protection of collective and integral traditional knowledge from the indigenous perspective", CAN – CAF. Caracas, May 2004. www.comunidadandina.org

[22] Decision 523 on the Andean Regional Strategy on Biodiversity. Lima, July 7, 2002.

- *Ethnic tourism:* The special interest of this industry is the knowledge of traditional practices as rights and ceremonies.
- *Knowledge of master and/or psychotropic plants:* Special interest exists in knowledge of plants used by shamen to obtain states of ecstasy.

For this reason, the main concern and the subject to be dealt with in these processes is the need to establish clear and legally binding frameworks which support, strengthen and prioritize the protection of traditional knowledge associated with biological resources and traditional cultural expressions. In addition, in practical matters it is also vital to deal with and resolve the rights and responsibilities inherent in indigenous lands and territories, their resources and their links with the conservation of traditional knowledge.

This being the case and in view of the case studies and legal and political reality in the region, it is necessary for national States and competent international organizations, such as the CBD and WIPO, to take into consideration and explicitly recognize, in their legal and political system, the following basic principles:

- The recognition of the nature of collective ownership of the knowledge, innovations and traditional practices of indigenous peoples.

- The essential link between traditional knowledge, territoriality and cultural identity.

- The principle of inter-related cultures directed towards a knowledge-based dialogue is essential for understanding the importance of traditional knowledge which allows the development of a *sui generis* system with a view to its conservation and protection.

- The conservation, revitalization and use of traditional knowledge as a component of the free determination of indigenous peoples.

- The intangible knowledge associated with genetic resources is inalienable and not subject to prescription.

- Collective and integral traditional knowledge constitutes a whole system of ancestral wisdom.

VII. Recommendations for international organizations such as WIPO and the CBD.

By combining the contributions already discussed at the Regional Workshop on Customary Law (Quito, January 2006), with the case studies conducted in the Andean countries, it is possible to formulate a number of recommendations, above all for WIPO, for consideration at its forthcoming negotiating fora.

In general terms, since the knowledge-related and legal situation of traditional knowledge and customary law in the Andean countries is as it is, it could be concluded that an overview of the region is somewhat encouraging but that, however, the production of more comprehensive studies on the principles and foundations of customary law from its own perspective, i.e. from the bottom up, is merited, since this right is fully valid in indigenous communities. Insofar as indigenous peoples desire it, the national and international legal systems should recognize respect for and exercise of their own government, their forms of organization, cultural identity and traditional territories, the administration and control of natural resources, including the control of collective and integral traditional knowledge.

This explicit recognition of the authority and power given to indigenous peoples, *inter alia* for the effective control of traditional knowledge through their own customs or customary law, would establish the foundations necessary for the establishment of protection mechanisms which are produced within the framework of the WIPO IGC and the CBD. In this sense and if this were beyond their control, produced within the framework of the WIPO IGC and the CBD. In this sense and if this were the direction taken, indigenous peoples should adopt internal supervision protocols and codes of ethics for the use of their traditional knowledge, controlled by community governments themselves.

In line with this logic, the IPRs proposed to offer protection for traditional knowledge do not have great validity, especially where this trend is directed towards private appropriation and exploitation for commercial purposes, which transgress the whole foundation and nature of traditional knowledge and the role played by customary law as a mechanism for their natural protection *per se.*

In accordance with the legal reality in the region – especially the recognition of the collective rights of indigenous peoples in the Political Constitutions of Ecuador and Venezuela – and ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, with reference to the value of customary law for the protection of traditional knowledge, it is relevant for the following aspects to be taken into account:

- The focus of a *sui generis* system for the protection of knowledge, innovations and traditional practices should be directed towards effective protection of such knowledge, innovations and traditional practices, and traditional cultural expressions, by means of customary law and not through access and commercialization as appropriation resources using IPRs.

- In the recognition of collective ownership, the intergenerational and integral nature of such knowledge, innovations and traditional practices should be reaffirmed in support of indigenous peoples and local communities.

- Better development of the principle of prior informed consent from indigenous and local communities for the use of their knowledge, innovations and traditional practices, and traditional cultural expressions, in the search for complementarity with the elements of free prior informed consent of indigenous

peoples, developed by the United Nations Permanent Forum on Indigenous Issues.

- The ***cultural objection*** for the use of knowledge, innovations and traditional practices, and traditional cultural expressions, should be expanded in depth, since much of the traditional knowledge is sacred and cannot be subject to the systems of use being developed in international negotiations, both within the CBD and WIPO.

- This *sui generis* system should promote and respect in the broadest possible manner the ancestral practices of use, management and exchange of genetic resources and traditional knowledge within specific indigenous peoples.

- The importance of the role of customary law should be taken into account, insofar as it is an age-old system of protection *per se* and its codification should be avoided, because this would lead to its extinction and it would become a positive right. The fact that it is not codified should give it greater flexibility and adaptability to different circumstances, thereby ensuring its continuity and legitimacy.

- The direct participation of indigenous and local communities should be guaranteed through their representative organizations and indigenous experts, in the negotiations on the *sui generis* system for the protection of knowledge, innovations and traditional practices.

- Caution should be exercised in the use of terms such as "customary", which can lead to the ambiguous perception that these laws are customs, as qualified by positive law, which might lead to an inaccurate perception of the term "customary law", which should be understood as ***Own Law or Indigenous Law***, including both customary rights and positive law standards.

Finally, it is considered that the treatment of this subject in the Andean region is still in its infancy and so it is necessary to discuss in greater depth the "Role of Customary Law in the Protection of Traditional Knowledge", bearing in mind the following parameters:

General objective:

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

Specific objectives:

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

- To carry out national and *in situ* legal studies with indigenous peoples themselves concerning the practical experience gained with customary law for the conservation of biological resources and associated traditional knowledge.

- Contribute with greater judgment to the importance of customary law for the protection of traditional knowledge in the fora of the CBD, WIPO and within the sphere of CAN, in the latter with a view to a future Andean decision on traditional knowledge protection.

- Generate the development of capacities of indigenous peoples themselves and the active participation of such peoples in national, regional and international negotiations.

The conduct of more comprehensive studies on this subject, which envisage the elements referred to, will provide us with a broader, social, legal and political context for customary law and other protocols existing in the region; as well as understanding better its nature associated with traditional cultural expressions and traditional knowledge associated with genetic resources and also identifying possible synergies with IPRs.

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