

# Community Biocultural Protocols

**Building Mechanisms for Access and Benefit Sharing among the Communities of the Potato Park based on Customary Quechua Norms**



**ANDES (Peru), the Potato Park Communities and IIED**

**October 2011**



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**PROTECTING COMMUNITY RIGHTS OVER TRADITIONAL KNOWLEDGE**



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# EXECUTIVE SUMMARY

In this case study, Asociación ANDES (Peru), the International Institute for Environment and Development (IIED), and the Potato Park present the results of the project “Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices.” This project included the development and negotiation of the Inter-community Agreement for Equitable Access and Benefit Sharing, which proposed an innovative approach to benefit sharing based on the use of indigenous customary laws, norms and practices. The concept of Biocultural Systems (BCS)<sup>1</sup>, which understands processes, resources, knowledge and all beings as reciprocal parts of an indivisible environment, was a guiding theory in this initiative. Accordingly, the inter-community agreement took the form of a Biocultural Protocol.

The Nagoya Protocol on Access to genetic resources and Benefit Sharing requires countries to take measures to ensure equitable benefit-sharing with indigenous and local communities (ILCs) for the use of traditional knowledge and genetic resources held by them, based on mutually agreed terms and Prior Informed Consent. As a result, countries shall take into account indigenous and local communities’ customary laws, community protocols and procedures in implementing their obligations relating to traditional knowledge (TK), and will endeavour to support the development by ILCs of community protocols for access to TK and equitable sharing of benefits from its use. The Potato Park’s inter-community agreement provides a model for developing effective community protocols which build the foundations for equitable and sustainable local economies, based on biocultural goods and services, while building community capacity to negotiate *equitable* agreements with third parties; these are termed biocultural protocols. It is one of the few examples of a community protocol which is actually functioning in practice to guide the distribution of a range of monetary and non-monetary benefits amongst communities.

Further, biocultural protocols are not only ‘external’ ABS and PIC tools, but also internal governance tools that use customary laws and inputs from national and international law, adapted to local conditions, to regulate interactions among biocultural resource users, and define and guide the behaviour of local networks. The Potato Park protocols emerged from the Potato Park Biocultural System and, therefore, are embedded in the traditional values, ethical norms, customary uses, and cultural and spiritual practices associated with the biocultural resources of the Park. This interlacing of intercultural practice allowed participants in the research process to link indigenous Andean legal principles, experiences, and norms to Western legislative models, thereby providing clear guidance as to how indigenous biological and cultural resources may be appropriately accessed and benefits equitably shared.

The Inter-community Agreement, developed through an in-depth participatory process facilitated by Quechua community researchers over 2-3 years, provides a broad outline for equitable sharing of all the benefits received by the Potato Park, directly or indirectly derived from its biocultural resources. Benefits from different economic collectives are shared and reinvested in strengthening the biocultural system, through an inter-community fund. Three core customary law principles that maintain biocultural systems were identified – reciprocity, duality and equilibrium and from these principles, derivatives were identified and used to flesh out the benefit-sharing framework, based on existing local norms and practices.

Development of the Inter-community Agreement of the Potato Park through participatory action research has produced learning regarding how to design appropriate mechanisms for equitable benefit sharing. It is the conviction of the researchers and community members involved in this study that, in order to design appropriate mechanisms to implement *sui generis* systems that are practical and efficient, and at the same time consistent with the aspirations, values and beliefs of indigenous and local communities, it is important to abandon preconceived notions about access and benefit sharing agreements and the processes of obtaining prior informed consent. A key starting point for developing *sui generis* systems is to analyze issues of access agreements and consent processes from the perspective of the communities themselves; using as the principal lens the customary norms that have thus far guided the preservation and maintenance of local traditional knowledge (TK).

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<sup>1</sup> A complex, adaptive, linked social and ecological system and all of its subsystems and the relationships between them. These relationships are co-evolving and self-organizing, producing rich biocultural diversity.





# 1. INTRODUCTION

The Potato Park communities are deeply committed to the conservation of biocultural resources, associated knowledge, and indigenous rights, and undertook the present project to further investigate the role of customary norms and institutions in the protection of traditional knowledge (TK) and resources. The development of a Biocultural Protocol, in the form of the Inter-community Agreement for Equitable Access and Benefit Sharing, is the result of their efforts. In addition to providing a valuable example of effective community-based protection of TK and genetic or biological resources in praxis, this initiative is also one of only a handful of examples worldwide of working models that stem directly from customary laws and norms. Given the present international paucity of models that adequately value and protect indigenous and local community rights, biodiversity and customary norms and practices in relation to benefit sharing and access to resources and knowledge – the present initiative may further serve as an example of best practice in relation to the implementation of the Nagoya Protocol.

“Protecting Community Rights over Traditional Knowledge: Implications of Customary Norms and Practices” is a research project conducted by the International Institute for Environment and Development (IIED) in five countries: Peru, India, China, Kenya and Panama, with financial support provided by Canada’s International Development Research Centre (IDRC), between 2005 and 2009. The project in Peru was jointly developed with Asociación ANDES and the communities that make up the Potato Park in the Cusco region. Its main objectives were to:

- 1) Protect the rights of the communities regarding their biological resource-related traditional knowledge, in accordance with their customary laws and practices; and
- 2) Contribute to the debate within the CBD, Food and Agriculture Organization (FAO), and World Intellectual Property Organization (WIPO) through findings on the role of customary law in defining mechanisms for equitable benefit sharing.

The present case study focuses on the project results for Peru, paying special attention to the experience gained in developing the Inter-community Agreement for Equitable Access and Benefit Sharing among the six communities of the Potato Park. The impetus for this agreement came with the signing of a repatriation agreement between the Potato Park and the International Potato Centre (CIP) in 2004. A mechanism was needed to ensure equitable sharing of the potato seeds and monetary benefits derived, and avoid potential conflicts amongst the communities.

The study results demonstrate the need to adopt an innovative approach to the distribution of benefits – one that takes into account indigenous perspectives as a starting point; and emphasises the holistic nature of traditional knowledge systems by working with the corresponding customary laws of Indigenous Peoples. This study also attempts to contribute to the construction of epistemological bridges between Indigenous and Western societies, through sharing experiences, including experiences of overcoming obstacles, and ideas about best practice in the design and implementation of a participatory, creative methodology and framework for benefit sharing. The aforementioned methodology and framework were both developed inter-communally, built from and by the respective communities.

## 2. ASOCIACIÓN ANDES AND THE POTATO PARK

### 2.1 Asociación ANDES

Asociación ANDES is an Indigenous NGO located in Cusco, Peru. ANDES is governed by, and collaborates with, community-level organizations in the development of strategies for the adaptive management of Indigenous Biocultural Heritage – strategies which affirm the rights and responsibilities of communities and prioritize food sovereignty, health, and local livelihoods.

ANDES builds local capacity and adaptive responses to the effects of globalization and other challenges, such as climate change, and strengthens the basic socio-economic, cultural, political, and ecological well-being of communities. ANDES focuses on: ameliorating poverty and fighting the causes of future impoverishment; the development and dissemination of models for culturally-based management of biodiversity and landscapes; the recognition and strengthening of traditional resource rights; and, the promotion of institutional and policy reforms relevant to environmental protection and self-determined development or *buen vivir*.

Placing these activities in their wider context, ANDES promotes the development of an endogenous development model that can achieve resilience for indigenous peoples and their territorialities at a regional scale. This model is based on the “Ayllu” system, a traditional concept of balance amongst three elements: humans and the domesticated environment, the wild environment and the spiritual world. Balance between these three leads to “Sumaq Causay”, or holistic living. Sumaq Causay presents a holistic vision that considers diverse elements of the human condition, where material goods are not the only determining factors, but rather other values, knowledge, and practices also influence the quality of life, and where the right to life applies to humans and nature alike. Sumaq Causay represents a viable local framework for development, integrating important elements of well-being, conservation, spirituality, traditional knowledge and governance systems. It also supports the right of people to control their own resources, economies and livelihoods, and to choose what cultural values they will embrace.

Territorial development under this model underlines the multidimensionality of indigenous identity and biological diversity and gives a holistic value to indigenous territoriality (not its commodification), re-establishing and enhancing old and new biocultural networks. One element of this has been the exploitation of the economic value of some aspects of the links between biological and cultural diversity; creating a variety of landscape goods and services and traditional knowledge-based local novel products - particularly derived from the local agricultural biodiversity.

The Ayllu based model has, in common with most indigenous belief systems, not traditionally been recognised in national or international policy. ANDES works to develop bottom-up legal and policy proposals that create enabling conditions that support traditional processes of food production, build resilience in agricultural landscapes and strengthen indigenous rights. ANDES has chosen to focus on the development of local rather than national policies because the national institutions which are capable of implementing effective policy are either openly against indigenous peoples’ interests or do not yet exist. However, such institutions exist at the local level and are highly sensitive to local realities with institutions that guarantee compliance and effectiveness.

### 2.2 The Potato Park

Located in Písaq, in the Sacred Valley of the Incas, between 3,400 and 4,500 meters above sea level, the Potato Park spans some 10,000 hectares of land. It was established in 1998, by Asociación ANDES-IIED and six Quechua communities in Písaq, Cusco, Peru, as an Agrobiodiversity Conservation Area. The organisation of the Potato Park is founded upon a series of agreements, chief among which is the ‘Inter-community Agreement’. The Potato Park is dedicated to the protection of the native potato via indigenous territoriality traditions and is emblematic of ANDES’ approach to self-determined development.

The initiative was undertaken to celebrate and protect a unique traditional mountain agroecosystem, its indigenous culture, and one of the richest native potato diversity areas in the world. The potato, an Andean biocultural expression, was chosen as a 'flagship species,' placed at the forefront of efforts to restore local habitats and ecosystems, ensure cultural survival, and promote local rights and livelihoods. The Park contains a vast diversity of domesticated and wild potato varieties, and is home to the largest number of wild potatoes in the world within a centre of origin of the potato and the genetic diversity found within just one plot in the area can reach up to 150 varieties (Chawaytire community, Potato Park). Apart from potatoes, other native Andean crops such as olluco, beans, maize, quinoa, wheat, tarwi, mashua and oca are produced. Key important functions of the agricultural system include food security, conservation, development and livelihoods and water conservation.

### **Social Organization and Governance**

There are six Quechua communities in the Potato Park, consisting of approximately 4000 inhabitants. The majority of the population is indigenous to the region, with only 1% of the population being immigrants. The communities rank in fourth place for extreme poverty and sixth regarding absolute poverty in Peru's poverty map (FONCODES 2007).

The concept of Pachamama, or Mother Earth, is the basis of customary law and practice. Particular emphasis is placed on the fact that human and the natural world are not separate: that they are interdependent. In this context, biocultural diversity is the basis of indigenous self-determination. The Potato Park governance system includes both customary and new institutions for decision-making. Customary laws have been incorporated into all aspects of the management of the Park, though the application of norms in the six communities varies according to the needs and traditions of each. In institutional terms, formal local organizations, with elected authorities, are recognized as legal representatives by the State, while traditional authorities continue to fulfill culturally important roles within communities but are not formally recognized. The Potato Park governance system is comprised of a mix of the two:

i) Formal Governance Structures: in Peru, the organization and decision making of the 'Comunidades campesinas'(rural communities), are considered in Law No.24656, General Law of Rural Communities. Their governance is based on 3 bodies:

- The 'Asamblea General' (General Assembly) which is the highest authority
- The 'Directiva Comunal' (Community Board),
- Specialized activity committees that coordinate with the Community Board.

ii) Traditional Governance Structures: There are three levels of administration that correspond to three scales:

a) Landscape scale:

This is understood in relation to mountain spirits. Ausangati is the most powerful mountain god in the area, with subordinate smaller mountains that form spirit guardians of the communities. Within the Park, the mountain Sunpichu and his wife (another mountain) are the owners of the land, the animals and even the community members.

b) Community scale:

- *Varayoc* (mayor): they are elected based on their community skills, are usually elderly in age, called taytallactas and are respected by the community. They are responsible for keeping order, cordiality and respect between community members. They also must lead and organize community labour.
- *Pututeros* (helpers): generally are children who support the Varayoc and are elected to pass on knowledge of territorial administration

c) Family scale:

Most of the decision-making occurs within families. The main spokesperson for families are usually men, while women play an important role in decisions over quality of life and planning of activities related to finances, food and health. When the father is not around, which is sometimes the case because of migrant labour, women take on male roles. Children also participate by supporting in tasks.

Incorporating these formal and traditional structures, the 'Association of the Communities of the Potato Park' is the umbrella organization of the 6 Quechua communities that make up the Park. Each community has formal legal recognition through communal land titles under the national territorial system. The Association also has formal recognition under Peruvian law that allows for the organization of communities that seek collective goals. The common goal in this case is not only conservation of cultivated agrobiodiversity, but also the development of indigenous territoriality based on solidarity economy and innovations associated to traditional knowledge and genetic resources, and the promotion of traditional resource rights. This common goal helps to bridge the gap between the formal recognition, which is abstract in nature, and the traditional reality, where the Association exists in relation to the landscape and not as a separate entity.

## 2.3 Developing an Indigenous Biocultural Territory: Activities in the Potato Park

The Potato Park provides a framework for a range of traditional and modern activities based on the particularities of its landscape and biocultural diversity. These activities are vertically and horizontally diversified as well as by sector, successfully integrating product development (vertical), territorial development (horizontal) and different sectors (e.g. genetic resources, handicrafts, gastronomy, agriculture, natural products). The six communities of the Potato Park have worked tirelessly to strengthen their technical skills and traditional knowledge systems and have used these to establish a host of initiatives:

- six natural medicine pharmacies;
- a cottage industry of natural products based on potatoes and medicinal plants, focused on the production of natural medicines, cosmetics and nutraceuticals;
- a biocultural tourism program based on landscape enjoyment and educational visits;
- a Culinary Sanctuary dedicated to the potato, which features hands-on activities associated with traditional crop production, experience of cultural and spiritual values of food, and a restaurant specialized in native potatoes; and
- a handicraft center which uses agrobiodiversity-derived inputs.

A local museum for the native potato is also being planned. These activities are implemented through collectives with the objective of conserving and sustainably using biological resources, and building a creative and solidarity economy based on local resources. The collectives include the Potato Arariwas (a seed repatriation and conservation collective), the gastronomy Qachun Waqachi collective, Tika Tijillay women's video collective, Naupa Awana craft collective, the Willaqkuna guides collective, and the Sipaswarmi Medicinal Plants Collective.

The creative links developed between product development, territorial development and production sectors of the Park is enabling construction of a dynamic solidarity economy model based on creativity, diversity, equity, self-management, ecological balance and principles of economic efficiency. This model is not only helping meet basic needs, but is also producing concrete benefits to share among all communities, as discussed later in this paper.

### 3. BIOCULTURAL SYSTEMS

In developing the Potato Park as a practical framework, one of the first outcomes from the research carried out by ANDES, IIED, and the Potato Park was the definition of the concept of Biocultural Systems. This is based on traditional concepts of conservation and sustainable use and has provided the foundations for the Park's policies in most areas, but particularly access to biodiversity and genetic resources, and associated traditional knowledge, as well as fair and equitable benefit sharing. The Biocultural Systems concept has been particularly valuable in relation to the elaboration of principles for benefit sharing because of the way it has highlighted that internal mechanisms within the Park are as important as the framework for engagement with external actors.

'Biocultural System' is a term that describes an indivisible system containing the knowledge, innovations, and practices of Indigenous and local communities, as they are collectively maintained. It incorporates the traditional territory itself, including natural resources and the diversity of genes, variety of crops, species, and ecosystems, and the cultural and spiritual values and laws developed within the socio-ecological context of the communities. These elements are customary parts of knowledge systems and are, in general, linked to cosmological beliefs as part of the Indigenous 'cosmovision,' or holistic view of the world. The strong links between human society and the environment, which form part of the lived experience of the communities of the Potato Park (and other Indigenous Peoples) suggest that biological and cultural resources are interdependent manifestations of the diversity of life on Earth. The natural environment is considered an essential part of human society just as many biological resources – such as diverse crops and healthy ecosystems – depend on time-honoured practices of breeding and stewardship. Therefore, the concept of Biocultural Systems broadly reflects the Ayllu system and the aspiration for Sumaq Causay mentioned earlier.

In terms of biodiversity management, the concept of 'Biocultural Systems' immediately leads to the point that resources, territories, culture, and traditional knowledge cannot be treated as separate objects that may be permanently alienated, but must be considered as a biocultural whole to which limited rights of access may be granted. Academically, there are parallels between this latter point and with the concept of transdisciplinarity. This is in the sense that both *transdisciplinarity* as a concept and (many) indigenous cosmovisions are incommensurable with the (artificial) separation of knowledge-about-the-world into bounded, and doctrinal disciplines such as 'economics', 'law' or 'biology'. Consequently, the maintenance of functioning Biocultural Systems requires a recognition of several key points:

- 1) The elements of a biocultural system must be treated as a whole. For example, a landscape provides physical space for biodiversity and knowledge development, while knowledge about a plant resource and the resource itself have a symbiotic relationship where the removal of one will lead to the destruction of the other.
- 2) Traditional knowledge and customary laws are intimately linked with their location and subjects.
- 3) Cultural and spiritual values shape the processes through which Indigenous Peoples, and probably all peoples, acquire, use, and transmit knowledge, thereby ensuring continuity.
- 4) Resources and knowledge are fundamentally linked to communities and, while they may be made use of, they cannot be permanently removed without damaging the community.

#### 3.1 The challenges to biocultural systems and the development of biocultural protocols

The holistic concept has been central in the Indigenous biodiversity agenda where identity is fundamental in their relationships with states. Existing constitutional and legal frameworks have begun to recognize the rights of indigenous peoples to ancestral territoriality, despite the context of persecution and forced displacement. Indigenous peoples underline that the recognition of prior informed consent and equity within an alien conceptual framework is not enough: they also demand their right to difference, that is, recognition of special rights for Mother Earth, including biological and genetic resources.

Perhaps the biggest threat to biocultural systems is the globally dominant European, subsequently North American, approach to growth and development.<sup>2</sup> This makes economic considerations, particularly the accumulation and growth of capital and the role of consumption, priorities. A key point is that, when applied in practice, it also tends to ignore any burdens that capital growth and consumption may place upon other considerations, such as social relationships, spirituality, environmental sustainability, biodiversity and wellbeing. Therefore, the uncontested privileging of economic goals in isolation is parasitic upon attempts to effectively manage the finite biological and non-biological resources of the planet.<sup>3</sup> Cultural diversity, and the knowledge systems that it maintains, are among these non-biological resources. The realization that the threats posed by globalisation required innovative, dynamic, effective and culturally appropriate responses to the problems faced by the Potato Park led to the identification of the following appropriate responses:

- Mechanisms and tools to protect Biocultural Systems, including the recognition and implementation of rights relating to systems of knowledge; and recognition, strengthening, and use of customary laws and approval of agreements for the restitution of biocultural systems;
- Local management and control of biocultural heritage; and the strengthening of customary norms and traditional institutions for common property resource management; and
- Incorporation of measures and mechanisms for the joint protection of traditional knowledge and biocultural systems in national and regional policy and legislation.

The Potato Park has developed numerous mechanisms and tools to protect Biocultural Systems, mostly around the cultural, research and commercial activities of the various collectives mentioned earlier. A good example of how these activities can reinforce the recognition and use of customary laws and support the restitution of biocultural systems is the agreement between the International Potato Centre (CIP) and the Potato Park. This not only repatriates native potato varieties to the Park, as a representative of Andean Quechua communities, but also supports a range of research activities around climate change monitoring and adaptation and all within a contractual framework that is informed by customary law.

Local management and control has been strengthened through the development of the Potato Park as an institutional structure supporting a range of collaborative activities. It has also been supported through the development of an inter-community agreement for benefit sharing. This agreement is an internal one among the communities of the Park and was borne of the realisation that any effective external engagement had to be based upon internal consensus as to how external relationships should be managed and how any direct and indirect benefits derived from them will be shared and used. Finally, some success in the incorporation of a biocultural systems approach into regional policy and legislation has been achieved through effective engagement with the Cusco regional government, as illustrated by its ordinances against biopiracy and transgenics.

Taken together, these experiences have led to the development of the concept of Biocultural Protocols that control the interactions occurring within the Biocultural System of the Park. Crucially, Biocultural Protocols also mitigate and inform interactions with external bodies and agencies.

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<sup>2</sup> See for example, Featherstone, et al, 1995; Yearly 1996; and Franklin et al, 2000

<sup>3</sup> Economical Economics has been instrumental in providing alternative strategies for redressing this imbalance.

## 4. THE POTATO PARK INTER-COMMUNITY AGREEMENT FOR BENEFIT SHARING

As discussed in the previous section, one of the main means by which the Potato Park has strengthened customary norms and traditional institutions, both in their relationships with external partners and internally, is through the development of an inter-community agreement for equitable benefit sharing.

The Inter-community Agreement is a broad outline for benefit sharing that includes all benefits received by the Potato Park, directly or indirectly derived from its biocultural resources. It is an innovative document, as it is based primarily on customary norms and practices identified by the communities. It reveals the true nature of these norms, which are not static, but constantly adapt to the changing environment (as do the components of a biocultural system). As such, these norms are able to respond to new situations, like those related to access to genetic resources under international frameworks, and to incorporate and adapt, when necessary, the principles, norms and tools of national and international legislation. Additionally, the Agreement provides a mechanism to protect and preserve traditional knowledge associated with biological resources and to strengthen the cultural identity of the communities.

### 4.1 Methodological approach for developing the agreement

Research carried out by the Potato Park communities, with the support of ANDES and IIED as key partners, concluded that, in order to ensure the effectiveness of resource-use and TK agreements, 'bottom-up' benefit sharing mechanisms are required. Such mechanisms are also conducive to efforts aimed at the alleviation of poverty, and are effective in providing protection against future impoverishment. 'Bottom-up' approaches, by facilitating the generation and distribution of benefits in a fair and equitable way, resonate with local expectations, community needs, traditional values, and customary practices. To this end, a number of guiding principles that constitute the basis of the customary legal and institutional system of the communities were identified. In the case of the Quechua communities of the Potato Park, these benefit sharing mechanisms are based on customary norms that guide traditional practices of reciprocity and allow for income equality and redistribution of wealth among the communities. These principles have been essential in maintaining the Quechua economy, but are also central to defining rules of justice and to regulating new benefit sharing situations, particularly in the context of multi-community arrangements. In order to develop the Inter-community Agreement for Benefit Sharing, it was necessary to identify these norms but to also, working with the communities, see which norms were relevant to regulating the benefits associated with biocultural systems, and identify new mechanisms that needed to be incorporated.

The first step was determining the methodology. Defining and implementing a methodological framework constituted a major challenge due to the lack of previous experiences from which lessons could be drawn, and the great variability of the contexts and situations related to access to collective biocultural heritage and specific issues related to genetic resources and traditional knowledge. One of the biggest hurdles was designing a participatory process that was culturally sensitive and, at the same time, could combine Western and Indigenous tools and involvement. Another obstacle was articulating the results of the research in a concrete way that could respond to the specific needs of the communities, while also contributing to achieving cultural and environmentally sound development beneficial to the communities, their environment, and their livelihoods. Finally, linking written national laws with the oral systems of Andean society proved to be a difficulty in and of itself.

The participatory methodology sought to address these challenges. The ultimate approach, designed by ANDES in collaboration with Indigenous researchers of the Park, was termed an 'emancipatory methodology,' because not only did it involve Indigenous researchers in its design, but its implementation was also led by the communities of the Park and included the use of Indigenous methods and technologies, combined with contemporary or mainstream participatory investigation methods. The Indigenous methods employed included: the use of myths, prophecies, and drawings; as well as several culturally-attuned courses of action, such as research work, horizontal training, Indigenous-based education, and strengthening of local governance. The research questions were addressed in local study groups facilitated by community technicians.

## 4.2 Why translate an agreement rooted in oral tradition into a written document?

Customary laws of Indigenous communities are, by definition, unwritten. They are transmitted orally from one generation to another, are adopted verbally and usually etched into the collective memory through participatory ceremony. The Inter-community Agreement only applies among the Park communities and, in principle, it should not be necessary to put it in writing; nevertheless, a decision was made to produce a written version. The reason for this was a recognition of the need to communicate the concept and detail of the agreement to an audience beyond the community of the Potato Park. The need to communicate was identified based upon several objectives:

1. For the purposes of research, contributing to a deeper understanding of the dynamics of customary law within a biocultural system, the nature of the agreements among the communities, and the similarities and differences with agreements based on Western legal systems;
2. In order to share the experience with other communities and experts seeking to develop creative, just and culturally sensitive schemes to define benefit sharing agreements with communities in different areas;
3. Recognising that, internationally, we are, or should be, in a dialectical process (not a debate), to contribute to a more constructive and practical discussion on the definition of *sui generis* systems for the protection of traditional knowledge and the role of customary law in such schemes; and
4. To provide an example of a practical application of the biocultural systems approach.

It is clear that one of the great difficulties in applying norms beyond the community level is precisely their unwritten nature, though customary law does achieve the same level of clarity and precision as systems of positive law (Kuruk, 2002). One way to solve this problem is to incorporate customary norms into agreements between communities and third parties.

## 4.3 Community Leadership in Development & Negotiation of the Agreement

The process for defining the Inter-community Agreement included an investigation to define its objectives, followed by a process for identifying the common interests of the communities, and then the creation of an inter-community committee. The role of this committee was to guide the negotiation process, creating a foundation for the agreement and helping the communities to create the necessary institutional framework for implementation.

After listening to the communities and understanding the dynamics of and principles derived from their customary norms, the community researchers compiled the various methods of benefit sharing identified and agreed upon by the six communities of the Potato Park, which resulted in a draft text. Subsequently, a consultation process was conducted, as a precursor to negotiations among the communities, to review and discuss the draft agreement. Preparation for these consultations included the development of materials in Quechua explaining each possible clause of the agreement and compiling outstanding issues for discussion. At the time of writing the agreement, the researchers identified a number of issues yet to be defined and adopted by the communities, such as new instruments (like funds created for the administration and distribution of benefits) and the role of the Association of the Potato Park (created by the six communities for the administration of the Park) in the implementation of the agreement, which led to another round of consultation and negotiation.

The consultation process was long and complex, making use of a variety of techniques including focus groups, interviews, conceptual graphics, videos in Quechua, and participation in community assemblies. Consultations based on the initial draft document, which began in 2007, brought to light a number of issues that had not been anticipated during the definition phase of the agreement. Some of the difficulties identified by the researchers were related to varying levels of 'biculturalism' and the different market links of the six communities. As a result, the communities showed some differences in both outlook and expectation related to the Park, as well as in the decision-making authority they were willing to delegate to the Association. This is an example of how the Park is experiencing new challenges and opportunities as a result of its interaction with Western society (e.g. sharing cultural values, generating new sources of income, and enhancing the livelihoods of the communities). These challenges and opportunities may generate conflicts that require time to understand and resolve, particularly since the communities are struggling to adopt agreements related to intangible or future issues, such as benefits that are yet to reach the Park.



The Inter-community Agreement is not only a step forward in designing a framework for benefit-sharing, but also an example of inter-community decision making and the creation and strengthening of institutions for the betterment of the biocultural system. To summarize, it has contributed to the endogenous construction of an Indigenous governance model among the communities of the Park, identifying and resolving conflicts in the process.

#### 4.4 The Agreement's foundation in customary norms and principles

ANDES researchers and the communities of the Potato Park examined customary laws by identifying their underlying, guiding principles. In this process, traditional practices of the BCS - including distribution of seeds, land inheritance, and transmission of knowledge at individual, communal, regional and general levels - were studied. An economic analysis of customary principles was also undertaken, in order to identify rules for benefit-sharing. A careful review of these (and other) practices with community members, combined with an examination of the literature on Andean society and worldview, led to the identification of three main Andean principles: reciprocity, equilibrium, and duality. These principles guide all aspects of the Andean cosmivision and underpin the practice of natural resource management. From these principles, derivatives were developed and used to flesh out the benefit-sharing framework in the Inter-community Agreement.

The agreement seeks to define the general mechanisms for the fair and equitable distribution of benefits derived from the management and direct or indirect use of the collective biocultural heritage that is embodied in the Potato Park. It is important to point out that, apart from Andean customary norms, national and international policies on access to genetic resources and benefit sharing, traditional knowledge and Indigenous Peoples' rights have informed the process (particularly those recognized by the CBD, the International Treaty of the FAO, ILO Convention 169, and the UN Declaration of Rights of Indigenous Peoples). Therefore this agreement represents an innovative approach to biodiversity conservation and sustainable use, including access to genetic resources, that prioritizes Indigenous epistemologies and norms while creating a model that is also applicable at the national and international levels.

The Potato Park is managed under the customary norms of *ayninakuy*, *yanantin*, and *rakinakuy* and, therefore, these also informed the inter-community agreement:

- **Reciprocity (*Ayninakuy*):** what is received must be paid back in equal measure.
- **Duality (*Yanantin*):** means that the cosmos is always divided into two opposite but complementary halves.
- **Equilibrium (*Rakinakuy*):** refers to proportion and harmony with nature (Pachamama, Mother Earth).

These principles or norms are applied to the sustainable use and conservation of biocultural systems. In this regard, traditional knowledge is owned collectively, or rather the communities recognise themselves as the custodians,<sup>4</sup> and access to that knowledge by third parties requires the prior informed consent of the six communities, as represented by the General Assembly of the Potato Park. In the text of the Inter-community Agreement, the communities state that common goods and collective property are key elements in maintaining traditional knowledge and practices. This reaffirms, through the functions assigned to the Association of the Potato Park, the integrated and collective nature of rights in a biocultural system.

Recognising collective custodianship, the Inter-community Agreement maintains the free flow of knowledge and resources among the communities and their members, as is the tradition of the communities of the Potato Park.<sup>5</sup> This customary norm encompasses both responsibilities and rights. On the one hand, everyone has the right to freely access knowledge and resources and to use them according to traditional practices and their own needs. On the other hand, they have the obligation to maintain the flow of knowledge and resources among themselves and with neighbouring communities, to transmit knowledge to future generations to ensure continuity, and to protect traditional knowledge and resources from third parties. This right has an exception in the case of sacred knowledge. Only specific individuals within communities can access sacred knowledge and resources, and they have a corresponding obligation to keep that knowledge and those resources secret. Other community members have the complementary responsibility to refrain from attempting to gain access to sacred knowledge and resources.

<sup>4</sup> This is also explicitly recognized in national legislation on the cultural heritage of communities and Indigenous peoples with reference to biodiversity (see Law No. 26839 for the conservation and sustainable use of biodiversity and Law No. 27811 on the protection of traditional knowledge), and in the sections of ILO Convention 169 concerning the ownership and possession of traditional lands and the administration and management of natural resources contained therein.

<sup>5</sup> A practice explicitly recognised by the Nagoya Protocol in Art. 12.4.

## 4.5 The Parties and implementing institutions

The six communities of the Potato Park are the parties to the Inter-community Agreement. They are represented by their own authorities, formally recognized by national legislation; and the Association of the Potato Park, whose General Assembly is composed of representatives of the six communities that make up the Park. The Association of the Potato Park is given functions in the allocation of benefits, as well as in the maintenance and administration of the Park's goods and services. Additionally, the Association of the Potato Park will support the implementation of the agreement. This is one of the points over which the communities encountered the most difficulty in reaching an agreement, since, while there are clear mechanisms for decision-making at the community level, some mechanisms at the inter-community level had to be defined during the negotiation process.

Furthermore, to develop the activities and services of the Park that produce revenue, the communities have created a series of economic collectives organized by the type of activity performed. Members of the collectives are elected by each community in the Park to participate in groups such as the women's gastronomy, video, and medicinal plants collectives. The economic collectives form part of the Association of Communities of the Potato Park, and are regulated under that organization. The Intercommunity Agreement, and its three core customary norms, dictate the relationship between the collectives and the Association in terms of distribution and redistribution of benefits. Within each collective, a General Assembly and elected Directors oversee and organize operations. Members of the collective have rights and obligations outlined in their bylaws, including the obligation to participate in discussion and approval of work plans and projects, and the obligation to contribute, either individually, or as a group to the Park's Communal Fund. These economic collectives generally earmark 10% of the benefits obtained through their activities to the Communal Fund, whose resources are used for the maintenance and sustainability of the Park, and are also redistributed in an equitable manner to communities of the Park at the end of the year.

Review of the organization and functioning of the economic collectives has led to a decision to transition to a model of a Multi-community Company, based on the Law of Indigenous Communities and taking from that law the basis for organization, legal recognition and management. The goal of the Multi-community Company is to ensure: broader representation of the collectives at Park level; an administration that maintains the unity of the area as a functioning principle; that assistance is available for the promotion and marketing of various products developed by the collectives; and that the profits generated by these collectives will be distributed to, or otherwise benefit, all members of the six communities that make up the Park.

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## 4.6 Benefit sharing

Throughout the development of the Inter-community Agreement, changes were made in how the funds generated by Park activities would be distributed. In 2007, benefits which accrued to the Potato Park were distributed to the Association of Communities of the Potato Park, and the following year, equally to all participating communities. Following some reflection on the different levels of participation and contribution to Park activities, and what constitutes fair and equitable distribution of benefits, criteria were developed to ensure that the benefits derived from Potato Park activities were distributed in a manner agreed upon by all communities. In 2009, a process of validation began, with the Intercommunity Agreement being presented at community meetings in each community of the Potato Park. Some additional observations were made at this stage, and a few final changes were required before the agreement was approved by the six communities and signed by their presidents, as well as by representatives of the economic collectives. That same year, the benefits generated through tourism activities, donations and contributions from the various economic collectives were distributed based on criteria identified by the communities of the Park.

The Association of the Potato Park is in charge of the distribution and redistribution of benefits and goods to community members, through a special commission created for this purpose (the Benefits Allocation and Oversight Committee); and through the Papa Arariwa (Guardians of the Native Potato) Collective, created specifically for the distribution of repatriated potato seeds to the Park as a result of the agreement with CIP. The rules of distribution and redistribution are among the most important customary norms of Andean society, as they are based on the principle of reciprocity that maintain the functioning of the Biocultural System. Each member of the community receives benefits/goods according to the amount and time of work and effort carried out. This principle of reciprocity is embodied in the practices of *voluntad* (willingness), *ayni* (mutual assistance) and *minka* (exchange of labour). The services provided directly by a member of the community (for example, those related to ecotourism), are carried out according to the same principle applied to the land rotation system for agriculture. As is the custom with land, work is also done in shifts (job rotation), thereby ensuring that everyone has the opportunity to perform the task. Community members receive the direct benefit of carrying out the task when it is their shift. By having an equal opportunity to provide service at some point, all members receive benefits.

The Inter-community Agreement proposes that the distribution of monetary benefits arising from the marketing of native potato seeds and biological resources, and those from the use of goods and activities within the Park (such as those derived from the agreement with CIP, payment for entry to the Park, and revenues from the Potato Park restaurant), should be fair and proportionate to the needs, capabilities, responsibilities, contributions, and efforts of the communities and their members. The same criteria apply to the non-monetary benefits, such as donations, scholarships, and infrastructure. Once the benefits are distributed among the communities, the surplus is used to construct and maintain a social safety net, using the solidarity-building principles of the traditional *ayllu*, thereby providing a measure of protection against neoliberal encroachment on Indigenous societies. The benefits from scholarships, or other benefits related to education, are distributed according to the structure and rules applied to family relationships in Quechua culture, providing inter-cultural education that strengthens cultural resilience.

Each collective of the Park is organized in a different way, depending on the type of product or services it provides. In all cases customary laws govern the distribution of monetary and non-monetary benefits. The gastronomy collective and the medicinal plants collective use collective labour to create a product or service for sale, and the monetary benefits are distributed equally among participants. The craft collective uses individual labour to produce goods for sale, so the profits from a sale go to the individual craftsman. In the case of tourism guiding services and home stay programs, the direct monetary benefits go to an individual or family on a rotational basis.

As has been mentioned, customary norms are dynamic and the communities have, over the years, incorporated various elements of national legislation. An example of this dynamism is the creation of the Intercommunity Fund to finance community projects of short- and medium-term duration, in order to support sustainability. Although the Intercommunity Agreement outlines the establishment of two funds, the Cultural Affirmation Fund, and the Fund for Reinvestment for Sustainability, the possible functioning of these funds is still in review. In the mean time, the Intercommunity Fund receives the funds which are intended to be destined to both funds. According to the Inter-community Agreement framework, particularly clauses 35 and 51, all community members must provide the fund with a percentage of the monetary benefits they receive through participation in the various economic collectives or through use of the Potato Park's collective trademark. The amount which was decided upon by the collectives is 10% of earnings, as a measure of reciprocity with the communities of the Park and as a contribution towards the maintenance of the Collective Biocultural Heritage. The fund is to be distributed once a year among the communities who have contributed, in proportion to that contribution.

The Intercommunity Fund is also fed by contributions from Park admission fees associated with tourism activities, educational activities, visits by journalists and donations. While still modest, the amount of income generated from all tourism and educational activities has nearly doubled each year between 2007 and 2010.

## 4.7 Conflict Resolution Mechanisms

By relying on customs and traditions, customary norms are known and accepted by all community members. Nevertheless, there is always the possibility of conflicts arising from the application of these norms. The community authority is responsible for dealing with these conflicts at three levels reflecting the overall governance structures used by the Park: the family, traditional authority, and the community's General Assembly. The Inter-community Agreement proposes a conflict resolution mechanism based on this scheme. When conflicts involve more than one community, they are resolved by the General Assembly of the Potato Park. The Andean justice system has a restorative focus, so these irrevocable decisions are aimed at restoring social equilibrium. The Inter-community Agreement recognizes that good management of conflict resolution requires the rational management of the resources, which are vital to the productivity of the communities and the livelihoods of their members.

## 4.8 Harmony with national and international laws

The Potato Park, ANDES and IIED believe that the Inter-community Agreement represents a traditional approach to community driven development that is more socially and ecologically sustainable than many of the prevalent interpretations of frameworks discussed at the international policy level. At the same time, the Inter-community Agreement, and the Potato Park biocultural system more generally, provide an option for an integrated interpretation of a series of international instruments and principles, such as: the United Nations Declaration on the Rights of Indigenous Peoples (Art 34) (United Nations, 2007); the International Labour Organisation Convention 169 (Article 8) (ILO, 1989); and the right to cultural life more generally as enshrined in international law (United Nations Universal Declaration of Human Rights [Art. 27.2] (United Nations, 1948) and the International Covenant on Economic, Social and Cultural Rights, e.g, Art. 15 [1] and Art 11 (United Nations, 1966).

The Potato Park also provides an example of a local, but more widely adaptable, framework for the implementation of the most recent agreement touching on the conservation and sustainable use of biodiversity, the Nagoya Protocol on Access and Benefit Sharing. The example of the Potato Park has obvious relevance to the situation of most indigenous communities but it may also be informative for other communities seeking to enhance local conservation and sustainable use related activities. The following table provides examples of provisions of the Nagoya Protocol and their practical implementation in the Potato Park and the Inter-Community Agreement, illustrating how the Protocol may be adapted to paradigms beyond the orthodox Western economic exploitation model:

NAGOYA PROTOCOL	INTER-COMMUNITY AGREEMENT AND POTATO PARK
Objective of the Protocol (Art.1)	Contribution to the conservation and sustainable use of genetic resources. Fair and equitable sharing of the direct and indirect benefits derived from the biocultural resources of the Potato Park. Transfer of technology.
Fair and Equitable Benefit-Sharing (Art. 5.2 and 5.5)	Example of framework for benefit sharing. Criteria developed to ensure that the monetary and non-monetary benefits derived from the Potato Park activities were distributed in a manner agreed upon by all communities. Creation of Intercommunity Fund, Cultural Affirmation Fund and the Fund for Reinvestment for Sustainability.
Development of legal, administrative or policy measures (several articles)	Ordinances passed by the regional government of Cusco against biopiracy and GMO. Development of intercommunity decision making processes and structure.
PIC to access to traditional knowledge associated with genetic resources (Art 7) and prior informed consent to access genetic resources (Art.6.3)	Intercommunity governance system structure for decision-making has been strengthened. Stronger position to grant and negotiate prior informed consent
Food Security (Art.8)	Assurance of survival and livelihood of communities. Access to adequate food and natural resources, free from adverse substances, and acceptable within the communities' culture.
Contribution to conservation and sustainable use of biodiversity (Art. 9)	Integrated in-situ-ex-situ model of conservation. 1345 varieties of potato in 2011. Restoration of local habitats and ecosystems, ensuring cultural survival promotion of local rights and sustainable use of genetic resources.
Taking into consideration indigenous and local community customary laws (Art. 12.1) Development by indigenous and local communities of Community Protocols, mutually agreed terms and Model Contract (Art.12.3)	Key feature. The research, consultation and negotiation processes that resulted in agreement based on customary law. The principles of reciprocity, duality and equilibrium are the pillars of the agreement and the decision-making structure.
Information to potential users about their obligations (Art.12.2)	Provides example of a practical application of a benefit sharing agreement and a methodology to develop future agreement based on customary laws.
Customary use and exchange of genetic resources amongst indigenous and local communities (Art. 12.4)	Ensure the free flow of resources among communities and their members.
Dispute Resolution (Art. 6.3.g, 7, and 18)	Intercommunity conflict resolution mechanism based on family, tradition and the community's General Assembly.
Model Contractual Clauses, best practices, guidelines (Art. 19 and 20)	Provides examples of best practice. The experience and methodology could be used in similar schemes to define benefit-sharing agreements. Clarifies the definition and representation of the beneficiaries of collective rights.
Awareness Raising (Art. 21)	The development of the inter-community agreement has shown that supporting community protocols can be a powerful tool for raising awareness of ABS issues amongst indigenous and local communities.
Capacity (Art.22)	Contribution to the construction of an Indigenous Governance Model and to the definition of sui generis system for the protection of traditional knowledge and the role of customary law. Stronger capacity to negotiate mutually agreed terms, develop and implement measures, legal and institutional development.
Technology Transfer (Art.23)	2004 Repatriation Agreement with the International Potato Center renewed. First community organization to make agricultural genetic resources available under the multilateral benefit sharing mechanism of the FAO Plant Treaty. Submission of potato varieties to the Svalbard Global Seed Vault in response to concerns about the long term in situ conservation of the varieties in the context of climate change in the Peruvian Andes

# 5. THE POLICY CONTEXT FOR DEVELOPING THE INTER-COMMUNITY AGREEMENT: KEY ELEMENTS AND SHORTCOMINGS

## 5.1 International policy: FAO, CBD, WIPO

Since the adoption of the Convention on Biological Diversity (CBD) in 1992, governments, NGOs, international organizations, and Indigenous Peoples have been exploring practical mechanisms to conserve and sustainably use biodiversity at the local level. The rights and obligations of indigenous and local communities have frequently been central to these processes. They are also supported by a number of other international instruments, including:

a) The United Nations Declaration on the Rights of Indigenous Peoples

- Article 3, *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
- Article 4, *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

b) ILO Convention 169 concerning Indigenous and Tribal Peoples

- Article 7 providing for prioritisation and self-determination in development and conservation activities
- Article 8 providing for the recognition of customary law
- Article 13 recognising relationships with land
- Article 14 recognising the ownership of, or other rights to, land
- Article 15 recognising rights to natural resources
- Article 16 providing for the right not to be displaced

Nevertheless, after up to two decades of implementation of these, and a number of other binding and non-binding instruments, the proposed approaches have proved both ineffective and inadequate.

Recently, two efforts related to the CBD framework have sought to develop practical mechanisms in the conservation and sustainable use of biodiversity, particularly in the area of access to genetic resources and benefit sharing. The International Treaty on Plant Genetic Resources for Food and Agriculture (2001) and the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing (2010) both have the potential for significant impact on the interests of indigenous communities.

### **The International Treaty on Plant Genetic Resources for Food and Agriculture**

The International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty) was adopted in 2001, entered into force in 2004 and, today, has 127 contracting parties.<sup>6</sup> The Treaty is closely related to the CBD, with an overall goal of the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use. The central pillar of the Treaty's support for sustainable agriculture and global food security, is the establishment of a Multilateral System for selected agricultural genetic resources; in effect an international commons pool. The MLS guarantees access to these resources and the sharing of benefits generated from their use.

A supporting element of the Plant Treaty is Article 9, Farmers' Rights. This recognizes the contribution that indigenous and local communities and farmers have made to the conservation and development of crop genetic resources and recommends various options for the protection of their rights, although these are all subject to national discretion. In addition to their lack of enforceability, these provisions do not address the problems of a lack of secure rights to land and genetic resources and only marginally address the challenge of policies that favour industrial agriculture and monocultures to the exclusion of smallholder agriculture.

It has been argued that the financial benefit sharing required of some users of the Multilateral System can ensure predictable and continuing benefit-sharing, which might be directed to a broad approach that includes the creation of measures for the protection of farmers' customary rights over genetic resources and associated landscapes, cultural values and customary laws, on which the continued conservation and improvement of crops by farmers depends. However, the Benefit Sharing Fund presents several challenges in this regard.

<sup>6</sup> <http://www.itpgrfa.net/International/content/127-nations-signatories-global-treaty-save-and-share-crop-diversity>

First, the limited scope, and low level, of the requirement for mandatory payments is unlikely to generate significant funds. Unless the obligation for mandatory payments is expanded to include all commercialized seeds, in manner that would match the Benefit Sharing Fund's rhetoric, the funds available from this mechanism are likely to remain negligible. Second, the absence of an efficient compliance mechanism for the Multilateral System and the Standard Material Transfer Agreement means that the benefit-sharing requirements and the restrictions for patents now stand on shaky ground (Chiarolla & Jungcurt, 2011). Third, the funds that are currently available through the Benefit Sharing Fund largely consist of voluntary donations from a limited number of sources and questions arise as to whether this largely represents the diversion of funds that have been removed from other projects relating to agriculture and development or whether it is additional money. Finally, if the funds available through the Benefit Sharing Fund are, at least in part, redirected money, this raises questions as to whether the Benefit Sharing Fund or the previous mechanisms for the distribution of these funds are the most relevant to indigenous and local community interests. The competitive proposal and 'wise person' review panel approaches used by the Benefit Sharing Fund create clear risks of structural bias towards dominant patterns of institutionalized research in the system.

### **The CBD and the Nagoya Protocol**

From its origins, the CBD has considered the nature of traditional knowledge and its relationship with biodiversity through various decisions of the COP and, particularly, through the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions (WG-8j). Articles 8(j), 10(c) and the preamble of the CBD highlight the interdependence between biodiversity, culture, traditional knowledge, and customary practices. Most recently, the decision "Elements for sui generis systems for the protection of traditional knowledge" adopted by the CBD COP-10 (CBD, 2011) states that the rights conferred to protect knowledge can include "*rights to all components of the biocultural heritage associated with the traditional knowledge — including rights over the biodiversity, customary laws, cultural and spiritual values and lands and waters traditionally occupied or used by indigenous and local communities.*"

The Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological Diversity (Nagoya Protocol) was adopted in late 2010 in and is currently waiting for the depositing of the fifty instruments of ratification necessary for it to enter into force (Nagoya Protocol, Art. 33). The Nagoya Protocol follows on from the Bonn Guidelines in seeking to develop the implementation of Article 15 of the CBD, the third pillar of that Convention.

Indigenous peoples and local communities continue to face biopiracy; therefore, the importance of the Protocol for ensuring appropriate access to their knowledge associated with genetic resources and benefit sharing should be beyond question. However, in common with general concerns about the Protocol's lack of detail and overwhelming deference to the discretion of national governments, there is concern that the Protocol does not provide adequate safeguards to ensure indigenous peoples' human rights and their full and effective participation, as reflected in and required by other instruments (Joint Submission by Grand Council of the Crees *et al.*, 2011).

The main features of the Protocol follow the established framework of access to genetic resources, including provisions on prior informed consent, mutually agreed terms and equitable benefit sharing. These do generally include explicit references to the need to accommodate indigenous and local community interests, but there are very few guidelines, and no guarantees, on these references.

From an indigenous perspective, perhaps the most interesting element of the Nagoya Protocol is its treatment of customary law in relation to traditional knowledge. This includes:

- i) The general consideration of customary laws, protocols and procedures (Art 12.1).
- ii) A requirement to establish mechanisms to inform users of TK about their obligations (Art. 12.2).
- iii) Encouragement for support to indigenous and local communities to develop their own (Art. 12.3):
  - a. Community protocols in relation to access and benefit sharing.
  - b. Minimum requirements for mutually agreed terms.
  - c. Model contractual clauses for benefit sharing.
- iv) A requirement to not restrict the customary use and exchange of genetic resources and associated TK within and amongst ILCs (Art. 12.4).

Points ii) and iii) are further supported by awareness raising and capacity building commitments in articles 21 and 22. The lack of binding commitments, at least to minimum standards, in the treatment of traditional knowledge is a matter for concern. The sometimes ambiguous nature of the relationship between traditional knowledge and genetic resources, and the associated highly qualified references to community rights over knowledge and genetic resources, are also a concern.

This situation places an emphasis on the setting up of the Nagoya Protocol as a forum, which must be open and accessible to indigenous peoples for it to be of any relevance. Indigenous peoples must also imprint human rights law, particularly the UNDRIP framework and monitoring mechanisms, on the meetings of the Nagoya Protocol. The situation also places emphasis on national level legal, institutional and operational mechanisms to implement the Nagoya Protocol. It is vital that indigenous peoples themselves lead and complement national implementation processes by developing local access and benefit sharing tools arising from their customary laws, as established in the Protocol. Biocultural protocols, built upon customary laws and human rights safeguards, can assist in realizing these objectives and should be integrated into the development of the internationally recognized certificate of compliance provided for in Article 17 of the Nagoya Protocol.

### **The World Intellectual Property Organization**

The World Intellectual Property Organization (WIPO) has recognized that traditional knowledge is inseparable from the traditional norms and practices of Indigenous Peoples (WIPO Information booklet), and should be considered with due recognition and respect for customary laws (Tobin *et al.*, forthcoming). As a result of the strength and conviction of Indigenous voices, WIPO has been working on the development of a *sui generis* system for TK protection that begins to recognize the customary norms of Indigenous Peoples as a fundamental tool in maintaining and preserving the ecosystem elements that sustain knowledge systems and ensure their intergenerational transmission.

## **5.2 The Peruvian Policy Context**

The biological and cultural richness of Peru, as well as its legal framework on biodiversity, genetic resources, traditional knowledge, and Indigenous rights, places the nation in a unique position to contribute to the current debate on ABS. This diversity gives rise to a significant number of plants with medicinal value and a variety of often globally significant crops, such as the more than 4,000 varieties of potato. This diversity is the result of millennia of innovation by the Quechua people of the Andes.

Peru is one of the few countries that has adopted national *sui generis* legislation for the protection of TK, and has ratified International Labour Organization (ILO) Convention 169, recognizing the inherent rights of Indigenous Peoples. Peru's Constitution upholds the right of Indigenous communities to use their customary laws on their lands. Specifically, the biodiversity law<sup>7</sup> recognizes traditional knowledge as the cultural heritage of Indigenous communities (Art 12); states that Indigenous Peoples rights in this regard are 'inalienable and infeasible' (Art. 11) and that access to this knowledge requires the prior informed consent of Indigenous Peoples (Art 6). It is regrettable however, that this protection does not extend to knowledge classed as 'in the public domain', which leaves many past cases of 'biopiracy' unchallenged (Art 13). In addition to these developments, the regional government of Cusco recently passed two ordinances: the Ordinance on Biopiracy (Ordenanza Regional 048 - 2008 CR/GRC.CUSCO contra la biopiratería) and the ordinance that declares Cusco as a transgenic-free zone (la Ordenanza Regional 010-2007- CR/GRC.CUSCO). These ordinances provide a supplementary legal framework, through which the creative combination of customary and Western laws can be realised in an innovative approach to community level conservation and sustainable use, including access and benefit sharing.

Despite these innovative mechanisms, there are contradictions in the Peruvian framework, primarily as a result of the country's bilateral trade agreement with the United States. This contains stronger rights for intellectual property rights holders than those required by international frameworks, such as those of the World Trade Organization. It also undermines the rights of traditional knowledge holders and the custodians of genetic resources, in contradiction of the regional legal framework established by Decision 486 of the Andean Community of Nations (CAN), which provided for the invalidation of traditional knowledge derived or genetic resource based patents in the absence of the required authorizations. As a result, Peru's patent law (Law 29316) represents a clear setback, since it only provides for a penalty, but does not threaten to invalidate patents, in the case of the inequitable and illegal use of traditional knowledge or the genetic or biological resources of Indigenous Peoples.

<sup>7</sup> Republic of Peru 'Law No. 27811 of 24 July 2002 introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources'

Available at: [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=3420](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=3420) (Last accessed 01.01.10)

And see also:

Republic of Peru 'Law No. 28216 of April 30, 2004 on the Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples'

Available at: [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=ES&id=5752](http://www.wipo.int/clea/en/text_pdf.jsp?lang=ES&id=5752) (Last accessed 01.01.10)

## 5.3 Shortcomings in existing access and benefit sharing models

### Traditional knowledge and biocultural systems

Biocultural systems create, maintain and further develop traditional knowledge through a complex of elements including languages, customary norms and practices, and traditional territories and resources. Current intellectual property rights regimes understand traditional knowledge within the context of restricted, Western, notions of property rights, which facilitate the commodification of Indigenous lands, traditional knowledge and resources by separating them from the network of relations within which they are formed and operate. Traditional knowledge is viewed as a discrete object, separate from the cultural and spiritual relationships and the lands within which it is embedded. CBD derived access and benefit-sharing regimes generally follow this line of thinking, even though the Convention itself allows for more sensitive and pluralist approaches.

The incorporation of traditional knowledge within alien and limited notions of property (e.g. public, private or common property<sup>8</sup>) have, far from furthering the interests of indigenous and local communities, more often than not succeeded in legalising acts of biopiracy. As a result, Indigenous Peoples' cultural integrity remains unprotected and adequate mechanisms for the equitable sharing of benefits derived from the use of knowledge have yet to be developed. For Indigenous Peoples, experiences with 'bioprospecting' (as biopiracy is often called by corporations and in free trade agreements) have proven that access and benefit sharing is more a curse than a blessing. Thus far it has only provided them with limited 'opportunities' as rewards for their knowledge, practices, innovation systems, and biodiversity stewardship, while these 'goods' are subsequently used to generate colossal profits for third party actors (Sufian Jusoh, 2009).

### Prior informed consent and mutually agreed terms

Perhaps reflecting its failure to accommodate the holistic nature of traditional knowledge and a preference for working within externally determined parameters, the prevalent access and benefit sharing model has been unable to deal justly with the issues of prior informed consent and mutually agreed terms. Arguably, this is best illustrated by the fact that the Nagoya Protocol contains little more substantive detail or commitment than was to be found in the CBD 20 years ago. Instead, the negotiation of benefit-sharing agreements continue to be characterised by asymmetrical power relations that frequently lead to inter- and intra-community conflicts, as well as creating uncertainty of governance, and in representation, amongst Indigenous Peoples.

The International Cooperative Biodiversity Group (ICBG)<sup>9</sup> projects provide useful illustrations of this problem. In Peru,<sup>10</sup> an early project made use of a 'know-how agreement' with three federations representing Aguaruna communities. Despite this interesting innovation, the project was criticised for its community-level approval process; particularly the resulting conflict that emerged among the peoples of Aguaruna and Huambisa, which resulted in the agreement only being signed by the Aguarunas. The relevance of a contract based approach to a situation of clearly asymmetrically positioned parties, and more particularly the use of this approach in the absence of any tailored national legal framework, was also questioned. Another ICBG project in Chiapas, Mexico, faced strong criticism regarding its process for prior informed consent, the criteria for deciding who would participate in the project, and the quality and quantity of benefits. The project was cancelled when national institutions withdrew their support and Indigenous communities decided not to participate.<sup>11</sup>

Some of the arguments used to explain the failure of the above models are that they focused on the possible *types* and *amount* of benefits while paying insufficient attention to the process and mechanisms for the *identification* of and for the *distribution* of benefits among the involved communities.

A precondition for the minimally satisfactory operation of these schemes is that they be supported by measures ameliorating the imbalance between the negotiating parties, and that the prior informed consent of the communities be obtained from the beginning of the project (including in the planning phase).

<sup>8</sup> For example in commons models or in intellectual property rights.

<sup>9</sup> The International Cooperative Biodiversity Group is a program sponsored by the National Institute of Health (NIH), Biological Sciences Directorate of the National Science Foundation and the Foreign Agriculture Service and Forest Service of the USDA created to commit joint efforts to address issues of biodiversity conservation, pharmaceutical drug discovery, and sustainable economic development. For more information about ICBG, see: [http://www.fic.nih.gov/programs/research\\_grants/icbg/index.htm](http://www.fic.nih.gov/programs/research_grants/icbg/index.htm).

<sup>10</sup> The Peru ICBG involved Searle, Washington University of St. Louis, Universidad Peruana Cayetano Heredia, The Natural History Museum of Peru, Universidad de San Marcos de Peru and three local federations of Aguaruna People: FAD, FECONARIN and OCCAM.

<sup>11</sup> For more discussion on ICBG in Chiapas, see "Bioprospecting. Can pharmaceutical research give back?" Cori Hayden. Harvard Review on Latin American Studies. Flora and Fauna. Nature in Latin America. Winter 2005. In: [http://drclas.fas.harvard.edu/revista/?issue\\_id=27&article\\_id=813](http://drclas.fas.harvard.edu/revista/?issue_id=27&article_id=813)



As such, it is essential to identify, in advance, whether the involved communities already have mechanisms for benefit-sharing that are tailored to the objective of the project or agreement. Additionally, the experiences of the ICBG in Peru and Mexico showed that communities must agree among themselves, and according to their customary norms, as to how they will distribute possible benefits, what kind of institutional capacity they will need, what their expectations are, and what are the advantages and disadvantages of the potential project. In this way, the communities will be in a better position to negotiate and to avoid possible intra-group conflict and the dissolution of solidarity that has typically resulted from such projects.



## 6. CONCLUSIONS

For decades, Indigenous Peoples have been calling for a holistic and more sensitive approach to their cultures; one that values the protection and preservation of, and one that nurtures, their traditional knowledge systems and biocultural diversity - an approach that does not privilege the economic considerations of third parties at the expense of other priorities. In this debate, the role of Biocultural Systems – a concept inspired by the interdependence between Indigenous Peoples and their environments – has become critical for the survival of Indigenous cultures and essential in generating appropriate, effective responses to global change. Benefit-sharing agreements involving biological resources and traditional knowledge, such as the one presented in this case study, should be consistent with the concept of biocultural systems. This study, through participatory methodologies, sought to provide a pioneering example in the development of a broader approach to access to genetic resources that does not only include the benefits derived from external access to genetic resources and traditional knowledge, but also those which come from community activities related to direct and indirect use of biocultural resources.

Traditional Knowledge does not spring forth *ex nihilo* (ie. from nothing) but is one product of, and vital element of, biocultural systems. To this end, strategies for the protection of traditional knowledge must simultaneously focus on the preservation and propagation of the relationships, biocultural values, and customary laws which accompany this knowledge. Strategies which do not pursue this aim are ultimately ineffective because they fail to preserve the territorialities and livelihoods that generate traditional knowledge. As such, there is an increasingly urgent need for Biocultural Protocols, such as the Inter-community Agreement, that are based in, and strengthen, customary laws and practices.

Through research on traditional norms, it has been shown that there are longstanding customary laws for the distribution of benefits among communities and their members. Additionally, in some cases, these laws have been adapted to deal with specific situations arising from the use of elements of collective biocultural heritage by third parties; these are now expressed in a concrete agreement that represents the vision and expectations of the communities on these issues. Other methodologies do not provide a “bottom-up” approach that: conserves biocultural resources; supports the rights of Indigenous Peoples; and that ensures that all heritage elements of biocultural systems are protected. The revaluing of a holistic approach, based on the concept of Biocultural Systems, gives rise to a model capable of confronting the obstacles that Indigenous Peoples face to protect and deliver real, and appropriate benefits from the use of their resources.

The anchoring of Biocultural Protocols in both customary law and national and international formal frameworks also links modern legal systems with their traditional and customary forebears in a positive manner – a kind of legal pluralism, with similar advantages, including the reflection of mutual respect and the tendency to promote equal treatment (and, by extension, empowerment). Further, Biocultural Protocols can be used in mutually reinforcing frameworks with international treaties (such as the CBD, the International Treaty of the FAO, ILO Convention 169, and the UN Declaration of Rights of Indigenous Peoples) in an integrated approach to collective rights. Broadly, treaties promote Biocultural Protocols, while Biocultural Protocols, in turn, provide pathways for the practical implementation of treaties *per se*. By providing a link to treaty processes, Biocultural Protocols also have relevance for technical and policy issues *within* international treaties. In fact, insofar as they articulate Indigenous experiences with treaty issues (including long histories of resistance to treaty-mandated impositions), and reveal critical alternatives to mainstream approaches, Biocultural Protocols are amongst the most important contributions Indigenous Peoples can make to technical, legal, academic and policy-led discourses.<sup>12</sup>

In May 2011, the United Nations Secretary General highlighted the international relevance of the work of the Potato Park by observing that: “In Peru, indigenous communities are responding to climate change by re-introducing native varieties of potatoes. They have support from a United Nations-backed fund benefiting poor farmers.<sup>13</sup> Now they are helping conserve the earth’s biodiversity.” However, he went on to observe that while “Ancient indigenous traditions can help overcome modern problems. The goal is not to appropriate your knowledge, to extract it or exploit it, but to respect indigenous peoples and help preserve their traditions.”<sup>14</sup>

<sup>12</sup> See, for example, Abrell, Elan, Kabir Bavikatte, Harry Jonas, Ilse Köhler-Rollefson, Barbara Lassen, Gary Martin, Olivier Rukundo, Johanna von Braun and Peter Wood, *Biocultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy* (Nairobi/CapeTown: UNEP/Natural Justice, 2009).

<sup>13</sup> The Potato Park is the recipient of project support from the UN Plant Treaty Benefit-Sharing mechanism.

<sup>14</sup> [http://www.un.org/apps/news/infocus/sgspeeches/statments\\_full.asp?statID=1185#](http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1185#)

The fact that biocultural approaches, such as the one proposed in this case study, are now emerging as useful concepts is testament to the inadequacy of reductionist, disciplinary methods that continue to be the *modus operandi* of conservation and development research, policy formulation, and action. Mainstream perspectives do not value the role Indigenous Peoples have played historically – and continue to play today – as stewards and guardians, innovators and developers, of their eco- and knowledge systems. The shift toward a biocultural systems approach comes with the recognition that Indigenous Peoples are the rightful owners of their biocultural heritage and associated knowledge, and that their customary norms and traditional governance systems can provide holistic, fair, and appropriate alternatives for their protection and promotion.

The Inter-community Agreement aims to serve as an example or model to other communities of the region and world, and to strengthen the ability of communities to negotiate equitable agreements on access and benefit sharing with third parties. An example of a Biocultural Protocol in praxis, it provides an alternative to most models based upon Western legal systems in that it prioritizes the well-being of Indigenous and local communities over the potential generation of profit for third parties.

Moreover, this agreement constitutes an opportunity to explore elements of customary law that could be incorporated into national and international legislation related to the access to biodiversity-related traditional knowledge and benefit sharing. The Inter-community Agreement represents a chance for both researchers and communities to improve mutual understanding and strengthen their abilities vis-à-vis these issues, enabling communities to create alternative models capable of confronting the negative effects of globalization.

The Inter-community agreement has brought benefits far beyond ABS, largely as a result of the in-depth, community led participatory processes conducted over 2-3 years. It provides the foundation for an equitable and sustainable local economy which reduces current and future poverty; and for collective decision-making, good governance and cohesion amongst the six communities of the Potato Park.



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