



**CUSTOMARY LAWS OF ILCs REGULATING ACCESS
TO GENETIC RESOURCES AND ASSOCIATED TK
AND ITS RELEVANCE TO THE INTERNATIONAL
ABS REGIME- SOME VIEWS AND POSSIBLE
OPTIONS**

Isabel Lapeña
SOCIEDAD PERUANA DE DERECHO AMBIENTAL
ISLE OF VILM, GERMANY
July 2009



CUSTOMARY LAWS OF ILCs REGULATING ACCESS TO GENETIC RESOURCES AND



AND ITS RELEVANCE TO THE INTERNATIONAL ABS REGIME-



- Previous Considerations
- Concept and Nature of ILCs Customary Laws
- Relevance of Customary Laws of ILCs Regulating Access to Genetic Resources and Associated TK
- Possible Contents in the International Regime regarding ILCs Customary Law
- Inclusion of Customary Law in Contracts
- Role of National Frameworks





PREVIOUS CONSIDERATIONS



- “Art.8j CBD “knowledge, innovations and practices of ILCs embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity”
- What makes TK “traditional” is the fact that are developed and customarily disseminated within communities
- TK protection may require recognition to the legal, cultural and social context that applies within the original community





PREVIOUS CONSIDERATIONS



- ILCs perspectives:

- Guarantee that mechanisms of access to GRRR and TK are based on respect to their customary laws and cultural practices

- Trust in their own laws for the better protection of TK

Andean Community “Elements for a Sui Generis Protection of Ancestral, Collective and Integral Knowledge” (2005)

“due to the characteristics of the collective and integral traditional knowledge of ILCs, it is recommended that their own ancestral systems based on their customary law and own cultural practices are the best option for the protection of their TK, allowing to consolidate their traditional structures”

- Bonn Guidelines

Call upon Parties to the CBD to respect the customs, traditions, values and customary practices of indigenous and local communities. as well as to secure customary use of



CONCEPT AND NATURE OF ILCs CUSTOMARY LAW



- Nature of TK- Nature of Customary Laws
- “Customary Law is a framework of norms, uses and customs that are transmitted among generations and exercised by ILCs’ own institutions and authorities on their territories and constitute legal systems acknowledged, accepted and respected by a collectivity and integrate the legal pluralism of countries with ILCs” (Quito 2006)
- Elements: define the very identity of the community; how traditional cultural heritage is shared and developed; Locality: local generation/local implementation



RELEVANCE OF CUSTOMARY LAWS OF ILCs REGULATING ACCESS TO GENETIC RESOURCES AND ASSOCIATED TK

SUBSTANTIVE

- Define user rights and exceptions (content of PIC)
- Determine who should benefit from protection
- Determine how benefits should be shared equitably within a community
- Assessment of cultural/spiritual offence or damage caused by misappropriation
- Determine possible forms of remedies and sanctions or restitutions following the breach of rights over TK
- Conflicts Resolution
- Guidance on the transmission of rights over TK from one generation to the following.
- Ensuring Compliance



RELEVANCE OF CUSTOMARY LAWS OF ILCs REGULATING ACCESS TO GENETIC RESOURCES AND ASSOCIATED TK

PROCEDURAL

- Appropriate forms of consultation and community decision making and consent
- Guide procedures to be followed in PIC



POSSIBLE CONTENTS IN THE INTERNATIONAL REGIME REGARDING ILCs CUSTOMARY LAW



- ILCs decision making incorporated in the Intl. Regime
 - Recognition of pre-existing customary laws as defining TK rights
 - Allow room for ILCs legal space in management of TK and GRR
 - Respect communal scenarios: avoid creating legal impediments to continuing use of customary law at the local level within the traditional context
- Focus on restraining illicit use beyond traditional context
 - Recognize ILCs PIC prior to access to GRR and TK is conceded
 - Previous stages to access according to Customary Law
 - Biocultural Protocols
 - Compliance measures



INCLUSION OF CUSTOMARY LAWS IN CONTRACTS



- Can deal with the sui generis matters of TK
- Include substantive contents to customary law and protection of TK (i.e. benefit sharing)
- Relies on the good faith of negotiating parties and equal bargaining: ILCs Negotiation Capacity
- Compliance: Alternative Resolution of Conflicts (according to customary laws)



ROLE OF NATIONAL FRAMEWORKS



- Precondition: indigenous rights recognition/legal pluralism at the national level
- Measures to deal with equity: set minimum standards
- Measures to ensure compliance with customary law and local systems of protection: Disclosure requirements + Check points
- Definition of misappropriation
- Dispute settlement mechanisms
- Information provider





Thank you!

ilapena@spda.org.pe

