Globally Important Ingenious Agricultural Heritage Systems
-An examination of their context in existing multilateral instruments

Professor Stuart R. Harrop[1]

Part 1

1.1 Introduction

The scope of the study

The scope of this study is contained in the Terms of Reference in Appendix 1 hereto. I have had the benefit of reading a previous report by Dr. Jose I dos R Furtado concerning aspects of the subject-matter of this analysis. I have avoided repetition of the content of that paper and, indeed, the approach I have taken is to deal with particularly relevant aspects of the international regulatory regime rather than to iterate comprehensive details that might, perforce, encompass considerable quantities of text concerned with marginally relevant instruments.

I have assumed that the reader has knowledge of the GIAHS concept, a basic knowledge of the purpose and parameters of the instruments referred to and of the history of the relevant regimes of international law and policy. Consequently, I have avoided a preliminary introduction to the concept of GIAHS and I have not copiously described each instrument dealt with except where the context otherwise requires.

There are a number of soft instruments that are not mentioned or dealt with in any detail in this report but which support the concept of GIAHS. These are not ignored through lack of value; rather they have given rise to other expressions of their principles in subsequent instruments, which are dealt with herein. An example of this is the World Charter for Nature[2] which contains text supportive of the concept of GIAHS and which has acted as the foundation for development of an enlightened international approach to the human relationship with the natural world.

There are also many instruments functioning at the regional level that are beyond the scope of this analysis.[3] For the present it is appropriate to indicate that regional law and policy will be relevant in context-specific cases as GIAHS sites are-established and prior analysis of regional and national laws and policies will be required in each case.

The structure of the report

- **Part 1- Introduction-** In this part the scope of the study and its structure is set out. The key components of GIAHS are identified and the relevant areas that might need to be reflected in international law and policy are identified.
- **Part 2- Analysis of international law and policy-** This part examines all relevant instruments in the light of the subjects identified in Part 1 as being relevant to GIAHS. The structure follows the main headings in Table 1 in Part 1 and the prime enquiry examines the extent to which the existing instruments support GIAHS?

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[1] Chair of Wildlife Management Law, Darrell Institute of Conservation and Ecology, Department of Anthropology, University of Kent, Canterbury, Kent CT2 7NS, United Kingdom

[2] 28 October 1982 General Assembly Resolution 37/7.

[3] Two such instruments include the European Landscape Convention (Council of Europe ETS No. 176 , 20 October 2000) and the African Convention on the Conservation of Nature and Natural Resources (Adopted at the second summit of the African Union on 11 July 2003)

- **Part 3-** This part sets out a comparison of alternate ways to progress GIAHS through international legal and policy creation and through links with other institutions.

GIAHS

First it is necessary to summarise the nature of GIAHS in order to identify those areas that might require support in international law and policy. The current definition of GIAHS is:

> *Remarkable Land Use Systems and landscapes which are rich in biological diversity evolving from the co-adaptation of a rural community/population with its environment and its needs and aspirations for sustainable development (FAO, 2002)*[4]*.*

A great deal of information can be extracted from this definition and it is clear that the GIAHS concept spans many disparate areas of policy and legal engineering. Further, the FAO continues to examine the concept in depth and clarify it as the project develops. There are some definitional issues that affect the manner in which the existing concept fits into and is supported by international law. These will be developed as they arise in the report but if the GIAHS concept is to be included in new instruments then an enhancement of the definition may be required without compromising the clear elements within it. As a means to accurately capture all components of GIAHS in a definition, it will probably be necessary to compile a list of potential GIAHS examples with details of their characteristics. This would facilitate the discovery of both common and idiosyncratic characteristics and would ensure that all legal needs could be supported.

In order to discover the extent to which international law supports GIAHS and to define the lacunae in that regime it is essential to isolate the component parts both patent and latent. Table 1 contains a summary of potential areas which are dealt with (or may need to be dealt with) in international regulation and policy instruments which are in existence and have relevance to GIAHS or which may need to be newly created in order to facilitate the fulfilment of the goals of GIAHS.

By setting out the list of areas no attempt is made at this stage to prioritise such areas or attach comparative importance to any of them.

[4] http://www.fao.org/sard/globingen_en.html

Table 1
List of issues relevant to GIAHS that require support through international policy and law

1. **Conservation**
   - Conservation and sustainable use of agricultural biodiversity
   - Conservation and sustainable use of biodiversity
   - Human impact on landscape and maintenance of human dependent biodiversity.
   - Promotion and protection of traditional knowledge systems (and vehicles such as languages for those systems) to the extent that those knowledge systems conserve agricultural and biological diversity
   - Protected area conservation
   - Protection of GIAHS activities through protection of adjacent lands either as buffer zones to the system or as conservation protected areas
   - Zoning of protected areas; *traditional use zones*, buffer zones and graduated use zones
   - Globally important/unique protected areas; world heritage etc.
   - Special conservation measures in arid zones, marine areas, inter-tidal zones, non-marine wetlands, forests, etc.

2. **Land Tenure, the laws of indigenous and rural communities and Human Rights**
   - Customary laws relating to land title
   - Balance between state and community ownership in protected areas and protected zones.
   - Hybrid land rights: easements etc.
   - Effective community ownership of lands in which GIAHS examples operate.
   - Decentralisation of land management: balance of control between central and local authorities and devolution of local area control to GIAHS communities.
   - Supporting and facilitating self-supporting community agricultural systems through appropriate rights in buffer zones to GIAHS areas
   - Participation by community representatives in wider planning/land control decisions that might impact on the protection of the agricultural system or the land on which it takes place and the adjacent/other lands on which it depends (e.g. water catchment areas)
   - Customary laws and forms of social organisation of indigenous and rural communities that support sustainable agricultural systems
   - Protection of customary legal systems with incidental protection for minority participants in the relevant community (women etc.) with added state controls to regulate despotism
   - Restitution of land to indigenous and tribal people
   - Right to continuance of cultures and traditional practices
   - Right to decide own use of land and natural resources
   - Right to choose own approach to development
   - Right to participate in planning
   - Right to participate in process of international law and policy making concerning GIAHS
   - Capacity building
   - Alleviation of poverty

3. **Intellectual Property Rights**
   - Nature of traditional ecological/agricultural knowledge (TK)
   - Nature of ownership of TK and of natural resources which are the subject of TK
   - Vehicles for protection of intellectual property in TK: *sui generis* rights etc
   - Prior informed consent for access to genetic resources
   - World trade and intellectual property protection.
   - Equitable benefit sharing
   - Global seed repositories and mechanisms for shared access to genetic resources

4. **Trade**
   - Trade in endangered species; CITES, ranching, split-listing in CITES appendices
   - National and international free trade legislation/tariffs relevant to agricultural products
   - Eco-labelling
   - Multilateral consent to departures from basic free-trade requirements in multilateral trade regime
   - Enhanced trade in products from GIAHS systems which possess special characteristics by reason only of their derivation from those systems (the issue of PPMs)

The Nature of the Regime of international law and policy dealing with biodiversity preservation and sustainable use

The concept of GIAHS falls clearly into the remit of the UN FAO as described in its constitution.[5] As will be seen the need for development of GIAHS within this organisation is supported by a great deal of international instruments and indeed fits well into the trend of goals proclaimed within both the 1992 and the 2000 Earth summit meetings. The historical regulatory trend has been to appreciate more the context of humans within the natural world rather than regarding humans as somehow separate from it. The GIAHS concept is perfectly placed to facilitate the appreciation of the role that our own species can play to preserve our relationship with the Earth.

The *current* mission for GIAHS is capable of fulfilment in its own right by appropriate funding, through the negotiation of agreements with individual States and through accords between the FAO and other conventions and institutions. However, the achievement of these objectives would depend upon goodwill in many cases and in the long term the concept would be better supported by international mandates that could be implemented through resultant national legislation. The phrase *international mandates* encompasses international legislation, accords between international institutions and, or alternatively, *soft* policy instruments. Part 3 of this report examines these alternatives in more detail.

The nature of the concept of GIAHS is supported by diverse facets of international law and policy. The net result is some support for the concept at the framework level but with no direct facilitation of the components which would preserve GIAHS systems and integrate their preservation within other global regulatory regimes that might otherwise impinge on their survival. The issue, when examined in the context of the current regimes of biodiversity protection, reveals many of the dynamics, challenges and obstacles facing the progression of other environmentally sound projects. Thus issues of state sovereignty versus global security and the integrity of global ecosystems; balancing concerns for the preservation of nature with the need to alleviate poverty and fulfil other human needs; the integration of measures to protect minority trading activities within the multilateral trade regime; human rights and the status of indigenous peoples' claims for land restitution all arise in relation to this topic and do not make for easy legal and political solutions to facilitate sound progress.

The single piece of legislation that brings together many of the relevant issues is the Convention on Biological Diversity. The CBD does not provide detailed guidance for governance but sets out a framework and in so doing seeks to address many of the challenges mentioned. The CBD lends itself well to the creation of subsidiary protocols (Cartagena for example) which deal with the conservation of biodiversity, the interrelationship of the human element with conservation and sustainable use of biological resources through agriculture and other means of exploitation. It also provides the potential support of a joint venture partner as it has done with the International Treaty on Plant Genetic Resources for Food and Agriculture (PGRFA). The CBD, supplemented by the other laws and policy statements, may offer one option for a solid foundation of legislation comprehensively supporting the principles and concept of GIAHS.

[5] See: *Basic Texts of the Food and Agriculture Organisation of the United nations-Constitution* Article 1 where the functions of the FAO include the conservation of natural resources.

Part 2

2.1 Conservation

The legislation and policy in the field of conservation is extensive. Early instruments in this field focused on species conservation. With a few exceptions, where they dealt with protected areas, they emphasised tracts of land distinctly defined where only non-human species would live. More recently, the instruments have had a more holistic approach to conservation linking human communities and human issues to species conservation and protected area management. However, the GIAHS concept, whereby humans operate and live in the central zone of a protected area, is supported by regulatory regimes only in exceptional cases.

Conservation instruments deal with a wide range of habitats and thus encompass a diverse group of potential GIAHS activities. Because this report is concentrating on the highest level of regulation, unless the context so requires, distinguishing between different classes of potential GIAHS activities (and thus different classes of habitats) has been avoided. It is important to appreciate, however, that GIAHS agricultural activities may involve exploitation of natural resources on open land, in wetlands, in montane areas, in forests, in the open sea, in the intertidal zones and in most of the areas in which humans are capable of surviving. Therefore, the general references herein to conservation of habitats and protected areas should be construed to include the entirety of the range of possible sites in which GIAHS activities could take place.

In this section the relevant instruments are examined in the light of the need to support the facets of GIAHS as detailed in Table 1. From the outset it must be made clear that, whereas biodiversity and traditional agricultural heritage may often be found together and may be protected and supported within legislation designed to protect biodiversity, there are many instances where they are mutually exclusive and the dynamics that drive them may be in conflict. An example of this is the regulatory dynamic to preserve pristine, primary habitat rather than secondary but often equally diverse habitat that may be a product of direct human intervention through traditional agricultural practices.[6]

Agenda 21[7]

Agenda 21 is an extensive document dealing comprehensively with the issues of environmental protection and development as seen in 1992. Its remit is far wider than conservation and it is relevant to the analysis of other subjects herein. It deals in detail with human issues and advocates that traditional human practices within the natural world, to the extent that they are sustainable with a positive impact on the

[6] Some believe that many primary habitats that superficially appear to have developed apart from human influence are the product of sophisticated yet subtle traditional practices. See in the context of Amazonian rainforest the debate in: Posey D.A. (1998) *Indigenous peoples: missing links and lost knowledge in the conservation of Brazil's tropical forests* in Hoage R.J. and Moran K. (1998) CULTURE The Missing Element in Conservation and Development National Zoological Park Smithsonian Institution, Kendall/Hunt Iowa p 114 and Look R. (2001) A better understanding of traditional home gardens through the use of locally defined management zones Indigenous Knowledge and Development Monitor, July 2001.

[7] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II.

natural world, are promoted and protected. It is still an authoritative document but should also be read in the light of the decisions of the Johannesburg Summit. There are many parts of the text that could be construed to directly support the GIAHS concept or which would otherwise support incidental measures designed to strengthen the functioning of GIAHS. In terms of the support for GIAHS from the conservation perspective the following parts of the text are relevant.

11- Combating Deforestation
Governments are required to act to increase forest cover where feasible, working, *inter alia*, with indigenous people, to establish and expand protected areas which, in addition to ecological aspects, should also preserve spiritual values and to support *sustainable utilization* of *the traditional forest habitats of indigenous people, forest dwellers and local communities*. This whole area, in practical terms remains a controversial topic even for conservationists at national level. Thus the role of people, and the nature of their tenure in secondary conservation zones is not clarified in detail in legislative instruments and reliance on policy has resulted in an inconsistent application of the principles enunciated herein in Agenda 21. This may be a key area for instruments relating to GIAHS to address especially in highly diverse forested areas. It is a direct mandate to support forest based GIAHS activities which, to date, may be overlooked in many areas with the prime focus on preserving primary forest without human presence beyond limited tourism.

14- Promoting Sustainable Agriculture and Rural Development
Section B of this Chapter urges more community control over agriculture and changes in market mechanisms and details other matters (14.16). In 14.25 there is a statement of the need to intensify agriculture to meet needs but with the qualification that there should be no encroachment onto fragile and marginal lands. 14.55 deals with some aspects of in situ conservation of valuable gene stock. Beyond these references, which have no direct impact on GIAHS, this chapter is surprisingly un-supportive of GIAHS. Indeed, with reference to 14.25, some GIAHS systems are particularly remarkable because of their ability to be sustained in marginal, fragile and arid environments.

15-Conservation of Biological Diversity
The combination of 15.4(g) and 15.5(e) is to reiterate Article 8(j) CBD which is analysed later. Both provisions are supportive of GIAHS.

16- Environmentally Sound Management of biotechnology
16.39(a)vi urges the recognition and fostering of traditional methods and knowledge and equitable benefit sharing from biotechnological developments. Again there are provisions which mirror Article 8(j) CBD and are thus supportive of GIAHS.

32-Strengthening the Role of Farmers
32.2 acknowledges indigenous and other rural families as stewards of natural resources and this is a precise re-statement of an aspect of the principles in Article 8(j) that directly supports GIAHS. The policy statement herein directly supports the type of *traditional use zone* that is required to support GIAHS agricultural systems especially where the species conservation mandates are so focused on non-human species as to be otherwise unhelpful.

The Forest Principles[8]

[8] UN General Assembly Report of the Conference of Environment and Development (Rio) Annex III Non-Legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forest.

Ethnobiological knowledge and practices are at their most diverse in tropical forests and they share this level of diversity geographically with biological diversity, cultural and linguistic diversity. Many potential GIAHS systems are found within and adjacent to forests. Whereas an agricultural system may operate by deforesting small areas within a shifting cultivation system the relevant example of GIAHS is only effective because of the conditions created by the adjacent primary or old secondary forest. Historically the GIAHS community will have depended upon this forest for other needs (clean and regular supply of water deriving from forest catchment areas, medicinal plants, hunted meat and so on). Regulation of forest activities is thus a key area for examination. The Forest Principles are expressed to be non-binding but would lend significant authority to any further regulatory instrument to support GIAHS. The principles urge support for indigenous peoples living in forests, the provision of an economic stake in forest use, appropriate land tenure arrangements (5(a)), and equitable benefit sharing in relation to traditional knowledge. These principles are repeated in a number of instruments; in particular the provisions of the CBD.

Johannesburg Declaration on Sustainable Development

The JDSD is extremely wide ranging and the concept of GIAHS is supported by many of the principles enunciated in its text. Some aspects of the text are dealt with in more detail under individual subject headings. Particular provisions of the Declaration are directly relevant to GIAHS and a progressive implementation of GIAHS would fulfil aspects of them. Paragraph 40 concentrates on agricultural and food security issues and much of it could be construed to support GIAHS. For instance paragraph 40(r) can be interpreted to provide a direct mandate for the GIAHS project (and other less *remarkable* practices) and requires members to:

> *Promote the conservation, sustainable use and management of traditional and indigenous agricultural systems and to strengthen indigenous models of agricultural production.*

The Declaration also directly supports indigenous and community-based forest management systems to ensure their full and effective participation in sustainable forest management (45(h)). This provides further international support for crucial areas of forest management that to an extent and inconsistently has been seen to conflict with eco-centric approaches to forest management. GIAHS provides a vehicle to resolve the conflict by supporting crucial technologies that support both biological and agricultural diversity. The Declaration in 26(e) also refers to the importance of non-conventional water resources and conservation technologies so often prevalent in GIAHS and which can enable not only agricultural diversity to flourish in arid zones but also, through the ancient nature of some of the water conservation practices, facilitate the existence of havens for unique biodiversity.

United Nations Millennium Declaration[9]

The Millennium Declaration and the Millennium Development Goals support and are supported by GIAHS in a number of ways both directly and incidentally. The inter-relationship between all of the goals and the need to ensure environmental sustainability is clear.[10] Apart from the general propensity of GIAHS to deal with gender issues, eradicate poverty and hunger, provide access to water and so on the most obvious area of synergy is linked to MDG 7: to *ensure environmental*

[9] UN General Assembly Resolution 55.2

[10] See generally: *Interim Report of Task Force 6 on Environmental Sustainability* (Coordinators Yolanda Kakabadse-Navarro Jeff McNeely Don J. Melnick) at www.unmillenniumproject.org/documents/tf6interim.pdf

sustainability. Specific tasks therein relate to forest cover (Indicator 25) and expanse of biodiversity (Indicator 26) which are directly supported by traditional GIAHS systems. MDG 8: to *develop a global partnership for development* is also relevant to the multilateral trade issues discussed later.

There is some visible evidence in the supporting papers of task forces relating to the Millennium Development Goals of the relevance of GIAHS-type traditional knowledge. The two following statements are found in the summary of the final report of Task Force 6.[11]

> *Around the world agricultural systems are increasingly vulnerable to overuse, inappropriate practices, and altered weather patterns. The task force recommends increasing the use of sustainable agriculture techniques to preserve natural assets, restoring and managing desertifed lands, and protecting surrounding natural habitat.* (p15*)*
>
> ***Agricultural production systems:***
> *Increase the use of sustainable agriculture techniques to preserve natural assets:*
> - *Protect and improve soils, including enhanced carbon sequestration.*
> - *Use water sustainably.*
> - *Maintain crop genetic diversity.*
> - *Mobilize local knowledge and experience.*
> - *Improve crop research, management storage, and use.*
> - *Restore and manage decertified lands:*
> - *Adopt prevention strategies to protect arid ecosystems.*
> - *Mobilize information and technology.*
> - *Protect surrounding natural habitat:*
> - *Rationalize land-use planning.*
> - *Set up systems of communal ownership and management rights*. (p.17)

Taken together these extracts may not be intended to refer directly to GIAHS but it is clear that GIAHS may exemplify these qualities and that the concept could contribute towards fulfilling this aspect of the Millennium Development Goals. Further, by preserving GIAHS, that knowledge becomes available to be applied piecemeal or in its totality in order to contribute to the fulfillment of the goals in situations where GIAHS do not take place but the application of that knowledge can assist nevertheless to fulfill aspects of the Millennium Declaration's goals.

Some of the recommendations in the extracts from the Task Force final report are also relevant to suggest emphases that are needed to support GIAHS such as the establishment of communal ownership systems, the rationalization of land-use planning and the protection of natural habitat surrounding GIAHS locations.

[11] *Environment and human well-being: a practical strategy- Summary version*
(Lead authors: Don Melnick, Coordinator, Jeffrey McNeely, Coordinator, Yolanda Kakabadse Navarro, Coordinator, Guido Schmidt-Traub and Robin R. Sears)
UN Millennium Project Task Force on Environmental Sustainability 2005
www.unmillenniumproject.org/who/task06.htm

Conventions and instruments dealing with conservation of natural resources/land practices and protected areas

The Convention on Biological Diversity

The text of the convention supports the concept of GIAHS in a number of articles dealing with specific areas. These will be examined briefly in turn. However, the preamble and Article 8(j) describe a wider remit of support and an extensive analysis is required.

Whilst expressly maintaining respect for the sovereignty of states[12], the preamble recognises

> *…. the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components*

Whereas not all of the components of GIAHS are present in this statement, its nature as an overview is clearly important and supports key principles within the concept. Article 8(j) of the CBD takes these principles further and, in terms of supporting GIAHS, is the most relevant principle in international legislation. Indeed it could be interpreted to support every aspect of GIAHS, although it is recognised that it has a different emphasis particularly because its central concern is biodiversity not agricultural bio-diversity or agricultural heritage.

Article 8(j) and the Convention on Biological Diversity

Article 8(j), accompanied by the chapeau to the Article, states as follows:

> *Each Contracting Party shall, as far as possible and as appropriate:*
>
> > *(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;*

A linked article 10(c) should also be cited at this stage, again accompanied by its chapeau:

> *Each Contracting Party shall, as far as possible and as appropriate:*
>
> *(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements*

Both articles support most aspects of GIAHS just as the concept of GIAHS is capable of fulfilling many aspects of these articles. 10(c) can be construed to directly support agricultural diversity and the type of practices that comprise GIAHS. However, there are systems which could conceivably fall outside the remit of 8(j) (and to an extent 10(c)). Thus a valid GIAHS system may have evolved from, but no longer embodies, an exclusively traditional lifestyle within the scope of the article. Further, there is a difference in emphasis and objectives. Article 8(j) is in the section of the CBD dealing with *in-situ* conservation of habitats and species in range states and the strategic

[12] Article 3 CBD.

conservation of specifically protected areas. The emphasis of the GIAHS concept encompasses this objective but is somewhat broader in its focus on natural, cultural and agricultural diversity. Additionally, a GIAHS example is also required to be *remarkable.* Both of these differences in emphasis result, for the most part, in GIAHS systems forming a subset of the practices contemplated by Article 8(j). However, it is conceivable that a GIAHS example could also be in conflict with the requirements of Article 8(j) through its emphasis on the maintenance of agricultural diversity. An example of such a conflict is best illustrated by reference again to the often *remarkable*, if not *ingenious*, traditional shifting cultivation methods adjacent to primary rainforest. Whereas the primary rainforest may consist of high natural diversity, the fallows left by shifting cultivation in the form of temporary secondary forest will possess a high level of agricultural diversity. From the perspective of the agriculturalist the secondary forest might be a priority target for preservation whereas the primary forest would be the target for the conservationist.

The convention is, in part, a framework convention and these clauses necessarily must be read at this level. There is, however, a working party under the auspices of the CBD, which is currently examining the more detailed implementation of the provisions of 8(j),[13] and a number of previous discussions have taken place at conferences of the parties. In addition the CBD secretariat has produced a profusion of policy papers concerning the implementation of the article.[14] The appearance of an article dealing with human traditional practices in the context of biodiversity conservation stresses the key role that indigenous and rural communities must have in participating in the implementation of strategies for conservation and reflects a new, enlightened international regulatory approach.[15] GIAHS could be seen to be one facet of a practical implementation of this.

An initiative to produce a protocol to the convention or some other instrument dealing with, *inter alia*, the GIAHS concept would be a practical way forward to put appropriate flesh on the bones of Article 8(j) and a joint venture between the FAO and the CBD in this respect would be the vehicle to achieve this.

There are some aspects of Article 8(j) which must be examined in more detail.

National legislation

The concept of GIAHS and its preservation, in some instances, may face considerable obstacles in national law. These would derive from the manner in which land rights and particularly native title are decided and from conservation policies that exclude and expel people living within traditional contexts. Whereas it would be expected that parties would implement an international commitment in their national legislation and thus alter their national regime, Article 8(j) is expressed to be subject to national legislation and suggests that the reverse applies in this context. Bearing in mind the framework nature of the clause and the imprecise drafting approach the words seem hardly necessary. This idiosyncratic approach may be inevitable, however, having regard to the depth of political feeling concerning this general issue. This part of the article attempts to honour the sovereignty of states and at the same time secure the well being of peoples (and indeed habitats and species) behind the veil of sovereignty. It may be that, by the use of these words, the CBD attempts to avoid confronting the difficult question concerning claims for restitution of indigenous

[13] This was established following the 4th Conference of the Parties of the CBD. (Decision V/16: *Article 8(j) and related provisions*.)

[14] See by example CBD Decision COP III/14.

[15] See UNEP/CBD/COP/3/19 *Knowledge. innovations and practices of indigenous and local communities: implementation of article* 8(j) (Note by the Executive Secretary) Para 8.

and other traditional territories.[16] In consequence the clause cannot be a mandate alone for returning deposed peoples to protected areas or giving back to them the rights they enjoyed before conquest or colonisation in the interests of preserving GIAHS. However, the clause would be meaningless if it dictated that national law (whether presently or prospectively promulgated[17]) simply overrides the requirements in the article especially in the case where national law is diametrically opposed to the article's key principles. A better interpretation is that the principles of the article must be implemented in a manner that conforms to national law principles. One advocate of indigenous peoples' rights states the position as follows:

> *Contracting Parties cannot remain inactive, but must make all efforts to do justice to the objectives of article 8(j).*[18]

If there were to be a protocol deriving from the CBD encompassing the concept of GIAHS the ambiguity in this aspect of the article would need to be addressed.

Respecting, preserving and maintaining knowledge, practices etc.

The words as a whole endeavour to secure more than an archival remnant of the knowledge, innovations and practices referred to. The reference to maintenance suggests a continuation of the evolution and development of such knowledge and practices. The Article clearly implies the preservation of that aspect of living knowledge which is relevant if not crucial for contemporary conservation strategies. Thus living examples of GIAHS would in part fulfil the intent of this article. The word *respect* is both helpful from a policy perspective but somewhat obscure from a legal point of view. Politically it connotes the perpetuation of indigenous culture by actively teaching it and by deploying the knowledge holders as teachers, conservation policy makers and so on.[19] In short it is understood by the CBD policy makers to mean that

> *Relevant traditional knowledge should thus be accorded a status in national life comparable to that shown to scientific knowledge.*[20]

It also connotes respect for the peoples who developed and maintain the practices referred to which in turn implies supporting them with capacity building and so on. However, it is difficult to transmute the word's connotations and potential commitments into absolute legal commitments and this word must therefore be seen as a catch-all in negotiations which will be the route to achieving some of the goals of conservation and indigenous peoples lobbyists. In the context of GIAHS the phrase

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[16] By using this approach it can also protect existing, beneficial national regimes that extend some protection to the indigenous and rural peoples envisaged in this article. As the CBD Executive Secretary has stated: *In keeping with the general orientation of the Convention, this provision leaves it up to individual countries to determine how it will be implemented. In addition, Article 8(j) subjects its obligations to national legislation implying that existing national legislation will take precedence.* UNEP/CBD/COP/3/19 *Knowledge. innovations and practices of indigenous and local communities: implementation of article* 8(j) (Note by the Executive Secretary) Para 14.

[17] See Glowka L.,Burhenne-Guilmin F., Synge H. (1994) *A guide to the convention on Biological Diversity* IUCN Environmental Policy and Law Paper No. 30 p48

[18] Gundling L. (2000) *Implementing Article 8(j) and other provisions of the Convention on Biological Diversity to strengthen the legal positions of indigenous and local communities* COICA (Co-coordinating body of Indigenous Organisations of the Amazon Basin), Quito, Ecuador.

[19] UNEP/CBD/COP/3/19 *Knowledge. innovations and practices of indigenous and local communities: implementation of article* 8(j) (Note by the Executive Secretary) Para 65.

[20] UNEP/CBD/TKBD/1/2 *Traditional Knowledge and Biological diversity* (Note by the Executive Secretary) Para 83.

would support a national respect for living examples of GIAHS through, *inter alia*, protecting aspects of the wisdom of these practices in national curricula as aspects of national (if not international) heritage and through seeking to understand the different paradigm of their ingeniosity.

Preservation and maintenance require the immediate protection from loss of the relevant practices. Further, maintenance suggests that practices are indeed carried out rather than displayed in tourist parks. The context of the article in the in-situ conservation section of the CBD reinforces this contention. Further, the article must also be read in conjunction with Article 10(c) of the CBD which is contained in the convention's section dealing with *Sustainable Use of Components of Biological Diversity*[21].

Reflecting on the joint construction of these Articles, the Executive Secretary of the CBD has taken the potential impact much further into sovereign territory:

> *Taken together, these provisions therefore require Parties to recognize that biological diversity is maintained, and very often enhanced, by the knowledge, innovations and practices of indigenous and local communities and that the preservation and maintenance of biological diversity goes hand in hand with the preservation and maintenance of cultural diversity. In order that indigenous and local communities may* continue to maintain *and develop their knowledge, innovations and practices (in other words, are able to ensure their cultural survival), they need secure access to the basis of such biological diversity and its components in their traditional lands.*[22]
> *……The need for Governments to recognize and guarantee rights to land for indigenous and traditional communities is thus a prerequisite both for the preservation and maintenance of the knowledge, innovations and practices referred to in Article 8(j), and for the protection of customary use of biological resources referred to in Article 10(c).* [23]

The reinstatement of traditional land rights where conservation is thereby benefited is a controversial issue in relation to the purpose and extent of this Article. It remains to be seen whether signatories to the CBD will be willing to implement it to this extent. However, these commentaries and interpretations clearly support GIAHS.

Communities embodying traditional lifestyles relevant for conservation
Obviously the reference to both indigenous and rural communities, defined by emphasising the nature of their knowledge and practices, is an approach which firmly focuses on conservation rather than entangling the article in the fine details of the definition of indigenous peoples. This can only assist the case for GIAHS. First, not all rural communities exercising GIAHS will be indigenous. Second, since the ethnicity of a community that carries out GIAHS practices may be fluid, it might be appropriate to keep the concept of GIAHS unfettered by connections to definitions of indigenous.

For the most part, by dealing with indigenous and traditional communities and not distinguishing between them, the Article supports a wider gamut of GIAHS systems. As will be seen, however, an extensive raft of international law and policy deal with the manner in which nations deal with indigenous people whereas those who are not

[21] Cited on page 10.
[22] UNEP/CBD/COP/3/19 Para 60.
[23] IBID Para 61.

within this category, but nevertheless operate GIAHS, cannot claim the benefits extended by this legislation.

Benefit sharing
The parties are required to *encourage* the equitable sharing of benefits deriving from the application of the practices and knowledge described within the Article. This word does not establish a strong obligation from the legal perspective and may well result in the choices being left to the whims of market forces. For GIAHS to be effective there needs to be a process of capacity building and equitable sharing of benefits deriving from GIAHS that go beyond the self-supporting nature of communities deploying such systems. This is a wider topic that requires detailed text in any regulatory instrument dealing with the subject of GIAHS. A voluntary initiative to amplify the principles in the CBD dealing with this aspect is contained in the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation.*[24] This document details the involvement of stakeholders particularly in the context of intellectual property rights in traditional ecological knowledge and develops the meaning of the term *prior informed consent.* Thus, although the emphasis of the guidelines is not entirely relevant to the concept of GIAHS, some important principles are enunciated therein which could be relevant in the design of aspects of a regulatory instrument to facilitate the protection of GIAHS.

Protected areas in the CBD
The CBD acknowledges the need to conserve *biological diversity whether within or outside protected areas*[25] and Article 8(j)'s support for GIAHS is not limited to systems operating in designated areas. In many cases traditional agricultural systems operate within buffer zones adjacent to core protected areas in which human agriculture use is prohibited. Article 8(e) specifically supports practices that would include GIAHS through the promotion of

> *environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas.*

The categorisation of protection surrounding strictly protected areas provides a useful vehicle for supporting the practices contemplated by Article 8(j) and more particularly the concept of GIAHS. However, more detail is needed in legislation or multilateral policy instruments and a category for GIAHS areas, whether included within a wider concept of *traditional use zone* or other defined category, is required. A serious point of departure, however, is that GIAHS cannot be restricted to secondary buffer zones. To do so would compromise the importance of these agricultural systems. The concept perceives the GIAHS operations as paramount and a GIAHS protected area would secure that the main, active interface of humans and the environment would take place in the core zone itself.

IUCN
IUCN has created a detailed classification of protected areas and a body of policy informing other initiatives has been formed thereby. The system designed would accommodate and support a specific initiative to define a GIAHS category in other instruments although the focus is necessarily on biodiversity rather than agricultural heritage. A key aspect of the classification system emphasises the link between human use of resources and biodiversity within a protected area. The system

[24] UNEP/CBD/COP/6/20 Page 262 VI/24. Access and benefit sharing as related to genetic resources.
[25] Article 8(c) CBD.

descends in categories from a strict protection of *natural* processes (that is to say areas *not materially altered by human activity*[26]) to areas where *societies live in harmony with the environment* in a manner *undisturbed by modern technology*[27] and on to areas sustainably used but which support nature conservation.[28] Category V may be the most relevant to GIAHS although certainly not a perfect match. It is described as follows:

> *Protected Landscape/Seascape: protected area managed mainly for landscape/seascape conservation or recreation – area of land, with coast or sea as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, ecological and/or cultural value, and often with high biological diversity. Safeguarding the integrity of this traditional interaction is vital to the protection, maintenance and evolution of such an area.*

Biosphere reserves

UNESCO's Man and Biosphere programme comprises, despite its designation as the *Statutory Framework of the World Network of Biosphere Reserves*, a system of soft law whereby a network of *Biosphere Reserves* has been created throughout the world. These include zoned protected areas that specifically take into account the integration of the social, economic and the natural as they move from the centre to the outside of the reserve area. The approach clearly encompasses support for the GIAHS concept and, as MAB's own website states:

> *People in many parts of the world have devised, over a long period of time, ingenious land-use practices which do not deplete the natural resources and which can provide valuable knowledge for modern production systems. Biosphere reserves are areas where such peoples can maintain their traditions, as well as improving their economic well-being through the use of culturally and environmentally appropriate technologies.*[29]

Despite being soft law, the regime expressly requires some legal protection[30] and national law has been generated as a result of application of the programme in a number of areas of the world[31].

Where a GIAHS example is present in a MAB reserve it should be supported and preserved through specific inclusion in management plans and supporting national law where applicable. The current strategy[32] for MAB reserves includes a number of statements that would explicitly lend support to the GIAHS concept. The strategy includes the desire to make MAB:

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[26] IUCN Protected Areas Management Categories: National Park (2).
[27] Ibid: Anthropological Reserve/Natural Biotic Area (7).
[28] Ibid: Multiple Use Management Area/Managed Resource Area (8).
[29] http://www.unesco.org/mab/nutshell.htm
[30] See Article 4.5(a) UNESCO, MAB Programme, *Statutory Framework of the World Network of Biosphere Reserves.*
[31] In Mexico, by example, Biosphere Reserves are protected by the *Ley General del equilibrio Ecológico y la Protección al Ambiente* Titulo segundo, Capitulo 1, Seccion 1, articulo 48 (DOF 1988, 1996). Although the definition in Mexican law has resulted in some sites, not yet recognised by the MAB programme, being included within the national law's definition and others which are recognised internationally being excluded. (See: http://www.oceanoasis.org/conservation/status.html.)
[32] Evolved at: The International Conference on Biosphere Reserve, organised by UNESCO in Seville (Spain) on 20-25 March 1995.

7. Reflect more fully the human dimensions of biosphere reserves. Connections should be made between cultural and biological diversity. Traditional knowledge and genetic resources should be conserved and their role in sustainable development should be recognized and encouraged and
8.Promote the management of each biosphere reserve essentially as a "pact" between the local community and society as a whole. Management should be open, evolving and adaptive. Such an approach will help ensure that biosphere reserves - and their local communities - are better placed to respond to external political, economic and social pressures.

GIAHS could work directly with the MAB programme to integrate GIAHS more closely therein or could consider emulating the MAB device by creating a similar, soft but *statutory,* framework to govern a world-wide GIAHS programme. This option may be a less diplomatically complex and speedier process than the creation of a protocol or convention although it would lack the obligatory status of a fully empowered legal mandate. If The GIAHS project were to consider creating a policy regime it would, of course, have one distinct difference to the standard MAB approach. The core GIAHS zone would be the area where the prime human activities would be taking place rather than restricting these to secondary zones.

RAMSAR

The Convention on Wetlands of International Importance 1971 (RAMSAR)[33], does not specifically mention human land practices in its text, but in the first clause in its preamble the interdependence *of man and his environment* is emphasised. The prevailing principle applied in RAMSAR to conservation of wetlands is *wise use*, which is interpreted as being synonymous with sustainable use.[34] Therefore, the human element in conservation is impliedly pervasive in the text. RAMSAR does not prescribe a great deal of control over wetlands as a whole, indeed it only requires its members to designate one site for the RAMSAR List, however, many GIAHS systems operate in or adjacent to wetlands and this convention cannot be ignored in this context.

Beyond the main text, RAMSAR has established directly relevant principles entitled *Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands*[35]. They focus on participatory management in wetlands, which would be a key factor for a community operating an effective GIAHS in or adjacent to a RAMSAR protected area or in other wetlands. These principles do not create binding obligations on RAMSAR members and, indeed, they acknowledge the difficulty of tailoring laws to the complex variety of community conservation activities and as a result of that do not add specific guidance which may be obviously assimilated to support the GIAHS case:

[33]The amended, current text is available at the RAMSAR website: http://www.ramsar.org
[34] As defined by Ramsar COP3 (1987), wise use of wetlands is *their sustainable utilisation for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem.*
[35] Adopted as an annex to Resolution VII.8 at the 7th Meeting of the conference of the RAMSAR Parties, San Jose, Costa Rica, 10-18 May 1999. These guidelines derive from Recommendation 6.3 of RAMSAR COP 6 (1996) which called upon the parties *to make specific efforts to encourage active and informed participation of local and indigenous people at Ramsar listed sites and other wetlands and their catchments, and their direct involvement, through appropriate mechanisms, in wetland management.*

> *It is not possible to provide a definitive list of criteria that will guarantee successful establishment of local and indigenous people's involvement. The breadth of the term "involvement" (from consultation to devolution of management authority) and the variety of local contexts means that there are few if any prerequisites to establishing participatory management. One consistent factor, however, is the possession of beliefs and values that support the Ramsar concept of "sustainable utilisation".*[36]

Beyond this cautious note and the fact that many of the guidelines are not directly relevant, there are some precise emphases which are recorded herein. Guideline 15.q states:

> *When involving local and indigenous people in the participatory process [of wetland management], those who facilitate or coordinate such efforts should: Support the application of traditional knowledge to wetland management including, where possible, the establishment of centres to conserve indigenous and traditional knowledge systems.*

Other provisions within the guidelines include the need to establish positive capacity building and knowledge exchange[37] and the specification of clear incentives and economic stakes and benefits.[38]

In a further document entitled *Guiding principles for taking into account the cultural values of wetlands for the effective management of sites*[39] a number of relevant guiding principles are as follows:

> *5 - To maintain traditional sustainable self-management practices.*
>
> *11 - To safeguard wetland-related traditional production systems.*
>
> *15 - To maintain traditional sustainable practices used in and around wetlands, and value the products resulting from these practices.*
>
> *26 - To consider the possibility of using quality labelling of sustainable traditional wetland products in a voluntary and non-discriminatory manner.*

These principles are general and flexible enough in all cases to support aspects of GIAHS provided the GIAHS system is supportive of wetland conservation (as they invariably are by definition of their remarkable nature and their durability).

Principle 26 relates to a different area: that of labelling and by implication the position of products deriving from GIAHS systems within the open markets of the multilateral trade regime. This issue will be dealt with later.

World Heritage Convention

With its approach to preserving cultural and natural heritage and with its particular emphasis on *outstanding universal value* (a parallel perhaps to *remarkable* but by no means synonymous with the term) this convention would seem to be a useful vehicle

[36] Ibid. paragraph 6.
[37] Ibid. paragraph 13.
[38] Ibid. paragraph 17.
[39] Resolution VIII.19 at "Wetlands: water, life, and culture", 8th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971) Valencia, Spain, 18-26 November 2002

for the support of GIAHS. Although the definitions in Articles 1 and 2 of the text of the convention do not expressly lend support to the type of landscape envisaged within the GIAHS concept they are fluid enough to permit development in this area. Thus the Convention's Operating Guidelines were amended in 1992 to permit the inclusion of *World Heritage Cultural landscapes* on the World Heritage List and increasingly the nominations for this category include agricultural sites. A number of examples of these landscapes already on the World Heritage List would certainly fall within the GIAHS definition and it is also interesting to note that some of the expert meetings held within the auspices of the WHC have dealt specifically with agricultural landscapes.[40] It is clear that the GIAHS project should collaborate with the WHC in any event but there are limitations to such collaboration. The need for outstanding universal value limits the sites that can be protected and the WHC does not deal with the totality of the issues which are examined herein as relevant to GIAHS and does not have the same volition or focus. However, the vehicle is there for collaboration at both the legal instrument and policy level.

Multi-Protection

Many sites receive multi-designation and RAMSAR, World Heritage and MAB apply their designations to the same area or overlap with each other in a number of instances. Cooperation takes place at many levels in this respect and the effect of multi-designation should not preclude the protection of GIAHS in the management plans related to these areas.

Others Conventions

A number of other international instruments deal with protected areas but without detailing practices in buffer zones or expanding on human use of land in or adjacent to protected areas. These are not dealt with because of their marginal relevance to GIAHS.

The Convention to Combat desertification in Those Countries Experiencing Drought and/or Desertification, Particularly in Africa[41] (CCD)

A number of GIAHS systems operate in arid and semi-arid areas and the sophisticated methods used to combat drought are essential aspects of the practices. The CCD deals generally with the need to combat drought and desertification and does not directly support GIAHS (except perhaps in one clause) although a number of provisions lend indirect support just as the promotion of GIAHS in arid and semi-arid will contribute to the fulfilment of the convention's goals.

Some of the relevant provisions are as follows:

> **Article 5(c)** examines the socio-economic factors. GIAHS provides a community approach to solving the problems of drought and is therefore indirectly relevant.
>
> **Article 5(e)** provides for an enabling environment to strengthen regulations to support work to combat drought. Where it can be shown that a GIAHS

[40] See generally UNESCO WORLD HERITAGE CENTRE BACKGROUND DOCUMENT ON UNESCO WORLD HERITAGE CULTURAL LANDSCAPES Prepared for the FAO Workshop and Steering Committee Meeting of the GIAHS project: Globally Important Ingenious Agricultural Heritage Systems by Dr Mechtild Rössler. This document provides a comprehensive overview of the subject from a WHC perspective.

[41] A/49/84/Add.2, annex, appendix II.

system could assist to combat drought this sub-article could be used to support particularly extensions of national laws to support such systems.

Articles 10.2(e) and (f) promote involvement of communities, farmers and pastoralists. GIAHS communities would be inevitably included in these groups.

Articles 10.3(c), (d) and (e) promote the strengthening of food security systems, alternate livelihood projects in drought–prone areas and the development of sustainable irrigation programmes (all of which could support or be supported by GIAHS).

Article 10.4 supports sustainable agricultural programmes.

Article 17 requires the parties to cooperate in relevant research and development and 17(c) in particular supports the GIAHS concept more explicitly in that it requires the parties to support research activities that:

> *protect, integrate, enhance and validate traditional and local knowledge, know-how and practices, ensuring, subject to their respective national legislation and/or policies, that the owners of that knowledge will directly benefit on an equitable basis and on mutually agreed terms from any commercial utilization of it or from any technological development derived from that knowledge;*

This sub-article would support research into GIAHS to the extent that its methods combat drought and otherwise fulfil the objectives of the CCD. Whereas it does not expressly support the maintenance of the knowledge this is surely implied having regard to the general purpose and other provisions of the convention. The owners of the knowledge are directly to benefit from its use although identifying the precise nature of the ownership of traditional knowledge is not a straightforward matter. (This point will be examined in the context of intellectual property.)

Article 19 deals with capacity building. In a general manner this article could be used to support GIAHS communities in arid zones.

Annex 1 includes a number of provisions promoting the development and support of local and diverse agricultural systems which could support GIAHS.

The international Treaty on Plant Genetic Resources for Food and Agriculture[42]
This treaty is primarily relevant to the intellectual property issues discussed later. However, the close links between the UN FAO and the CBD referred to in Article 1.2 create provisions dealing with subjects such as *in situ* conservation which are pertinent to the present examination.

The treaty deals only with plant genetic resources for food and agriculture and thus where methods in GIAHS concern animal genetic resources the treaty does not technically apply. However, the general provision concerning *in situ* conservation will necessarily support habitats which in turn will include whole ecosystems along with the animal species participating in that ecosystem.

[42] Adopted through resolution 3/2001 of the FAO conference.

Article 5 requires parties to *promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources for food and agriculture.* There are a number of particular requirements leading on from this general statement and the two most important for GIAHS are:

> ***5.1(c)*** *Promote or support, as appropriate, farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and agriculture*
>
> ***5.1(d)*** *Promote in situ conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, inter alia, the efforts of indigenous and local communities*

5.1(c) confirms support for the robust and self-supporting nature of many traditional systems including GIAHS. 5.1(d) describes *in situ* conservation by indigenous and local communities in areas including protected areas. This directly supports traditional systems including GIAHS. However, support for indigenous communities in practical terms may require that their land zones are all protected areas to some degree. Indeed, many traditional practices are carried out in areas adjacent to protected areas that may constitute buffer zones whether recognised as such or not. Buffer zones and *traditional use zones* adjacent to protected areas are *protected* where appropriate regulatory regimes have been created to secure their nature as buffers to the central protected zone and fall within the definition of protected areas in Article 2 of the CBD:

> *a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives*

Clearly in specific zoned systems such as within the MAB programme all zones are *protected* albeit to different degrees. However, many key zones in biodiversity hot spots where potential GIAHS sites may be found do not receive protection because they are not *designated or regulated* as protected areas and because there may be disagreement about whether their objectives are *conservation objectives*. Consequently, in tropical rainforest areas, there may be samples of primary forest regulated as protected areas. Whereas the ancient *traditional use zones* on their borders in which sophisticated shifting agriculture in bio-diverse secondary forest prevails, often receive no protection and even attempts to claim land rights by the traditional communities may be frustrated by other stronger competing interests. Without some degree of protected area designation the traditional systems operate precariously and may contravene blunt laws designed to protect natural areas (primary forest for example) that operate without an appreciation of traditional use of the forest and its positive consequence for biodiversity or without the emphasis on the preservation of agricultural-diversity prevalent in the treaty under discussion.

Article 6 is also relevant in the GIAHS context. Its emphasis is on promoting the sustainable use of plant genetic resources for food and *agriculture* and in particular it promotes the *maintenance of diverse farming systems that enhance the sustainable use of agricultural biological diversity and other natural resources* (6.2(a)) and supports research into systems where, *inter alia*, *ecological principles are applied in maintaining soil fertility and in combating diseases, weeds and pests* (2.2(b)). Both of there principles support aspects of GIAHS in clear terms.

The remainder of the treaty is dealt with in the context of intellectual property.

General points concerning conventions dealing with land use

GIAHS is supported by, and supports many of the principles and objectives in, the CBD. A member state desiring to protect GIAHS could base a useful national law solely on the powers derived from a full implementation of the CBD provided that the appropriate detail was incorporated in the national law in the manner discussed in the preceding analysis of Article 8(j). However, politically, this would be a great deal to expect from a member state without greater elucidation of the requirements in an international instrument. The provisions of the CBD only provide a framework and comprehensive provisions designed to facilitate the protection of GIAHS in an international instrument would provide a far more effective lever to effectively protect these systems.

In terms of protected area sites under MAB, RAMSAR and WHC, each regime has its own requirements and own definitions. These intersect with the concept of GIAHS to an extent but not comprehensively. Therefore, where appropriate and acceptable within the jurisdiction of the relevant regime, GIAHS protection should be included in resultant management plans.

In terms of depending upon Protected Area regimes there are, however, two qualifications. First, the inclusion of GIAHS in a protected area regime may in some cases compromise the objectives of the GIAHS. Many of the objectives of protected area regimes relate to the conservation of naturally occurring resources. However, the objectives of GIAHS are wider and have their own unique focus and volition. By inter-mixing two differing concepts there may be conflicts which will, in turn, result in GIAHS (with its non-legal authority) being required to compromise as the weaker party. Second, the objectives of the WHC appear to coincide closely with aspects of GIAHS. However, because of the need to fulfil the requirement of *outstanding universal value* (which only partly equates with *remarkable*) there will be many examples of GIAHS not protected through the WHC approach.

Penultimately, this analysis has searched for mutual support between regimes and GIAHS but has not examined the relative merits of those regimes. This would be a further study in itself. For the present purposes it is sufficient to note that there are severe limitations to the effectiveness of many international measures and to rely on them would not alleviate all of the challenges facing the success of the GIAHS project.

Finally, in the light of the matters to be examined, as set out in Table 1, some specific matters need direct attention. First, in order to establish support for GIAHS in existing instruments this analysis has not been able to avoid some contrived inclusion of the type of agricultural heritage and agricultural bio-diversity that concerns the concept within the objectives, *inter alia*, of preserving biodiversity. Therefore, there is a need, in instruments directly supporting GIAHS, to define this aspect as the prime goal of the instrument in order to avoid the potential conflicts that result from contrived inclusion in the term *biodiversity*. Second, there are a considerable number of provisions dealing with zoning of protected areas. However, GIAHS needs to define its own requirements perhaps including a central GIAHS *traditional use zone,* peripheral GIAHS-use zones (by example in adjacent primary forest) and other buffer zones to protect the integrity of GIAHS from negative outside influences. Third, there would be a need to directly integrate GIAHS with other instrument and institutions in order to avoid clashes of interest (by example between species conservation interests and GIAHS).

2.2. Land Tenure, the laws of indigenous and rural communities and Human Rights

Customary law

GIAHS constitutes traditional systems operated by indigenous or other rural communities (that do not fall within the definition of *indigenous)*. Tradition is dynamic. Consequently these systems are able to take advantage of developments. However, the point at which tradition becomes non-traditional may be finely balanced in some cases. Further, the word *dynamic* does not necessarily connote types of accelerated change that are so drastic as to erase all traces of the foundational practices. Tradition, according to some indigenous sources is not only dynamic but also self-determined[43] and this self-determination and self governance in the manner in which GIAHS is executed may be a crucial element to prevent an example of GIAHS moving from its traditional integrity to, in effect, becoming a production-oriented contemporary practice. A facility for the control and integrity of traditional practices may be provided by the customary governance practices of the relevant community. Such regime of customary law may be crucial to the survival of GIAHS. Indeed, in some cases, systems may only effectively operate within the parameters of a community's customary legal system. These parameters may determine share of work, ownership of produce and seed stock, dispute settlement, rituals surrounding aspects of agricultural work, key decisions in the operation of the system and so on. The customary laws, just like the remainder of the traditions, may have evolved over a long period of time and thus have the same time-tested strength that the GIAHS has and, in some cases, may be as integral to the practices as the nature of the land on which they are carried out.

In so many cases customary legal systems have been largely supplanted by the regimes of the state in which they operated. This can endanger the structure of regimes that enable GIAHS examples to function. In addition, the result can be a substantial alteration of a community's perception of the local natural resources and habitats that are exploited by GIAHS. This change of perception can convert a set of traditional practices based on a holistic view of a GIAHS system embedded, supported by and supporting the environment into the mere exploitation of natural resources as an agricultural commodity. The resultant over-emphasis on productivity may remove a key foundation of the traditional system.[44] However, if a customary legal system is to remain in place it must function in the contemporary world and be capable of linking into higher regimes and policies. In particular, such regimes must conform to the prescriptions of human rights law and other minority protection requirements. Further, supervening state regimes should retain residual control to prevent despotism to protect individual rights[45] and to retain the integrity of the contemporary legal context. This mix of the traditional with the contemporary state

[43] Submission to the CBD Executive Secretary from the Four Directions Council, Canada, 15 January 1996 quoted in UNEP/CBD/COP/3/19 Para 79.

[44] Tongkul F. (2002) *Traditonal systems of indigenous peoples of Sabah, Malaysia; wisdom accumulated through generations* Pacos Trust P. 61

[45] This point is made in the summary volume of the Eden Project: *Evaluating Eden*. See Roe D., Mayers J., Grieg-Gran M., Kothari A., Fabridus C. and Hughes R. (2000) EVALUATING EDEN Exploring the myths and realities of community-based wildlife management- Series overview

system may be difficult to achieve. However, if sensitively handled in the interests of the survival of the system, the result could provide a model for enlightened development.

The vehicle for support of customary law could be in a protocol to Article 8(j) or such over parallel or similar instrument. Certainly respect for practices within Article 8(j) can be fulfilled by supporting key regimes that act as integral parts of the structure of such practices. There is a no need to be restricted to implied interpretations of legal provisions however. Other instruments that specifically support the continuance of customary law regimes include Article 26 of the UN Draft Declaration on the Rights of Indigenous Peoples and the International Labour Organisation (ILO) Convention 169. This convention is dealt with in more detail later but for present purposes it requires due regard to customary laws in the application of state laws (Article 8.1). It asserts the right of the peoples affected by the convention to retain their laws and institutions so long as *these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights* (Article 8.2).

Thus for GIAHS systems there is clear support for the maintenance of customary law subject to the protection of individual rights through higher regimes within the state or beyond.

Land and Human Rights

GIAHS land practices invariably involve indigenous or rural communities working in a traditional manner often in ancestral lands or lands otherwise occupied for many generations. One of the most sensitive areas of regulation surrounding these practices concerns the nature of land ownership in GIAHS sites. Many potential GIAHS communities may not possess land tenure within the state system imposed over their internal customary laws. Further, their own customary systems may grant internally a species of land rights that is not in conformity with the dominant state system. The sensitivities and complexities surrounding this aspect cannot be overemphasised. There are numerous pressures exerted on the land used in GIAHS or other traditional systems, not only by competing interested persons resulting from historical appropriation and regime change, but also by competing issues. Indeed, there are many examples of ancestral territories where groups of people have been removed to create state owned and controlled protected areas for conservation either of natural resources or of other forms of national heritage.[46]

There are also practical problems in determining native title resulting from lost records, clashes between legal systems that define land tenure and the difficulties in distinguishing between genuine claimants and fraudulent claimants who take account of the grey areas that sometimes affect native title issues[47].

The issue of land tenure in relation to GIAHS cannot be over-looked. If a GIAHS example that is operated in a traditional manner is to survive it has to be given permanent status and this will invariably require either the granting of security of land tenure to the community that operates it or transmission of the land to a state authority that controls the operations on the site through management agreements

[46] By example the establishment of Yellowstone National Park involved the forcible removal of the Tukarika Shoshone in order to meet the strict criteria of the existing concept of wilderness area. (See: Stevens S. (1997) *Conservation through Cultural Survival: Indigenous Peoples and Protected Areas* Island Press, Washington p. 28)

[47] This information is based on obstacles to the management of indigenous title claims described to the author by officials in Sabah, Malaysia who were dealing with native title in the Crocker Range area.

and the other regulatory devices that are used in protected area management. Where the GIAHS example involves peripheral activities in territories beyond the central GIAHS land, which may be regarded as ancestral lands through the customary law of the community, these extra zones may have to be acknowledged through additional land tenure arrangements or rights. Where a GIAHS example operates in secondary rainforest, by example, these latter rights may be designed to permit limited hunting and gathering activities in protected primary rainforest in a manner that is carefully controlled within the protected area's management plan. In this latter respect the Anglo Saxon concept of *common rights* (or *profits a prendre* held by a community) might be an appropriate model.[48] Where such common rights are not required it may be that some form of tenure may have to be established in buffer zones around a GIAHS site in order to protect the site from development that will degrade the operation of the traditional practices or otherwise to reflect the traditional customary rights in order to support the practices in an authentic manner. It is a difficult task to theorise about the whole package that may be required and of course everything can be achieved, except the granting of human dignity, through the device of state ownership of sites. However, with the emphasis on human rights, participation of communities and ground-up management it would make more sense to look to the granting of tenure (with some security reserved by the state, through planning measures, to ensure that the land is used in a manner that is acceptable to the GIAHS regime).

However, international legal instruments have not detailed the manner in which land tenure is to be granted to traditional communities. The obvious complexity and variety of legal regimes along with many other factors preclude general regulation. There are a number of relevant provisions within legal instruments, policy documents and draft instruments. These instruments deal restrictively with the rights of *indigenous* and in some cases with *tribal* people. Consequently some communities practising GIAHS will not fall within the totality of the ambit of these provisions.

Nature of indigenous people in international law

Both indigenous and non-indigenous traditional communities may operate GIAHS systems. It is necessary, therefore to define *indigenous people* in order to assess the extent to which international legislation may affect the varying communities involved in the GIAHS project. There are a number of definitions in policy documents and elsewhere.[49]

The International Labour Organisation's approach (in ILO Convention 169) captures most of the ingredients of other attempts and, bearing in mind its regulatory status, may be the best working definition as follows:

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[48] See: Harrop, SR (1999) *From English moors and meadows to the Amazon rainforest: land use, biodiversity management and forgotten law*. In Integrated Protected Area Management, Ed by M Walkey, IR Swingland and S Russell. Pp 249-260 London: Chapman & Hall and; Harrop S.R. (2003) *Human Diversity and the Diversity of Life- International regulation of the role of indigenous and rural human communities in Conservation* The Malayan Law Journal 4 MLJ xxxviii-lxxx

[49] See: United Nations High Commissioners for Human Rights Fact Sheet No. 9 (Rev. 1); The Rights of Indigenous Peoples Article 1(3) Draft of the Inter-American Declaration on the Rights of Indigenous Peoples (approved by the Inter-American Commission of Human Rights on 18 September 1995. O.A.S. Doc. OEA/Ser/L/V/II.90, Doc. 9 rev. 1); Martinez Cobo J.R. (1986) *Study of the Problem of Discrimination Against Indigenous Populations, Volume V, Conclusions, Proposals and Recommendations.* E/CN.4/Sub.2/1986/7.at p.5 and Chapter 3 of James Anaya S. (1996) *Indigenous Peoples in International Law* Oxford University Press, New York.

1. This Convention applies to:

(a)Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

International Instruments dealing with indigenous title to land and rights

Agenda 21
Chapter 26 -Recognizing And Strengthening The Role Of Indigenous People And Their Communities
This chapter urges governments, *inter alia,* to incorporate the rights of indigenous peoples into national legislation and to permit them to actively participate in national law and policy-making concerning the management of resources. Whereas this does not expressly mention restitution of lands it is supportive of a bundle of rights of indigenous peoples and, in respect of GIAHS sites which they occupy, the right to be involved in management and resource use decision-making.
7- Promoting Sustainable Human settlement Development
Countries are urged to strengthen *community-based land –resource protection practices* (7.30(e)) and to establish secure land tenure for, *inter alia*, indigenous people and other rural communities (7.30(f)). This is a key area developed in legislation and policy dealing with indigenous rights although not dealt with in appropriate detail in legislation dealing with conservation issues.
8- Integrating Environment and Development in Decision-making
In planning and land-related decisions states are urged to delegate decision making to the lowest level of pubic authority (8.5(g)). This is a central theme of many policy instruments but is not yet dealt with in detail in relevant conservation legislation.
10- Integrated Approach to the Planning and Management of land Resources
10.7(d) Governments are specifically asked to *strengthen management systems for land and natural resources by including appropriate traditional and indigenous methods.*
32-Strengthening the Role of Farmers
32.2 acknowledges indigenous and other rural families as stewards of natural resources and 32.5 contains a set of useful principles for GIAHS paraphrased as:

- Decentralise decisions making to local level
- Enhance land tenure, its use and access to it for women and other vulnerable groups
- Promote sustainable farming practices
- Strengthen policies that encourage self sufficiency in, inter alia, indigenous practices

- Enhance the participation of farmers in policy making when concerned with these matters

The Forest Principles
The principles urge support for indigenous peoples living in forests, the provision of an economic stake in forest use, appropriate land tenure arrangements (5(a)), and equitable benefit sharing in relation to traditional knowledge.

Johannesburg Declaration on Sustainable Development
The declaration mirrors the Forest Principles in article 45(h) where states are required to:

> *Support indigenous and community-based forest management systems to ensure their full and effective participation in sustainable forest management.*

United Nations Millennium Declaration[50]
The summary of the final report of Task Force 6[51] of the UNMD project provides some incidental support for GIAHS in that it urges the *use of sustainable agriculture techniques to preserve natural assets.* Aspects of the recommendations in the extracts from the Task Force final report are also relevant to suggest emphases that are needed to support GIAHS such as the establishment of communal ownership systems, the rationalization of land-use planning and the protection of natural habitat surrounding GIAHS-type locations.

Article 8(j) Convention on Biological Diversity
Article 8(j) avoids directly prescribing land ownership. It is clear that if traditional practices of indigenous peoples are to be maintained, there must be land on which to practice them and if the practices are to continue basic human freedoms and aspects of the components that support human dignity may have to be acknowledged. The granting of secure land tenure as a package of other measures is the obvious way to work towards securing the survival of GIAHS practices. Further clarification in a protocol or other instrument is required to take this further.

Draft Declaration on the Rights of Indigenous Peoples[52]
The UN Draft Declaration on the Rights of Indigenous Peoples is a precise, clear and forthright document and emphasises the importance of its provisions by stating that even these are only *minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.*[53]

Although only a draft document, the language is unequivocal and makes it clear that restitution of indigenous lands should take place. Where relevant to GIAHS, and land tenure issues are an important factor, the following sample articles demonstrate a great deal of support although compensation for a loss of GIAHS site within the terms of Article 27 might be an appropriate right but would be unlikely to support the GIAHS concept.

> ***Article 25***

[50] UN General Assembly Resolution 55.2
[51] *Environment and human well-being: a practical strategy- Summary version*
(Lead authors: Don Melnick, Coordinator, Jeffrey McNeely, Coordinator, Yolanda Kakabadse Navarro, Coordinator, Guido Schmidt-Traub and Robin R. Sears) UN Millennium Project Task Force on Environmental Sustainability 2005 www.unmillenniumproject.org/who/task06.htm
[52] E/CN.4/Sub.2/1994/2/Add.1 (1994).
[53] Article 42.

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation…

International Labour Organisation (ILO) Convention 169[54]

This convention deals extensively with the rights of indigenous and tribal peoples to land and the maintenance of their cultures, rights and dignity. The definition of these categories of people is wide-ranging and would cover many potential GIAHS communities. Further, a number of the issues dealt with in the convention have direct relevance to the GIAHS concept. As will be indicated some aspects of the convention could also run counter to the persistence of GIAHS.

The following examines themes that are particularly relevant to GIAHS, however, it must be noted that the whole convention could potentially have some relevance to a varying degree.

Respect for cultural and spiritual values and their links with land

First the convention emphasises the safeguarding of indigenous and tribal culture (Articles 2.2 and 4.1) and goes on in Article 13.1 to require members to

> *respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.*

[54] Convention concerning Indigenous and Tribal Peoples in Independent Countries International Labour Organisation (ILO) Convention 169. (Adopted by the General Conference of the International Labour Organisation on 27 June 1989.)

This obligation has wide implications for the cultural and spiritual relationship of indigenous peoples with their ancestral territories which go far beyond the scope of this study. The article may also be interpreted to support, as a subset of the wider relationship, the practical tradition-land relationship manifested in all cases within the GIAHS concept. Further, the land practices in many GIAHS examples are likely to be based on cultural and/or spiritual values that support (through customary law deriving from cultural or spiritual norms) the traditional practices that constitute the core of the system.

The article specifically refers to land that is not necessarily owned by the relevant community and yet the requirement to *respect* the values relating to that land implies the securing of the continuance of cultural practices. In practice, this can only be achieved in perpetuity by granting forms of tenure to the relevant community or by securing state protection through land designation or planning measures that prevent frustration of the cultural and spiritual links with the land however they are manifested.

Customary law and land title
In order to accommodate the idiosyncrasies in the diversity of concepts of land ownership within customary law regimes; Article 17.1 requires respect for customary land title transmission rules.

Land Tenure
The Convention emphasises indigenous peoples' rights to land and particularly aims at protecting access to and use of traditional lands. The full text of part II contains many relevant provisions in this respect. In the GIAHS context these provisions, whether they purport to grant, or may be interpreted as granting, tenure, are supportive of GIAHS in that they imply as a minimum that member states should take steps to protect the traditional access and use of lands (and surrounding zones) to the extent that they have been traditionally occupied (Article 14.1). Thus planning or protected area designation are corollaries of these articles if the full grant of land tenure is not possible. It is also suggested, irrespective of the form of tenure that is granted, that the rights should not be frustrated by other activities that might destroy the fruits of the land relevant to the practices (such as mining, mineral exploration, logging operations etc.). This aspect of access to natural resources is dealt with later.

Article 14.1 states important principles supportive of GIAHS particularly where GIAHS communities share lands with others or overlap activities in zones external to the central GIAHS lands. The Article states that:

> *The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*

The reference to *rights of ownership and possession* does not necessarily connote full ownership[55]. The intention instead appears to be to reflect the idiosyncratic nature

[55] See: *The International Labour Organisation Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989* Discussion document Ministry of Maori Development p 5.

of indigenous title as closely as it can be within the state laws. In some cases it may be necessary to create *sui generis* forms of tenure rights: *community or native title,* by example. Where a state legal regime permits, this form of title may be in the nature of a trust whereby ownership of the legal estate is held by the elders, for the benefit of the whole community.[56] In relation to access rights for shifting cultivators and nomads, as referred to in the article, rights of access in the form of easements or the Anglo-Saxon and Norman concepts of *common rights* or *profits a prendre* might be more appropriate (as already referred to). Again any concept must fit in with the state legal paradigm.

Access to natural Resources

A GIAHS community will need full, unobstructed access to the natural resources they require for their practices and total livelihood. The natural resources may be available in lands they own and also in other peripheral territories that they may have occupied solely for the purposes of obtaining those natural resources. It is essential that these rights are protected. Further, the activities of a GIAHS community may also be disrupted by external activities such as mining and forestry work. In order to prevent disruption, control in natural resources needs to be vested in communities with, at the least, state protection in the peripheral zones.

Article 13.2 explains that *lands* in the articles dealing with natural resources includes the *total environment of the areas which the peoples concerned occupy or otherwise use.*

Article 15.1 secures protection of the rights of indigenous peoples in the natural resources available in their ancestral territories as follows.

> *The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.* (15.1)

However, the position is altered by Article 15.2 where the state withholds certain rights:

> *In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.*

GIAHS communities need to have guaranteed access to all their essential natural resources whether through unequivocal rights in land or through state concessions. Where a state has reserved to itself rights, in the manner described in 15(2), compensation would not be an appropriate remedy and would not enable a GIAHS community to function. Although this convention deals with the subject robustly, an

[56] The English law of trusts lends itself particularly well to this approach to ownership. In countries where such a system is not legally possible there are other approaches that could be deployed such as the use of devices in the nature of corporate ownership vehicles.

instrument to grant greater powers would be needed to protect some GIAHS communities.

Other matters

Where land needs to be appropriated to expand and enhance a GIAHS system Article 19 could assist in that it requires that indigenous and tribal peoples are treated in an equivalent manner to other sectors of a society by *National agrarian programmes* in relation to:

> *(a) The provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;*
> *(b) The provision of the means required to promote the development of the lands which these peoples already possess.*

However, the article does not refer to traditional use of the land allotted and appears to be designed to avoid the marginalization of minority groups. Nevertheless, having regard to the wealth of references to tradition, culture and spiritual belief in the Convention there is nothing herein precluding such land being used for the expansion and development of GIAHS traditional practices, which are, by nature, dynamic.

Article 23 supports, and requires *whenever appropriate* the strengthening and promoting of rural and community based industries and traditional activities of indigenous and tribal people such as *hunting, fishing, trapping and gathering.* This article is clearly supportive not only of core GIAHS practices but also of the peripheral community practices that secure self–sufficiency in a GIAHS community.

The Convention is concerned, primarily, with the protection of the rights of indigenous and tribal peoples and where possible redressing the balance created by historical land and cultural appropriation. The GIAHS concept is a means to support this but also has its own volition. Thus if a GIAS site is designated as such it would be appropriate to require that it remains in that state (albeit one of dynamic development) in perpetuity. Article 7.1 might contradict this attempt to restrict land for GIAHS purposes, it states as follows:

> *The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.*

The article bestows on indigenous and tribal peoples full rights to decide their own future. It could conceivably permit a community to revoke GIAHS practices and move to other contemporary methods of land use and the article could be used to prevent unrestricted designation of a site for GIAHS purposes. Whereas GIAHS as a concept would seem to fully support the aspirations of indigenous groups this is one point where potential conflicts could arise. An instrument dealing with this issue would have to consider this at two levels. First, what is the mechanism for ensuring that a GIAHS site, which conforms to the criteria, only becomes one with appropriate consent from the GIAHS community? Second, where a designated site is to be undesignated, perhaps at the behest of the GIAHS community, what is the process for dealing with connected factors such as rights in shared traditional knowledge?

The alleviation of poverty

Clear rights of tenure and the involvement of GIAHS communities in land management are two essential foundations for effective GIAS operations. Securing firm foundations for the continuance of GIAHS systems would also necessarily assist to fulfil wider policy exhortations not extensively detailed herein dealing with the alleviation of human poverty. By example, effective GIAHS examples with a facility to share technology could assist to alleviate poverty particularly in arid zones and areas subject to drought from time to time.

It is not intended to repeat herein extracts from the extensive policy provisions dealing with the subject except for one example. Chapter 3 of Agenda 21, dealing directly with poverty alleviation, makes key connections between the issues. It refers to the need to decentralise aspects of state authority, in particular natural resource management (3.5 (a)) and 3.7 (d), respect for the cultural integrity of indigenous people and communities (3.7(b) and the empowerment of women in decision making (3.7(a). These are all themes relevant to GIAHS that are reiterated and in some instances developed in other policy and legal instruments that deal extensively with the subject such as the Johannesburg Declaration on Sustainable Development.

General Points

Whereas there is a great deal of support in international interests for the securing of clear rights to land and to operate GIAHS practices, the provisions are necessarily not focused on the issues that concern GIAHS. They are either focused on conservation or on human rights. The needs of GIAHS can fulfil both of these aspirations but falls in between them and requires its own specific prescriptions to secure that a GIAHS system may operate in perpetuity in a dynamic and developing manner.

There is a fundamental right expressed in the ILO Convention169, as has been noted, that permits traditional peoples to determine how they wish to live and how they wish to accommodate the possibilities that development might bring to them. However, the concept of GIAHS imputes some preservation of tradition. Balancing the drastic metamorphoses that development might bring with this need to preserve and maintain knowledge can produce conflicting mandates. Consequently there is an urgent need to clarify the extent to which GIAHS as a concept is able to support different levels of change. Whereas all traditional knowledge is dynamic, and change itself has been the prime creator of the ingenious aspects of the practices, there is a point at which change is no longer an evolutionary dynamic but has become a force with a volition of its own capable of eroding the practices completely. GIAHS must address the dilemmas that come with development before embarking on the construction of detailed regulatory engineering.

2.3. Intellectual Property Rights and the protection of traditional ecological knowledge within GIAHS

The nature of GIAHS Knowledge

All examples of GIAHS will embrace unique traditional knowledge (TK). GIAHS examples apply a unique body of practices to land use and possess, in many cases, unique genetic resources deriving from the practices (landraces by example). The community operating GIAHS is also likely to possess incidental TK (hunting, fishing and trapping technologies, medicinal plant knowledge and so on) derived from the relationship with the wider environment in which the GIAHS operates. There has been a general debate for some time about the wider ramifications for TK of

international intellectual property law (TRIPS[57] in the WTO portfolio being the central topic) and the issue of *biopiracy* has been examined in many debates and by numerous authors.[58] It is not intended to repeat the details of that debate herein or to qualitatively analyse the entirety of it but to identify the components of both the debate and the law that are relevant to GIAHS.

The issues concern a number of variants of intellectual property rights with the patent being at the centre of the debate. From the perspective of many traditional communities the concept of a patent derives from an alien regime of law that does not conform to their legal concepts and norms. Further, TK is fluid and often customary law operates a radically different approach to proprietary rights which makes it difficult to link the parameters of a patent to a component of TK. Thus TK does not necessarily lend itself to protection within the prevalent commercial paradigm. Further, even if traditional peoples could take some action to convert aspects of their knowledge into patentable inventions (through further applications or other inventive steps), there is the urgent need for capacity building to empower communities to operate strategically in the commercial world of IPR's with equal ability to negotiate and strategise.

One of the controversial and ambiguous issues surrounding TK is the level of protection that should be accorded to it by intellectual property rights. An IPR merely creates a power in the owner to exclude the unauthorised use of intellectual property by third parties.[59] Whereas the protection of TK implies taking steps to preserve the whole of the knowledge (beyond the patentable components) and often the community, culture and the traditional rights of ownership in the lands in which it subsists[60].

The areas where GIAHS knowledge requires protection through international intervention may be summarised as follows. It should be emphasised that many of the following points are not specific to GIAHS; they apply to all aspects of TK.

Preservation of GIAHS praxis and other knowledge

In some instances there may be an imperative to preserve GIAHS knowledge in tangible form and in a manner that both protects it from un-licensed exploitation and also sustains the dynamic process by which it is created.

It may be necessary to prescribe an active programme of archiving GIAHS

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[57] Agreement on Trade-Related Aspects of Intellectual Property Rights: (Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.)

[58] See by example: Correa, Dutfield G. (2000) Intellectual Property Rights, Trade and Biodiversity. IUCN, Earthscan Publications Ltd. London., Harrop S.R. (2004) Indigenous peoples, traditional ecological knowledge and the perceived threat of the intellectual property rights regime Law, Science and Policy Vol 2 pp207-239

[59] See: Downes D. (1997) Using Intellectual Property as a Tool to Protect Traditional Knowledge: Recommendations for Next Steps Center for International Environmental Law, Washington, DC 1997 and *The great protection racket: imposing IPRs on traditional knowledge* http://www.grain.org/seedling/seed-04-01-3-en.cfm

[60] See Simpson T (1997) *Indigenous Heritage and Self-determination: The Cultural and Intellectual Property Rights of Indigenous Peoples*, International Work Group for Indigenous Affairs, Copenhagen and generally for an excellent anaysis of the whole issue: *Correa C.M.* Traditional Knowledge and Intellectual Property Issues and options surrounding the protection of traditional knowledge *A Discussion Paper* commissioned by *The Quaker United Nations Office (QUNO), Geneva, with financial assistance from the Rockefeller Foundation* www.geneva.quno.info/pdf/tkmono1.pdf

knowledge (with a facility for regular and continued up-dating) since both the language and the culture, which constitute the vehicle for the traditional knowledge, may be rapidly disappearing. The principles enunciated in Article 8(j) are probably the most appropriate foundation for further work on this aspect and the issue of IPR's is indirectly relevant rather than having a direct connection. Archived material will primarily ensure that the GIAHS knowledge survives but it also creates a clear set of materials capable of being protected by copyright. Reducing the material to tangible form will also ensure that there is a clear record of *prior art* to preclude certain predatory patenting attempts as will be discussed later.

In any detailed description of archiving requirements it is essential to ensure that the GIAHS community has a full copy of the result and, if possible, is entirely in control of the archiving process.

Biopiracy and GIAHS

This pragmatic need to preserve the knowledge has consequences for its security. The process of archiving knowledge can itself result in un-licensed and unrewarded exploitation. However, biopiracy in all its forms may be receding as access rights regimes and research agreement requirements with benefit sharing arrangements, deriving from the stipulations of Article 15 CBD, are now prevailing in many range states.[61] Any intervention to archive the knowledge within a GIAHS system or other access to the relevant TK should therefore be controlled within these regimes. Beyond this national implementation there may be little more to expect from members of the CBD possessing rich biodiversity and diverse traditional cultural diversity. On the other hand all CBD members could support these new access laws by requiring in national patent laws that, prior to a grant of a patent concerning traditional knowledge, a certificate of origin of source germplasm or a certificate of permitted local access (and appropriate benefit sharing arrangements) should be produced.[62]

Some national regimes pose particular problems that can only be solved by a complete and uniform harmonisation of patent law principles. This is illustrated by the *Neem* case.

Access to Components of Biodiversity and closing of access by monopolies- The Neem case

It is imperative that international intellectual property protection systems operate so as not to frustrate the continuing viability of GIAHS. It would seem unlikely that existing systems of traditional knowledge with inherent technology could be affected but there is one instance of an unusual aspect of a foreign law allegedly doing just that. The Neem case does not relate to a GIAHS candidate but it nevertheless demonstrates potential problems that could affect GIAHS. The case is controversial and is used herein only as a theoretical illustration.

A US company obtained a patent claiming a simple innovation in relation to Neem, *Azadirachta indica*, which is a plant with many traditional applications in medicine, agriculture and pesticides. Although the knowledge in relation to Neem is both

[61] Ruiz M. (2003) Intellectual Property Rights and Biodiversity: Processes and Synergies Background paper for Workshop on TRIPS and CBD Global Biodiversity Forum Cancun, Mexico, September 5-7, 2003 IUCN p.7

[62] See: Tobin B. (1998) *Protecting collective property rights in Peru: the search for an interim solution* Asociacion para la Defensa de los Derechos Naturales, Lima, Peru and also, according to Corea: India has recommended this type of approach as a way of harmonising TRIPS with Article 15 CBD (Supra note X p7)

widely known and ancient it would appear that it had not been reduced to writing. Instead much of this dynamic knowledge had been transmitted in traditional rural fashion, informally and orally. A patent cannot be granted where the substance of the invention (*prior art*) is already in existence. Article 102 US Patent Act defines prior art, *inter alia*, as prior use or knowledge in the United States but restricts the scope to information *that is patented or described in a printed publication in…a foreign country*.[63] Had the traditional Neem technology derived from Native American oral knowledge the patent would have failed. To date the US patent stands, but a linked European Patent Office filing was revoked after hearing the evidence of the details of the prior art from Indian experts. The problem that could result from this type of scenario is that key GIAHS genetic resources could become economically less viable where a corporation from a financially advantaged country, that has the capability to control markets and create new ones, can operate a monopoly regime. If it succeeds in owning a patent or similar monopoly in local technology, according to some and in theory for present purposes, it can drive the price of the original genetic resource beyond the reach of non-capacitated local producers making the subject of indigenous knowledge inaccessible to them and with little of the large-scale profits returning to the source community.[64]

An appropriation of an IPR in a key aspect of GIAHS knowledge could, in a similar fashion, have the effect of fatally disrupting the equilibrium of the GIAHS example.

Clearly this approach to indigenous knowledge needs to be altered in the rare case where this is the approach at national level.[65] Article 3 TRIPS requires equivalent treatment to foreign and internal nationals. Article 102 US Patent Act treats traditional knowledge holders who are US citizens in a different manner to foreign citizens. A dispute panel exploring the matter might resolve the issue.

Protection of Farmers Rights and regulated shared development of knowledge in plants used in food and agriculture

The concept of *farmers' rights* as specifically enunciated in the International Treaty on Plant Genetic Resources for Food and Agriculture is an important one for GIAHS and recent developments go some way to remove the problem just described in relation to knowledge related to plants used in food and agriculture (although not knowledge relating to animals or knowledge related to medicinal plants). It also provides a platform for the establishment of a system of *sui generis* rights as envisaged by Article 27.3(b) TRIPS.

Article 9 deals with the issue and it is predicated in 9.1 on recognition of the contribution of *indigenous communities and farmers* to the conservation and development of plant genetic resources for agriculture. 9.2 requires national measures to *protect and promote Farmers' Rights including protection of* [relevant]

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[63] US Patent Act, 1997 § 102 (a)

[64] See Kadidal S. (1998) *United States patent prior art rules and the neem controversy; a case of subject-matter imperialism?* Biodiversity and Conservation 7, 27-39 p 28. One NGO lobbying paper stated that *A processing plant set up by Grace* [the Neem patent owner] *in India can handle 20 tons of seed per day. Almost all of he seed collected- which was previously freely available to the farmer and healer- is now purchased by the company causing the price of neem seed to rise beyond the reach of the ordinary people.* (http://www.platformgentechnologie.nl/patents/euro_pat_office/patents/neem_final_backgrounder_nl.shtml)

[65] Ibid Kadidal S. (1998) *United States patent prior art rules and the neem controversy; a case of subject-matter imperialism?* Biodiversity and Conservation 7, 27-39

traditional knowledge in genetic resources and participation in equitable benefit sharing for use of those resources in agriculture and for food. To the extent that methods and knowledge arising from GIAHS concern plants used for food or agriculture this clause is very relevant to the concept but peripheral GIAHS knowledge relating to animals and medicinal plants would not be within the ambit of the clause.

Article 9 is subject to a number of qualifications (as with the CBD) and this contrasts with parallel international agreements such as TRIPS which has an unambiguous drafting approach. Thus the obligations on a national government in this article are expressed to be *subject to its national legislation* and to be exercised by that government *in accordance with* [its] *needs and priorities.* The reference to national legislation reflects the approach in Article 8(j) and the points made in relation to that article must be repeated in this context. The reference to *needs and priorities* is superficially sensible in that these matters do need to be tailored to the national situation. On the other hand the phrase could be a licence to allow conflicting priorities to prevail. No such qualification in TRIPS applies for instance and the provisions therein are both absolute and not expressed to be supervened by any other interests or other international instruments.

Subject to these words of caution Article 9 could produce a matrix of national protection which could solve many of the fears deriving from the biopiracy and access to resource debate already referred to in respect of plant genetic resources. It also provides an international agreement in the event that a national government is declared to be in breach of TRIPS in terms of national treatment[66] and thus would conform to some of the requirements of indirectly related WTO panel decisions.[67]

Articles 10-14 deal with a *Multilateral System of Facilitated Access and Benefit-Sharing.* The system facilitates access to an agreed list of plant genera to secure food security and there are specific provisions for equitable benefit sharing in a relatively precise form where commercial profits are made from genetic resources available through this system. The arrangements for such sharing are secured, *inter alia*, through a standard material transfer agreement.

Much of the system described in these articles should support GIAHS both in the securing of benefits for traditional resource holders and to enable them to gain access to other genetic resources in order that their traditional systems may also progress and remain dynamically able to cope with changes in local climate and so on.

Traditional knowledge is self-determined by the relevant community and is dynamic. There is no reason why a GIAHS system should not progress by assimilating other external aspects of community knowledge or the developments of science. There is the need, therefore, to have access to technological developments protected by intellectual property laws that may make these developments financially beyond the reach of GIAHS communities. International systems of access are needed to ensure that the key GIAHS technologies can both be shared and participate in sharing technological developments of all types on an equitable basis. The PGRFA goes some way to create the mechanisms to achieve this.

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[66] Article 1(3) TRIPS.

[67] See e. g. *United States- Import prohibition of certain shrimp and shrimp products*: Decision of Appellate Body of WTO DS58/AB/R.

TRIPS and the CBD

General

The debate between the seemingly conflicting terms in these two international agreements has relevance to GIAHS because many of the supportive terms of the CBD could be frustrated by some of the proposed interpretations of TRIPS. The CBD and TRIPS do not operate from the same perspectives. The former's objectives are to preserve biodiversity in the context of sustainable development. The latter's objectives are to enhance development through open global markets. In some respects TRIPS is legally stronger in that it is precisely drafted and with no provision for subordination to other conventions; whereas the CBD expressly subordinates its often imprecise, framework provisions to other law[68] and in particular to IPR law[69]. Politically TRIPS is also supported by most states and yet the USA has not ratified the CBD. The exceptions to the general provisions of TRIPS mirror to an extent the exceptions in the core provisions throughout the WTO portfolio originally contained in Article XX of GATT 1947. To date the jurisprudence of dispute panel decisions has restrictively supported the environmental exceptions because of the overriding need to avoid distortion of markets.[70] However, the leading dispute panel decisions do prescribe multilateral negotiations[71] in order to justify derogations from the main principles of free trade within the WTO portfolio of agreements. Consequently, the CBD and subsequent protocols, treaties and conventions that deal with the subject-matter of IPR's should work with and not be in conflict with TRIPS.

The WTO's Committee of Environment is examining, *inter alia*, the relationship between the multilateral environmental agreements that contain trade measures and the multilateral trade regime and has included TRIPS within the ambit of the examination.[72] In particular it is examining the connection between TRIPS and the CBD[73] and also the important issue of Article 27.3(b).[74]

Article 27.3(b) TRIPS

The *a priori* assumption in TRIPS is that developments in every area of technology should be patentable and WTO members are required to provide patent protection for micro-organisms and microbiological processes. Nevertheless Article 27.3(b)

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[68] Article 22 CBD.

[69] Article 16.2 CBD. But note Article 16.5 which requires the parties to secure that IPRs are supportive of the convention subject to international and legislation (the latter aspect severely weakening the preceding words).

[70] See Report of the Panel –*United States- Restrictions on imports of tuna* DS21/R and DS/29/R. *United States – import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R . In the latter case, although the Appellate Body found that an environmental measure could be justified in principle under the general defences to GATT '47(and most other WTO agreement contraventions) contained in Article XX (g) of GATT '47, it also concluded that the measure failed to meet the requirements of the chapeau of Article XX. The chapeau requires that measures should not:

….be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade…

(See for a discussion of the point: Harrop, SR (2000) The trapping of wild mammals and attempts to legislate for animal suffering in international standards. Journal of Environmental Law Vol. 12 Issue 3 pages 333-360).

[71] Ibid.: shrimp turtle decisions.

[72] Environment and TRIPS (WT/CTE/W/8 and W/8/Corr.1).

[73] The CBD and TRIPS (WT/CTE/W/50).

[74] The Relationship Between the CBD and TRIPS with a Focus on Article 27.3(b) (WT/CTE/W/125).

TRIPS permits members to:

> *….exclude from patentability:*
>
> *(b) plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.*

And goes on to say that:

> *Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.*

The subject-matter of this article is clearly relevant to GIAHS in a number of respects. First, it permits members to remove from the protection of patentability some of the subject-matter of GIAHS knowledge; thereby taking away some aspects of the "threat" providing a sufficient number of key members in the IPR market do this. Second, it provides for a *sui generis* system to protect plant varieties. The debate within the TRIPS Council concerning the nature of such *sui generis* rights continues and has a wide range of variations in the suggestions put forward by different parties.[75] The results should accord with the PGFRA but this area requires careful observation. It is noteworthy that, in contrast to environmental and other MEAS, TRIPS does not permit non-party observers at its meetings and indigenous organisations and other NGO's are not present. Indeed the CBD has not yet been given permanent observer status.[76] In this context the PGFRA should certainly be a direct participant in the discussions.

A further development in the discussion is the pronouncement of the Doha Declaration.[77] In that instrument the Council of TRIPS is asked:

> *to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore…... In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.*

Again the deliberations are restricted to TRIPS members and those seriously working to join the WTO[78]. The WTO Committees on Trade and Development and Trade and Environment are also to play a part in the debate.[79]

The TRIPS/CBD debate demonstrates that there is a general problem with priorities and power bases in this area. Developments in international law have been rapid in commercially powerful areas such as information technology but slow in response to the case of traditional knowledge protection.[80] Agreements to further world trade are drafted precisely without qualification and are not expressed to be subject to other agreements whereas conventions designed to deal with the problem of cultural, bio and agro-diversity tend to be ultimately subject to other agreements and contain

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[75] Correa Supra note X pp24-25

[76] Correa Supra note X p 23.

[77] WORLD TRADE ORGANIZATION MINISTERIAL CONFERENCE Fourth Session Doha, 9 - 14 November 2001 MINISTERIAL DECLARATION WT/MIN(01)/DEC/1

[78] Ibid Article 48.

[79] Ibid Article 51.

[80] Dutfield G. *The Public and Private Domains: Intellectual Property Rights in Traditional Ecological Knowledge* WP 03/99, OIPRC Electronic Journal of Intellectual Property Rights, (http://www.oiprc.ox.ac.uk/EJWP0399.html) and on semi-conductor protection legislation see: Drahos, P. "Indigenous Knowledge and the Duties of Intellectual Property Owners". Intellectual Property Journal, 11, August, pp. 179-201, 1997.

qualifications that would allow nations who do not wholeheartedly desire to support the case to avoid obligations. In terms of direct problems to GIAHS, however, the lack of *locus standii* in TRIPS negotiations (whether generated by Doha or otherwise) seems anomalous and not constructive. The UN FAO should certainly take steps to involve itself in the debate to address the issues described herein.

Benefit Sharing

A current issue deriving from general rights in TK that is relevant to GIAHS is that there should be equitable benefit sharing where third parties deploy GIAHS and other traditional knowledge for their own use. Many instruments (Article 8(j) CBD included) refer to benefit sharing and the way to deal with this aspect for GIAHS may be to ensure in any GIAHS instrument that the relevant principles in the Johannesburg Declaration on Sustainable Development are followed. That declaration specifically urges states in paragraph 42(j) to *develop and implement benefit sharing mechanisms on mutually agreed terms for the use of* traditional knowledge and in 44(o) makes the following practical suggestion which could be directly assumed by GIAHS:

> Negotiate ….. *within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines*[81]*, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources.*

General Points

Although some specific, practical points have been made that could be executed in a GIAHS instrument the general subject of protection of traditional knowledge applies to a much wider range of knowledge than that found in GIAHS. However, the issues remain the same. There is no need to devise a system of protection just for GIAHS and it is important that the project is represented in all relevant negotiations and discussions but does not expend its time reinventing the wheel. Other international policy instruments have identified the key areas of work that are required thus paragraph 44(p) of the Johannesburg Declaration on Sustainable Development encourages the:

> *…successful conclusion of existing processes under consideration by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization, and in the ad hoc open-ended working group on article 8(j) and related provisions of the [CBD];*

The WIPO committee referred to has pooled together the issues and the ideas concerning the wider subject of protecting traditional knowledge. There are many papers available from the work of that committee with useful ideas and extensive analyses of the issues. It is beyond the scope of this work to analyse them all. However, as the JDSD indicates the WIPO intergovernmental committee is the appropriate forum for further work on the subject. Although many other institutions are relevant: the CBD, the FAO, WTO/TRIPS and so on; they all have individual emphases whereas the central issue is not conservation of biodiversity, agriculture or trade but intellectual property rights. WIPO focuses on this central issue and is capable of dealing with all the other issues equitably and in a manner that should ultimately promise a holistic solution. It is appropriate therefore to encourage work in this forum with full involvement of other interested institutions. However, it would be naïve to expect international regulation to emanate rapidly from that committee. In

[81] Supra note 23: *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation.*

the meantime, therefore, the GIAHS project needs to identify the IPR needs of the project and examine available solutions (such as emphasising access protection, archiving GIAHS technology and using central seed bank facilities and so on) in addition to lobbying the WIPO committee in respect of relevant advances in the law that would assist the project. If the UN FAO is not already represented in the WIPO committee it certainly should be. Beyond this, certain specific and practical points have been made in respect of some issues and these can be developed in a bespoke GIAHS instrument.

2.4. Trade

International Trade and GIAHS

GIAHS examples in their original form provided subsistence needs for traditional communities. In some cases a system would operate as totally self-supporting when coupling its agricultural practices with hunting and gathering for secondary needs (medicines, fish and meat etc.). Indeed, in many instances, there are still remarkable agricultural systems that operate self-sufficient practices. Further, most traditional systems produce enough surplus produce for trade with neighbours and beyond in order that some needs would be met through realising the trade value of produce. Where enough trade is possible to enter international markets some capacity building and international intervention may be needed in order to facilitate competitiveness amongst seasoned international trade participants.

For GIAHS systems there are three trade issues of varying importance deriving from international legal instruments:

A. CITES

The impact of the Convention in International Trade in Species of Flora and Fauna[82] (CITES) is relevant to GIAHS where products emanating from GIAHS communities are listed in the CITES Appendices and come into international trade or have the potential to be in international markets. Beyond the consequences to GIAHS within the terms of the convention, the WTO's Committee on Trade and Environment (CTE) is examining the relationship of Multilateral Environmental Agreements within the WTO regime and CITES is a subject within that debate, although CITES representatives are not visibly participating in the discussions. For the present purposes the matter of CITES within the multilateral trade regime would not be the concern of the GIAHS project unless final decisions were made.

B. Subsidies

Agricultural and other subsidies detrimentally affecting biodiversity-rich but otherwise comparably poor countries may be relevant to the enhancement of trade from some GIAHS systems. The exhortations deriving from the Johannesburg summit and elsewhere have made the wider point about the impact of subsidies and it is for other fori to receive the message. There is little point in the GIAHS project dispersing its energy on this aspect.

C. The WTO and GIAHS

Measures designed to enhance the competitiveness of specific GIAHS products through beneficial tariff systems, state approved ecolabelling and so on will have WTO implications. Such measures might create a distortion of trade in favour of the GIAHS example that would breach the foundational free-trade provisions operated by the

[82] Signed at Washington, D.C., on 3 March 1973 and amended at Bonn, on 22 June 1979

multilateral trade regime. There are two types of products that might have discriminatory measures applied to them and this may affect the way in which WTO rules apply. First, there may be unique products deriving from GIAHS communities that receive state assistance applied either at export or import. Second, GIAHS products that are not unique and have no integral difference to similar non-GIAHS products may similarly receive special treatment (when discriminatory measures will be applied on the basis of non-product related PPMs- i.e. GIAHS production rather than non-GIAHS production).

CITES and trade in products from GIAHS

The purpose of CITES is to conserve endangered species that are in international trade. It does not deal with other aspects of conservation nor does it deal with national trade. And yet CITES has moved, in the interests of promoting sustainable use, to regulate some internal activities in order to permit endangered species to come into trade.[83] Thus it permits some species artificially propagated or farmed to come into international trade even though the wild species are allocated the highest level of trade embargo protection through listing in CITES Appendix 1. This is achieved through split listing whereby ranched or farmed animals/plants under strictly controlled schemes, but not wild populations, are placed on CITES Appendix II.[84] If a GIAHS community is involved in a sustainable programme, through application of their technologies, to farm or otherwise cultivate CITES Appendix 1 species these may only come into international trade if a decision is made to permit that population to be down-listed to Appendix II. Listing decisions are complex in each case and depend upon an analysis of the international trade effect on the species in addition to ecological parameters, population dynamics and so on as detailed in the CITES listing criteria[85]. For split listing to occur an evaluation needs to be carried out in each case. Therefore it would be unreasonable to expect CITES to make a precise, blanket decision to support products from GIAHS sources. However, it could adopt a general resolution to find ways to support such systems where international trade is relevant. Although a pre-Rio convention, it is clear that CITES is taking steps to coordinate its activities with other institutions such as the CBD secretariat[86], and on other issues with the FAO.[87] It would be appropriate, once the issues are clearly identified, to approach CITES with a view to collaboration with the FAO on the GIAHS project if there are likely to be a number of instances where CITES Appendix 1 species are to come into trade from a GIAHS source.

There are few direct references in decisions of CITES of relevance to GIAHS. The following found in a CITES resolution dealing with the sustainable use of biodiversity provides one route for the commencement of GIAHS-related negotiations.

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[83] The following contains an analysis of the recent transition of CITES: Harrop S.R. (2003) *From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission* Journal of International Wildlife Law and policy 6: 79-104

[84] Wijnstekers, W., The Evolution of CITES, 6th ed. (CITES, 2001)

[85] See CITES: Conf. 9.24 (Rev. CoP12)

[86] See by example: CoP13 Doc. 12.1.1 Convention On International Trade In Endangered Species Of Wild Fauna And Flora Thirteenth meeting of the Conference of the Parties Bangkok (Thailand), 2-14 October 2004 *Strategic and administrative matters Cooperation with other organizations Synergy between CITES and CBD Achieving Greater Synergy In CITES And CBD Implementation*

[87] Ibid. Page 7 re: The Collaborative Partnership on Forests.

The needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources.[88]

Clearly special access to international trade for a GIAHS community could be lucrative and would mean that a significant benefit sharing return could be obtained through this for the benefit of the community.

Listings in Appendix II (other than split-listings) and in Appendix III could also have relevance to GIAHS but in remote circumstances and these will not, therefore, be analysed in detail herein. Any accord developed between CITES and the GIAHS project would necessarily cover all CITES possibilities.

The WTO portfolio of agreements and GIAHS

General trade measures

The basic provisions of the multilateral trade regime now operated by the WTO requiring non-discrimination against imported products originated in the General Agreement on Tariffs and Trade 1947. These provisions have been replicated and expanded in the WTO portfolio in order to counteract many of the different approaches taken to evade or avoid the original basic free trade principles and to deal with areas of trade that were not within the jurisdiction of the GATT or were not adequately dealt with in the old regime. The basic free trade provisions can have the effect of impeding aspects of some GIAHS systems that may require assistance in markets too competitive for specialist GIAHS products. Having regard to their sustainable source it would be wise for them to be extended advantages in markets dominated by other, less sustainable and often mass-produced, competing products. In order to assist GIAHS products a state would therefore have to directly intervene to apply measures or otherwise support such beneficial trade measures. Aside from the application of certain disguised measures or technical regulations dealt with later, such direct intervention by a state may contravene the basic free trade provisions in the GATT'47. In these circumstances there is a need to resort to the exemptions in Article XX within that agreement. Considerable jurisprudence has been devoted to the use of Article XX with substantial emphasis on the chapeau in the article and its prohibition on disguised restriction on trade and arbitrary discrimination. Many of the dispute decisions of the WTO have stated that multilateral consensus is required to support a discriminatory measure if it is to gain exemption pursuant to Article XX. In cases that did not rely on multilateral consensus a substantial number of unilateral measures seeking to achieve environmental aims have fallen foul of the provisions in the chapeau.[89] In the case of GIAHS products such multilateral consensus ought to be achieved to enable this aspect of GIAHS to be supported.

The categories within Article XX that would apply to GIAHS products include measures:

(b) necessary to protect human, animal or plant life or health

(f) imposed for the protection of national treasures of artistic, historic or archaeological value

[88] See Annex to Conf. 13.2 Sustainable use of biodiversity: Practical Principle 12- Addis Ababa Principles and Guidelines.

[89] There are a number of panel decisions that would be relevant and many academic and policy documents dealing with the area. For the present purposes see: WTO Appellate Body decision: *United States – import prohibition of certain shrimp and shrimp products* WT/DS58/AB/R dated 12 October 1998.

> *(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.*

Category (f) would only be relevant in a small number of cases and is only mentioned so that its benefit is not discounted. Category (g) is the most closely concerned with the GIAHS concept and in some instances category (a) would also be relevant. However, none of the categories fits the vision of GIAHS perfectly. Most GIAHS examples will conserve exhaustible natural resources but some, in arid zones for instance, are operating remarkable systems that emphasise the survival of human communities in hostile conditions rather than the conservation of exhaustible natural resources. In such an example category (a) may be preferable to (g).)

In practical terms, however, if the next stage of multilateral consensus is achieved there should be no obstacles emanating from the multilateral trade regime. (First, a dispute would have to be initiated, probably by a state that had signed up to the multilateral consensus and, second, there would be an element of diplomatic risk for a WTO panel to challenge a measure based on multilateral consensus encompassing issues of environmental and agricultural heritage.)

PPMs, Standards, Ecolabels and The Technical Barriers to Trade Agreement

There is an ongoing and controversial debate about the WTO's position on process and production methods (PPMs). This is relevant to GIAHS products because it is likely that GIAHS systems could be enhanced by ecolabels demonstrating the GIAHS source of products which may have non product related PPMs applied to them. The whole debate and the factors interlaced with it will not be reiterated herein; a great deal of material at official, NGO and academic levels deals with the detail.[90]

The Agreement on Technical Barriers to Trade within the WTO portfolio deals to an extent with the ecolabel issue. The purpose of the agreement is to avoid disguised restrictions on trade deriving from the application of technical regulations and standards. The TBT endeavours to achieve this by precisely delineating the circumstances in which technical regulations and standards may intervene in international trade. The basic principles of the TBT replicate the GATT'47 to an extent and consequently no unnecessary obstacles to international trade are permitted and in particular discrimination between foreign and domestic products that are alike is prohibited. This requirement immediately challenges GIAHS products that are only distinguishable from others on the basis of PPMs. (This is a common problem for many products deriving from sustainable sources and a long standing source of contention for many environment-oriented initiatives.) However, where a technical regulation is applied within an international standard there is a rebuttable presumption that it is not an unnecessary obstacle to international trade.

The following statement was made in a UNEP discussion paper in 1994:

> *Following the Uruguay round, the general agreement on tariffs and trade shows a strong preference for the use of international standards, particularly in areas concerning health and the environment, to avoid the possibility of national standards creating non-tariff trade barriers.*[91]

It may be, therefore, that technical criteria in relation to GIAHS products could be incorporated in a standard made under the auspices of the International Standards Organisation or some other similar body. That standard would enunciate the precise

[90] See for a comprehensive reference list and useful analysis of the law: *Section 6; Ecolabelling an International trade law Implications* in *Product certification and ecolabelling for fisheries sustainability* FAO Fisheries Technical Paper 422.

[91] Campbell L.B. (1994) *International Environmental Standards: Their Role in Mutual Recognition of Ecolabelling Schemes (Discussion Paper September 1994)* UNEP.

criteria to be applied to a GIAHS sourced product in order for it to be designated as such (by label or otherwise). Such standards are required to derive from international consensus rather than from a unilateral, prescriptive source and should provide an effective way of providing legitimate, negotiated exclusions to the general free trade principles of the multilateral trade regime. Key principles within the TBT are as follows.

- The use of technical standards themselves should *not create unnecessary obstacles to international trade* (Preamble).
- Technical standards *should not be more trade-restrictive than necessary to fulfil a legitimate object* (Article 2.2)
- Existing or imminent international standards should form the basis for technical regulations (Article 2.4)
- Transparency must be maintained in the process of development and monitoring of all standards (Articles 2.5, 2.9, 2.11, 4, 5 (non-exclusive list)).

It will be noted that these prescriptive principles provide a rebuttable safe haven for restrictions on international trade that are based on technical standards which have some international trade impact. Consequently, rather than prohibiting actions, this WTO agreement is providing a permitted means to restrict trade.

The legitimate objective in relation to GIAHS products would probably fall within the following criteria in Article 2.2 TBT: *protection of human health…,animal or plant life or health, or the environment.* However, the emphasis would be on the objective of the *environment* because the former words may be interpreted in a phytosanitary rather than wider context. (As evidence of this approach the words are reflected in the WTO's *Agreement on the Application of Sanitary and Phytosanitary Measures*[92] where, purely for the purposes of that Agreement, the use of the phrase *to protect animal or plant life or health* is narrowly restricted (in Annex A to the Agreement) to:

> *...measures taken to protect from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms …and…from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.)*

Unfortunately, therefore the GIAHS category is not clearly represented in the list of legitimate objectives within the TBT and in most cases the *environment* category is the only one that may be deployed.

Conclusion

If there are to be non-voluntary ecolabelling schemes it seems likely that these would have to conform to standards created within the TBT. It should also be indicated that where ecolabels based on standards made within the TBT rules distinguish between products on the basis of PPMs it is not clear whether they are within the TBT. However, in practical terms it might be best to close as many loopholes as possible. On a cautionary note it may take some time to negotiate a GIAHS standard. However, in order to defeat the obstacles to all the challenges to international trade and GIAHS (whether or not deriving from the TBT) some sort of international instrument may be the best way forward and there is one precedent to this effect. The attempts to provide an ISO standard for humane mammal traps failed after nine years of work. Rapidly thereafter, in the face of a threatened WTO dispute concerning a unilateral EU ban on the import of certain furs, the Agreements on International Humane Trapping Standards[93] were negotiated and signed containing both an international accord on the

[92] *The Results of the Uruguay Round of Multilateral Negotiations- The Legal Texts Agreement on the Application of Sanitary and Phytosanitary Measures*.

[93] There are two agreements. The first is the Agreement on International Humane Trapping Standards between the European Community, Canada and the Russian Federation. O.J.

general subject and technical standards. The trade dispute immediately evaporated. A similar route might well be the way forward for GIAHS if trade issues prove to be relevant.[94]

Multilateral Solution to Trade Issues for GIAHS

The theme arising herein is that there should be a multilateral accord on the trade issues of GIAHS. This could deal with both the CITES issues (to the extent possible as discussed) and the WTO issues. Either a legal instrument or a multilateral policy document may well suffice to protect GIAHS trade interests. The visibility of a policy document would be hard to ignore and diplomatically the WTO cannot be seen to be overriding even soft multilateral environmental mandates. There are a number of international policy documents that already support the trade measures contemplated herein, albeit in wider terms than the GIAHS concept encompasses. Examples of these are as follows.

Agenda 21 Chapter 14- Promoting Sustainable Agriculture and Rural Development
Section B of this Chapter urges more community control over agriculture and changes in market mechanisms and details other matters (14.16).

The Forest Principles
Article 13(b) urges the removal of tariff barriers and impediments to market access for locally processed/higher value-added forest products.

Johannesburg Declaration on Sustainable Development
Paragraph 99 (b) urges states to:

> *support voluntary WTO-compatible market-based initiatives for the creation and expansion of domestic and international markets for environmentally friendly goods and services*

Although this clause refers to *voluntary* mechanisms, state support could be construed as intervention and thus the WTO provisions would be likely to apply.

United Nations Millennium Declaration
Millennium Development Goal 8 urges states to *develop a global partnership for development*, which, although not directly referring to world trade, certainly would need to deal with the issues.

Part 3

3.1 The options for enhancing the status of GIAHS through regulatory or policy instruments

NO. L 042, 14/02/1998 P. 0043 – 0057. It was approved in the European Community by Council Decision 98/142/EC (O.J. no L 042, 14/02/1998 p.40-41.). The second is the International Agreement in the form of an Agreed Minute between the European Community and the United States of America on humane trapping standards - Standards for the humane trapping of specified terrestrial and semi-aquatic mammals. O.J. L 219 , 07/08/1998 p. 0026 – 0037

[94] See generally: Harrop, SR (2000) The trapping of wild mammals and attempts to legislate for animal suffering in international standards. Journal of Environmental Law Vol. 12 Issue 3 pages 333-360

General

Specific policy and legal engineering would facilitate the survival of GIAHS examples through securing the cooperation of states, relevant international institutions and other stakeholders in GIAHS operations. The most powerful tool available to achieve this would be the international convention. Some conventions, particularly in the field of biodiversity preservation are, however, very widely drafted and permit states considerable latitude in the manner in which implementation takes place. From a strictly legal perspective this may not be an ideal deployment of legal engineering but in the international diplomatic context such a convention may represent a great step forward.

Even a comparatively weak convention will take a considerable time to progress to signature and ultimately ratification by range and other interested states. For the GIAHS project there is an immediate need to protect GIAHS communities and their operations since, for many reasons, they characteristically have a fragile chance of survival. The option of a policy instrument as a more rapid solution must also be considered.

In some respects the distinction between international hard and soft law is elusive. This is particularly noticeable when comparing the effects of such instruments. WHC and RAMSAR (both convention-based regimes) and MAB (based on a soft law framework) have designated an extensive number of protected areas throughout the world. It is not appropriate to quantitatively analyse each list and use this as a basis for comparison because the parameters of each programme are very different.[95] The criteria are themselves limiting in both the WHC and the MAB programmes whereas, although RAMSAR operates within precise criteria, its list is the most extensive presumably because of the vast quantity of key wetlands around the world. However, it is interesting to note that all three programmes share protected area territories in a significant number of cases.[96] This alone indicates some level of equivalent status.

There are important lessons for GIAHS in this comparison especially since it has considerable synergy with aspects of the objectives and strategies of the institutions referred to. It must be borne in, however, that GIAHS is not just aiming at protecting territories, it is also aiming to preserve human oriented heritage. In this respect the MAB programme may be the closest comparator, although, as has been indicated there have been some moves in RAMSAR to emphasise the importance of communities in the RAMSAR sites and the WHC is now particularly moving to protect aspects of living and dynamic, rather than merely static and historical, heritage.

One other side effect, created irrespective of the type of instrument used, is particularly noticeable in the cases of RAMSAR, WHC and MAB. This is the clear branding that is linked to their protected areas. This is evident on a perusal of their material on the web, at their listed sites and in material provided by supportive

[95] Currently Ramsar has 1458 wetland sites designated for inclusion in the Ramsar List of Wetlands of International Importance. The World Heritage List includes 812 properties and there are 482 biosphere reserves within the MAB programme.

[96] It is not possible to be precise because the sites operated by each programme do not necessarily have the same geographical coverage and, in some cases, one site in one programme may embrace more than one site or only part of a site in another. Approximate figures for current shared sites are as follows: MAB/RAMSAR joint; 99; MAB/WHC joint: 81; MAB/WHC/RAMSAR: 18.

NGOs. It is clearly an attribute that would also assist the facilitation of the GIAHS project.

As a final, general point, if a policy route is to be taken it is important that it should be designed with the same amount of precision that would be applied to a convention. Indeed in the biodiversity preservation sector there are some soft instruments that are much more precise in their stipulations than some conventions that have suffered from compromise in the negotiation process.

Definition, components of GIAHS and formal criteria

The pinnacle of a GIAHS instrument would be the definition in that it would encapsulate the instrument's prime objective. Although the definition currently in use by the project may well be appropriate for application in a policy instrument, it may require further embellishment and subsidiary definitions in a legal instrument. The current language expressly refers to GIAHS landscapes being rich in biological diversity. As has been mentioned herein, there are potential conflicts in this area where the perception is that primary areas rich in biodiversity imply limited human intrusion. The example reiterated is the conflict between maintaining primary and secondary rainforest. Both are rich in biological diversity; one maintained with little or no human intervention and the other maintained only though the impact of human intervention. The GIAHS definition may require a further element to ensure that it remains a priority issue when such conflicts arise.

One way to resolve this, without losing key linkages with Article 8(j) CBD, the World heritage Convention and the MAB programme and so on might be to include and define other implied components of GIAHS such as agricultural heritage. The existing reference to biodiversity would permit the continued linkages but the extra element would assist to distinguish GIAHS landscapes from others thereby facilitating the creation of stand-alone GIAHS sites that would not be subservient to the mandates of other instruments.

Some work, both conceptual and legal, is required to ensure that the GIAHS components are accurately identified before such a step is taken.

Further data to determine priorities

Whether or not the definition of GIAHS is to be altered it is important to collect data in respect of as many and as varied a set of GIAHS examples as possible; specifically examining in that data aspects which might reflect legal requirements. The result would assist to enhance definitional requirements but would also facilitate the determination of other legal priorities.

The information should include the details described in Table 2.

Table 2

Data required to determine legal priorities and structure

1. Conservation issues

- Current protected area status of site and surrounding lands.
- Buffer zone needs.
- Human-environment conflict issues.

2. Land tenure arrangements

- Current tenure position in relation to core lands and
- Position in relation to other lands used by GIAHS communities.
- Conflicts in relation to use of land identified.
- Community linkages with national institutions/NGO's

3. Traditional Knowledge

- Key TK and level of protection required e.g. archiving
- Potential patentable technology within TK.
- Scope for wider use of the GIAHS TK
- Needs for external knowledge to enhance GIAHS.
- Third party use of knowledge occurring - benefit sharing issues.
- Access barriers to TK.
- Extent of unique genetic resources- seed stock etc.

4. Trade in GIAHS products

- Extent to which national and international trade takes place.
- Potential for international trade.
- CITES implications of trade.
- Potential for unique GIAHS products.

The data would also enable a set of criteria to be compiled to enable proposed GIAHS sites to be admitted to the GIAHS list.

Land Tenure

This is politically the most difficult area. It is also difficult to prescribe a detailed universal solution because of the idiosyncrasies of individual GIAHS site requirements. There may be many scenarios. GIAHS sites may be designated as protected areas under national laws with special, statutory rights of occupancy granted to communities[97]; they may be wholly owned by communities, they may even be owned by NGO's. However, there are two key factors for the GIAHS projects. The land must continue to be used for the GIAHS purpose and the community must be in control of the activities therein. An instrument dealing with this aspect would work at two levels. First, the GIAHS landscape and other related zones would need to be designated by the state as protected areas for the GIAHS purposes. Second, the communities would be granted some form of tenure therein (from full ownership

[97] As an example: the Ngorongoro crater area in Tanzania is a well-known wildlife park. Uncharacteristically for African wildlife protected areas the establishing instrument, the Tanzanian Ngorongoro Conservation Area Ordinance 1959, expressly permits the local Maasai people to live in the protected area.

to easements and other occupancy rights) subject to the overriding state designation. That tenure may be of a different nature depending on the zone to which it applies.

The instrument may also deal with the right of the GIAHS communities to operate within their own customary legal frameworks subject to certain overriding aspects of state law: human rights, minority protection and so on.

At the regional planning level there would be prescribed rules for community (as stakeholder) involvement in land use that might impact on the GIAHS example.

Traditional Knowledge
Provisions to link into other initiatives to protect knowledge (access regimes, farmers rights and so on) could be acknowledged. Where there are specific ways to protect the TK of GIAHS communities these would be reinforced. Specific programmes to archive knowledge could be detailed. Direct links to benefit sharing provisions, such as the Bonn guidelines, could be made or reiterated in a customised manner within an instrument.

Trade
The instrument could record the need to enhance the GIAHS concept through beneficial trade mechanisms such as a GIAHS ecolabel supported by states and could also refer to collaboration with CITES for split listing and other measures in respect of species used in GIAHS-sourced trade. It could also be designed to consist of a multilateral accord in order that it could be used as a shield against a WTO dispute. There could be a mechanism to develop standards to support a GIAHS label.

Options for creating an institutional and regulatory framework

Because of the cross-linking with other existing institutions there are a wide variety of options available to the GIAHS project. It must also be borne in mind that there are gradations of change that also have to be built into the possibilities. Thus the ultimate goal may be to achieve a comprehensive convention or policy instrument but to achieve this the first step might be a hybrid route with an initial declaration of policy supporting the concept, building up as the project grows to achieving the full target instrument. There also must be some realism about the current state of global politics and priorities for legislative development. A careful reflection on this subject will generate some understanding of the extent to which aspects on the GIAHS list of desirable objectives are currently achievable. In this respect, if the project proceeds in steps and is successful along the way, other more difficult to achieve objectives might become possibilities as the reputation of the project becomes enhanced.

The options for end-products are as follows:

- ***GIAHS Convention***
- ***Protocol to the CBD (Article 8(j), 15 etc.) – GIAHS/CBD joint venture***
- ***Soft law (policy) instrument performing much of the work of a convention but voluntary (not requiring state accession)***
- ***Hybrid- hard/soft instrument dealing with some aspects plus joint venture for management of protected areas with key organisations: CBD, WHC, MAB etc.***

- ***Do Nothing beyond relying on existing legal provisions, grant/financial aid and joint ventures***

GIAHS convention

If the route of convention were to be taken it would be best to ensure that all issues raised in the preceding analysis are dealt with. These are summarised as follows.

1) Define GIAHS in an expanded manner including the need to preserve biological and agricultural diversity and cultural/traditional heritage.

2) Define GIAHS site criteria (in an appendix) with provision for amendment.

3) Describe the ambit of GIAHS protected areas, including zoning (central dedicated zone, multi-use restricted zone and buffer area).

4) Define the operations that may take place within the GIAHS protected area zones.

5) Provide means to secure the persistence and security of GIAHS and the related communities either through the granting of levels of land tenure in central zones and peripheral zones or through other central mechanisms whereby licences to occupy state protected areas are granted.

6) Protect GIAHS lands from state intervention for mineral/forestry resources etc.

7) Encourage the persistence of customary law regimes in GIAHS communities subject to the overriding right of state law to govern human rights issues, access to higher courts, application of principles of justice etc.

8) Involve GIAHS communities as stakeholders in the management of lands that affect the GIAHS operations (water catchment areas etc.)

9) Define GIAHS traditional knowledge and give due regard for its dynamic nature.

10) Establish ownership of GIAHS knowledge within customary legal systems but with intervention of state law to establish full legal ownership (e.g. by trustee systems through community elders etc.).

11) Make provision for appropriate capacity building in GIAHS communities.

12) Define rules of access to GIAHS knowledge; establish archiving requirements and a central database for GIAHS knowledge (linking to the PGRFA, concept of Farmers Rights and the Standard Material Transfer Agreement system as a benefit sharing mechanism).

13) Describe linkages with other institutions dealing with intellectual property rights in TK.

14) Define mechanism for creating standards for labelling of GIAHS products (or include in an appendix such standards – defining in the main text the manner in which standards may be revised).

15) Describe specific linkages with other institutions/conventions (CBD, CITES, WHC, RAMSAR, MAB programme etc.) with requirement for cooperation where

possible specifically in the fields of protected area management and, in the case of CITES, sustainable trade in GIAHS community products.

16) Describe linkages into multilateral trade regime rather than declare subservience.

17) Describe NGO relationships (especially with regard to indigenous peoples representation)

18) Establish secretariat

19) Prescribe regular conference of the Parties

20) Funding mechanism.

21) Convention boiler plate clauses

As has been made clear the path to a full convention would be long and many of the suggestions herein would be subject to erosion through compromise along the way.

Protocol to the CBD

A protocol deriving particularly from Article 8(j), but also linking into other provisions of the CBD such as Article 15, would have the advantage that it could deal with many of the items listed in the preceding section but would benefit from the added strength of a joint venture partner. There could also be shared costs in secretariat work, the convening of conferences of the parties and aspects of administration.

The disadvantages of such an approach would be the uncertainty of the extent to which the GIAHS goals could be achieved without compromising some of the mandates concerning the conservation of biological diversity in the CBD. (The conflicts between human-influenced diversity and "natural" diversity are reiterated.) Further, some of the suggested clauses for the GIAHS convention may go well beyond the remit of the CBD, bearing in mind its existing text (land tenure issues by example). Negotiations on these issues might therefore fail before they reach the discussion table.

The negotiation of a protocol could be as slow a process as the development of a convention. However, it would be hoped that it would be marginally more rapid bearing in mind that international acceptance for many of the issues is already established in the parent convention.

Policy instrument

Apart from the boiler plate provisions that belong solely to the realm of international legal instruments much of the content of the GIAHS convention could be reiterated in a policy instrument albeit, in some respects, couched in rather more precatory and compressed language than the mandatory and detailed words in a convention. Of course acceptance of the text of a policy instrument would be voluntary and wherever GIAHS sites are discovered there might be a need for the GIAHS team to commence negotiation with a state to accept the terms of the instrument. However, as the GIAHS brand becomes more well known and the programme gains momentum this may become an easier task in many cases.

Soft law may also be strengthened in the manner it is presented. The MAB regime is governed primarily by a relatively simple and straightforward document known as the Statutory Framework of the World Network of Biosphere Reserves. To an English lawyer and those trained in countries with legal regimes derived from the English

system, the word statutory connotes a legally binding regime. To an extent the title of the MAB regime may assist to add the appropriate legal mystique to what is otherwise a soft regime.

The MAB approach is to use a straightforward framework that is supplemented from time to time by detailed strategy documents such as the Seville Strategy For Biosphere Reserves. Other international policy documents such as the Forest Principles and Agenda 21 are more detailed if not comprehensive in their coverage of the subject-matter. If the GIAHS project were to take the soft law route it would have the option of dealing with some aspects of the challenges that face GIAHS and building on its framework in subsequent initiatives or attempting to deal with all issues in one document *ab initio*.

Deploying the soft law route initially may also be a useful way to assist the project on the road to full recognition. Indeed, a short policy declaration proclaiming general support for GIAHS coupled with a brand launch with appropriate publicity would probably be the best first step whatever the desired end goal. This would enable GIAHS to gain sufficient credibility and power to begin working with pilot sites prior to moving on to a more sophisticated level of international acceptance. The FAO itself offers a number of useful routes to issuing this first policy declaration. It could be done through the Conference of the parties of the FAO or through one of its Committees or Commissions. COAG would seem an appropriate choice, as would the CGRFA.

Hybrid instrument

There are a number of issues that are best suited to policy instruments and others that may require the force of law. The choice may depend upon the nature of the topic, its level of diplomatic sensitivity or the strength of other texts dealing with the general area. Land tenure issues may be more acceptable to some states if dealt with in a non-binding instrument because of their sensitive nature. Similarly the international community may more easily accept issues of world trade relevance if they are contained in policy rather than legal texts because of the reluctance to compromise the already precise and apparently immoveable legal texts within the WTO portfolio of agreements.

Some issues may also be more easily achieved through joint ventures. The issue of CITES and GIAHS products may be a case in point. Whatever form an instrument takes there are many instances where unity creates strength and also would make financial sense. Where the criteria of institutions are capable of permitting joint initiatives and the conflicts are not fatal to a joint venture, the GIAHS project should continue to work with other organisations that share some of its objectives. The prime candidates are the CBD at the meta-level and the WHC, MAB and RAMSAR at the level of jointly designating sites. The secondary relationships might be with CITES, WIPO and with the WTO if it would allow this.

There is also scope for significant relationships with NGOs involved with the interests of indigenous peoples, conservation, agriculture and the alleviation of poverty.

Reliance on existing provisions

This analysis has demonstrated that many international policy instruments lend support to GIAHS and a number of legal instruments also support aspects of the project. The project could proceed on the basis of joint ventures alone and persuasion of states to adopt certain measures to protect GIAHS. However, there would still need to be an expanded definition of GIAHS and some form of criteria and

guidelines to enable GIAHS to function effectively, coherently and consistently across state boundaries and so even a rudimentary policy framework would be required.

As has been mentioned, without a concept established in its own right through an international instrument in whatever form, there is always the risk of compromise to GIAHS as it attempts to work in joint venture with legally stronger partners. Consequently, even if GIAHS is to rely primarily on other instruments, a policy declaration of support atleast at the level of a Council or Commission of the FAO would be required in order to give international credence to the project. Such a declaration has already been described as a good first step to achieving the other options but would be the minimum requirement if the current option is the chosen route.

Summary of the way forward

Whereas a new fully multilateral convention would be the ideal solution, in terms of the power to secure compliance, it seems unlikely that this would be feasible having regard to the time it would take to negotiate and put in place. Further, there are some very sensitive areas of regulation to deal with such as trade and land tenure. Without a sensitive long-term strategy, these topics alone could frustrate the progress of an endeavour to achieve a complex regulatory instrument. As has been seen, existing law comes very close to supporting the GIAHS concept and differences in emphases, although important, are at the margins in many cases. It would seem, therefore that a policy document reiterating the dynamics of the project and its connections with other ventures; adding in as many of the potential components of a convention as possible (clear definitions, criteria, zoning and tenure and planning requirements and so on) may be a more practical solution as a medium term goal.

UNESCO's Man and Biosphere programme is a good example of a soft regime that nevertheless appears to operate with the strength of a convention. This programme constantly reframes its strategy and works on many of the issues that would be important to the success of a GIAHS site especially as they relate to community involvement and the required gradation of zones. The MAB system is also responsible for extensive site designations around the world with a significant impact on state laws dealing with conservation of protected areas. The MAB programme also shares a number of sites with RAMSAR and WHC and thereby provides a model for GIAHS joint ventures.

However, the GIAHS concept differs dramatically from the MAB regime in that humans operate their agricultural practices within the central core zone in any protected area. Additionally, the primary emphasis of GIAHS is the preservation of agricultural practices, agricultural biodiversity and agricultural heritage. Consequently, whether or not the MAB approach is ultimately emulated, the logical home for it is within the portfolio of instruments, committees and commissions of the FAO.

In terms of the steps that should be taken it would be best to aim high but with sensitivity and caution. Whereas the ultimate goal might be a convention or a sophisticated policy framework, the first step could be a simple supportive policy declaration detailing the concept, reciting both its benefits and the manner in which GIAHS would fulfil not only the FAO's objectives but also many of the other current key global aspirations. This declaration could be made by the FAO itself or perhaps COAG or CGRFA. It may be that in practice either COAG or CGRFA would be the appropriate entities to issue the declaration.

The first step would probably coincide with an appropriate campaign to provide a strong branding of GIAHS with the communication of a clear self-justifying concept.

This way forward would enable GIAHS as a project to proceed with a programme of pilot site work and, in time as the project gains more recognition and appreciation from the global community, to develop a comprehensive policy or convention instrument to fully regulate the concept. Within that time it could also develop its relationship with other institutions and establish specific joint ventures with organisations sharing potentially relevant protected areas. If the project requires it could also develop a strategy for securing a series of accords with organisations such as CITES and the WTO where appropriate.

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Appendix

TERMS OF REFERENCE

The objective of the assignment is to do a systematic, consultative and forward-looking study of the relationship of international objectives, instruments and commitments with the Globally Important Agricultural Heritage Systems (GIAHS) initiative. This study will revolve around three questions:

1. What is the importance of existing international objectives, instruments and policy processes for the GIAHS initiative?
2. What is the contribution of the GIAHS initiative to the existing international objectives, instruments and policy processes?
3. What international institutional and regulatory framework should/could be put in place in order to support the objectives of GIAHS?

Work: In undertaking this study, the consultant will essentially review literature in the public domain and consult selected experts within and outside FAO. The work will include:

1. Review literature on international and regional multilateral agricultural, trade, natural resources and environmental conventions, agreements and declarations affecting agro-biodiversity and natural resource conservation, traditional knowledge (including community-based natural resource management systems), indigenous peoples, rural and sustainable development such as the Convention on Biological Diversity (CBD), the General Agreement on Trade and Tariffs (GATT/UNCTAD), Trade Related Intellectual Property Systems (TRIPS), the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC on IP, GR, TK and FL) the World Heritage Convention (WHC), the Categories of National Parks and Protected Areas of the World Conservation Union (IUCN), the Man and Biosphere (MAB) Reserves (UNESCO), the International Treaty on Plant Genetic Resources (ITPGR/FAO) and other relevant materials of the FAO governing bodies including the CGRFA and COAG, the European Landscapes Convention (ELC), Precautionary Principles, UNCED 1992 Rio Declaration (Agenda 21), WSSD 2002 Johannesburg Declaration, UN-CSD Forums, UN First Nations Forum, FAO Ministerial Conferences; UN Convention to Combat

Desertification (UNCCD), Universal Declaration on Cultural Diversity (UNESCO), Draft Declaration on the Rights of Indigenous Peoples (UN-HCHR) and the Millennium Development Goals (MDGs).

2. Appraise principles, policies and incentive mechanisms within these multilateral instruments conducive to strengthening and complementing the GIAHS initiative in terms of promoting global recognition of GIAHS and promoting their continued existence and evolution. Elements that are of importance to GIAHS include: the conservation and promotion of agricultural biodiversity and other natural resources, the promotion and protection of traditional knowledge systems, the promotion of cultural diversity, the recognition and promotion of critical linkages between culture and nature, promotion and recognition of indigenous and traditional customary systems of access to and management of natural resources, the enhancement of sustainable rural livelihoods and poverty alleviation;

3. Consult key resource persons in UN agencies, Convention secretariats and other international organisations on the questions of this study.

4. Propose a scenario for creating an international institutional and regulatory framework to achieve the objectives of GIAHS.

5. Hold a seminar in FAO-HQ on the basis of a first draft of the study to solicit inputs and views from experts especially within FAO;

6. Submit to the GIAHS Secretariat a final report based on this study. The target audience of the report is the GIAHS secretariat itself and all those involved directly in the governance, management and implementation of the initiative.

7. Prepare an executive summary for policy makers, which focuses on question 2.