

Consultancy Paper

“Study on compliance in relation to the customary law of indigenous and local communities, national law, across jurisdictions, and international law”

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I. INTRODUCTION

Since its emergence in the 17th Century, and up until and beyond World War II, international law defined a “people” as the aggregate of the population of a state. Further, the simultaneously evolving human rights system came to focus on the rights of the individual, vis-à-vis the state. This state-individual dichotomy remained essentially unchallenged into the 1970s, resulting in international law having little room for Indigenous Peoples and their collective rights. But the last 25 years or so have seen a paradigm shift in international law, predominantly occurring within the Indigenous Peoples’ rights discourse. When the UN started to seriously address indigenous issues in the late 1970s, international law’s traditional definition of a “people” in terms of citizenship was quickly contested. The UN and its member states soon acknowledged that Indigenous Peoples should be allowed to maintain, reinforce and develop the distinct societal structures they had managed to preserve despite colonisation. International law on Indigenous Peoples hence came to hold that the people as such could be bearer of rights, thereby legally and conceptually distinguishing Indigenous Peoples from minorities. The World Community has since then, gradually clarified what these rights encompass in more detail, and in the process also specifying where on the world’s political and legal map, Indigenous Peoples belong. In particular, the adoption of United Nations Declaration on the Rights of Indigenous Peoples (DECRIPS) by the UN General Assembly in 2007, has helped to clarify the content and scope of several Indigenous rights relevant to the International Regime on Access and Benefit Sharing.

The DECRIPS confirmed that Indigenous Peoples –do constitute “peoples” – and thus as “peoples” have the right to self-determination. Importantly, the right to self-determination that Indigenous Peoples enjoy is not a sui generis right but the general right to self-determination, applicable to all peoples. The right to self-determination encompasses a right of Indigenous Peoples to autonomy in their internal affairs, which in turn envelopes the right to determine over their genetic resources (GR) and traditional knowledge, innovations and practices (TK). The International Regime (IR) must be mindful of Indigenous Peoples’ status as legal subjects under international law, but need not define who constitute an Indigenous People. The IR must rely on a general understanding until the relevant UN human rights forum has agreed on a formal definition.

Indigenous Peoples’ status as legal subjects under international law has not only resulted in them enjoying the overarching right to self-determination. Recent developments in international law have also affirmed that Indigenous Peoples have rights specifically to GR and TK. The right to benefit from one’s creativity has evolved from being merely an individual right to embrace also the rights of Indigenous Peoples as collectives, pursuant to which Indigenous Peoples have the right to own and control TK they have created. They also have right to redress for TK already taken without their free, prior and informed consent (FPIC). In the same vein, both the general right to property, understood in the light of the right to non-discrimination, and international legal sources particularly addressing Indigenous rights, confirm that Indigenous Peoples have the right to own and control natural resources on their territory. Nothing in international law indicates that the general right to natural resources should not include GR. Notably, also in such instances when the state retains ownership rights to GR, the Indigenous People must still be regarded as having rights to the GR, inasmuch as the Indigenous People has traditionally used the GR. However, when a GR originates from an Indigenous People’s territory, but the people have

not actively used the GR, the Indigenous People might only have a right to share in the profits from the utilization of the GR. Recognition of Indigenous Peoples' rights to TK and GR must also lead to acknowledgement of Indigenous Peoples' customary laws pertaining to GR and TK. This follows from international law, but also from the very nature of TK. TK protection must recognize TK's constantly evolving character within a defined collective, a people. Hence, TK protection cannot be confined to a particular moment in time and must not regulate in detail regarding who within a particular group may hold what rights to what aspects of TK. That would freeze the TK in time and result in the TK being absorbed into domestic legislation rather than being governed by the cultural and legal context from which it springs.

In conclusion, Indigenous Peoples' rights to GR, TK and customary laws do not conflict with the principle of states' sovereign rights over natural resources. Indigenous Peoples' rights can, and should, be recognized side-by-side with states' sovereign rights.

II. WHAT ARE CUSTOMARY LAWS AND HOW DO THEY DIFFER FROM THE LEGISLATION OF THE STATE?

The Convention on Biological Diversity has adopted the standard definition of customary law as "law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws"¹.

This section briefly outlines both the advantages and disadvantages of this definition, and presents a few illustrative case studies on how customary law has been used in the legal systems of a few parties to the Convention in access and benefit sharing legislation.

One strength of the definition is that it is clearly related to the concept of common law, the "body of principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs from immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs"¹.

There are shades to the interpretation of the use and origin of common law, but the core of the idea is that the principles of law come from a long history of use and interpretation (precedence), not statute. Common law occupies a substantial space in national and international law². Both national and international private law of contracts, which is one core tool for access and benefit sharing and the enforcement of foreign judgments, is largely a matter of common law. Space does not allow for a detailed discussion of the common law, and general recognition of customary law in the legal systems of most of the world's nation states³.

¹ Black's Law Dictionary, 6th ed., (1990). West Publishing Co.

² See H. Patrick Glenn. *On Common Laws* (2007). Oxford.

³ For several leading accounts, see: Leon Sheleff. *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism*. 2000. Frank Cass; Peter Ørebech, Fred Bosselman, Jes Bjarup, David Callies, Martin Chanok and Hanne Petersen. *The Role of Customary Law in Sustainable Development*. 2005. Cambridge; Paul G. McHugh with Ashley McHugh Ngai Tahu. *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination*. 2005. Oxford; Stroud Francis Carter Milsom. *A Natural History of the Common Law*. 2003. Columbia University Press. An extensive bibliography of over 1500 references on customary law and common law is available from one of the authors, Preston Hardison, prestonh@comcast.net.

The definition, however, obscures significant differences between customary law, as commonly expressed by indigenous peoples, and common law and statutory law. The legal bases of the differences are addressed in Section III below. Here, a first distinction is made between what anthropologists have referred to as "etic" interpretations (external to a culture) and "emic" interpretations (internal to a culture). The differences relate to common indigenous vs. non-indigenous concepts about the origins of law, the relationships among the different kinds of beings, entities and objects in the world, the status of individuals, instrumentality (uses of the world), and the nature of transgressions and harms.

One recent interpretation by Rebecca Tsosie, a Native American law professor, summarizes some of the differences between indigenous customary law and modern legal systems⁴. In many dominant legal systems, property law is utilitarian, focuses on private property rights, and is based on a bundle of rights that "typically includes the rights to include, exclude, use, sell, transfer, purchase and encumber"⁵. Indigenous property systems are commonly characterized by collective ownership (where the community owns a resource, but individuals may acquire superior rights to or responsibilities for collective property), and communal ownership (where the property is indivisibly owned by the community). Although some property is alienable within and outside of communities, indigenous property systems emphasize duties and obligations to objects and resources. Many objects and resources are considered to be inalienable, fundamental to the identity and collective survival of the community, or having obligations and duties attaching from time immemorial to time infinite⁶.

Indigenous property systems also commonly emphasize the sacred, spiritual and relational values of resources rather than the utilitarian and economic. Although the term "resources" will be retained here, even the use of the term stretches the understanding of many indigenous peoples and illustrates some of the problems in the conversation between legal traditions. Indigenous peoples often have what has been termed a "kincentric" view of nature⁷. Nature is not inert and designed exclusively for the benefit of individuals or humankind. The world is viewed as being alive, and populated by beings that have varying degrees of kinship with humankind. Animals, plants, rocks, mountains, spirits, ancestors, human remains, ritual objects may all be thought to be alive and in some cases, fully human. Every person has obligations to maintain these relationships in the proper way. These relationships and obligations begin at birth, as "humans are born into a closely linked and integrated network of kinship, family, social and political relations"⁸ Failure to maintain them can lead to personal, collective and cultural harm⁹. These relationships are also essential in maintaining core collective values of reciprocity and respect that are necessary for

⁴ The following account draws extensively on arguments in Rebecca Tsosie. Cultural challenges to biotechnology: Native American cultural resources and the concept of cultural harm. 2007. 36 *Journal of Law, Medicine & Ethics* 396. Similar arguments are common in the works of indigenous scholars and writers. See, for example: XXXX

⁵ *ibid.* p. 397.

⁶ *ibid.* p. 398.

⁷ Dennis Martínez. Karuk Tribal Module for the Main Stem River Watershed Analysis: Karuk Ancestral Lands and People as Reference Ecosystem for Ecocultural Restoration in Collaborative Ecosystem Management. (1994). Karuk Tribe of Northern California.

⁸ Robert N. Clinton. The rights of indigenous peoples as collective group rights. 1990. 32 *Arizona Law Review* 739. Cited in Tsosie, note 4. p. 398.

⁹ Tsosie, note 4. p. 398, 407; Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain, July 09, 2003 to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 5-17, 2003. <http://www.wipo.int/export/sites/www/tk/en/igc/ngo/tulaliptribes.pdf>

cooperation and dispute resolution necessary for the continued survival of small-scale indigenous communities dependent on biodiversity for their livelihoods.

Indigenous peoples customary law related to "intangible property" also differs from mainstream legal systems. In the dominant legal traditions, the default for knowledge is to exist in the public domain as the common heritage of humanity. Intellectual property rights are granted for new knowledge as time-limited monopolies to provide economic incentives for innovation (with the exception of trade marks, trade secrets and geographic indications)¹⁰. One common requirement for protection is to fix intangible knowledge into a tangible form (writing, recording, etc.) in order to obtain intellectual property protection. Another common feature in dominant law is to grant exemptions for certain activities, such as research, education, and news reporting. There is also a general presumption (although not shared by indigenous peoples) that knowledge that has "leaked" beyond indigenous territorial boundaries through research or other forms of divulgence loses rights to protection and becomes part of the public domain.

These legal presumptions may conflict with customary laws in several ways. Traditional knowledge is not new knowledge. Fixing traditional knowledge in tangible form may violate customary law, to record or share some knowledge, even within a group. It is a common misconception that traditional peoples share all of their knowledge in common. In reality, knowledge is often entrusted to custodians that have received the knowledge through heredity lines, spiritual election, clan membership, gender membership or apprenticeship. The customary obligations of custodianship for healers, shamans, hunters, fishers, weavers, women, men and other groups within indigenous communities do not expire with time, but are often believed to be perpetual. The customary law restrictions may exist for all uses of traditional knowledge and associated resources, even those uses which other legal traditions consider to be exempt or in the public domain. The issue of "leakage", the status of traditional knowledge already recorded in books and held in databases and registers, and the status of GR and associated TK considered to be, in the public domain all raises significant customary law issues for many indigenous peoples.

The core of the problem is that indigenous peoples often have significant conflicts of law with dominant legal systems. Their definition of duties, obligations, powers, limitations and harms are defined through their customs, not national or foreign courts. An illustrative example concerns the treatment of Native Hawai'ian human remains in *Na Iwi O Na Kupuna O Mokapu v. Dalton*¹¹. The US Navy had disinterred and disarticulated human remains during construction. In Hawai'ian custom, "human remains are spiritual beings that possess all of the traits of a living person"¹². Disarticulation is not only disrespectful, it is the rendering of a living spirit that can feel and respond. Placing "human remains" in a drawer is not simply storage, but imprisonment in solitary confinement, separated from the land and other ancestors. Hui Malama, a Native Hawai'ian organization representing the descendents of the human remains, filed suit listing the remains as living plaintiffs. By doing so, under custom the Hui Malama accepted a sacred covenant to protect the remains and prevent data collected on them from being released to the public. Those who accept such obligations, under customary law, can receive spiritual punishment resulting in physical and spiritual harm

¹⁰ Tsosie, note 4. p. 399; XXXX

¹¹ Tsosie. Note 4. 406-409. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995).

¹² *ibid.* p. 407.

and emotional trauma. The human remains were denied standing in the case, as the judge could find no evidence of the cultural harms that were claimed¹³.

The purpose here is not to comment on the merits of the case, but to point out the difficulties of resolving conflicts of law. Even the concept of "human remains" as inert and material relics conflicts with customary law that accepts them as living spiritual beings. The dominant legal tradition that requires proof of cultural affiliation to such spiritual beings when they occur outside of contemporaneous territorial boundaries conflicts with customary law that considers them to be sacred and alive, no matter where they occur. The demand to meet certain evidentiary standards privileges one legal system against another.

All of these issues are significant for the development of an international regime on access and benefit sharing for indigenous GR and associated TK. Indigenous peoples often have elaborate and deep beliefs and customary law related to what other label as "genetic resources", traditional knowledge, proper uses of these and obligations towards them. Unless these issues are addressed by the proposed regime, it is likely that it will fail to deliver widespread benefits to indigenous peoples, or that benefit sharing will be fair and equitable¹⁴.

Part III reviews principles of international law that recognizes standing for customary law. Issues and examples in national implementation will be addressed in the next section. Rather than covering a range of examples, that have been covered well elsewhere in submissions to the CBD and to WIPO, as well as extensive reviews¹⁵, one case is explored in more depth to draw out some issues in customary law.

Many nations have recognized customary laws to varying degrees¹⁶, particularly as these relate to customary land tenure and local resource management. The United Nations recognized the close relationship between indigenous peoples, their lands and economic, social and physical well-being in Chapter 21 of Agenda 21 in 1993, urging parties to take measures for the "recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development" (Agenda 21, 26.3.iii).

The utilitarian value of customary law for the conservation and sustainable use of biodiversity is founded in its long history and regulating the use of natural resources¹⁷. Customary law as a whole is not static, but is based around sets of core principles that provide guidance for ongoing adjustments to dynamic environmental and social environments. While the details are often place-specific, adjusted to fit indigenous peoples to particular historical, social and ecological contexts, common principles of customary law include reciprocity, respect for the Earth and all living things (than can extend to rocks, mountains, waters and

¹³ *ibid.* p. 408.

¹⁴ Jim S. Fingleton. *Legal Recognition of Indigenous Groups*. 1998. FAO Development Law Service. <http://www.fao.org/Legal/prs-ol/lpo1.pdf>, pp. 33, 34: "the more the legislative regime allows groups to incorporate their own cultural concepts and processes into their formal legal structures, the more likely those structures are to be effective in meeting their members' needs and wishes. The recognizing law must, in other words, be culturally appropriate if it is to serve a useful purpose." Quoted in Carlos María Correa. *Elements of an International Regime for the Recognition of National Regulations on Access to Genetic Resources*. 2008. n. 71.

¹⁵ XXXXXXXX

¹⁶ E.g., see: John W. Bruce. *Legal Bases for the Management of Forest Resources as Common Property*. FAO, Rome; Michael A. Ntunmy. (ed.). *South Pacific Legal Systems*. 1993. University of Hawaii Press, Honolulu.

¹⁷ e.g. see Manfred O. Hinz. *Without Chiefs there Would be No Game: Customary Law and Nature Conservation*. 2003. Out of Africa Publishers, Winhoek.

other aspects of the world often thought of as inert by others), a focus on relational and restorative ethics and justice, and focusing on collective good rather than personal gain¹⁸. It is at the core of indigenous identity, and failure to recognize it are likely to erode the basis of sustainable ways of being and create long-standing resentment and resistance to substitutions for local norms, institutions, taboos and protocols¹⁹.

While a number of states have made progress in implementing laws to recognize customary law related to benefit sharing arrangements, these arise mostly from non-genetic uses of species in sustainable land, fauna and flora management or in sustainable wild food, herb, medicine, non-timber forest products (NTFPs), crafts markets and similar uses²⁰.

The difference between the use of customary law in these cases and its role in an access and benefit sharing regime are potentially significant. The focus of these laws are generally on activities that take place wholly on traditional lands, and the resource flows from which benefit sharing arises are conserved biodiversity, water, forest, wildlife, soil, ecosystem services and similar benefits, or a stream of natural products. Commonly, these are tangible things that can be defended, and those wishing to access them must negotiate this on a case-by-case basis.

When genetic resources and/or associated traditional knowledge are shared, both can be easily copied and shared without necessarily needing to return to the communities of origin. In non-genetic uses of biodiversity, users are acquiring what economists have called "rivalrous goods". They are finite, divisible, consumable and non-reproducible. If one person, for example, buys some medicinal herbs, another person cannot possess them simultaneously. And once the herbs have been used, the only way is to go back to the sellers for more.

Bioprospectors searching for genetic resources, however, are often not interested in the genes themselves, but in the information they carry and associated traditional knowledge. Information and knowledge, in the non-indigenous view, have been called "non-rivalrous". They can potentially be limitlessly copied. If indigenous communities share knowledge and genetic resources in common, then information and knowledge revealed for one is revealed for all. Other indigenous communities could therefore lose their ability to control access to shared GR and associated TK, or potentially to share in any benefits from their use. It is also worth reiterating that customary law may not view the information for GR and associated TK as non-rivalrous. Non-rivalrous goods are often conceived of as those that can be used limitlessly by all without diminishing use by any one individual. As described

¹⁸ Tsosie. Note 4; Krystyna Swiderska. *Protecting Traditional Knowledge: A framework based on Customary Laws and Bio-Cultural Heritage*. 2006. *Comparing and Supporting Endogenous Development (COMPAS-ETC)* / University of Bern - Centre of Development and Environment (CDE), Leusden, The Netherlands / Bern, Switzerland. pp. 358-365. <http://www.bioculturaldiversity.net/Downloads/Papers%20participants/Swiderska.pdf>

¹⁹ see Fingleton. Note 13; Brendan Tobin. *Customary law in ABS and TK Governance: Perspectives from Andean and Pacific Island Countries*. Draft. 2009. UNU/IAS Working Paper, Tokyo; UNU. *International Expert Group Meeting on the Convention on Biological Diversity's International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights*. E/C.19/2007/. 2007. p. 10.

²⁰ Sarah Laird (ed.). *Biodiversity and Traditional Knowledge: Equitable Partnerships in Action*. 2002. Earthscan, London; Sarah A. Laird, Rebecca McLain, and Rachel P. Wynberg. *Wild Product Governance: Finding Policies the Work for Non-Timber Forest Products*. 2009 (forthcoming). Earthscan, London; Brendan Tobin. *The Role of Customary Law in ABS and TK Governance: Perspectives from Andean and Pacific Island Countries*. 2009. UNU/IAS, Tokyo: "In Pacific Island countries, up to 80 per cent of land and marine rights are governed by customary law. In most countries of the region, customary law plays an important part in governing natural resource management."

above, customary law may hold that use by others can have harmful spiritual and physical impacts. The importance of this for the ABS regime will be discussed below.

As opposed to a non-genetic use of a natural product or durable good, there is a greater potential to transform the genetic materials and associated traditional knowledge into uses that do not respect the customary laws and traditional obligations for their appropriate uses. They present some difficult problems in controlling third-party uses, recognition across jurisdictions and compliance.

A few states have started to address these issues²¹. Peru, for example, introduced Law No. 27811 of 24 July 2002 for a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources. This agreement was the first comprehensive attempt of its kind, and has a number of measures that recognize customary law and indigenous rights to traditional knowledge related to biodiversity. The law recognizes ancestral rights to traditional knowledge, and requires that those wishing to access knowledge obtain prior informed consent (PIC), for which their right to apply their customary law and processes in the consent process is recognized²². This is consistent with the Peruvian Constitution of 1998 that acknowledges the judicial authority of indigenous peoples to use their customary laws within their own territories, provided the exercise of this authority doesn't interfere with the fundamental rights of the person²³.

The law also contains sui generis measures requiring that benefit sharing must occur with indigenous peoples even where traditional knowledge occurs in the public domain. Prior, informed consent (PIC) is encouraged, but not a necessary condition, for accessing knowledge already in the public domain.. A percentage of bioprospecting benefits are placed in the Fund for the Development of Indigenous Peoples that is managed and distributed by indigenous representatives. The Law also treats traditional knowledge as inalienable indigenous cultural patrimony, to be managed for the good of the present and future generations²⁴. Customary law is also used for dispute resolution.

The law arguably has two main weaknesses. One is that although there are progressive aspects to benefit sharing for traditional knowledge in the public domain (discussed below in part IV), it undercuts the position of a number of indigenous representatives who have argued that the public domain is a difficult concept for indigenous peoples²⁵. The second is that it allows for communities to independently enter into

²¹ For some leading recent global and regional reviews, see: APEC Intellectual Property Experts Group / APEC Committee on Trade and Investment. Survey on Access to Genetic Resources and Protection of Traditional Knowledge in APEC Economies.2008. APEC, Singapore. http://www.apec.org/apec/publications/free_downloads/2008.MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/committees/cti/pubs/2008.Par.0018.File.v1.1; Sarah A. Laird and Rachel Wynberg (eds.). Access and Benefit-Sharing in Practice: Trends in Partnerships across Sectors. SCBD, Montréal. 2008. <http://www.cbd.int/doc/publications/cbd-ts-38-en.pdf>; Manuel Ruiz Muller. The Protection of Traditional Knowledge: Policy and Legal Advances in Latin America. 2006. IUCN/BMZ/SPDA, Lima-Peru; Kirsten Neumann, Brendan Tobin, and Carol Smith Wright. The Central Asia and Mongolia Bioresources and Biosecurity Network: Capacity Development on Access to Genetic Resources, Benefit-Sharing, and Biosafety in Central Asia and Mongolia. 2003-2004. UNU-IAS, Tokyo, Japan.

²² Muller. Note 20; Brendan Tobin. Setting protection of traditional knowledge to rights: Placing human rights and customary law at the heart of traditional knowledge governance. In Kamau, E.C. and G. Winter (eds.): Genetic Resources, Traditional Knowledge and the Law: solutions for Access and Benefit Sharing. 2009. Kluwer, Dordrecht.

²³ Tobin. Note 21.

²⁴ Tobin. Note 21.

²⁵ SCBD. Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime. UNEP/CBD/WG-ABS/5/INF/9. SCBD, Montréal. 2007: " . . .

bioprospecting contracts, creating the situation described above where one community can disclose traditional knowledge shared among many communities, undercutting indigenous cultural patrimony²⁶. Various indigenous groups have also raised concerns about the effective participation of indigenous peoples in the development of the law and the low levels of benefit sharing required.

Around the same time of the development of the Peruvian law, a number of Jibaro peoples (Shuar, Achual, Aguaruna, Huambisa Jibaro and Candoshi) that had been involved on both sides of disputes over an International Cooperative Biodiversity Groups (ICBG) project met in two workshops in June and August, 2002²⁷. The ICBG-Peru bioprospecting project among the Aguaruna (1993-1999) had been the focus of intense controversy in the late 1990s. On the one hand, many indigenous peoples made claims of biopiracy. On the other, the project set up a prior informed consent process created four kinds of contracts, each tailored for a different proposed use of the genetic resources and associated genetic resources (license option agreements, biological collection agreements, know-how license agreements and subcontract agreements). The project became embroiled in difficult politics, with the involvement of foreign NGOs, national NGOs, and conflicts among indigenous representative organizations.

The two workshops were convened with indigenous organizations from Peru and related organizations from Ecuador. As a result of the workshop, the indigenous peoples decided to form greater unity and recommended the development of a set of common protocols based on common customary law for regulating access to traditional knowledge, and to require that compliance with these should be required in national ABS legislation²⁸.

In another approach a Peruvian indigenous organization, Asociación Andes, has been empowered by local indigenous communities through customary processes to represent their interests in negotiations for the repatriation of potato germplasm from the

any regime on access and benefit-sharing and sui generis protection of GR and associated TK must be compliant with the relevant indigenous peoples' customary laws and protocols, which provide the traditional legal basis for protection of genetic resources and traditional knowledge. This further implies that genetic resources and traditional knowledge protected by indigenous customary legal systems, do not fall into the so-called public domain, for the purposes of intellectual property." para. 38, p. 7; Victoria Tauli-Corpuz. Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples. Third World Network, Penang. 2004: "Traditional knowledge is not in the public domain. While much of it is known because we openly share this knowledge, it is still held by individuals, clans, tribes, nations and different independent communities. The use and sharing of this knowledge is guided and regulated by complex collective systems, customary laws and norms. While we share some of our knowledge and genetic materials, we reiterate, this does not mean that we put these in the public domain for unfettered use by anybody. We share these with those who are trusted, those who will use these for the common good and not for their own selfish ends, and those who know their roles and responsibilities in using the knowledge and resources." p.18. <http://www.twinside.org.sg/title2/IPR/IPRS05.pdf>; Clark Peteru. Draft Proposal for a Model Law on Traditional Ecological Knowledge. 2002: This draft act proposes that indigenous peoples retain rights to traditional knowledge in the "public domain" depending on how it was placed there - for example depending on indigenous understanding of the consequences of sharing knowledge, acquisition through deception, dedication to the public domain with full intent, and so on.

²⁶ Tobin. Note 21.

²⁷ Tobin. Note 21. For the ICBG perspective on this project, see: Walter H. Lewis and Veena Ramani. Ethics and practice in ethnobiology: analysis of the International Cooperative Biodiversity Group Project in Peru. In: McManis, Charles R. (ed.): Biodiversity and the Law: Intellectual Property, Biotechnology & Traditional Knowledge. Earthscan, London. For another set of perspectives, including commentaries by several researchers who have been involved in bioprospecting, see: Shane Greene. Indigenous people incorporated? Culture as politics, culture as property in pharmaceutical bioprospecting. *Current Anthropology* 45(2): 211-237. <http://are.berkeley.edu/courses/EEP143/fall2007/Indigenous%20People%20incorporated.pdf>.

²⁸ Tobin. Note 21.

International Potato Centre (CIP), with whom they signed an agreement in 2005²⁹. One of the main concerns of the communities was continued access to their historical variety of potatoes that have spiritual, aesthetic and practical values such as use in adaptation to climate change. They were also concerned about misappropriation as defined by privatization, commercialization, patenting and unjust enrichment.

Potato varieties that were collected from the region have been repatriated to the communities for in situ conservation in a Potato Park. The parties to the agreement "recognise the role of the Potato Park in developing a community protocol for the management of knowledge systems, in accordance with the customary rights and responsibilities of the communities, and agree to implement this Agreement in such a way as to reflect the principles of open sharing for mutual benefit and for the benefit of humanity," and any benefits generated from the use of the genetic resources are used for the continued maintenance of the Potato Park³⁰. The model that they use is of open access and a "commons" model. The communities have no problem with standard access for breeding research and distribution of their historical potato varieties to other communities, as long as these are not privatized and the uses conform to their customary laws. This mandate coincides with the CIP, which was founded on the principles of potato germplasm as the common heritage of humankind.

Some Lessons Learned on Customary Law

Some general conclusions that can be drawn from the previous discussions and examples are:

1. Customary law is a fully developed legal system with enduring aspects and dynamic feature that adjust to new circumstances that are framed in terms of the more enduring customary legal principles;
2. It proceeds from a very different cosmovision (holistic worldview combining multiple dimensions of the world, including spiritual dimensions);
3. There are both practical (utilitarian) and political reasons (indigenous rights: discussed below) to take customary law into account. Customary law has been adjusted to local circumstances, and is the context in which indigenous peoples make sense of and adaptive decisions about, the world around them, as well as the context, in which the fairness and equity of policies is judged;
4. Customary law should be respected at all stages of the development of ABS projects, from the procedures indigenous peoples use to accept, reject and negotiate agreements, to control over the uses of their GR and associated TK;

²⁹ Agreement on the Repatriation, Restoration and Monitoring of Agrobiodiversity of Native Potatoes and Associated Community Knowledge Systems between The Association of Communities in the Potato Park, represented by the Association for Nature and Sustainable Development (ANDES) and The International Potato Centre (CIP). <http://www.grain.org/brl/?docid=81995&lawid=2223>

³⁰ See: Argumedo, Alejandro; Pimbert, Michel. Traditional Resource Rights and Indigenous People in the Andes. 2005. IIED, London. 12 pp.; Krystyna Swiderska. Protecting Traditional Knowledge: A framework based on Customary Laws and Bio-Cultural Heritage. 2006. Comparing and Supporting Endogenous Development (COMPAS-ETC) / University of Bern - Centre of Development and Environment (CDE), Leusden, The Netherlands / Bern, Switzerland. pp. 358-365. <http://www.bioculturaldiversity.net/Downloads/Papers%20participants/Swiderska.pdf>

5. Regimes will need to involve dispute resolution procedures at and above the community level that are led by indigenous peoples and incorporate customary law;
6. If customary law is incorporated into any instrument related to ABS, such as contracts on mutually agreed terms, the regime should ensure that the terms are recognized and enforceable across all jurisdictions;
7. The regime needs to clarify what is inside and outside the scope³¹, and develop appropriate sectoral regulatory approaches, with the full and effective participation and free, prior and informed consent of indigenous peoples. Customary law may make some uses of GR and associated TK more acceptable than others - such as normal plant breeding versus the development of Genetically Modified Organisms (GMO). Customary law issues surrounding medicinal plants may differ from those involving traditional crops. Some sectors may lend themselves to broad-scale approaches to benefit sharing that can benefit many indigenous peoples, to narrower contract-based approaches;
8. Work with indigenous peoples to clarify needs, aspirations, terms and mutual understandings. "Misappropriation" may refer, inter alia, to: any use outside of the indigenous communities of origin; any biotechnological use; any commercialization; or to unjust enrichment without compensation.
9. Respecting customary law in ABS regimes is the best way to promote the goals of the Convention, because lack of respect is likely to lead to intractable conflicts and the failure or limited success of ABS initiatives, and the failure to equitably exchange traditional knowledge, innovation and practices that could contribute to the security of nations and all peoples in meeting the challenges of a rapidly changing global environment;
10. Failure to respect customary law will contribute to the further erosion of traditional biodiversity management systems and traditional knowledge associated with biodiversity, and thus to barriers to meeting the goals of this Convention as well as the loss of global cultural diversity.

III. THE LEGAL STATUS OF CUSTOMARY LAWS WITHIN INTERNATIONAL LAW

A. Indigenous peoples as legal subjects under international law and the right to self-determination

The nation-state, as well as the first international norms, saw the light in the wake of the Peace of Westphalia in 1648. The international legal system gradually emerging came to define a "state" as the territory over which the sovereign's (i.e. the King's) military power extended. It defined a "people" as all persons residing within the state, thus defined. International law was blind to ethnic and cultural differences. It was not concerned that states

³¹ SCBD. Note 25. "There is increasing convergence around ABS between sectors using genetic resources and those using raw materials as commodities. However, this is also associated with greater regulatory confusion at the national level with regard to the scope of ABS and whether or not regulation extends beyond genetic resources." p. 36.

defined by military power were rarely culturally homogenous.³² Neither did international law find it necessary to protect cultural minorities. Initially, international law was predominantly concerned with state-to-state relationships. But in addition, with time, rules governing the relationship between the state and its citizens – the embryo of the human rights system – surfaced. Since international law did not know cultural differences, the emerging human rights system was concerned only with the well-being of the individual.

When confronted with it, this international legal order proved problematic to indigenous peoples. The described state-individual dichotomy had no room for indigenous peoples. When measured by the European powers, indigenous peoples' societies were deemed not to have stringent enough societal structures to be regarded as states. International law knew no other legal subjects than the state and the individual, and had no room for indigenous peoples.³³

The described basic features of international law remained essentially unchanged to and beyond the two World Wars. These features were included in both the UN Charter as well as into the modern human rights system that the young UN set out to craft. Even the decolonization movement emerging after the world wars essentially bypassed indigenous patterns of association.

The last 25 years or so have, however, seen a paradigm shift in international law's position on the legal status of indigenous peoples. This development within international law is ultimately about indigenous peoples' political and legal status as such. But there have also been shifts in international law specifically pertaining to TK and GR. Section A, below investigates the political status of indigenous peoples. Sections B and C then consider TK and GR, specifically. Section D, examines indigenous peoples' customary laws and section E. considers the relationship between indigenous peoples' rights and state sovereignty, while section F. provides a brief summary of this section.

A. The Political Status of Indigenous Peoples

The principal right of all peoples is the right to self-determination. Discussions on who constitutes a "people" within the international legal discourse has therefore predominantly occurred in the context of the phrase "All peoples have the right to self-determination", enshrined e.g. in the common Article 1 of the 1966 UN Covenants on Civil and Political Rights (CCPR), and Economic, Social and Cultural Rights (CESCR), respectively.³⁴ In line with the outlined conventional position of international law, at the time when these instruments were adopted, the term "people" in the common Article 1 was understood to mean the aggregate inhabitants of a state. Indeed, until the 1980s, this position remained essentially uncontested. About that time, the UN commenced seriously addressing the situation of indigenous peoples. In 1982 the UN established a Working Group on Indigenous Populations (WGIP). The fact that the UN conceptually separated indigenous

³² It was simply decided that the population formed one nation. Hence the concept "nation-state".

³³ This study has no room for a lengthy exposé over indigenous peoples' first encounters with the international legal system. This brief overview necessarily has to simply history. For instance, particularly in the Americas and in the Pacific, there are examples of the European powers initially regarding certain indigenous people as international legal subjects. This is e.g. evidenced by the treaty making practices in these continents. But also in these regions, in the states' mind, indigenous peoples eventually lost their status as legal entities. For an extensive overview over international law's positions on indigenous peoples at this time, see James Crawford, *The Creation of States in International Law* (2nd edition, Oxford (2006)), pp. 260-271.

³⁴ Both adopted and opened for signature by General Assembly resolution 2200 A (XXI) of 16 December 1966.

peoples from minorities, who had their own working group, is significant. It shows that when starting to address the concept and issues indigenous peoples, the UN member states soon acknowledged that the situation of indigenous peoples differs significantly from that of minorities, and that international law must reflect this difference. Put simply, international law, to date, does not recognize minorities as legal subjects.³⁵ For instance, the UN Minority Rights Declaration does not protect minority groups as such, but rather individual members of the group.³⁶ Indigenous peoples, on the other hand, have to a large extent managed to preserve their own societal structures, including their own legal systems, existing side by side with the majority society. When the UN commenced paying attention to indigenous peoples, it took the position that indigenous peoples should be allowed to maintain and develop their distinct societies. In other words, international law on indigenous peoples came to recognize that the people as such, hold rights.

The above is for instance mirrored in the ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO 169).³⁷ Contrary to the Minority Declaration, most of the rights the ILO 169 proclaims are rights of indigenous peoples as such, and not of individual members of the people. Still, it is clear that at the time, the world community was still struggling with determining how more precisely, indigenous peoples fitted in the world political and legal map. For instance, the right to self-determination was not included in ILO 169. Rather, Article 1.3 stated that “[t]he use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.” The “rights” referred to was essentially the right to self-determination. The ILO could not agree on this matter, and deliberately left it to subsequent human rights processes to decide, to what extent the right to self-determination applies to indigenous peoples. Similarly, the Political Declaration adopted at the UN World Conference against Racism (WCAR) in 2001 stated that the rights adhering to the term “indigenous peoples” were to be determined by other fora.³⁸ By this time, it was also clear which forum would finally settle the matter. From its inception in 1982, the right to self-determination dominated WGIP’s agenda. In 1985, WGIP started crafting a draft Declaration on the Rights of Indigenous Peoples (DECRIPS). In 1993, it presented a draft that included an Article 3 which proclaims that indigenous peoples’ right to self-determination. A working group was formed to reach a political agreement on the draft DECRIPS. “[A]nother fora” in the WCAR Political Declaration referred to this working group.

While states sought a political agreement on self-determination in the DECRIPS process, authoritative interpreters of international law took position on the issue. The UN Human Rights Committee (HRC) and the UN Committee on Economic, Social and Cultural Rights (the CESCR), are mandated to authoritatively interpret the ICCPR and CESCR, respectively. Since the late 1990s, the HRC has developed a coherent jurisprudence on the applicability of the right to self-determination to indigenous peoples. When an indigenous group constitute a people (and not an ethnic minority), the HRC has repeatedly confirmed that the indigenous group does constitute a people also for legal purposes, entitled to the right

³⁵ The same is by the way true for “local communities”, a term that lacks meaning under international law.

³⁶ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly resolution 47/135 of 18 December 1992

³⁷ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the ILO General Conference at its 26th session

³⁸ A/CONF.189/12

to self-determination.³⁹ The CESC has been more cautious in applying the right to self-determination to indigenous peoples. Nonetheless, it has on numerous occasions underlined indigenous peoples' rights to decide in their own affairs, and has recently begun to explicitly apply Article 1 to indigenous peoples.⁴⁰ In summary, the HRC and the CESC have held that an indigenous group – inasmuch as it constitutes an indigenous “people”⁴¹ – do enjoy the right to self-determination.

The HRC and CESC jurisprudence is of particular relevance as authoritative interpretations of the primary legal source on self-determination. But also other international legal sources, including regional bodies, have confirmed that indigenous peoples are legal subjects entitled to self-determination. The EU Northern Dimension Action Plan affirms that the EU shall protect indigenous peoples' right to self-determination.⁴² Similarly, the African Commission on Human and Peoples' Rights has understood the term “peoples” in the African Charter to not necessarily mean the sum of the inhabitants of a state.⁴³ The Inter-American Human Rights bodies too, have repeatedly underscored that international law recognizes indigenous peoples' right to respect for their cultural integrity and identity as distinct peoples⁴⁴, acknowledging that indigenous rights are in part rights of the people as such.⁴⁵

States are of course the ultimate creators of international law. As mentioned, when agreeing on ILO 169 and the Durban Declaration, states referred to the DECRIPS process for their position on the legal status of indigenous peoples. In 2007, the UN member states confirmed the position taken by the UN HRC, the UN CESC and other expert bodies by adopting DECRIPS,⁴⁶ including its Article 3 proclaiming that “Indigenous peoples have the right to self-determination.” DECRIPS further includes several other provisions affirming indigenous peoples' status as legal subjects under international law. For instance, pursuant to Article 2, “Indigenous peoples ... are ... equal to all other peoples ...”. Technically speaking, DECRIPS is not a legally binding document. Nonetheless, as most UN Declarations, many provisions still enshrine legally binding international law, affirming that already recognized rights apply also to indigenous peoples. Such is the case with the right to self-determination. As mentioned, the UN member states were fully aware of the significance of DECRIPS Article 3. Thus informed, they adopted an Article 3 that is a clone of the legally binding common Article 1.1 of the 1966 Covenants. The only difference is that the DECRIPS, rather naturally, refers specifically to “indigenous” and not “all” peoples. As the Covenants Article 1.1, DECRIPS Article 3 proclaims that indigenous peoples have “the”

³⁹ CCPR/C/79/Add.105 (Canada), CCPR/C/79/Add.112 (Norway), CCPR/C/79/Add.109 (Mexico), A/55/40 (Australia), CCPR/CO/75/NZL (New Zealand), CCPR/CO/74/SWE (Sweden), CCPR/CO/82/FIN (Finland), CCPR/C/CAN/CO/5 (Canada), CCPR/C/NOR/CO/5 (Norway) and CCPR/C/USA/Q/3/CRP.4 (the United States)

⁴⁰ See e.g. E/C.12/PHL/CO/4 (Philippines), para. 16 and E/C.12/SWE/CO/5 (Sweden), para. 15.

⁴¹ Regarding a definition of indigenous peoples, see further below

⁴² Commission of the European Communities COM (2003) 343 final, adopted on 10 June 2003

⁴³ Communication No. 75/92 (1995), *Katangese Peoples' Congress v. Zaire*, Eighth Activity Report 1994-1995, Annex VI, para. 6. See also ACHPR's Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, para. 22.

⁴⁴ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc.26.(1984), at 81, para. 15 and Case No. 7615 (Brazil), Inter-Am. Commission Res. No. 12/85 (March 5, 1985), Annual Report of the Inter-American Commission on Human Rights, 1984-1985, O.A.S. Doc. OEA/Ser.L/VII.66, doc. 10, rev. 1, at 24, 31 and 33 (1985).

⁴⁵ IACHR, The Human Rights Situation of Indigenous Peoples of the Americas, OEA/Ser.L/V/II/108, Doc. 62 (2000), p. 125

⁴⁶ UN Document A/61/L.67. The DECRIPS was adopted by vote on 13 September 2007, with 143 in favour, 4 against and 11 member states abstaining.

- and not “a” - right to self-determination, affirming that it is not a sui generis right being proclaimed. Rather, DECRIPS Article 3 confirms that the general right to self-determination – the one right to self-determination international law knows - apply also to indigenous peoples.

Having confirmed indigenous peoples’ status as legal subjects, international law may now have to define who constitutes an “indigenous people”, for legal purposes. No formal definition exists today, although much has been written about common characteristic of indigenous peoples⁴⁷. But the UN operates with a few, rather similar, working definitions.⁴⁸ From these working definitions one can deduce what a formal definition, if adopted, may look like. In general terms, an indigenous people, is an indigenous group that had established a distinct society on a fairly definable territory prior to invasion or colonisation of that area, hence are often referred to as “first peoples”. In modern times they usually form a non-dominating sector of society, and continuously possess a common ethnic identity and cultural homogeneity. Most importantly, the group must still enjoy a distinct and intrinsic connection to its traditional territory.⁴⁹ Finally, the group must self-identify as an indigenous people. However, the International Regime need not concern itself with defining what constitute an indigenous people. It can rely on this general understanding or these common characteristics, until such a time as the UN human rights fora may adopt a formal definition.

In the context of the International Regime, the resource dimension of the right to self-determination is of particular relevance. It is in general terms laid out in DECRIPS Article 4, confirming that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs. Further, pursuant to Article 5, “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.” Naturally, given the centrality of GR and TK to indigenous cultures, indigenous peoples’ autonomous functions embrace such resources and knowledge. For the more exact content and scope of those rights, one has to survey provisions specifically addressing GR and TK. Provisions on indigenous peoples’ rights to their collective creativity are of particular relevance to TK. International legal sources on indigenous peoples’ rights to lands, territories and resources (LTRs) should be studied carefully when determining indigenous peoples’ rights to GR.

B. Indigenous peoples’ rights to their collective creativity (TK)

When the young UN embarked on crafting the modern human rights system, it acknowledged persons right to benefit from their own creativity. Pursuant to the Universal Declaration of Human Rights⁵⁰ (UDHR) Article 27.2, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” This provision was subsequently included almost verbatim in the legally binding CESCR Article 15 (1) (c). Clearly, on the face of it, the right proclaimed is an individual one. But also international law’s view on rights to creativity has

⁴⁷ Refer the Martínez Cobo Report to the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986), see below.

⁴⁸ See UN Document E/CN.4/Sub.2/1986/7/Add.4, para. 379-382 (the so called Cobo-definition) and the World Bank Operational Manual, Operative Directive, OD 4.20. Also ILO 169 Article 1 Indigenous Customary offers a definition of the peoples falling under the Convention.

⁴⁹ It is predominantly this territorial connection that distinguishes indigenous peoples from minorities.

⁵⁰ General Assembly resolution 217 A (III) of 10 December 1948

evolved recently, particularly in an indigenous context. Hence, the CESCR has, admitting that the drafters did not foresee this effect, underlined that in light of recent progressive developments in international law, CESCR Article 15 (1) (c) must today be understood to protect also the collective creativity of in particular indigenous peoples.⁵¹ The CESCR has further explicitly called on states to develop special IPR-regimes that protect the collective right of indigenous peoples to their TK.⁵²

By adopting DECRIPS, the UN member states have confirmed also this shift in international law. Article 31 proclaims that indigenous peoples “have the right to maintain [and] control their cultural heritage [and] traditional knowledge ... as well as the manifestations of their sciences, technologies and cultures, including ... genetic resources...” Further, pursuant to Article 11, “Indigenous peoples have the right to ... maintain, protect and develop the past, present and future manifestations of their cultures, such as ... technologies... [and] States shall provide redress ... which may include restitution ... with respect to their cultural [and] intellectual ... property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” Hence, the right to benefit from one’s creativity has evolved from being merely an individual right to embrace also the rights of indigenous peoples as collectives. Indigenous peoples have the right to own and control TK they have created. They also have right to redress for TK already taken without their free, prior and informed consent (FPIC).

C. Further on indigenous peoples’ rights to land and resources (GR)

Indigenous peoples’ rights to lands, territories and resources (LTRs) can conceptually be divided into rights that i) have as a basis the recognition that continued control over their traditional LTRs constitutes a pre-requisite for indigenous peoples being able to preserve and develop their distinct cultural identities and ii) constitute a particular aspect of the general right to property. Indigenous LTR-rights as a right to culture follows e.g. from CCPR Article 27, as interpreted by the HRC⁵³, and the ILO 169 Articles 13-15, as interpreted by the ILO Secretariat.⁵⁴ The right can be summarized as follows. If a competing activity prevents, or renders it significantly more difficult for, an indigenous community to exercise its culture, the competing activity is prohibited. No proportionality test is allowed. The threat the competing activity causes to the exercise of the culture cannot be compensated by the activity, if allowed, generating substantial profits or otherwise being of significant value to the society as a whole.

⁵¹ Committee on Economic, Social and Cultural Rights General Comment No. 17 (2005), para. 7, 10 and 32

⁵² E/C.12/BOL/CO/2 (Bolivia), para. 37 and E/C.12/MEX/CO/4 (Mexico), para. 46

⁵³ *Ivan Kitok v. Sweden* (Communication No. 197/1985), views adopted on 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third session, Suppl. No. 40 (A/43/40), pp. 221-230, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), views adopted on 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-Eighth session, Suppl. No. 40 (A/38/40), pp. 1-30, HRC General Comment No. 23 (50), reproduced in UN Doc. HRI/GEN/1/Rev.5, pp. 147-150, *Ilmari Lämsman et al v. Finland* (Communication No. 511/1992), views adopted on 26 October 1992, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth session, Suppl. No. 40 (A/50/40), pp. 66-76 and *Jouni E. Lämsman et al v. Finland* (Communication No. 671/1995), views adopted on 30 October 1996, Report of the Human Rights Committee, Vol. II, UN Doc. No. A/52/40), pp. 191-204 and *Apirana Mahuika et al v. New Zealand* (Communication No. 547/1993), views adopted on 27 October 2000, Report of the Human Rights Committee, Vol. II, UN Doc. No. A/56/40), pp. 11-29

⁵⁴ International Labour Office, ILO Convention on Indigenous and Tribal Peoples, 1989 [No. 169], a manual, 2003

For the purposes of the International Regime, indigenous peoples' property rights to LTRs are, however, of particular importance. Also these rights have been subject to recent progressive development. As described above, it is a defining characteristic of indigenous peoples that they have inhabited and used their traditional territories since before the arrival of other populations. Still, even though most domestic jurisdictions recognize initial occupation as a mean to acquire property right to land, such recognition was in most instances traditionally reserved for the non-indigenous population. Indigenous peoples' traditional land use was most often not regarded as giving rise to property rights. Rather, the state considered itself the owner of the indigenous people's traditional territory. As a result, still today, most states presume that they own the indigenous people's territory.

But recently, domestic and international courts and institutions have increasingly come to question whether a legal order that has resulted in private property rights to land for the non-indigenous population - at the same time as the state consider itself the owner of the indigenous people's traditional territory - is in conformity with the fundamental right to non-discrimination.⁵⁵ It has been held that if domestic law recognizes that occupation results in property rights to land, this must apply equally to the indigenous people. UN institutions, courts etc. have concluded that it is discriminatory to design a domestic legal system so that stationary land use common to the non-indigenous population results in rights to LTRs, whereas more fluctuating use of land characterizing many indigenous cultures does not. It is not sufficient that the legal system is formally non-discriminatory. It must also guarantee equal treatment in practice. In summary, international law calls on domestic law to acknowledge that indigenous peoples hold property rights to LTRs traditionally used, inasmuch as the domestic legislation acknowledges private property rights to land, in general.

As with the other rights discussed, international legal instruments specifically addressing indigenous peoples have affirmed the general development in international law. Pursuant to ILO 169 Article 14, states shall recognize indigenous peoples' rights of ownership and possession over lands traditionally used more or less exclusively. To lands today shared with the majority population, indigenous peoples have usufruct⁵⁶ rights. Article 15.1 confirms that the rights Article 14 proclaims encompasses also natural resources in the lands traditionally used. Pursuant to Article 15.2, indigenous peoples shall, whenever possible, share in the benefits from the use of minerals and sub-surface resources the state retains ownership over. DECRIPS Article 26.2 proclaims that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources ... they possess by reason of ... traditional occupation or use..." Pursuant to Article 28 "Indigenous peoples have the right to ... restitution or, when this is not possible, just, fair and equitable

⁵⁵ See e.g. the UN Committee on the Elimination of Racial Discrimination's General Recommendation No. 23: Indigenous Peoples: 18/08/97. See further the Inter-American Commission on Human Rights in *Maya Indigenous Communities of Toledo Dist. v. Belize*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev., *Mary & Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R. Doc. 5 rev. 1 at 860, para. 131 (2002), by the Inter-American Court of Human Rights in the Case of *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 79 Inter-Am. C.H.R. Ser. C, para. 149 (2001), *Moiwana community v. Suriname*, Inter-Am. C.H.R. (Ser. C) No. 124 (2005), by the Belize Supreme Court in Claims No. 171 and 172 of 2007, *Aurelio Cal and Manuel Coy et al v. The Attorney General of Belize and the Minister of Natural Resources and Environment* (Oct. 18, 2007), the Inter-American Court on Human Rights ruling in the Case of the *Saramaka People v. Suriname*, judgement of August 12, 2008 and the High Court in Botswana, *Misca*. No. 52 of 2002, of 13 December 2006. Compare also the ruling by the Supreme Court of Norway in the so called *Svartskog Case* (Rt 2001 side 1229).

⁵⁶ the legal right to use and enjoy the advantages or profits of another person's property.

compensation, for the lands, territories and resources which they have traditionally ... occupied or used, and which have been ... taken ... without their free, prior and informed consent.” Unlike ILO 169, DECRIPS includes no particular provisions on minerals or sub-surface resources. One must therefore assume that Articles 26 and 28 encompass also such resources.

There is no evidence of international indigenous rights law treating GR differently than other natural resources. Consequently, in states where domestic legislation provides for private property rights to GR, indigenous peoples have the right to own and control GR springing from their territory. If the state retains ownership rights to GR, the situation is perhaps somewhat more complex. But at least when indigenous peoples have traditionally used the GR in question, they must be regarded as having rights to the GR as such, and not only to TK associated with the GR. That is so, even when such rights are not recognized for the population in general. First, ILO 169, Article 15.2 limits states’ possibility to retain ownership vis-à-vis indigenous peoples to minerals and sub-surface resources. Article 15.2 does not refer to GR. Further, indigenous peoples’ rights to GR used also follows from the right to self-determination. If used by the indigenous people, the GR forms part of the people’s sphere of autonomous rights, as also explicitly confirmed by DECRIPS Article 31, quoted above.

When a GR originates from an indigenous people’s territory, but the people have not actively used the GR, it appears pertinent to draw an analogy from indigenous rights to minerals and sub-surface resources. Pursuant to ILO 169 Article 15.2, indigenous peoples have then, the right to share in profits resulting from the utilization of the GR, whenever possible. It is difficult to see a situation where it would not be possible to share profits with the indigenous people. Indigenous peoples’ right in general to share in profits from use of resources originating from their traditional territories has further been increasingly confirmed by state practice.⁵⁷ It appears safe to conclude that the right to share in profits forms, or at least is on the verge of forming, part of international customary law. Hence, with regard to GR situated on an indigenous people’s territory but not used by the people, the International Regime should award indigenous people at least a right to fair share in the profits from such utilization.

D. Indigenous peoples’ customary laws

When recognizing indigenous peoples’ rights to TK and GR, one must in the same breath acknowledge, and find compliance measures for, indigenous peoples’ customary laws and protocols pertaining to GR and TK. This follows immediately from what distinguishes TK from conventional intellectual property rights (IPRs). TK is – per definition - i) “traditional” in the sense that it is developed, maintained and disseminated within a cultural context and hence constantly evolving, and ii) “collectively held”, i.e. such development etc. occurs within a defined collective, a people. In other words, TK cannot be dealt with solely as information. It has an inherent normative and social component. As information, TK can easily be communicated beyond its original context, while the norms adhering to the TK are intrinsically local and much less readily transmitted.⁵⁸ Hence, any TK protection must first recognize TK’s constantly evolving character. TK cannot be confined

⁵⁷ See e.g. AHDR (Arctic Human Development Report) 2004. Akureyri: Stefansson Arctic Institute, pp 101-116.

⁵⁸ Antony Taubman and Matthias Leistner, “Traditional Knowledge”, in *Indigenous Heritage and Intellectual Property* 2nd edition, Silke von Lewinski ed. (Kluwer Law International, 2008), p. 60

to a particular moment in time. Second, TK protection must be mindful of that the fact that TK is collectively held also means that TK is managed in accordance with the norms of the collective. This is not to say that individual members of the people cannot hold rights to elements of TK. But to find out whether such rights exist, and what they contain, one has to consult the law of the collective. For these two reasons, TK protection must treat TK as the province of the relevant indigenous people. It must leave it to the norms of that people to determine internal rights to TK. The alternative is that domestic law regulates in detail, who within the group hold what rights to what aspects of TK. But that would deprive the TK of its characteristic of being traditional and collectively held. The TK can then no longer constantly evolve, in response to developments in the collective's society and its needs. In summary, TK therefore cannot be protected as a conventional property right. Domestic legislation cannot simply ascribe a confined set of rights – such as Intellectual Property Rights (IPRs) defined in detail by the law - to TK holders. This would freeze the TK in time and result in the TK from then on, being governed by, i.e. being absorbed into, domestic legislation. Domestic law can only protect TK by acknowledging its evolving character in a cultural context and by recognizing the autonomous legal order within which the TK lives.⁵⁹

International law enshrines the logic outlined above. Obviously, norm-creating institutions and the norms themselves constitute an integral part of any self-determination system. Indigenous peoples' customary legal systems are hence protected under the right to self-determination. In addition, indigenous peoples' right to respect for their customary laws is specifically addressed in international law. ILO 169 Article 8 proclaims that national laws and regulations shall give due respect to indigenous peoples' customary laws. Pursuant to DECRIPS Article 34, indigenous peoples "have the right to ... develop and maintain their ... juridical systems or customs". Further, DECRIPS Article 40 proclaims that the implementation of indigenous rights "... shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned..." and Article 27 particularly emphasizes that states shall "give due recognition to indigenous peoples' laws, traditions, customs and land tenure systems..." when implementing indigenous peoples' rights to LTRs. Recall also that pursuant to DECRIPS Article 11, states shall provide redress with regard to TK already taken in violation with indigenous peoples' customary laws.

E. The relationship between indigenous peoples' rights and state sovereignty

The International Regime respecting indigenous peoples' rights pertaining to GR, TK and customary laws does not conflict with the principle of states' sovereign rights over natural resources. Indigenous peoples' rights can, and should, be recognized side-by-side with states' sovereign rights.⁶⁰ State sovereignty is a principle of international law providing that no state may interfere in another state's internal affairs. States are essentially

⁵⁹ One can here make a comparison with indigenous peoples' rights to LTRs. Particularly in common law countries, courts have for several years acknowledged that native title distinguishes itself from other rights to land, precisely because one cannot limit native title to a set of rights frozen in time. Rather, the courts have held, autonomous legal traditions constitute an integral part of native title. For instance, in the groundbreaking *Mabo Case*, Justice Brennan J. submitted that "*Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.*" See *Mabo v. Queensland (No. 2)* (1992) 107 ALR 1: 42.

⁶⁰ Pursuant to GA resolution 41/120 of 4 December 1986, international instruments should e.g.: a) be consistent with the existing body of international human rights law" (i.e. not fall below existing international standards) [and] b) be of fundamental character and derive from the inherent dignity and worth of the human person.

free to determine and apply laws and policies within their jurisdiction, something external actors such as other states and multinational corporations must respect. But state sovereignty is subject to limitations prescribed by international law, in particular human rights law. This is mirrored in CBD Article 3, affirming that state sovereignty is limited by the UN Charter and other principles of international law. It follows from the UN Charter that human rights law conditions state sovereignty in connection with the state's treatment of persons and peoples under its jurisdiction. In conclusion, the principle of state sovereignty over natural resources cannot be invoked against the rights of indigenous peoples residing within the state.⁶¹

F. Conclusions

To comply with the international legal system, the International Regime shall recognize indigenous peoples' rights to their TK and GR, in manners that acknowledge their collective and evolving character. Protection of indigenous peoples' TK and GR shall hence include measures ensuring compliance with their customary laws, treating TK and GR as the province of the indigenous people in question. But not only does recognition of rights to TK and GR demand respect for customary laws. As will be further elaborated under IV and V, below, the best way to ensure compliance with customary laws is conversely to provide adequate and correctly designed protection for TK and GR.

IV. HOW CAN THE INTERNATIONAL REGIME ENSURE RESPECT FOR CUSTOMARY LAWS IN THE JURISDICTION OF THE COUNTRY IN WHICH THE INDIGENOUS PEOPLE RESIDE

[International endeavours to protect TK as a distinct, sui generis form... confront a deep paradox: how to give broader, even global meaning and effect to norms and knowledge systems that are intrinsically and irreducibly local in character, and that rely on the original community context for their full significance, without eliminating the essential qualities of TK. Too strong and pre-emptive an international sui generis model for IP protection may homogenize TK:⁶²

Any attempt to devise uniform guidelines for the recognition and protection of Indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single 'model' that will not fit the values, conceptions or laws of any Indigenous society.⁶³

The diversity of the very subject matter of TK and of its customary modes of protection may require, instead, a *suorum genorum* framework – an heterogeneous network of mutual recognition that does not confine TK into one distinct genus, but recognizes that divergent knowledge traditions, integrated with

⁶¹ See Report of the International Indigenous and Local Community Consultation on Access and Benefit Sharing and the Development of an International Regime, UNEP/CBD/WG-ABS/5/INF/9, 19 September 2007, paras. 32-33.

⁶² Tauban, Anthony, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge* at 3.

⁶³ Four Directions Council, 'Forests, Indigenous Peoples and Biodiversity,' Submission to the Secretariat for the CBD, 1996, in Tauban, Anthony, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge* at 3.

customary law, warrant recognition as distinct genera, under the aegis of a general set of core principles.⁶⁴

As Section II explains, the way in which customary law distinguishes itself from statute law is no legitimate reason for not respecting customary norms. Nonetheless, as Section III has indicated, to effectively recognize customary laws, one must not be ignorant to its differences in comparison with statute law.

Often, there is little easily accessible information available on what constitutes valid customary law. Indeed, it might be difficult for a non-member even to know whether a norm exists at all. And if it has been determined that a relevant customary norm pertains to the TK or GR in question, sometimes the Indigenous People might not – under their customary legal system - be in a position to disclose certain elements of their law to non-members or uninitiated members. Further, also if the non-member may be able to discern a certain practice, she might still not be able to determine whether the members of the group adhere to the practice because of viewing it as a norm, or for other reasons. In other words, it might be difficult to determine whether there is *opinio juris*, which is normally a necessary element for a practice to constitute a norm. Finally, also when the non-member has overcome all the outlined hurdles, it is, as described above, a defining characteristic of customary laws that they are constantly evolving over time. This means that what was valid law some time ago, might not be so today.

These characteristics of customary laws must be taken into account when designing an effective way to ensure compliance with customary norms in domestic legislation. There are two principal legal technical solutions available to make domestic legislation comply with customary laws.

1. One can incorporate the customary norms of an Indigenous People into the domestic legislation, by copying relevant material provisions of the customary law into national law. In other words, the customary law determines rights and obligations within another, separate, legal system. The customary law is then not a source of law proper. For the reasons just mentioned - such as that customary norms are often not known or at least not known in full - incorporation might often not be a practical approach. But more importantly, as Section III D. describes, because of TK's constantly evolving and collective character, it might often be harmful to incorporate the customary law into domestic law. Incorporation risks freezing the norm in time, depriving the customary law both of its capacity to adjust to changes in the environment and its intrinsic connection with the society it is supposed to govern.

2. It is therefore, in most instances, a more practical approach that domestic law recognizes and give legal effect to the relevant customary laws simply by referring to the customary legal system, but without specifying its material content. By doing so, domestic law extends the legal effect of the customary law as a legal source proper beyond its traditional reach. An example of such a protection system is the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.⁶⁵ The African Model Legislation proclaims that “the State recognizes and protects the community rights ... as they are enshrined and protected under the norms, practice and customary law found in ... the indigenous

⁶⁴ Tauban, Anthony, *supra* 33, at 3

⁶⁵ OAU Model Law, adopted in 2000.

community, whether such law is written or not”⁶⁶. Similarly, the Costa Rica Biodiversity Law recognizes custom as a source of law for establishing sui generis community IP rights to traditional knowledge, proclaiming that such rights exist and shall be legally recognized by the mere existence of the cultural practice.⁶⁷

In addition to specifically recognizing the customary law as such, national law can also indirectly recognize the customary law by recognizing that Indigenous Peoples’ TK and GR vest in that People. The Model Law of the Pacific Community constitutes an example of this approach. The Model Law calls on national law to define TK holders as:

- i) the people; or
- ii) the individual who is recognized by the People as the individual in whom the custody or protection of the TK are entrusted in accordance with the customary laws of the people.⁶⁸ Similarly, Peruvian law requires FPIC by an Indigenous People before their collective knowledge derived from biological resources are accessed.⁶⁹

Of course, there can also be combinations of the two approaches. For instance, under the Philippines Indigenous Peoples Rights Act, Indigenous Peoples’ knowledge can only be accessed subject to their FPIC. The Act further stipulates that the consent shall be obtained in accordance with the indigenous people’s customary laws. In addition, if a dispute arises, customary law shall be used to solve the conflict.⁷⁰

In practical terms, for the purposes of ensuring compliance with customary laws, there appears to be little difference between directly recognizing customary laws and indirectly recognizing such by establishing protection for the GR and TK. The effect seems to be essentially the same. If national law proclaims that Indigenous Peoples have the right to own/control their TK and GR, one can presume that access will only be granted by the indigenous people in accordance with their customary laws and FPIC.

Legally and technically speaking, there is a difference, however. If the domestic legislation explicitly recognizes the customary law of the Indigenous People, this implies that the state limits its own jurisdiction – its sovereignty - if one wishes - by defining a certain sphere within which the conventional domestic regulation pertaining to TK and GR will not apply. Instead, the domestic law prescribes that anyone wishing to access such defined TK and GR will have to approach the relevant Indigenous People to find out what laws apply to the subject matter. On the other hand, if the domestic legislation “merely” recognizes indigenous peoples’ right to their GR and TK, this does not entail any transfer of sovereignty, technically speaking. True, the indigenous people will still presumably only grant access in accordance with its customary laws. But what will then follow, from the contract with the user, are contractual clauses that can then be enforced by the domestic legislation. It is then the customary law transformed into a contractual clause, rather than the customary law *strictu sensu*, that is being applied.

⁶⁶ See *ibid*, ArtIndigenous Customary Lawe 17.

⁶⁷ See Law No. 7788 of 1998, ArtIndigenous Customary Lawes 82-84.

⁶⁸ See the Model Law for the Protection of Traditional Knowledge and Expressions of Culture, of the Secretariat of the Pacific Community, adopted in 2002.

⁶⁹ See ArtIndigenous Customary Lawe 6 of Peru’s Law No. 27,881 of 2002.

⁷⁰ See Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission of Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for other Purposes, Republic Act No. 8371 (1997), pp. 35 and 65.

In both instances, however, for the purposes of legal certainty, the domestic law will have to identify the GR and TK being subject to protection and/or the customary laws that should be complied with. For instance, under the Panama law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge, TK collective to Indigenous Peoples shall be registered in a national register established for that purpose.⁷¹ And the right to use cultural elements thus registered shall be governed by the regulation of the indigenous community, provided that the customary norm has been registered too.⁷²

To simplify procedures even further, the domestic law could identify a relevant institution of the indigenous people in question. By contacting that institution, the user can find out under what circumstances, pursuant to what conditions, and in accordance with who's consent - the TK and/or GR can be accessed. The indigenous institution could also provide a certificate evidencing that the TK/GR has been accessed legally. This also means that the user need not have a full understanding of the applicable customary law. For instance, secret and/or sacred material – and the customary laws pertaining to such – generally have a profound and detailed significance for the indigenous people in question. Notwithstanding, it is possible for a non-member to be placed on a strict obligation of confidentiality, enforceable under external laws, without knowing the background for the obligation in any detail.

If so desired, the state can limit the recognition to specific aspects of the customary law, for instance to customary norms pertaining to TK and GR relating to biodiversity. They state could further safe-guard itself against unwarranted effects, by specifying that it will not recognize customary law of certain content. Presumably, however, such limitations will not be deemed necessary with regard to customary laws regulating TK or GR. Rather, one can foresee states considering such safeguards within the sphere of e.g. family law or criminal law.

In conclusion, the IR should recognize indigenous peoples' right to consent (or not consent) before elements of their TK and GR are accessed. Further, the IR thus recognizing the right of FPIC is in turn be the best way to ensure compliance with Indigenous Peoples' customary norms and protocols pertaining to TK and GR. Key to ensuring respect for GR, TK and customary laws pertaining to those is hence the point of actual access to the TK and GR by non-members. Indigenous Peoples' call for protection is triggered when a bio-prospector etc. is proceeding to somehow alienate the TK/GR from the original Indigenous People. Most of the crucial questions relevant to the IR can and has to be determined at this point of access. Only at this point can the legal circumstances and terms for transfer be effectively set. It is also at the point of access that the customary laws of the Indigenous People start to interface with the laws of the external actor.⁷³ This study takes the position that it is first and foremost the obligation of domestic law to ensure both that potential bio-prospectors are directed to the relevant indigenous people and to assist in making sure that FPIC is thereafter respected. If domestic legislation identifies certain

⁷¹ See Executive Decree No. 12 (2001) regulating Law No. 20 of 26 June 2000, ArtIndigenous Customary Lawe 7 (iii).

⁷² See *ibid*, ArtIndigenous Customary Lawe 15.

⁷³ Antony Taubman and Matthias Leistner, "Traditional Knowledge", in *Indigenous Heritage and Intellectual Property* 2nd edition, Silke von Lewinski ed. (Kluwer Law International, 2008), p. 87

spheres of GR and TK that can only be accessed with the consent of an identified Indigenous People, a user will only be able to legally access such knowledge or resources following agreement on mutual agreed terms (MAT), entered into with the relevant representatives of the Indigenous People. The Indigenous People will obviously enter into such an agreement only if access and terms conform with its' own relevant customary laws. And if entered into, the MAT can define what obligations and restrictions are associated with the use, respecting the applicable customary laws of the Indigenous People. So, it seems that recognizing rights to GR and TK as such is the most effective way to ensure respect also for customary laws.

Indeed, it is difficult to see that specific protection of customary laws adds anything to a legal system that already protects GR and TK. Respect for both 1) Indigenous Peoples' rights to TK and GR and 2) their customary laws pertaining to such knowledge and resources is therefore dependent on the right to FPIC being present in domestic legislation. Given the importance of national recognition, the IR should render provider states' access to compliance measures prescribed by the IR contingent on the provider country recognizing the right to FPIC of Indigenous Peoples in their domestic legislation. In other words, the IR should include Indigenous Peoples' rights in any definition of misappropriation, making the right to FPIC a public law obligation.

Unambiguous respect for Indigenous Peoples' rights and rules on FPIC also provides for legal certainty. Potential users are under such circumstances, without transaction costs, made aware that in order to use an element of TK or GR, they will have to obtain the consent of an identified authority of the relevant indigenous people. And once they have managed to reach a MAT with that authority, all the rules the user need to adhere to follows from the contract.

Similarly, certificates of compliance should include not only a certificate of compliance with national law, but also include reference to Indigenous Peoples' customary laws pertaining to GR and TK. Furthermore, a certificate of compliance should also identify the right-holders to GR and TK, and serve to implement rights of Indigenous Peoples pertaining to GR and TK, e.g., by including evidence of whether FPIC has been obtained from the relevant Indigenous Peoples. Certificates of origin and/or compliance must include not only the GR but also the associated TK.⁷⁴

V. HOW CAN THE INTERNATIONAL REGIME ENSURE RESPECT FOR AND COMPLIANCE WITH INDIGENOUS CUSTOMARY LAWS IN JURISDICTIONS OUTSIDE THE INDIGENOUS TERRITORY OF ORIGIN?

A. Introduction

An International Regime faces an extraordinary challenge in its regulation of subject matters that do not respect natural and artificial borders. GR and TK do not yield to lines on a map. But, the emerging IR is not without guidance. The CBD and Bonn Guidelines represent a consensus on some key questions that should direct future negotiations.

On the question, how will states exercise their asserted sovereignty to Genetic Resources, the CBD answers – primarily by contract and through administrative law. Under the Bonn Guidelines, prospective users and providers are requested to negotiate binding

⁷⁴ This language comes from the Indigenous Expert Meeting on ABS (Montreal, September 2007). It might be good to look at if we want something on Certificates of Compliance in the Report.

access and benefit sharing contracts under the supervision of national administrative authorities. These Guidelines place the substantial and procedural implementation by national law in the good faith efforts of States. Whether all States have acted or will act in good faith is a matter that only time will tell. It is clear from national reporting to the CBD Secretariat that there remains many Parties to the CBD that have not meaningfully implemented the Bonn Guidelines by ABS policy, national legislation or regional agreements. This may be one of the key drivers behind the call for an IR. Without all Parties agreeing to set certain international standards in place, there is incentive for the commercially reasonable (or even the unscrupulous) entity or person to forum shop for unregulated jurisdictions.

In answer to the question of how can the IR ensure compliance with Indigenous customary law outside of indigenous territories, it is these authors' perspective that we must find aspiration in existing international and national instruments. We must also be mindful of the consensus chosen legal paths of the CBD – contract and administrative law. If Indigenous Peoples are to influence the existing direction of the IR, they may be required to work within the contract law and administrative law architecture. Examples may be Indigenous customary law “contracting in” provisions in ABS arrangements and parallel but equal Indigenous administrative and adjudicative authorities.

Indigenous Peoples' pragmatism will be called upon during the course of these negotiations. Moving beyond the important political statements for greater purposes to the pithy text-driven drafting and negotiations, will require leadership from all Indigenous regions. Indigenous Peoples may have to have vision on such important topics as incremental change, sovereignty reconciliation and reciprocal rights recognition to achieve their ultimate ends.

It is necessary to interpret the CBD assertion of sovereignty in its proper broader context of international law and favourable domestic law, including both case and regulatory law. One must perhaps examine equitable reconciliation of Indigenous customary law within the emerging IR, drawing upon the affirmations that already exist in COP Decisions and the Bonn Guidelines and provide constructive commentary on future considerations for negotiators.

The final Part of this Study, looks to the Bonn Guidelines as the framework for negotiations and an indisputable indication from Nation-States on a direction forward. It is our general conclusion that this framework can provide a substantive and procedural basis for inclusion of Indigenous customary law. Following, we consider: (1) Contract as an Inclusive Instrument; (2) Binding or Non-Binding; (3) Relationship of ABS International Regime with other International Regimes; (4) Competent Authorities; (5) FPIC based upon Indigenous Customary Law; (6) Dispute Resolution – Development of an International Competent Authority; and (7) Enforcement of ABS Arrangements.

B. Contract as an Inclusive Instrument

Contract law can be *sui generis*⁷⁵ in nature, scope and application. Contracts allow for a dynamic and inclusive negotiation process. An agreement customized for the specific parties and subject matter can draw upon other areas of law such as, Indigenous customary law, conflicts of law, rules for the domestic and international context, privacy law, administrative law and labour law. The identified challenges for contracts include the good

⁷⁵ *Sui generis* is a Latin term meaning 'forming a kind by itself; unique, literally of its own particular kind,' or class.

faith of the negotiating parties; the unequal bargaining power between user and provider; the legal and personal capacity of the Peoples to negotiate a fair and equitable arrangement; and, other access to justice-related issues. These challenges are not insurmountable, but will take vision.

From these authors' perspective, contract law alone cannot guarantee fairness and equity among users and providers. Contract law requires a domestic legislative and international instrument-based counter balance. The IR will need to require Parties to develop ABS policy, administrative and legislative measures at the national level to ensure good faith implementation and a level playing field for all negotiating parties, based on equity rather than equal treatment. This is a key point that is suggested as a binding component of the IR. Nations that adopt the next instrument of the ABS regime must be strictly required to develop national law to ensure its effective implementation. Parties cannot be permitted to adopt an instrument by COP Decision, but make limited efforts to implement. Initial evidence seems conclusive that few Parties to date have developed legislation, particularly developed countries.

Specific to Indigenous customary law, we would strongly recommend some minimum and standard contractual terms for ABS arrangements. These contractual terms can form part of the national Material Transfer Agreements (MTA) and the national legislation or any other policy or administrative instrument. The International Regime would instruct Parties to include these standards in the ABS ratifying legislation and assist in their implementation, interpretation and possible adjudication at the international level. Given that these standards would have to arise from the applicable Indigenous Peoples themselves, we would not contemplate setting out an exhaustive list in this paper, as there needs to be respectful consultation on the substance of key terms. We would, however, foresee that the following terms may be common to many Indigenous Peoples:

- (a) Rights recognition is a precondition to contractual negotiations;
- (b) As a good faith measure, all users will explicitly recognize and affirm that Indigenous Peoples have prior rights, including a right to self-determination within their territory;
- (c) To the extent possible, Indigenous decision-making processes will be incorporated into the negotiation of ABS arrangements, the contractual terms themselves and the dispute resolution processes arising from the contract;
- (d) Indigenous Peoples representatives will be pre-certified as the appropriate representative body;
- (e) Indigenous customary law will be given equal weight in dispute resolution processes;
- (f) FPIC will form a substantive part of all ABS arrangements and incorporate Indigenous customary law;
- (g) All ABS arrangements will serve as positive evidence that FPIC of Indigenous Peoples has been obtained; and
- (h) All ABS arrangements will provide for a process to withdraw FPIC.

It is often the case that Indigenous Peoples take the position that their customary law must form an integral component of an IR, particularly as it applies to Indigenous GR and TK. Incorporation of Indigenous customary law within ABS arrangements such a material transfer agreements is one tangible means that can achieve this end. To ensure that ABS arrangements are negotiated in good faith and not obtained by

unscrupulous parties taking advantage of Indigenous Peoples' unequal bargaining power, the State can play a substantive role by creating a stable negotiating environment. The State can create a safe harbour for ABS negotiations between users and providers, if the terms of negotiations are clear and there are minimum standards established. A well designed ABS regime can facilitate equitable arrangements and thereby provide legal certainty.

C. Binding or Non-Binding

It is the interpretation of these authors that this debate is arguable but not constructive. It is unnecessary for each chorus to rise to vocalize their support for a binding versus non-binding regime. In answer to the question: "Should the IR be binding or non-binding?" We rise and say "Yes". The IR will necessarily have components that are discretionary and mandatory. The IR already exists in soft law (policy, procedures, manuals) and hard law (constitutions, statutes, regulations, binding contracts and case law). The debate is passè.

The IR must develop mechanisms that will allow Indigenous customary law to be binding in the national and international context. Perhaps the easiest way is through contracts that incorporate Indigenous customary law as a substantive and procedural component. These contracts can expressly choose a jurisdiction for their interpretation. These contracts can also explicitly state that Indigenous customary law will be given equal weight in their interpretation of relevant provisions of that contract. It would appear most logical that the jurisdiction of choice for initial interpretation would be the domestic/territory of origin. It is the most convenient forum for the Indigenous party and likely the country of origin of the TK and GR.

It might also be useful to have an option for parties to set out alternate dispute resolution (ADR) provisions that allow for an international competent authority to advise, mediate and possibly arbitrate contracts arising from ABS of TK.

D. Competent Authorities

Under this heading, we would like to discuss three competent authorities: (i) national competent authority, (ii) Indigenous Peoples competent authority, and (iii) international competent authority.

(i). National Competent Authority

If Parties are to comply with the spirit and intent of the Bonn Guidelines, competent authorities must be established at the national level. Many Parties have not put the appropriate resources or administration in place to properly implement their identified national authority. To date, a little over half the parties to the Convention have nominated a ABS focal point. This failure leaves a regulatory gap that allows for jurisdiction shopping by users. It is a commercially reasonable result that users will opt to obtain rights in less regulated legal environments. If there were national competent authorities in place in all jurisdictions, legal certainty would be provided to both users and providers. A binding component of an IR should include the requirement that Parties must develop legislation that establishes a national competent authority.

We submit that there are important roles for competent authorities in the national context including, but not limited to, the following:

- (a) Certifying the appropriate negotiating parties, including determining that all applicable Indigenous Peoples are a party to the negotiations;

It may be the case that neighbouring Indigenous Peoples have a joint title system based upon their customary law. In that case, the Competent Authority would consult all potentially affected Indigenous Peoples and provide them opportunity to make submissions that they are a proper party to negotiations. Not dissimilar to a certified negotiating party in labour law, the applicable Indigenous Peoples' entity would be required to provide evidence of their right to represent a specific Indigenous Peoples and be certified by the national authority. The national authority might also be given a legal duty to consult all potentially affected Indigenous Peoples to ensure legal certainty of representatives.

- (b) Developing, setting and enforcing minimum standards that must form part of all ABS arrangements;

In labour and consumer protection law, there are minimum standards for determining necessary provisions of respective agreements, where the agreement is silent or contrary to a minimum term, the minimum term supercedes. A difficulty in the ABS arrangements is legal certainty and standardization.

A standard term might be that all ABS arrangements, as a monetary benefit must establish an education trust and the contribution would based upon the use of the TK. If there was no trust provision, the standard language would be set out in the agreement.

Another standard term might be that a change in use from academic research to commercial shall trigger a renegotiation of all non-monetary and monetary benefits.

- (c) Ensuring that users and parties do not “contract out” of minimum standards;

It will be important to ensure that a party cannot contract out of the national law. It is not uncommon that a party with greater negotiation power attempts to have the other parties agree to lower standards, particularly if they are financially vulnerable.

- (d) Certifying national compliance (i.e., determining whether the ABS arrangement meets all required terms of national legislation, including those terms that require Indigenous Peoples rights to be respected and recognized);

A key role for a national authority would be the issuance of certificates of national compliance. In the Indigenous Peoples context, this might mean providing the national authority with the jurisdiction to analyze, interpret, amend and certify an ABS arrangement with an Indigenous People. If the

national authority is properly constituted it would have the ability to receive submissions by the appropriate Indigenous Peoples on the manner in which the ABS complies or fails to comply with the FPIC of the indigenous people.

(ii). Indigenous Competent Authority

It has been suggested by some Indigenous Peoples that Indigenous institutions are best situated to determine whether an ABS arrangement is equitable and achieved by a good faith and voluntary negotiation process. In such circumstances, the general proposal would be that a parallel authority be created to specifically review, interpret, assess and enforce ABS arrangements where Indigenous Peoples were a party to the contract. The Bonn Guidelines call upon competent authorities to: (1) develop requirements for FPIC, (2) establish mechanisms for effective participation; (3) provide information for decision-making purposes; (4) enhance capacity for negotiations; and, (5) ensure that the terms of an ABS arrangement respect customs, traditions, values and customary practices of Indigenous Peoples. It is our opinion that there may be validity to this proposal for an Indigenous Competent Authority.

One of the most empowering and legal certainty-providing opportunities that an Indigenous Peoples Competent Authority (“IPCA”) is the establishment of Certificates of Compliance that are granted pursuant to Indigenous customary law. In these circumstances, IPCA’s would consult all affected Indigenous Peoples, ensure that their Free Prior Informed Consent had been obtained pursuant to their customary law and issue a Certificate of Compliance. A more practical example of a possible ABS process is outlined below under FPIC based upon Indigenous Customary Law. The key will be that Indigenous Peoples must be involved in the design and architecture of an IPCA.

In issues of dispute resolution, it may be most appropriate if such a competent authority were modelled on a labour law tribunals. For instance, in that situation, a panel of three notable persons would be selected; one by the Indigenous Peoples, one by the prospective user and another by both parties.

(iii). International Competent Authority

The enforcement of national ABS laws in an international context may require the establishment of a new international institution or coordination with an existing international dispute resolution process. It may not be necessary for an International Competent Authority to have a substantive administration or facilities. An Authority would be struck on an ad-hoc basis to mediate and arbitrate disputes arising out of ABS arrangements. If an International Competent Authority is created, it will need to have a degree of expertise on Indigenous Peoples’ customary law or at minimum the ability to access expertise on the subject matter. Such a body might have the ability to validate certificates of national compliance or certificates of Indigenous Peoples compliance for their application outside their country/territory of origin, respectively. The mechanics on certain issues below are illustrative.

E. Customary Law in foreign jurisdictions

How can a body of law that is local in nature be applied in foreign jurisdictions throughout the world? The answer may be simply a matter of following the appropriate steps

with the competent authorities. That is, based on the discussion above, it may be a tiered process whereby:

- First, a request is made by a prospective user to the Indigenous provider for an ABS arrangement about particular traditional knowledge.
- Second, the user and provider negotiate an arrangement in good faith – it is signed, sealed and delivered to an Indigenous Peoples Competent Authority. The agreement includes evidence of a consultation process whereby FPIC was achieved. The Indigenous People will presumably ensure that the agreement is in conformity with its customary law. Otherwise it will not achieve consent. It will be imperative at this stage that there be an existing national ABS policy and legislation that requires such an ABS agreement and sets out specific terms.
- Third, the IPCA reviews the agreement, exchanges are made with the parties regarding the ABS arrangement and IPCA determines FPIC has been achieved – an IPCA issued certificate of compliance is issued.
- Fourth, the IPCA Certificate is sent to the National Competent Authority and accepted as evidence of FPIC, they issue a complementary Certificate.
- Fifth, an international competent authority reviews the certificate and evidence and issues its own certificate.

F. Dispute Resolution

For Indigenous Peoples to effectively invigorate their customary law at the international level, they must have the ability to be a party to disputes arising from the ABS arrangements they negotiate. There will predictably be access to justice concerns (funding and capacity to represent), evidentiary burdens (weight of oral history) and issues with respect to the FPIC requirements. There is some hope that an Indigenous Peoples granted certificate of compliance may resolve many of the FPIC related issues. Access to justice concerns may require an enhanced role for voluntary funds to ensure that Indigenous Peoples are not denied their legal rights at a national or international mediation or arbitration.

If Indigenous Peoples' rights to TK, GR and customary laws pertaining to such subject matter are recognized in the jurisdiction within which the Indigenous People reside, the customary law can also be recognized in another – normally user country - jurisdiction equivalent to the domestic law of the provider state. The customary laws of Indigenous Peoples will then be recognized in the foreign jurisdiction, if it follows from relevant private international law that the laws of the country in which the Indigenous People reside can be effectuated in the user jurisdiction.

Arbitration and arbitration clauses can be helpful to Indigenous Peoples seeking recognition of their rights under the IR. When negotiating MAT, the Indigenous People can request a contract clause proclaiming that disputes shall be settled through arbitration. The Indigenous People could then further insist on rules of procedures for the arbitration to be included in the MAT that accommodates for a relevant role of applicable customary law

relating to substantive obligations, at the same time as catering for certainty and a legally binding outcome.

Indigenous Peoples can also have interests in disputes where they have not had the opportunity to be a party to an adequate MAT. Application of Indigenous customary law at an international dispute resolution will therefore in addition require explicit language in an IR that requires that Indigenous customary law be considered and given appropriate deference in disputes relating to ABS arrangements with Indigenous Peoples. Key areas that Indigenous customary law should be applied include the following:

- (i) The interpretation, application or implementation of this ABS agreement;
- (ii) A breach or anticipated breach of the ABS agreement;
- (iii) Compensation as it relates to interference with traditional use or communal property; or,
- (iv) Any other matter as provided herein or as may be referred to the dispute resolution process by the Indigenous Competent Authority.

It may also be suitable for an Indigenous Competent Authority to have standing in any dispute resolutions processes, along with the specific Indigenous Peoples to the ABS arrangement, as they will have in-house expertise on the core areas in dispute. It may even be most appropriate that an Indigenous Competent Authority would be the first dispute resolution mechanism and then an appeal. It may be advisable that only disputes with specific extra-territorial aspect would go directly to the international ABS dispute resolution mechanism.

G. Enforcement of ABS Arrangements

In the current IR, an ABS arrangement can be internationally enforced only by application of international conflict of laws rules. It is a two step process, commence a legal action to apply to the respective court for damages or other enforcement measures in contract, next, apply enforcement of foreign judgment rules. It is an imperfect mechanism and is largely driven by the ability of the respective parties with the financial resources to access the justice system. It goes without stating that Indigenous Peoples' history with dominant legal systems has not been a positive experience. We argue that enforcement of ABS arrangements with Indigenous Peoples must be more socio-economically and socio-culturally sensitive.

There may be a positive role for the competent authorities to play in this instance. The current International Regime does not provide the competent authorities any specific enforcement powers, the details of these were left to the good faith implementation of the ratifying Nation-State. It is our general impression that empowering the competent authorities or another institution is required for the International Regime to become truly binding at the national and international level.

With regard to enforcement issues, we suggest the following general principles that may be adopted:

- (a) The chosen jurisdiction for enforcement of all ABS arrangements will be deemed to be the country/territory of origin;
- (b) If there is more than one country/territory of origin, the applicable international institution (i.e., international competent authority) will be deemed to have jurisdiction;
- (c) If there is more than one Indigenous Peoples' territories, the applicable Indigenous Peoples' institution (i.e., Indigenous Peoples competent authority) will be deemed to have jurisdiction; and,
- (d) All decisions of the applicable competent authority will be recognized and enforced as though they were a judgment of a court of the country of origin;

VI CONCLUSIONS

The IR must pay particular attention to the point of access to TK and GR by non-members. It must be mindful of that most of the crucial questions relevant to the IR can only be effectively determined at the point of access and that it is also at this point the customary laws of the Indigenous People start to interface with the laws of external actors. Consequently, the IR must include compliance measures that ensure that domestic law directs potential bio-prospectors to the relevant Indigenous People to obtain its FPIC. This is purpose is most effectively achieved by the IR including Indigenous Peoples' rights to GR and TK in any definition of misappropriation. Provider countries access to compliance measures put forward in the IR should be contingent on the domestic law in the provider country should be contingent on the domestic legislation recognizing Indigenous Peoples' rights to GR and TK. Such protection should be designed in a manner that acknowledges TK's and GR's collective and evolving character.

Through private international law, ensuring Indigenous Peoples' rights at the point of access will also contribute to customary law being recognized in user country jurisdiction on par with the domestic law of the provider state.

Through respect for Indigenous Peoples' right to FPIC legal certainty is also achieved. Domestic law and regulation shall identify to users from what relevant authority of what indigenous people they need to obtain FPIC in order to use TK and/or GR. Having obtain consent from that authority, all the rules the user need to adhere to follows from the contract.

End.
