UNEP

CBD

Convention on Biological Diversity

Distr.
GENERAL

UNEP/CBD/ABS/GTLE/3/INF/1*
13 May 2009

ENGLISH ONLY

GROUP OF TECHNICAL AND LEGAL EXPERTS
ON TRADITIONAL KNOWLEDGE
ASSOCIATED WITH GENETIC RESOURCES IN
THE CONTEXT OF THE INTERNATIONAL
REGIME ON ACCESS AND BENEFIT-SHARING
Hyderabad, India, 16-19 June 2009

STUDY ON COMPLIANCE IN RELATION TO THE CUSTOMARY LAW OF INDIGENOUS AND LOCAL COMMUNITIES, NATIONAL LAW, ACROSS JURISDICTIONS, AND INTERNATIONAL LAW

Note by the Executive Secretary

1. At its ninth meeting, the Conference of the Parties, in paragraph 13 (e) of decision IX/12, on access and benefit-sharing, requested the Executive Secretary to commission a study on "How can compliance be ensured in conformity with Indigenous Peoples and local communities customary law, national law, across jurisdictions, and international law, including human rights and trade?"

2. Pursuant to that request, a study addressing this issue was commissioned by the Secretariat and carried out by a team of experts**,** including Merle Alexander, Dena Kayeh Institute (Canada); Preston Hardison, Tulalip Tribes (United States of America); Mathias Ahren, Saami Council (Finland, Norway, Sweden and the Russian Federation) and circulated at the seventh meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing.

3. The resultant study is attached hereto for the information of participants in the meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-sharing. It is being circulated in the form and language in which it was received by the Secretariat. The views expressed therein are those of the authors and do not necessarily represent those of the Secretariat, nor those of the institutions to which the authors are affiliated.

* The document was previously circulated as UNEP/CBD/WG-ABS/7/INF/5.

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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* In addition to the authors, a reference group including indigenous and local community representatives from Latin American and Caribbean region, Africa, Australia/Pacific, Asia, Russia and Eastern, Central Europe and the Caucasus, was established to provide feedback and to ensure that regional perspectives were taken into account, and included the following as members: Lucia Belfort (LAC region), Lucy Mulenkei (Africa), Gladman (Local Communities/Africa), Neva Collings (Australia/Pacific), Joji Carino (Philippines/Asia), and Erjen Khanmaganova (Russia/Eastern, Central Europe and the Caucasus).

1 The views expressed in this paper are those of the authors and do not necessarily reflect those of the institutions to which they are affiliated.

I. SUMMARY

1. When starting to seriously address indigenous issues, the United Nations and its Member States acknowledged that indigenous peoples should be allowed to maintain, reinforce and develop the distinct societal structures they had managed to preserve despite colonization. The international legal system has evolved to acknowledge indigenous peoples as legal subjects, enjoying e.g. the right to self-determination. These developments have further confirmed that indigenous peoples have human rights to genetic resources and traditional knowledge. The fact that these rights are human rights implies that they are relevant also in states that retain ownership rights to genetic resources and/or traditional knowledge. The International Regime ("IR") must recognize indigenous peoples' particular rights to genetic resources and traditional knowledge, applicable also in States where rights to genetic resources and/or traditional knowledge are not recognized for the population in general.

2. International law further confirms that indigenous peoples have the right to preserve and develop their customary legal systems. This is natural, since customary laws are an essential component of indigenous peoples self-governing rights, and do not in any significant manner differ from other legal system, including statute law. The only significant way in which indigenous peoples' laws differ from that of other societies is the source from which the law get its authority. Statutory law bears the seal of a legislator, whereas customary laws get their authority not from a stamp by a formal institution, but from social acceptance.

3. The IR must recognize indigenous peoples' rights to their traditional knowledge and genetic resources in manners that acknowledge that genetic resources and traditional knowledge are collective held and constantly evolving. As a consequence, domestic law cannot simply ascribe a confined set of detailed IPRs to traditional knowledge holders. This would freeze the traditional knowledge in time and result in the traditional knowledge from then on being absorbed into the domestic legislation. Rather, domestic law can only protect traditional knowledge by acknowledging its evolving character in a cultural context by recognizing the autonomous legal order within which the traditional knowledge evolved. In other words, the IR must respect customary laws of indigenous peoples in order to adequately recognize indigenous peoples' rights to traditional knowledge and genetic resources. This can most effectively be achieved by the domestic law recognizing relevant customary laws 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.

4. The stated implies that the IR must pay particular attention to the point of access to traditional knowledge and genetic resources by non-members. Only at this point can terms for transfer be effectively set. Domestic law must direct potential bioprospectors to the relevant indigenous people's authority and assist in making sure that the principle of free prior informed consent (FPIC) is thereafter respected. If domestic legislation identifies certain spheres of genetic resources and traditional knowledge that can only be accessed with the consent of an identified indigenous people, a user will only be able to legally access genetic resources and/or traditional knowledge following agreement on mutually agreed terms (MAT), entered into with relevant representatives of the indigenous people. The indigenous people will then enter into such an agreement guided by its' own relevant customary laws. The MAT from then on defines what obligations and restrictions are associated with the use, indirectly respecting customary laws of the indigenous people. So, recognizing rights to genetic resources and traditional knowledge as such is one, perhaps the most effective, way to ensure respect also for customary laws.

5. Reliance on contracts can be as equitable or inequitable as the governing jurisdiction in which it is negotiated. The identified challenges for contracts include the good 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. 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.

6. Specific to indigenous customary law, the authors strongly recommend some minimum and standard contractual terms for ABS arrangements, including, but not limited to, the following:

(a) Rights recognition is a precondition to contractual negotiations;

(b) All users will explicitly recognize and affirm that indigenous peoples have prior rights, including a right to self-determination within their territory;

(c) 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.

7. The described approach provides for legal certainty. Once potential users have entered into mutually agreed terms with an indigenous authority identified by domestic law, all the rules the user need to adhere to follows from the contract. The legal certainty can be further enhanced by certificates of compliance including evidence of whether FPIC has been obtained from the relevant indigenous people.

8. To ensure compliance with indigenous peoples' rights to genetic resources and traditional knowledge – as well as with pertinent customary laws - the IR must include indigenous peoples' rights to genetic resources, traditional knowledge and FPIC 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 recognizing indigenous peoples' rights to genetic resources and traditional knowledge.

9. 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.

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

10. The Akwé: Kon Guidelines use a common 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". 2/

11. 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 and in access and benefit sharing legislation3. The following discussion presents some commonly expressed 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.

12. One recent interpretation summarizes, from an indigenous perspective, some of the differences between indigenous customary law and modern legal systems. 4/ 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.

13. Indigenous property systems commonly emphasize the sacred, spiritual and relational values of resources rather than the utilitarian and economic. The use of the term "resources" illustrates some of the problems in the conversation between legal traditions. Indigenous peoples often have a "kincentric" view of nature. 7/ Nature is not an inert resource our source of property with utilitarian value, but alive, 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, and failure to maintain them can lead to personal, collective and cultural harm. 8/. Kincentric relationships define core collective values of reciprocity and respect

2/ Akwé: Kon Guidelines II(c) (2004); Black's Law Dictionary, 6th ed., (1990). West Publishing Co.

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.

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: Kristen A. Carpenter; Sonia Katyal and Angela Riley. In defense of property. 118 Yale Law Review 100. 2009.

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/ 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

linked to cooperation and dispute resolution necessary for the continued survival of small-scale indigenous communities dependent on biodiversity for their livelihoods. 9/

14. Indigenous peoples' customary law related to "intangible property" also differs from mainstream legal systems. In many 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 is to grant exemptions for certain activities, such as research, education, and news reporting. Knowledge that has "leaked" beyond indigenous territorial boundaries through research or other forms of divulgation often loses rights to protection and becomes part of the public domain.

15. 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. Knowledge is often entrusted to custodians whose customary obligations may be perpetual, not diminishing over time. Customary law restrictions may exist for uses of traditional knowledge and associated resources which other legal traditions consider to be exempt or in the public domain. The issues of "leakage", of traditional knowledge already recorded in books and held in databases and registers, and of genetic resources and associated traditional knowledge considered to be in the public domain all raise significant customary law issues for many indigenous peoples. 11/

16. One core problem is that indigenous peoples generally define duties, obligations, powers, limitations and harms 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. 12/ The United States 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". 13/ 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 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 claimed. 14/

17. The purpose here is not to comment on the merits of the case, but to point out that the case involves distinct legal authorities and jurisdictions. 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

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9/ Alejandro Argumedo and Tammy Stenner. Association ANDES: Conserving Indigenous Biocultural Heritage. International Institute for Environment and Development, London. 2008.

10/ Tsosie, note 4. p. 399

11/ Victoria Tauli-Corpuz Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples. Tebtebba Foundation/Third World Network, Penang. 2004.

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

13/ Ibid. p. 407.

14/ Ibid. p. 408.

alive, no matter where they occur. The demand to meet certain evidentiary standards privileges one legal system against another.

18. All of these issues are significant for the development of an international regime on access and benefit sharing for indigenous genetic resources and associated traditional knowledge. Indigenous peoples often have elaborate and deep beliefs and customary law related to the proper uses of these and obligations towards genetic resources and traditional knowledge. Unless these issues are addressed by the proposed regime, it may fail to deliver widespread benefits to indigenous peoples, and benefit sharing may not be perceived by indigenous peoples as fair and equitable. 15/

19. 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, one case is explored in more depth to draw out some issues in customary law.

20. Many nations have recognized customary laws to varying degrees, 16/ 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).

21. The utilitarian value of customary law for the conservation and sustainable use of biodiversity is founded in its long history of regulating the use of natural resources. 17/. 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, common principles of customary law include reciprocity, respect for the Earth and all living things (than can extend to rocks, mountains, waters and 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 gain. 18/ 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 protocols. 19/

22. 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

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15/ 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.

16/ See, for example, John W. Bruce. Legal Bases for the Management of Forest Resources as Common Property. FAO, Rome; Michael A. Ntumy. (ed.). South Pacific Legal Systems. 1993. University of Hawaii Press, Honolulu.

17/ See, for example, Manfred O. Hinz. Without Chiefs there Would be No Game: Customary Law and Nature Conservation. 2003. Out of Africa Publishers, Winhoek.

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.

(NTFPs), crafts markets and similar uses. 20/ 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.

23. The difference between the use of customary law in these cases and its role in an access and benefit sharing regime on genetic resources are potentially significant. 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 rivalrous goods that 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.

24. Bioprospectors searching for genetic resources, however, may not be interested in the genes themselves, but in the information they carry and associated traditional knowledge. Information and knowledge are non-rivalrous in that they can potentially be limitlessly copied. Genetic information and traditional knowledge revealed for one is revealed for all. Indigenous communities could lose their ability to control access to shared genetic resources and associated traditional knowledge, or potentially to share in any benefits from their use. It is also worth reiterating that customary law may not view the information for genetic resources and associated traditional knowledge as non-rivalrous. Non-rivalrous goods are conceived as those that can be used by all without diminishing use by any one individual. 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.

25. As opposed to a non-genetic use of a natural product or durable good, there is a greater potential to transform the genetic resources 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.

26. In one approach to address these issues, 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 International Potato Centre (CIP), with whom they signed an agreement in 2005. 21/ 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 they defined it by privatization, commercialization, patenting and unjust enrichment.

27. 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

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."

21/ 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

any benefits generated from the use of the genetic resources are used for the continued maintenance of the Potato Park. 22/ 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.

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

(a) Customary law provides a system with enduring "obligatory rules of conduct, practices and belief" within which indigenous identity is framed;

(b) Customary law is not static, but evolves to incorporate new concepts and circumstances, such as "biodiversity" and "genetic resources", while framing these within customary legal traditions and beliefs;

(c) Customary legal traditions and beliefs proceed from a cosmovision, or holistic worldview combining multiple dimensions of the world, including spiritual dimensions, that may differ significantly from national systems. Uses of genetic resources and/or associated traditional knowledge are often evaluated by indigenous peoples in terms of their customary laws, which could be addressed in the international regime through cooperation between customary and national legal authorities;

(d) Different uses of genetic resources and/or associated traditional knowledge (such as use for open plant breeding or direct production of medicinal products versus the production of transgenetic organisms) may require differential treatment;

(e) Access and benefit sharing for genetic resources and/or associated traditional knowledge will be most effective when indigenous perceive that their customary law and traditional principles of obligation, custodianship, and reciprocity for sharing have been respected.

III. THE LEGAL STATUS OF CUSTOMARY LAW IN INTERNATIONAL LAW

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

29. The State, as well as the first international norms, emerged in the wake of the Peace of Westphalia in 1648. The international legal system that surfaced came to define a "State" as the territory over which the sovereign's military power extended. All persons residing within the State, thus defined, became a "people", for legal purposes. Early international law was predominantly concerned with state-to-state relationships. But with time, rules governing the relationship between the state and its citizens – the embryo to the human rights system - surfaced. International law did not know cultural differences. The emerging human rights system was concerned only with the well-being of the individual. The described state-individual dichotomy had no room for indigenous peoples as groups or collectives. When

22/ See: Alejandro Argumedo and Michel Pimbert. 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

measured by the European powers, indigenous peoples' societies were deemed to have underdeveloped societal structures, and were hence not regarded as States. .23/

30. Even though some argue that peoples' rights proper emerged earlier, the dominating view seems to be that the described basic features of international law remained essentially unchanged until and beyond the two World Wars. The State-individual dichotomy was incorporated into both the United Nations Charter and the first human rights instruments the young United Nations set out to craft.

31. The last 25 years or so have, however, seen a paradigm shift in international law's position on the legal status of indigenous peoples. These developments have directly impacted on indigenous peoples' rights to genetic resources and traditional knowledge under international law. This Section A investigates the present political status of indigenous peoples. Sections B and C then consider traditional knowledge and genetic resources, respectively. Section D examines international law's position on customary laws and section E considers the relationship between indigenous peoples' rights and the principle of state sovereignty.

32. The principal right of peoples is the right to self-determination. Discussions on who constitutes a "people" within the international legal discourse have 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 United Nations Covenant on Civil and Political Rights (CCPR), and the Covenant on Economic, Social and Cultural Rights (CESCR), respectively. 24/ In line with the outlined conventional position of international law, it seems that at the time when these instruments were adopted, the term "people" in the common Article 1 was generally understood to refer to 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 doing so, the UN member states almost immediately 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 minority groups as legal subjects.25 For instance, the UN Minority Rights Declaration does not protect minority groups as such. Rather, the bearers of the rights proclaimed are the individual members of the group.26 Indigenous peoples, on the other hand, have to a large extent managed to preserve an intrinsic connection to their traditional, fairly definable, territories, as well as their own distinct societal structures, including their own legal systems. Indigenous peoples have preserved their distinct societies, existing side by side with the dominant society. When the UN commenced paying attention to indigenous peoples, it took the position that indigenous peoples should be allowed to maintain and develop these distinct societies. In other words, international law on indigenous peoples came to recognize that the people as such hold rights.

33. The above is for instance mirrored in the ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO 169), adopted in 1989. 27/ In contrast 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.

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

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

25/ The same is true for "local communities", a term that lacks meaning under international law.

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

27/ 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

Yet it is clear that at the time, the world community was still struggling with determining where more precisely indigenous peoples fit in the world political and legal map. For instance, the right to self-determination was not included in ILO 169. The ILO 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 United Nations World Conference against Racism (WCAR) in 2001 stated that the rights adhering to the term "indigenous peoples" were to be determined by another forum. 28/ By 2001, it was also clear which forum would finally settle the matter. In 1985, the United Nations had started elaborating a draft Declaration on the Rights of Indigenous Peoples (DECRIPS). From the beginning, the most debated provision in DECRIPS was Article 3, proclaiming indigenous peoples' right to self-determination. In 1993, a working group was formed to reach a political agreement on the draft DECRIPS. "[A]nother forum" in the WCAR Political Declaration referred to this working group.

34. While States sought a political agreement on self-determination in the DECRIPS process, authoritative interpreters of international law took position on the issue. The Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (the CESC), are mandated to authoritatively interpret the CCPR 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 for legal purposes, entitled to the right to self-determination. 29/ 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. 30 In summary, the HRC and the CESC have held that an indigenous group – inasmuch as it constitutes an indigenous "people" 31/ – does enjoy the right to self-determination.

35. 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 the right to self-determination. The European Union Northern Dimension Action Plan affirms that the Union shall protect indigenous peoples' right to self-determination. 32/ 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. 33/ 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 peoples, 34/ acknowledging that indigenous rights are in part rights of the people as such. 35/

28/ A/CONF.189/12.

29/ 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)

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

31/ Regarding the definition of indigenous peoples, see further below.

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

33/ 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

34/ 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)

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

36. States are of course the ultimate creators of international law. As mentioned, when agreeing on ILO 169 and the WCAR Declaration, states deferred their decision on the legal status of indigenous peoples to the DECRIPS process. In 2007, the Member States of the United Nations confirmed the position taken by the expert bodies referred to above by adopting the DECRIPS, 36/ including its Article 3 affirming that "*Indigenous peoples have the right to self-determination*." DECRIPS further includes several other provisions underlining 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. Still, that is not the same thing as to say that the rights the DECRIPS enshrines cannot be legally binding. Whether a provision in DECRIPS mirrors already legally binding international law, merely affirming that the right applies also to indigenous peoples must be determined by an analysis of the provision. As to the right to self-determination, the UN member states were fully aware of the significance of DECRIPS Article 3. Thus informed, they adopted an Article 3 that is in language identical to the legally binding common Article 1.1 of the 1966 Covenants. The only difference is that the DECRIPS refers specifically to "indigenous" and not "all" peoples. As the Covenants Article 1.1, DECRIPS Article 3 proclaims that indigenous peoples have "the" - 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 recognizes - applies also to indigenous peoples.

37. 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, but the UN operates with a few, rather similar, working definitions. 37 From these working definitions one can deduce what a formal definition, when 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. It forms a non-dominating sector of society, and continuously possesses a common ethnic identity and culture. Most importantly, the group still enjoys a distinct and intrinsic connection to its traditional territory. 38/ Finally, the group self-identifies as an indigenous people. The IR need not concern itself with a definition of indigenous people. It can rely on a general understanding until the relevant United Nations human rights forum may adopt a formal definition.

38. As to the content of the right to self-determination, DECRIPS Article 4 sets forth 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. Given the centrality of genetic resources and traditional knowledge to indigenous cultures, indigenous peoples' autonomous functions must be deemed to embrace such resources and knowledge. For the more exact content and scope of those rights, one has to survey provisions specifically addressing genetic resources and traditional knowledge. Provisions on indigenous peoples' rights to their collective creativity are of particular relevance to traditional knowledge. International legal sources on indigenous peoples' rights to lands, territories and resources (LTRs) should be studied carefully when determining indigenous peoples' rights to genetic resources.

B. Indigenous peoples' rights to their collective creativity (traditional knowledge)

39. When the young United Nations embarked on crafting the modern human rights system, it acknowledged persons right to benefit from their own creativity. Pursuant to article 27, paragraph 2, of te the Universal Declaration of Human Rights, 39/, "*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*

36/ Document A/61/L.67. The DECRIPS was adopted by vote by the UN General Assembly on 13 September 2007, with 143 in favour, 4 against and 11 Member States abstaining.

37/ See E/CN.4/Sub.2/1986/7/Add.4, para. 379-382 (the so called Cobo-definition) and World Bank Operational Manual, Operative Directive, OD 4.20. Also ILO 169 Article 1 defines what peoples fall under scope of ILO 169.

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

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

author." This provision was subsequently included almost verbatim in the legally binding CESCR Article 15 (1) (c). On the face of it, the right proclaimed is an individual one, but international law's view on rights to creativity has also evolved, particularly in an indigenous peoples' context. Hence, the CESC 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. 40/ The CESC has further explicitly called on states to develop mechanisms that protect the collective right of indigenous peoples to their traditional knowledge. 41/

40. By adopting the DECRIPS, the Member States of the United Nations have confirmed 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 traditional knowledge they have created. They also have right to redress for traditional knowledge taken without their free FPIC.

C. Further on indigenous peoples' rights to land and resources (genetic resources)

41. Indigenous peoples' rights to 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' ability 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 HRC 42/, and ILO 169 Articles 13-15 .43/ 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 being of significant value to the society as a whole, if allowed.

42. For the purposes of the IR, indigenous peoples' property rights to LTRs are, however, of particular importance. Also these rights have been subject to recent development. As described above, it is a defining characteristic of indigenous peoples that they have inhabited and used their traditional territories prior to the arrival of other populations. Yet while most domestic jurisdictions recognize initial occupation as a mean to acquire property right to land, such recognition was in most instances reserved for the non-indigenous population. Indigenous peoples' traditional land use was most often not regarded

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

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

42/ *Kitok v. Sweden* (Communication No. 197/1985), 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), 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 Länsman et al v. Finland* (Communication No. 511/1992), 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. Länsman et al v. Finland* (Communication No. 671/1995), 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), 27 October 2000, Report of the Human Rights Committee, Vol. II, UN Doc. No. A/56/40), pp. 11-29

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

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 indigenous lands.

43. But recently, domestic and international courts and institutions have increasingly come to question whether such legal practice is in conformity with the fundamental right to non-discrimination. 44/ 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. United Nations 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 ensure 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.

44. As with the other rights discussed, international legal instruments specifically addressing indigenous peoples have affirmed the general developments 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 usufruct 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 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. The mentioned provisions make no particular references to genetic resources, but there is no reason for, and nothing suggests, that international indigenous rights law should treat genetic resources differently than other natural resources. Recall also that DECRIPS Article 31, quoted above, explicitly affirms that indigenous peoples have the right to control their genetic resources.

45. It is important to note that:

(a) ILO 169 and DECRIPS are not isolated instruments. Rather, ILO 169 and DECRIPS confirm general developments within international law;

(b) The rights outlined imply that indigenous people have particular human rights to genetic resources. This means that also in states that retain ownership rights to genetic resources, indigenous peoples still have rights to genetic resources, even when such rights are not recognized for the population in general.

44/ See for example the 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).

46. In the present study on compliance with customary laws, there is not room to discuss the content of these rights in detail. But generally speaking, the outlined legal sources imply that indigenous peoples have the same rights to genetic resources traditionally used as they have to natural resources in general. With regard to genetic resources originating from the indigenous people's territory, but that the people has not used, it might be that the indigenous people's right is limited to benefit-sharing.

D. Recognition of indigenous peoples' customary laws in international law

47. When recognizing indigenous peoples' rights to traditional knowledge and genetic resources, one must in the same breath acknowledge, and find compliance measures for, indigenous peoples' customary laws and protocols pertaining to genetic resources and traditional knowledge. This follows immediately from what distinguishes traditional knowledge from conventional intellectual property rights (IPRs). Traditional knowledge 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 occurs within a defined collective, a people. In other words, traditional knowledge cannot be dealt with solely as information. It has an inherent normative and social component. As information, traditional knowledge can easily be communicated beyond its original context, while the norms adhering to the traditional knowledge are intrinsically local and much less readily transmitted. 45/ Hence, any traditional knowledge protection must first recognize the constantly evolving character of traditional knowledge. Traditional knowledge cannot be confined to a particular moment in time. Second, the protection of traditional knowledge must respect that the fact that traditional knowledge is collectively held also means that traditional knowledge 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 traditional knowledge. But to find out whether such rights exist, and what they contain, one has to consult the law of the collective. For these reasons, traditional knowledge protection must treat traditional knowledge as the province of the relevant indigenous people. It must leave it to the norms of that people to determine internal rights to traditional knowledge. The alternative is that domestic law regulates in detail who within the group hold what rights to what aspects of traditional knowledge. But that would deprive the traditional knowledge of its characteristic of being traditional and collectively held. The traditional knowledge can then no longer evolve, in response to developments in the collective's society and its needs. In summary, traditional knowledge must not be protected as a conventional IPR. Domestic legislation cannot simply ascribe a confined set of detailed IPRs to traditional knowledge holders. This would freeze the traditional knowledge in time and result in the traditional knowledge from then on being governed by, i.e. being absorbed into, domestic legislation. Domestic law can only protect traditional knowledge by acknowledging its evolving character in a cultural context by recognizing the autonomous legal order within which the traditional knowledge lives. 46/

48. 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

45/ 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

46/ 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, 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.

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.

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

49. The International Regime respecting indigenous peoples' rights pertaining to genetic resources, traditional knowledge and customary laws does not conflict with the principle of the sovereign rights of States over their own natural resources. Indigenous peoples' rights can, and should, be recognized side-by-side with states' sovereign rights. 47/ State sovereignty is a principle of international law providing that no State may interfere in another State's internal affairs. States are essentially 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 Article 3 of the Convention on Biological Diversity, affirming that state sovereignty is limited by the Charter of the United Nations and other principles of international law. It follows from the Charter of the United Nations 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. 48/

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

50. As explained in sections II and III above, the way in which customary laws distinguish themselves from statute law is no legitimate reason for not respecting customary norms. Customary laws define rights and responsibilities of individual members of an indigenous people on important aspects of life, culture and the world view, including to genetic resources and traditional knowledge. 49 In that sense customary laws do not significantly differ from other laws, including statute laws. All societies have developed norms to govern their internal relationship. 50 The only significant way in which indigenous peoples' laws differ from that of other societies is the source from which the law get its authority. 51 Statutory law normally bears the seal of a legislator, which is what gives it the status of law. Customary legal systems, on the other hand, are normally not codified. Customary laws get their authority not from a stamp by a formal institution, but from social acceptance. One should not over-emphasize this difference, however. Statutory legal systems too, recognize custom as a legal source. Moreover, the statute normally does not come out of nowhere. Also statutory law has as its ultimate source shared perceptions of right and wrong in the society it is supposed to govern. And like customary law, statutory law will also change – or rather be changed – when such perceptions evolve, however not always as swiftly as customary laws do. And, conversely, some indigenous peoples have codified their customary norms.

47/ Pursuant to General Assembly 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.

48/ UNEP/CBD/WG-ABS/5/INF/9, 19 September 2007, paras. 32-33

49/ *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, S. James Anaya in Arizona Journal of International and Comparative Law, Volume 21, No. 1, 2004, pp. 48-52 and *Doing Things the Right Way*, in Dene Traditional Justice in Lac La Martre (1995).

50/ *On Customary Law and the Saami Rights Process in Norway*, Tom G. Svensson, in "On Customary Law and the Saami Rights Process in Norway", Centre for Sámi Studies Publication Series No. 8, 1999

51/ *Folk Law*, Gordon R. Woodman, in Dictionnaire Encyclopedique de Theorie et de Sociologie du Droit (2nd ed. 1993), pp 262-265

51. But even if there are no dramatic differences between customary and statute law, as Section III has further indicated, to effectively recognize customary laws, one must not be ignorant to the differences that do exist. In particular, when designing an effective way to ensure compliance with customary norms in domestic legislation, one must be mindful of customary laws' constantly evolving character. There are two principal legal technical solutions available to make domestic legislation comply with customary laws:

(a) 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. The customary law then determines rights and obligations within another legal system. The customary law is not a source of law proper. But because of traditional knowledge'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;

(b) It is therefore in most instances a more practical approach that domestic law *recognizes* and give legal effect to the relevant customary laws 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*.52 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 community, whether such law is written or not*". 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. 53/

52. In addition to specifically recognizing the customary law as such, national law can also indirectly recognize the customary law by recognizing that indigenous peoples' traditional knowledge and genetic resources 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 traditional knowledge holders as:

(a) The people; or

(b) The individual who is recognized by the people as the individual in whom the custody or protection of the traditional knowledge are entrusted in accordance with the customary laws of the people. 54/

53. Similarly, the *Peruvian law Protection Regime for the Collective Knowledge of indigenous peoples Derived from Biological Resources* requires FPIC by an indigenous people before their collective knowledge derived from biological resources are accessed. The law further prescribes that when obtaining FPIC, the indigenous people's right to apply their customary law and processes in the consent process shall be recognized. 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. FPIC 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

52/ OAU Model Law, adopted in 2000

53/ See Law No. 7788 of 1998, Articles 82-84.

54/ The Model Law for the Protection of Traditional Knowledge and Expressions of Culture, of the Secretariat of the Pacific Community, adopted in 2002

as inalienable indigenous cultural patrimony, to be managed for the good of the present and future generations. Customary law is also used for dispute resolution. 55/

54. 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. If a dispute arises, customary law shall be used to solve the conflict. 56/

55. 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 genetic resources and traditional knowledge. The effect seems to be essentially the same. If national law proclaims that indigenous peoples have the right to own/control their traditional knowledge and genetic resources, one can presume that access will only be granted by the indigenous people in accordance with their customary laws. 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 - by defining a certain sphere within which the conventional domestic regulation pertaining to traditional knowledge and genetic resources will respect the authority of customary laws. Accordingly, the domestic law prescribes that anyone wishing to access such defined traditional knowledge and genetic resources will have to approach the relevant indigenous people to find out what norms apply to the subject matter. On the other hand, if the domestic legislation "merely" recognizes indigenous peoples' right to their genetic resources and traditional knowledge, this does not entail any derogation of sovereignty, technically speaking. True, the indigenous people will still presumably only grant access in accordance with its customary laws. But that will then follow from the contract with the user, 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.

56. In both instances, however, for the purposes of legal certainty, the domestic law will have to identify the genetic resources and traditional knowledge being subject to protection. 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, collective traditional knowledge of indigenous peoples shall be included in a national register established for that purpose. 57/ 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.

57. To simplify procedures further, domestic law could identify a relevant institution of the indigenous people in question. By contacting that institution, the user can find out pursuant to what conditions, and in accordance with whose consent - the traditional knowledge and/or genetic resources can be accessed. The indigenous institution could also provide a certificate evidencing that the traditional knowledge/genetic resources 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 to 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 detail.

55/ Peru Law No. 27811 of 24 July 2002. Even though the law could appear progressive, one should be aware that indigenous groups have raised concerns about the effective participation of Indigenous Peoples in the development of the law and the low levels of benefit sharing required.

56/ 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

57/ Executive Decree No. 12 (2001) regulating Law No. 20 of 26 June 2000

58. In conclusion, the IR should recognize indigenous peoples' right to grant (or withhold) consent before elements of their traditional knowledge and genetic resources are accessed. Recognizing the right of FPIC in the IR is one efficient way to ensure compliance with indigenous peoples' customary norms and protocols pertaining to traditional knowledge and genetic resources. Key to ensuring respect for genetic resources, traditional knowledge and customary laws pertaining to those is hence the point of access to the traditional knowledge and genetic resources by non-members. Most of the crucial questions relevant to the IR can be addressed at the 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.58 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 spheres of genetic resources and traditional knowledge 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 representatives of the indigenous people. The relevant indigenous people will enter into such an agreement guided by its' own relevant customary laws. And if entered into, the MAT can define what obligations and restrictions are associated with the use, respecting customary laws of the indigenous people. So, recognizing rights to genetic resources and traditional knowledge as such is one, perhaps the most effective, way to ensure respect also for customary laws.

59. Respect for both indigenous peoples' rights to traditional knowledge and genetic resources and their customary laws pertaining to such knowledge and resources requires 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 ABS domestic legislation. The IR should include indigenous peoples' rights in any definition of misappropriation, making the right to FPIC a public law obligation.

60. The above also provides for legal certainty. Potential users are with little transaction costs made aware that in order to use traditional knowledge or genetic resources, 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' pertinent customary laws. Furthermore, a certificate of compliance should also identify the right-holders to genetic resources and traditional knowledge, e.g., by including evidence of whether FPIC has been obtained from the relevant indigenous people. 59/

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

61. An IR faces a challenge in regulating subjects that do not respect natural and artificial borders. genetic resources and traditional knowledge do not yield to lines on a map or natural landscapes that mark territories. But, the emerging IR is not without guidance. The CBD and Bonn Guidelines represent a consensus of Parties on some key questions that may guide direct future negotiations. Affirmation and

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

59/ 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.

recognition of Indigenous customary law application at the national and international level on genetic resources and traditional knowledge in clear and explicit terms requires further guidance.

62. On the question, how will States exercise their asserted sovereignty to genetic resources, the Convention on Biological Diversity answers – primarily by contract and through administrative law. The Bonn Guidelines ask prospective users and providers to negotiate access and benefit sharing contracts under the supervision of national competent authorities. These Guidelines place the substantial and procedural implementation by national law in the good faith efforts of States. It is clear from national reporting to the Convention Secretariat that there remain many Parties 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 compliance to international standards, there is incentive for the commercially reasonable (or even the unscrupulous) entity or person to operate in unregulated jurisdictions.

63. The pragmatism of indigenous peoples will likely be called upon during the course of upcoming 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 require vision and wisdom on such important topics as incremental change, sovereignty reconciliation and reciprocal rights recognition to achieve their ultimate ends.

64. It is necessary to interpret the Convention's assertion of sovereignty in its proper broader context of international and domestic law, including case and statutory/regulatory law. One must examine equitable reconciliation of Indigenous customary law within the emerging international regime, drawing upon the affirmations that already exist in decisions of the Conference of the Parties and the Bonn Guidelines and provide constructive commentary on future considerations for negotiators.

65. 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: (b) Contract as an inclusive instrument; (c) binding or non-binding; (d) Relationship of ABS international regime to other international regimes; (e) competent authorities; (f) FPIC based upon indigenous customary law; (g) dispute resolution – development of an international competent authority; and (h) enforcement of ABS arrangements.

B. Contract as an inclusive instrument

66. Contract law can be *sui generis* 60/ 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. However, reliance on contracts is also as equitable or inequitable as the governing jurisdiction in which it is negotiated. The identified challenges for contracts include the good 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.

67. The IR must develop mechanisms that will allow Indigenous customary law to be binding in the national and international context. A tangible 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

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

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 traditional knowledge and genetic resources. 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 possible arbitrate contracts arising from ABS of traditional knowledge.

68. 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 a decision of the Conference of the Parties, but make limited efforts to implement. Initial evidence seems conclusive that few Parties to date have developed legislation, particularly developed countries.

69. 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 (MTAs) 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.

70. Indigenous peoples often state that indigenous customary law must form an integral component of an IR. Incorporation of that indigenous customary law within ABS arrangements is one tangible means that can achieve this end. To ensure that ABS arrangements are negotiated in good faith and not obtained by disadvantage of indigenous peoples' bargaining power, the State can play a substantive role

by creating a equitable 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

71. 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 passé.

D. Competent authorities

72. 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

73. 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.

74. 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 traditional knowledge. 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 the rights of indigenous peoples 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 analyse, 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 peoples' competent authority

75. 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 to the National Competent Authority be either recognized where indigenous peoples have existing decision-making bodies or established 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 peoples Competent Authority.

76. One of the most empowering and legal certainty-providing opportunities that an indigenous peoples Competent Authority ("IPCA") may have 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.

77. 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

78. 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

79. 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:

(a) First, a request is made by a prospective user to the Indigenous provider for an ABS arrangement about particular traditional knowledge;

(b) 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;

(c) 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;

(d) Fourth, the IPCA Certificate is sent to the national competent authority and accepted as evidence of FPIC, they issue a complementary certificate;

(e) Fifth, an international competent authority reviews the certificate and evidence and issues its own certificate.

F. Dispute resolution

80. 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 people 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.

81. If indigenous peoples' rights to traditional knowledge, genetic resources 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.

82. 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.

83. Indigenous peoples can also have interests in disputes where they have not had the opportunity to be a party to an ABS arrangement. 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:

(a) The interpretation, application or implementation of this ABS agreement;

(b) A breach or anticipated breach of the ABS agreement;

(c) Compensation as it relates to interference with traditional use or communal property; or,

(d) Any other matter as provided herein or as may be referred to the dispute resolution process by the indigenous competent authority.

84. 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

85. 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.

86. 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.

87. 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 people's 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;
