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**BRIDGING THE NAGOYA COMPLIANCE GAP: THE FUNDAMENTAL
ROLE OF CUSTOMARY LAW IN PROTECTION OF INDIGENOUS
PEOPLES' RESOURCE AND KNOWLEDGE RIGHTS**

Brendan M. Tobin

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TABLE OF CONTENTS

Introduction	144
1. International Protection of Indigenous Peoples' Knowledge and Resource Rights	144
2. Customary Law and Ambiguity in the Nagoya Protocol	147
3. Plugging the Compliance Gap	149
4. Customary Law, IGC and Sui Generis Protection of Traditional Knowledge	151
5. Customary Law in Regional and National Protection of Traditional Knowledge	152
6. Constitutional Recognition of Customary Law and the Case for Native Title	154
7. Securing Recognition of Customary Law in Foreign Jurisdictions	156
8. Biocultural Protocols and Codification of Customary Law	158
9. Intercultural Legal Pluralism and Equity	160
Conclusions	161

INTRODUCTION

The adoption of the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing to the Convention on Biological Diversity (Nagoya Protocol), in October 2010, was seen as a significant step forward in the recognition of Indigenous peoples and local communities' rights over their genetic resources and traditional knowledge.¹ The Nagoya Protocol obliges States to ensure the existence of prior informed consent for access to and use of Indigenous peoples and local communities' genetic resources and traditional knowledge.² States are also obliged 'to take into consideration' the customary laws and protocols of Indigenous peoples and local communities in implementing the Nagoya Protocol.⁴ There is, however, concern about the level of commitment towards implementation of these provisions. A draft European Union proposal for implementation of the Nagoya Protocol, for instance, makes no reference at all to customary law and restricts protection to a small fraction of traditional knowledge.⁵

This article explores international legal protection of Indigenous peoples' rights over their genetic

resources and traditional knowledge.⁶ It analyses the status of customary law in international human rights law and under national constitutional law, as well as its place in regional and international regulation of access to genetic resources and protection of traditional knowledge. It discusses the challenges, opportunities and modalities for securing state recognition of customary law. It goes on to discuss the initiatives taken by Indigenous peoples in the development of biocultural protocols and argues that good global governance must rest on a body of intercultural legal pluralism. The article concludes that due respect and recognition for customary law is crucial if states are to meet their obligations to respect, protect and fulfil Indigenous peoples' human rights and ensure legal certainty for users of genetic resources and traditional knowledge. It further concludes that the adoption of robust international compliance mechanisms, in particular disclosure of origin requirements in intellectual property regimes, will play a double role in securing recognition of customary law and working with customary law to bridge the Nagoya Protocol's compliance gap.

1

INTERNATIONAL PROTECTION OF INDIGENOUS PEOPLES' KNOWLEDGE AND RESOURCE RIGHTS

Recognized in more than a dozen international instruments, the right of Indigenous peoples to protect and enjoy their traditional knowledge has become a standard bearer of the drive for recognition and protection of their human rights and cultural heritage.⁷ Equally important are the numerous

1 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, available at <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>, Articles 6 and 7.

2 The Nagoya Protocol talks of Indigenous and local communities. Indigenous peoples have, however, highlighted the importance of adopting the language of international human rights law, and accordingly this article will refer to Indigenous peoples. See WIPO, Report of Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, WIPO/GRTKF/IC/25/INF/9 (2013), Annex 1, p. 2, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_25/wipo_grtkf_ic_25_inf_9.pdf.

3 See Nagoya Protocol, note 1 above.

4 *Id.*, Article 12.

5 Proposal for a Regulation of the European Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union Brussels, 4.10.2012 COM(2012) 576 final, 2012/0278 (COD)C7-0322/12 (2012), available at [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2012\)0576_com_com\(2012\)0576_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2012)0576_com_com(2012)0576_en.pdf) [hereafter Proposal].

6 Although the article primarily addresses the rights of Indigenous peoples it will on occasion refer to both Indigenous peoples and local communities. Even where not specifically referred to in the text much of the content may be applicable to local communities as well.

7 See Mick Dodson, *UNPFII Study on Customary Laws Pertaining to Indigenous Peoples' Traditional Knowledge and to What Extent Such Customary Laws Should be Reflected in International and National Standards Addressing Traditional Knowledge* E/C.19/2007/10 (2007).

international instruments recognising Indigenous peoples' rights to their natural resources including genetic resources.⁸ Recognition and protection of these rights is inextricably linked to realisation of rights to food, culture, education, health, land, resources, customary laws and institutions, development, human dignity, and self-determination.⁹

The most comprehensive articulation of Indigenous peoples' human rights is to be found in the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP or Declaration).¹⁰ The Declaration formally recognises Indigenous peoples' rights to self-determination¹¹ and to promote, develop and maintain their own legal regimes, in accordance with international human rights standards.¹² It also recognises their rights to the lands, territories and resources they have traditionally owned, occupied or otherwise used or acquired,¹³ and requires that these rights be adjudicated with due respect for their customs, laws and land tenure systems.¹⁴ States are obliged to establish and implement 'in conjunction with Indigenous peoples' fair, impartial, independent, open and transparent processes to recognise and adjudicate their rights over their lands, territories and resources'.¹⁵ This is to be done with 'due recognition' for their 'laws, traditions, customs and land tenure systems'.¹⁶ The Declaration gives specific recognition to Indigenous peoples' rights over human and genetic resources, seeds, medicines, and knowledge of the properties of fauna and flora,

as well as over their cultural heritage and intellectual property.¹⁷ It requires states to provide redress, including compensation, when there has been breach of Indigenous peoples' resource rights.¹⁸ It also requires that Indigenous peoples have access to prompt, just and fair procedures to resolve disputes with states or other parties, and access to effective remedies for breaches of their individual and collective rights.¹⁹ These procedures and any decision taken under them must give due regard to the Indigenous peoples' customary laws and traditions and to international human rights.²⁰

Although UNDRIP is not of itself legally binding, it has already been relied upon by international treaty bodies,²¹ and is widely seen as reflecting the status of international human rights of Indigenous peoples,²² as set out in international human rights instruments and in customary international law.²³ Unlike treaties, which only bind those states that have ratified them, customary international law, derived from state practice and *opinio juris*, may bind states without any formal acquiescence on their part.²⁴ According to Anaya, customary international law has already crystallised around Indigenous peoples' rights to self-determination,²⁵ to their

8 See for example United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, U.N. Doc. A/Res/61/295 (2007) (hereafter UNDRIP) and Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull.59, entered into force Sept. 5, 1991 (Hereafter ILO Convention 169).

9 See Brendan Tobin, 'Setting Protection of TK to Rights – Placing Human Rights and Customary Law at the Heart of TK Governance', in Evanson C. Kamau and G. Winter eds, *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* 101, 104-110 (London: Earthscan, 2009).

10 UNDRIP, note 8 above.

11 *Id.*, Article 3.

12 *Id.*, Article 34.

13 *Id.*, Article 26.1.

14 *Id.*, Article 26.3.

15 *Id.*, Article 27.

16 *Id.*

17 *Id.*, Article 31.

18 *Id.*, Article 28.

19 *Id.*, Article 40.

20 *Id.*

21 Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life (art. 15 (1), Para. (a), of the International Covenant on Economic Social and Cultural Rights) E/C.12/GC/21 (2009), 2.

22 See Elsa Stamatopoulou, 'Taking Cultural Rights Seriously', in Steven Allen and Alexandra Xanthaki eds, *Reflections on the UN Declaration on the Rights of Indigenous peoples* 387 (Oxford: Hart Publishing Ltd, 2010).

23 Customary international law has been defined as reflecting the 'common ground [that states and other relevant actors have reached] about minimum standards that should govern behaviour toward Indigenous peoples' which represent a 'controlling consensus' flowing from 'widely shared values of human dignity'. See James Anaya, *Indigenous peoples in International Law* 61 (New York: Oxford University Press, 2nd ed. 2004).

24 See J. D. Smelcer, 'Using International Law More Effectively to Secure and Advance Indigenous peoples' Rights: Towards Enforcement in US and Australian Domestic Courts' 15/1 *Pacific Rim Law & Policy Journal* 301, 304 (2006).

25 See Anaya, note 23 above, at 112.

lands²⁶ and cultural integrity.²⁷ Customary international law has also been claimed to recognise Indigenous peoples' rights to their language, sacred sites and cultural artefacts,²⁸ as well as to their traditional lands and resources.²⁹ Most important for the purposes of the current analysis is the recognition by customary international law of Indigenous peoples' rights to their own legal regimes and the concomitant obligation of states to respect and recognise Indigenous peoples' legal regimes in order to secure their human rights.³⁰

Whereas UNDRIP is merely declaratory and the courts are the final arbiters of the existence of customary international law, International Labour Organisation Convention 169 on Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169 or Convention) establishes binding legal obligations for member states.³¹ The Convention

requires that special safeguards be given to Indigenous peoples' rights to natural resources pertaining to their lands, including rights to participate in use, management and conservation.³² Where states retain rights to resources on or under the land they are obliged under Article 15 (2) of the Convention to consult with Indigenous peoples in advance of undertaking or permitting any programmes for the exploration or exploitation of such resources on their lands. Indigenous peoples are to participate in benefits of such activities and to receive compensation for any damage arising therefrom.³³ States are also obliged to secure Indigenous peoples' participation in decision-making processes affecting them,³⁴ and to recognise and respect their customary laws and traditional decision making institutions.³⁵ ILO Convention 169 has inspired constitutional changes to recognise indigenous rights in many countries, particularly in Latin America.³⁶ More recently, the Convention has spurred developments in national legislation for consultation with Indigenous peoples prior to the grant of rights for the exploitation of natural resources on their territories.³⁷

The Conference of the Parties, the governing body of the Convention on Biological Diversity 1992 (CBD), has declared the CBD to hold the primary mandate for protection of traditional knowledge relevant for the conservation and sustainable use of biological diversity.³⁸ In exercise of that mandate,

26 *Id.*, at 70.

27 *Id.*, at 137.

28 See Siegfried Weissner, 'Rights and Status of Indigenous peoples: A Global Comparative and International Legal Analysis' 12 *Harvard Human Rights Journal* 57, 109 (1999).

29 See 'Final Written Arguments of the Inter-American Commission on Human Rights submitted to the Inter-American Court of Human Rights Court in the case of Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua, August 10, 2001' 19/1 *Ariz. J. Int'l & Comp. L.* 325 (2002), Para. 64, where the Commission argues that, 'Numerous international instruments and precedents affirm that Indigenous peoples have the right to safeguard their traditional tenure over land and natural resources. These international instruments and precedents, together with a pattern of relatively consistent developments at the domestic level in American countries among others, demonstrate the existence of a norm of customary international law in this regard, or at least a very advanced process in the creation of such a norm'.

30 See Brendan Tobin, 'Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights' 305 (PhD Thesis, National University of Ireland, Galway, 2011). See also Robin Perry, 'Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty' 24 *Harvard Human Rights Journal* 71 (2011).

31 As of July 2013, 22 primarily Latin American states had ratified ILO Convention 169. Apart from Latin American countries, ratifications have also come from a number of European states (Denmark, Netherlands, Norway and Spain) and from one Pacific Island state (Fiji), one Asian state (Nepal), and in 2010 the first African state to ratify the Treaty (the Central African Republic). For a list of Treaty parties, see <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>.

32 ILO Convention 169, Article 15 (1).

33 *Id.*, Article 15.

34 *Id.*, Article 6.

35 *Id.*, Articles 8 and 9.

36 See for example Constitution of Colombia 1991, Articles 246, 286 and 287; Constitution of Peru 1993, Articles 2.19, 89, 149; Constitution of Ecuador 2008, Article 191 and Constitution of Bolivia 2009, Article 30. II.

37 See for example Peru's Ley No. 29785, Ley del derecho a la consulta previa a los pueblos indígenas u originarios reconocido en el Convenio No. 169 de la Organización Internacional de Trabajo, which is described as an example of 'best practices' by Special Rapporteur James Anaya in his submission to the Expert Mechanism on 'Some examples of good practices for Indigenous peoples' participation in decision making: political participation, consultation standards, and participation in development projects' cited in A/HRC/EMRIP/2011/2' (2011), Para. 63.

38 Convention on Biological Diversity, COP-4, Decision IV/10, Measures for implementing the Convention on Biological Diversity.

the Conference of the Parties has recognised requirements for consultation and prior approval by Indigenous peoples for access to and use of their resources and knowledge as set out in the CBD.³⁹ In October 2010, the adoption of the Nagoya Protocol established a binding legal regime to regulate access to genetic resources and benefit sharing and the protection of associated traditional knowledge.

2 CUSTOMARY LAW AND AMBIGUITY IN THE NAGOYA PROTOCOL

The Nagoya Protocol has adopted two key measures to secure the rights of Indigenous peoples over their traditional knowledge and genetic resources and to define state obligations to protect and secure these rights in a fashion that complies with and is supported by relevant international human rights law. Firstly, it requires Parties to take measures with the aim of ensuring that the prior informed consent or approval of Indigenous peoples and local communities is obtained (a) for access to genetic resources 'where they have the established right to grant access to such resources',⁴⁰ and (b) for access to 'traditional knowledge associated with genetic resources that is held by Indigenous peoples and local communities'⁴¹. The Nagoya Protocol also requires that mutually agreed terms be established for access to traditional knowledge.⁴² Secondly, in what may prove to be its most ground-breaking provision, Article 12 requires States in their implementation of the Nagoya Protocol to 'take into consideration the customary laws and protocols' of Indigenous peoples and local communities. In effect the Nagoya Protocol is applying and reinforcing international human rights obligations calling for due recognition and respect for customary law. The Nagoya Protocol

is the first binding international legal instrument to specifically recognise the responsibilities of countries to 'take into consideration' customary law of Indigenous peoples and local communities in the development of national law and policy.

The Nagoya Protocol is crafted in such a way that customary law governs both the point of access and the point of use of genetic resources and traditional knowledge. Both, states in which Indigenous peoples reside and user states⁴³ are obliged to 'take measures...with the aim of ensuring' that access to and use of Indigenous peoples' genetic resources⁴⁴ and traditional knowledge⁴⁵ within the regulating state's territory is subject to their prior informed consent. This obligation applies to states when dealing with issues regarding the rights of Indigenous peoples from both their own and foreign jurisdictions. The Nagoya Protocol's implementation may therefore be seen as requiring states to adopt measures supporting intercultural legal pluralism,⁴⁶ and the fulfilment of Indigenous peoples' human

43 Although all countries are potentially user countries the term is widely understood as applying primarily to countries with advanced research, technological and/or industrial capacity in the pharmaceutical, cosmetics, natural products, agroindustrial, and biotechnology sectors. See Charles V. Barber, Sam Johnston and Brendan Tobin, *User Measures: Options for Developing Measures in User Countries to Implement the Access and Benefit-Sharing Provisions of the Convention on Biological Diversity* (Tokyo: UNU-IAS, 2nd ed 2003).

44 Nagoya Protocol, note 1 above, Article 6 (2).

45 *Id.*, Article 7.

46 An intercultural approach to legal pluralism promotes respect for distinct legal jurisdictions while drawing upon a wide range of legal sources including state, customary and international law for the development of law in areas such as equity, criminal, land, family and constitutional law as well as human rights. It would also support the redefinition of the status of customary law within the hierarchy of laws. This may be distinguished from multicultural legal pluralism which sees state and customary laws co-existing in parallel yet distinct worlds within the same jurisdiction. The multicultural approach tends to lead to the subordination of customary law where it conflicts with state law. See Catherine Walsh, 'The Plurinational and Intercultural State: Decolonization and State Re-founding in Ecuador', *Kult 6 - Special Issue, Epistemologies of Transformation: The Latin American Decolonial Option and its Ramifications* 65 (2009), available at <http://www.postkolonial.dk/artikler/WALSH.pdf>.

39 Convention on Biological Diversity, 5 June 1992, Article 8 (j).

40 Nagoya Protocol, note 1 above, Article 6 (2).

41 *Id.*, Article 7.

42 *Id.*

rights. By requiring their prior informed consent the Nagoya Protocol empowers Indigenous peoples and local communities to control access to and use of their traditional knowledge and genetic resources. Indigenous peoples and local communities are entitled to regulate their own consent processes within the framework of their own legal regimes and decision-making practices. The effect of this is to extend the remit of customary law far beyond its historic jurisdiction. The obligation to ensure prior informed consent in Articles 6 (2) and 7 of the Nagoya Protocol applies to all countries Party to the Protocol, where traditional knowledge is being accessed and/or utilised, and is not conditional on any action by the countries in which Indigenous peoples reside. To decide otherwise would make obligations to respect Indigenous peoples' rights, including their human rights over their genetic resources and traditional knowledge, conditional upon the national capacity and political will of the states in which they reside. The obligation to 'protect, respect and fulfil' Indigenous peoples' human rights under international law and their rights as set out in the Nagoya Protocol is, however, directed towards all states and most importantly towards any state within whose territory a breach of such rights may occur.

Despite its clear recognition of Indigenous peoples' and local communities' rights over their genetic resources and traditional knowledge, the Nagoya Protocol does not establish or recognise their exclusive property rights over their resources and knowledge. On the contrary, it includes a number of highly ambiguous qualifications regarding the resources and knowledge for which prior informed consent is required. Article 6 of the Nagoya Protocol, for example, requires prior informed consent for access where Indigenous peoples have 'an established right to genetic resources'. Just what 'an established right' means is unclear. A narrow interpretation of the term would limit it to rights specifically set down in national law. A broader interpretation would include recognition of rights derived from international treaties and customary international law and most importantly from the customary laws of Indigenous peoples and local communities themselves. Also confusing is the reference in Article 7 of the Nagoya Protocol to 'traditional knowledge associated with genetic

resources' that is 'held by Indigenous peoples and local communities'. The Nagoya Protocol does not define either term, leaving it up to national law and the courts to decide whether or not specific traditional knowledge is in fact 'associated with' genetic resources and what Indigenous peoples and local communities must do to prove they 'hold' relevant knowledge. These and other ambiguities in the Nagoya Protocol threaten to undermine its implementation at the national and regional level. Drawing attention to human rights law, constitutional recognition of indigenous rights and to the customary laws and protocols of Indigenous peoples and local communities, may help prevent narrow interpretations of ambiguous terms being used to further dispossess Indigenous peoples of their resource and knowledge rights. Effective realisation of the promise of the Nagoya Protocol will, however, ultimately depend on political will, judicial capacity and possibilities of international oversight. Serious doubts concerning the existence of such will began to emerge with the publication of a draft European Proposal for legislation to implement the Nagoya Protocol in late 2012.⁴⁷

The draft European Union legislation to implement the Nagoya Protocol, published in 2012, has adopted a very narrow approach to the identification of protected traditional knowledge. This was ostensibly due to the lack of an agreed international definition of what constitutes 'traditional knowledge'.⁴⁸ It also sought to limit state obligations to adopt measures to ensure the existence of prior informed consent to those cases where national legislation regulating access to and use of Indigenous peoples' genetic resources and traditional knowledge exists in their home countries. This is tantamount to denying the obligation of states to prevent a breach of Indigenous peoples' human rights within their territories if those rights are not secured in the country in which the Indigenous peoples reside. Also problematic is the complete lack of any guidance in the draft law on the manner in which European Union member states are to 'take into consideration' Indigenous peoples' and local communities' customary laws and protocols in the development of national law and the resolution of disputes relating to access and use of genetic

⁴⁷ Proposal, note 5 above.

⁴⁸ *Id.*

resources and traditional knowledge.⁴⁹ In a positive move the European Parliament has, more recently, issued a strong resolution supporting effective protection of Indigenous peoples' rights over their genetic resources and traditional knowledge.⁵⁰

3

PLUGGING THE COMPLIANCE GAP

The Nagoya Protocol requires states to ensure that utilization of genetic resources and traditional knowledge within their jurisdiction complies with the national access and benefit sharing legislation of source countries.⁵¹ The Nagoya Protocol also establishes the framework for an international monitoring system including a series of checkpoints where compliance may be demonstrated through the provision of an internationally recognisable 'certificate of compliance'.⁵² Proposals for an international certification scheme have been closely linked to proposals calling for mandatory disclosure of the origin of genetic resources and traditional knowledge and evidence of prior informed consent

for their use as a condition for processing patent applications.⁵³ The Conference of the Parties to the Convention on Biological Diversity was the first international body to support disclosure proposals in Decision VI/24 which calls upon states to 'encourage disclosure of the country of origin of genetic resources in applications for intellectual property rights ... as a possible contribution to tracking compliance with prior informed consent and the mutually agreed terms'.⁵⁴ While the Nagoya Protocol has not established any specific requirements for disclosure it does require states to designate effective checkpoints to monitor and enhance transparency about the utilization of genetic resources.⁵⁵ Numerous proposals have been made for the adoption of international obligations on disclosure in the World Trade Organisation (WTO)'s Agreement on Trade Related Aspects of Intellectual Property (TRIPS).⁵⁶ Measures setting out obligations for mandatory disclosure requirements relating to access and use of genetic resources and traditional knowledge are also at the heart of the on-going negotiations at the World Intellectual Property Rights Organisation (WIPO) Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC).⁵⁷ Upwards of 50

49 For more in-depth discussion of the European draft legislation for implementation of the Nagoya Protocol, see Brendan Tobin, *Biopiracy by Law: EU draft law threatens Indigenous peoples' rights over their traditional knowledge and genetic resources*, Issue 2, *E-IP Review*, January 2014 [forthcoming].

50 European Parliament Resolution of 15 January 2013 on development aspects of intellectual property rights on genetic resources: the impact on poverty reduction in developing countries 2012/2135(INI), Para. 20, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0007+0+DOC+XML+V0//EN> [hereafter European Parliament Resolution of 15 January 2013].

51 Nagoya Protocol, note 1 above, Articles 15 and 16.

52 *Id.*, Article 17. For discussion of certification systems, see Brendan Tobin, Geoff Burton and Jose Carlos Fernandez-Ugalde, *Certificates of Clarity or Confusion: The Search for a Practical, Feasible and Cost-effective System for Certifying Compliance with PIC and MAT* (Yokohama: UNU-IAS, 2008). See also Brendan Tobin, David Cunningham and K. Watanabe, *The Feasibility, Practicality and Cost of a Certificate of Origin Scheme for Genetic Resources*, UNEP/CBD/WG-ABS/3/INF/5 (Montreal: CBD Secretariat, 2005).

53 See Brendan Tobin, 'Alternativas a Las Legislaciones De Propiedad Intelectual, Reunión Regional Sobre Propiedad Intelectual y Pueblos Indígenas', Regional Meeting on Intellectual Property Rights and Biodiversity, COICA/UNDP/, 28-30 September 1994, available at http://griffith.academia.edu/BrendanMichaelTobin/Papers/1354490/Alternativas_a_la_Propiedad_Intelectual.

54 Convention on Biological Diversity, COP 6, Decision VI/24, Access and benefit-sharing as related to genetic resources.

55 Nagoya Protocol, note 1 above, Article 17.

56 See for example documents WT/GC/W/564, 31 May 2006, and the communication to the World Trade Organization in 2011 by Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the ACP Group and The African Group (TN/C/W/59), setting out a proposal to incorporate disclosure requirements in the Trade Related Aspects of Intellectual Property Agreement. A more extensive list of relevant documents is to be found on the WTO website, available at http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm.

57 See WIPO, Consolidated Document Relating to Intellectual Property and Genetic Resources, Revision 2, 8 February 2013, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_www_230222.pdf.

countries have already adopted some form of disclosure obligations relating to biological resources, making the case for a global regime even stronger.⁵⁸ In an interesting move, the European Parliament has called upon European negotiators to support the adoption of disclosure of origin provisions in on-going international negotiations.⁵⁹

Adoption of international disclosure obligations in other forums would pave the way for more effective implementation of the Nagoya Protocol's provisions for monitoring access and use of genetic resources. They would not however plug the gap in monitoring access to or use of traditional knowledge under the Nagoya Protocol. The Nagoya Protocol makes no provision for monitoring of access to or use of traditional knowledge and provides no guidance on securing compliance with obligations on prior informed consent and consideration of customary law. While the Nagoya Protocol requires Parties to provide access to a system for resolving disputes,⁶⁰ it does not provide any remedy for aggrieved Indigenous peoples and local communities to ensure protection of their rights. In the absence of strong compliance mechanisms at the international level the burden for enforcing Indigenous peoples' rights over their resources and knowledge is, therefore, likely to fall on national courts, regional human rights organisations, such as the Inter-American Court of Human Rights, and alternative dispute resolution mechanisms.

National and regional courts and alternative dispute resolution mechanisms will need to prepare themselves for the challenges associated with providing access to justice for Indigenous peoples from foreign jurisdictions and for taking into consideration their customary law. Amongst the issues courts may be called upon to adjudicate will be the extent of Indigenous peoples' rights over

genetic resources and traditional knowledge, the existence or otherwise of prior informed consent for access to and use of such resources and knowledge, and the identification, interpretation and application of relevant customary law. Customary law has, therefore, a key role to play in determining the existence or otherwise of Indigenous peoples' rights over genetic resources and knowledge; the identity of those entitled to grant prior informed consent; and, whether consent has indeed been given; as well as the nature of the rights and limitations, including fiduciary obligations, associated with access to and use of relevant resources and knowledge.

The possibility of introducing customary law, in particular customary law from a foreign jurisdiction, in judicial and alternative dispute resolution forums raises many practical and legal issues.⁶¹ These include questions of access to courts, standing, the status and proof of customary law, the manner in which evidence of customary can be taken, and the preparedness of the judiciary, lawyers and court personnel to receive and maintain the confidentiality of relevant customary laws.⁶² This is just a small sample of the issues which courts and legislators in countries with Indigenous peoples and local communities among their population, as well as those with strong biotechnology, pharmaceutical, agroindustrial and/or natural products industries, will need to address in the coming years. Perhaps the greatest question facing the judiciary and arbitrators will be whether and to what extent they can and should adopt a flexible approach, akin to that of traditional decision-making authorities, to the application of customary law principles. This will be crucial if customary law is to maintain its dynamism and legitimacy. These are not simple challenges. They must, however, be addressed if states are to meet their obligations under international human rights law and the Nagoya

58 See David Vivas-Eugui, Bridging the Gap on Intellectual Property and Genetic Resources in WIPO's Intergovernmental Committee (IGC), Issue Paper No. 34, ICTSD's Programme on Innovation, Technology and Intellectual Property 31 (Geneva: International Centre for Trade and Sustainable Development, 2012).

59 See, European Parliament Resolution of 15 January 2013, note 50 above.

60 Nagoya Protocol, note 1 above, Article 18.

61 See Brendan Tobin, 'The Role of Customary Law and Practice', in Christoph Antons ed, *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* 127, 146-151 (Alphen aan den Rijn: Kluwer Law International, 2009).

62 See Brendan Tobin, *The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries* 87 (Geneva: WIPO UNU, 2013).

Protocol, as well as under emerging instruments for the protection of genetic resources and traditional knowledge being negotiated at the WIPO IGC.

4 CUSTOMARY LAW, IGC AND SUI GENERIS PROTECTION OF TRADI- TIONAL KNOWLEDGE

The WIPO IGC has since its establishment in 2001 been slowly edging its way towards the formal negotiation of one or more international instrument(s) for the protection of traditional knowledge and traditional cultural expressions. Central to the IGC's deliberations has been the question of the role of customary law and disclosure requirements in the regulation of genetic resources and traditional knowledge.⁶³

Early on the IGC recognised the importance of ensuring due respect and recognition for customary law in the definition of measures for the protection of traditional knowledge.⁶⁴ It also recognised that respect for customary law may require consideration of the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.⁶⁵ In a document setting out proposed objectives and draft articles for the protection of traditional knowledge

the IGC saw customary law as having a role to play in identifying traditional knowledge,⁶⁶ ensuring equitable benefit sharing,⁶⁷ and defining cases of misappropriation.⁶⁸ The document also highlighted the importance of securing the customary usage of traditional knowledge.⁶⁹

In 2006, WIPO prepared an Issues Paper on customary law describing numerous ways in which customary law has already been recognised in intellectual property related cases and national legislation.⁷⁰ These include establishing collective legal standing; settlement of community disputes; asserting an equitable interest in intellectual property; sustaining a claim of breach of confidence; conferring collective ownership of an intellectual property right; as the basis of a general right over biological resources and traditional knowledge; protecting continuing customary use; determining entitlement for damages; and the status of a claimant as a member of an Indigenous peoples or other traditional community, or to establish a specific indigenous or aboriginal right.⁷¹ References to customary law continued to be prominent in the draft objectives and articles prepared by the IGC until early 2010.⁷² At that stage the IGC began more

63 See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICIPGR TKF), Draft Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, WIPO/GRTKF/IC/5/10, 2 May 2003 and WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICIPGR TKF), Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications, Document Submitted by the European Community and its Member States, WIPO/GRTKF/IC/8/11, 17 May 2005.

64 WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICIPGR TKF), The Protection of Traditional Knowledge, Draft Objectives and Principles, WIPO/GRTKF/IC/10/5, 2 October 2006, Article 1.

65 *Id.*, Article 1 (5).

66 *Id.*, Article 6.

67 *Id.*, Article 5.

68 *Id.*, Article 1(5). The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable benefit sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

69 *Id.*

70 See WIPO, *Draft Customary Law Issues Paper 1: Customary Law & the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge: Issues Paper – version 3.0* (December 2006).

71 *Id.* See also Antony Taubman, 'Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge', in K. Maskus and J. Rechman eds, *International Public Goods and Transfer of Technology under a Globalised Intellectual Property Regime* 521, 531-532 (London: Cambridge University Press, 2005).

72 See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICIPGR TKF), The Protection of Traditional Knowledge, Revised Objectives and Principles, WIPO/GRTKF/IC/16/5. Prov., 22 January 2010, Article 1.

focused negotiations based upon a revised mandate provide by the WIPO General Assembly, which called upon the IGC to:

Undertake text-based negotiations with the objective of reaching agreement on a text of an international instrument (or instruments) *which will ensure* the effective protection of genetic resources, traditional knowledge and traditional cultural expressions.⁷³

As negotiations began in earnest references to customary law began to disappear from the IGC's draft instrument for protection of traditional knowledge. What remained were references to its role in benefit sharing and rights to continue customary use of resources. A steady increase in recognition of customary law at the national and regional level,⁷⁴ described in more detail below, contrasts with the decreasing profile it is being given in the negotiating texts of the WIPO IGC. The IGC's position also runs contrary to the overall increase in the recognition of customary law in international law in general and as recognised in the Nagoya Protocol in particular.

5 CUSTOMARY LAW IN REGIONAL AND NATIONAL PROTECTION OF TRADITIONAL KNOWLEDGE

Significant advances have been made in the development of legal frameworks for the protection of traditional knowledge in various regions of the world. The Andean Community Decision 391 of 1996, for example, requires prior informed consent of indigenous, local and Afro-American communities as a pre-condition for approval of bioprospecting agreements involving the collection

of resources on their lands or use of their traditional knowledge.⁷⁵ Community Decision 486 requires applicants for patents utilising genetic resources or traditional knowledge from the region to disclose its origin and show that prior informed consent has been obtained for its use.⁷⁶ In 2005, a report by indigenous experts prepared at the request of the Andean Community secretariat proposed that any regime for protection of traditional knowledge be grounded in customary law.⁷⁷ The report recommends that any regime be based on "Indigenous peoples' own ancestral systems based on customary law and their own cultural practices...thus allowing communities to further consolidate their traditional structures".⁷⁸

In 2010 the African Intellectual Property Organization (ARIPO) adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Swakopmund Protocol).⁷⁹ The Swakopmund Protocol reflects many provisions of the earlier IGC draft documents on protection of traditional knowledge and traditional cultural expressions. Its stated purpose is to protect traditional knowledge holders against infringement of their rights under the Swakopmund Protocol and to protect

⁷³ See WIPO General Assembly, Report of the 38th General Assembly (Geneva, WIPO 1 October 2009) WO/GA/38/20, 60.

⁷⁴ See Tobin, note 30 above, at 95-104.

⁷⁵ See Andean Community Decision 391: Common Regime on Access to Genetic Resources, available at www.sice.oas.org/trade/junac/decisiones/dec391e.asp.

⁷⁶ See Andean Community Decision 486: Common Intellectual Property Regime, available at <http://www.sice.oas.org/trade/junac/decisiones/dec486e.asp>, Article 26 (i).

⁷⁷ See R. De la Cruz et al., *Elementos Para La Protección Sui Generis De Los Conocimientos Tradicionales Colectivos e Integrales Desde la Perspectiva Indígena* (Caracas: Comunidad Andina Y Corporación Andina De Fomento, 2005).

⁷⁸ *Id.* My translation of original text: 'Dada las características de los conocimientos tradicionales colectivos e integrales de los pueblos indígenas se recomienda que para su protección se opte por los sistemas propios y ancestrales de los pueblos indígenas, es decir, sobre la base del derecho consuetudinario y las prácticas culturales propias, permitiendo así que las comunidades tengan una mayor consolidación de sus estructuras tradicionales internas...'

⁷⁹ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Adopted by the Diplomatic Conference of African Regional Intellectual Property Organization (ARIPO) at Swakopmund (Namibia) on 9 August 2010.

expressions of folklore against misappropriation.⁸⁰ Traditional owners are, under the Swakopmund Protocol, granted the exclusive right to authorize exploitation of their traditional knowledge.⁸¹ Exploitation is defined as including manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context.⁸² Protection is not to affect traditional use and accessibility of knowledge.⁸³ The duration of protection is unlimited as long as the criteria for recognition of knowledge as traditional are maintained.⁸⁴ Under the Swakopmund Protocol, customary law has a central role to play in identifying traditional knowledge and expressions of culture,⁸⁵ in determining rights holders,⁸⁶ and in the resolution of local and transboundary conflicts over ownership rights.⁸⁷ Munyi adopts a critical view of the Protocol's adoption, which he says reflects extensive influence by WIPO and negatively diverges from the position of the African Union Model Law,⁸⁸ which views community rights, traditional knowledge and biological resources as being inextricably linked.⁸⁹ Despite such drawbacks, the Swakopmund Protocol's adoption may strengthen the hand of the African countries in negotiations at the IGC on contentious issues such as the recognition of customary law.

Work on the development of a model law for protection of traditional knowledge in the South Pacific has been going on for more than a decade and has been the subject of numerous regional, sub-

regional and national workshops. An early version of the draft model law sought to redefine the application of the public domain to traditional knowledge, regulating rights not on the basis of where information was found but on the basis of how it got there.⁹⁰ Later iterations of the Traditional Biological Knowledge, Innovations and Practices Act, commonly referred to as the 'TBKIP Model Law', have retreated from this position, but note the need for further evaluation of opportunities to redefine intellectual property law to better secure the rights of Pacific Islanders.⁹¹ The TBKIP Model Law requires prior informed consent for use of traditional knowledge, thereby, providing opportunities for Indigenous peoples to require conformance with customary norms and practices. In 2010 the Pacific Islands Forum Secretariat published a comprehensive set of guidelines for the development of legislation for the protection of traditional knowledge, based upon the TBKIP Model Law.⁹² The guidelines draw attention to the important role of customary law in many areas of traditional knowledge governance including identification of traditional knowledge, determining rights of ownership, resolution of disputes, and distribution of benefits.⁹³ These reflect many of the areas in which customary law is recognised in the Swakopmund Protocol and in the WIPO Issues Paper on customary law, demonstrating the growing awareness of the need to give due recognition to customary law in laws regulating traditional knowledge rights.

⁸⁰ *Id.*, Section 1.1.

⁸¹ *Id.*, Section 7.1.

⁸² *Id.*, Section 7.3.

⁸³ *Id.*, Section 11.

⁸⁴ *Id.*, Section 13.

⁸⁵ *Id.*, Sections 4 and 16.

⁸⁶ *Id.*, Section 18 (a).

⁸⁷ *Id.*, Sections 22(1) and 24.

⁸⁸ African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (Lagos: Organisation of African Unity, 2000).

⁸⁹ See Peter Munyi, 'Progress or Setback? An African Regional Instrument to Protect Traditional Knowledge and Folklore' 2/2 *ICTSD: Bridges Trade BioRes Review* (May 2008), available at <http://ictsd.org/i/news/bioresreview/12091/>.

⁹⁰ Draft Model Law for the Protection of Traditional Ecological Knowledge, Innovations and Practices 200X, available at <http://www.mabs.jp/countries/others/pdf/331e.pdf>.

⁹¹ The Traditional Biological Knowledge, Innovations and Practices Act 200X, available at http://www.sprep.org/attachments/legal/MLv11.doc4Apr_000.pdf.

⁹² Pacific Islands Forum Secretariat, 'Guidelines for Developing Legislation for the Protection of Traditional Biological Knowledge, Innovations and Practices Based on the Traditional Biological Knowledge, Innovations and Practices Model Law' (2010), available at http://www.spc.int/hdp/index2.php?option=com_docman&task=doc_view&gid=256&Itemid=44.

⁹³ *Id.*

6

CONSTITUTIONAL RECOGNITION OF CUSTOMARY LAW AND THE CASE FOR NATIVE TITLE

The resilience of customary law and its importance for the definition of national regulations on genetic resources and traditional knowledge is apparent from an analysis of national constitutions.⁹⁴ According to Cuskelly, 115 national constitutions give direct or indirect recognition to the rights of Indigenous peoples and/or local communities to their customary laws and practices.⁹⁵ Forms of recognition include, among others, the definition of customary law;⁹⁶ establishment of procedures for proof of customary law;⁹⁷ recognition of customary law as forming part of national law;⁹⁸ recognition of traditional authorities;⁹⁹ declaration of rights to autonomy and self-governance;¹⁰⁰ application of customary law by national courts;¹⁰¹ establishment or maintenance of traditional or local courts;¹⁰² recognition of traditional territories and land as inalienable, imprescriptible and immune from

seizure;¹⁰³ recognition of natural resource rights;¹⁰⁴ requirements for courts to include judges versed in customary law;¹⁰⁵ creating advisory bodies or Councils of Chiefs to directly participate in decision making and/or advise on national law and its effect on customary law;¹⁰⁶ defining the relationship between customary law and common law, constitutional law and/or national law;¹⁰⁷ recognition of customary rules relating to marriage and family law;¹⁰⁸ and recognition of customary law which does not conflict with human rights,¹⁰⁹ in particular women's rights.¹¹⁰ Most widespread is the recognition of rights to culture and/or cultural integrity.¹¹¹

94 See Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law around the World* (Bangkok: IUCN, 2011).

95 *Id.*, at 6.

96 See constitutions of Ghana 1992, Article 11 (3); Lesotho 1996, Section 154; Marshall Islands 1979, Article XIV, Section 1; Papua New Guinea 1975, Schedule 1(2) and Zimbabwe 1979, Section 113.

97 See Constitution of Rwanda 2003, Article 145.

98 See constitutions of Gambia 1997, Section 7; Singapore 1963, Article 2 and Zimbabwe 1979, Section 113.

99 See constitutions of Ghana 1992, Article 270 (1); Lesotho 1996, Sections 45 & 46; South Africa 1996, Sections 211 and 212; Uganda 1995, Article 246 (1); Zimbabwe 1979, Section 111(1); Colombia 1991, Article 246 and Peru 1993, Article 89.

100 See constitutions of Bolivia 2009, Articles 289-296, 299 & 304; Ecuador 2008, Article 57(9); Nicaragua 1987-2005, Article 180 & 181; Paraguay, Article 63; Peru 1993, Article 89; Slovenia 1991, Article 64 and Ukraine 1996, Article 140.

101 See constitutions of Liberia 1986, Article 65; Nigeria 1999, Section 237; Rwanda 2003, Article 145 and South Africa 1996, Section 39 (2).

102 See constitutions of Ethiopia 1994, Article 78; Ghana 1992, Article 125 (2) & (5); Malawi 1994, Section 110(3); South Africa 1996, Section 143(1) and Zimbabwe 1979, Section 18(15).

103 See constitutions of Gambia 1997, Section 22(4); Ghana 1992, Article 267; Kenya 2010, Article 60; South Africa 1996, Section 25(7); Uganda 1995, Article 237 and Zambia 1996, Article 16(2).

104 See constitutions of Bolivia 2009, Article 352-4, 381-3 & 384; Ecuador 2008, Article 57(6) and Peru 1993, Article 66.

105 See Constitution of Nigeria 1999, Section 237, which provides that at least three Justices of the Court of Appeal are to be learned in customary law.

106 See constitutions of Ghana 1992, Article 272; Botswana 1966, Article 88(2) and Somalia 2004, Article 30.

107 See constitutions of Papua New Guinea 1975 and Solomon Islands 1978.

108 See constitutions of Federal Democratic Republic of Ethiopia 1995, Article 34(4) & (5); Kenya 2010, Article 45; Republic of Liberia 1986, Article 23(b); Republic of Malawi 1994, Section 22(5); Republic of Mozambique 1990, Article 119; Republic of Namibia 1990, Article 4(3)(b) and Republic of South Africa 1996, Section 15(3).

109 See for example Constitution of Rwanda 2003, Article 201: unwritten customary law remains applicable as long as it has not been replaced by written laws, is not inconsistent with the Constitution, laws and regulations, and does not violate human rights, prejudice public order or offend morals.

110 See Constitution of Ethiopia 1994, Article 35 (4) which provides that customs and practices that oppress or cause harm to women are prohibited and Constitution of Malawi 1994, Section 24 (2), which provides that legislation shall be passed to eliminate customs and practices that discriminate against women.

111 Rights to culture may be found in the constitutions of more than 60 countries: Albania, Algeria, Andorra, Armenia, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia, Brazil, Colombia, Congo, Cameroon, Ecuador, Egypt, Ethiopia, Finland, Gambia, Georgia, Guatemala, Honduras, Hungary, Kazakhstan, Kiribati, Kyrgyzstan, Laos, Latvia, Lithuania, Macedonia, Mongolia, Mozambique, Myanmar, Nepal, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Philippines, Peru, Poland, Qatar, Romania, Rwanda, Seychelles, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Sudan, Sweden, Syria, Thailand, Timor-Leste, Tuvalu, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Zambia.

Rights to culture as enshrined in Article 15 (1) (c) of the International Covenant on Economic Social and Cultural Rights have been interpreted by the Commission on Economic Social and Cultural Rights as including the right of Indigenous peoples to their 'way of life'.¹¹² The right to a culturally specific 'way of life' must include a right to live according to culturally specific legal mores and practices intrinsic to that way of life. Constitutional recognition of Indigenous peoples' rights to their culture and/or laws, customs and practices provides firm support for claims by Indigenous peoples for the recognition of native title over their traditional knowledge. Native title is a concept developed under common law recognising a subsisting legal right based on customary law in favour of Indigenous peoples over their lands and resources.¹¹³ Halewood, in a comprehensive study of the relevant law in Canada, argues that '... under certain conditions, aboriginal peoples enjoy collectively held rights, recognised in common law, to preclude others from using, reproducing, an disseminating their knowledge'.¹¹⁴ He claims that 'to date ... no aboriginal knowledge protection rights appear to have been extinguished'.¹¹⁵ Consequently he argues that application of the common law doctrine of continuity¹¹⁶ would require that the content of the rights over traditional knowledge be defined through deference to customary laws of the relevant peoples.¹¹⁷

Attempts to extend the concept of native title to cultural property have to date found little traction with the courts. Arguments against such recognition in Australia have centred on the existence of copyright laws, which it has been argued override any common law basis for recognition of a form of native title right over cultural property.¹¹⁸ But cultural property susceptible to copyright is only a small fraction of Indigenous peoples' traditional knowledge. In *Western Australia v Ward*,¹¹⁹ a defining case on native title rights, Kirby J. in a dissenting opinion held that:

Recognition of the native title right to protect cultural knowledge is consistent with the aims and objectives of the Native Title Act, reflects the beneficial construction to be utilised in relation to such legislation and is consistent with international norms declared in treaties to which Australia is a party. It recognises the inherent spirituality and land-relatedness of Aboriginal culture.¹²⁰

For the Tulalip Tribes, the position is, according to Hardison, quite clear. As they never relinquished their rights and their rights have not been extinguished, they are entitled, under the doctrine of continuity, to exercise sovereign control over their traditional knowledge.¹²¹ These sovereign rights are, however, threatened by lack of respect for their customary laws. In a statement to the fifth meeting of the WIPO IGC they put it thus:

Indigenous peoples have generally called for protection of knowledge that the Western system has considered to be in the 'public domain' as it is their position that this knowledge has been, is, and will be regulated

112 See Patrick O' Keefe, 'The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR' 47 *International and Comparative Law Quarterly* 904, 905 (1998).

113 See Williams Robert, *The American Indian in Western Legal Thought: Discourses of Conquest* (New York: Oxford University Press, 1990).

114 See Michael Halewood, 'Common Law Aboriginal Knowledge Protection Rights: Recognizing the Rights of Aboriginal Peoples in Canada to Prohibit the Use and Dissemination of Elements of Their Knowledge' 358 (PhD Thesis, York University, 2005).

115 *Id.*, at 360.

116 The doctrine of continuity recognises the continuing application of the laws of colonised peoples who have not been the subject of conquest. See Jeremie Gilbert, *Indigenous peoples' Land Rights under International Law: From Victims to Actors* 18 (Aldersey, New York: Transnational Publishers, 2006).

117 *Id.*

118 See *Bulun Bulun v R & T Textiles Pty Ltd.* (1998) Federal Court of Australia 41 IPR 513, 523 - 525. See also discussion in Heather McRae et al., *Indigenous Legal Issues: Commentary and Materials* 426 (Sydney, London, Sao Paolo, Eagan: Thomson Reuters, 4th ed. 2009).

119 See *Western Australia v Ward* on behalf of Miriuwung Gajerrong, *High Court of Australia*, Judgment of 8 August 2002, 2002 HCA 28.

120 Cited in McRae et al., note 118 above, at 428.

121 Pers. comm., Preston Hardison advisor to the Tulalip Tribes, July 2011.

by customary law. Its existence in the 'public domain' has not been caused by their failing to take steps necessary to protect the knowledge in the Western [intellectual property] system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use.¹²²

On the one hand, Article 12 of the Nagoya Protocol makes clear the obligation of States to provide such recognition and respect. The European Union draft law for implementation of the Nagoya Protocol, on the other hand, demonstrates continuing resistance to doing so. A kindly view might see this resistance as due to a failure to understand the historical place of customary law in the global and national legal order and its necessary place in contemporary legal pluralism. A less kindly view would see this as a continuing refusal to show customary law the due respect and recognition it is entitled to under international law by many of the same states that were originally responsible for marginalising, negating and distorting customary law during the colonial period.

7 SECURING RECOGNITION OF CUSTOMARY LAW IN FOREIGN JURISDICTIONS

Collectively, the Nagoya Protocol, international human rights law, regional laws regulating access to genetic resources and traditional knowledge and national *sui generis* regimes, create an extensive body of state practice recognising Indigenous peoples' rights to apply their own customary laws to protect their resource and knowledge rights. They also

create a body of state practice evidencing obligations to recognise and respect Indigenous peoples' customary laws in order to secure their human rights. This state practice supports claims that these rights of Indigenous peoples and state obligations have become norms of customary international law, which are applicable to all states whether or not they are parties to relevant international human rights instruments and the Nagoya Protocol.¹²³

Taken together, customary international law, human rights law and the Nagoya Protocol provide powerful reasons why all users of Indigenous peoples' and local communities' genetic resources and traditional knowledge should apply a due diligence standard to ensure that there has been compliance with their customary laws and decision making processes.¹²⁴ Failure to do so may well result in the disruption of research and development activities. It may also lead to the loss of rights, including intellectual property rights, over the products of research and development involving the direct or indirect use of genetic resources and traditional knowledge for which prior informed consent has not been obtained in accordance with customary law. It is noteworthy in this vein that the US Native Graves Act, which establishes criminal sanctions for illegal trafficking in Native American remains and cultural objects,¹²⁵ defers to tribal customary law to determine the 'legal question of alienability at the time the item was transferred'.¹²⁶

Legislative recognition of customary law and of obligations to secure prior informed consent for access to and use of traditional knowledge in

¹²²Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain', July 9, 2003, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, July 5-17, 2003.

¹²³See Tobin, note 30 above, at 118. See also Perry note 30 above, at 98.

¹²⁴Due diligence is the standard set for users of genetic resources in the draft European Union law for implementation of the Nagoya Protocol. See Proposal, note 5 above.

¹²⁵See James A. R. Nafziger et al., *Cultural Law: International, Comparative and Indigenous* 427 (Cambridge and New York: Cambridge University Press, 2010).

¹²⁶See Rebecca Tsosie, 'Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Harm' 35/3 *Journal of Medical Ethics* 396, 404 (2007).

conformance with customary law may not of itself ensure the faithful application of customary law. Forsyth argues, for example, that despite numerous references to recognition and application of customary law the approach taken in the Pacific Islands Model Law on Traditional Knowledge and Expressions of Culture¹²⁷ is not truly (or deeply) pluralistic'.¹²⁸ In support of her view she notes that customary law is not given primacy under the model law nor are customary institutions given any state enforcement powers.¹²⁹ Even where customary legal regimes are granted primacy by national and/or regional law, they will, unless supported by state law, be unable to ensure the application of their laws beyond their own limited jurisdiction. This highlights the important role of states and regional bodies in adopting measures to facilitate and promote recognition of customary law. For this reason it is vital to identify, strengthen and where necessary develop functional interfaces between customary, state and international law and their respective judicial or quasi-judicial and administrative authorities.¹³⁰

One means to help implement obligations related to the recognition of customary law would be to establish some form of verification system to certify compliance with prior informed consent of Indigenous peoples, which in many cases will be based on customary law. Determining just who is empowered to verify compliance and the basis upon which any certificate of compliance might be granted are challenging questions. In a perfect scenario the issue would be one for Indigenous peoples themselves to determine. One possibility would be the establishment of some form of biocultural

certification system overseen by an international body representing Indigenous peoples or an ombudsman. A central indigenous certifying system might well be established with links to and the support of the United Nations Permanent Forum on Indigenous Issues. Such a body could help Indigenous peoples establish their own certification processes at a local and/or national level and might also hold information on certifying bodies for those seeking to access traditional knowledge or genetic resources in accordance with the rights of Indigenous peoples.

A key challenge in securing rights over traditional knowledge relates to knowledge shared by various communities or Indigenous peoples and which may also be known in varying degrees by non-indigenous communities and the wider population. Such knowledge may be subject to a diverse body of customary laws and national jurisdictions. In a draft report on widely distributed traditional knowledge, Ruiz suggests that the most equitable means to share benefits arising from access to and use of shared traditional knowledge may be through a multilateral benefit sharing fund.¹³¹ Drawing on Vogel's work on information economics,¹³² and the proposed multilateral benefit-sharing fund provided for in the Nagoya Protocol,¹³³ he argues in favour of the establishment of a multilateral fund for sharing of benefits derived from the utilization of traditional knowledge. This he suggests may be funded through the collection and distribution of some form of levy on the natural resources, cosmetics and biotrade sectors.¹³⁴ One potential drawback to such a

127 Pacific Islands Model Law on Traditional Knowledge and Expressions of Culture 2002, in Secretariat of the Pacific Community, *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, available at http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw_ProtectionofTKandExprsnsofCulture20021.pdf.

128 See Miranda Forsyth, 'Do You Want it Gift Wrapped?: Protecting Traditional Knowledge in the Pacific Island Countries', in Peter Drahos and Susy Frankel eds, *Indigenous peoples' Innovation: IP Pathways to Development* 189, 190 (Canberra: ANU ePress, 2012).

129 *Id.*, at 204.

130 See Tobin, note 62 above, at 31.

131 See 'Report Seeks to Advance Discussions on Shared Traditional Knowledge', Intellectual Property Watch, 22 July 2013, available at <http://www.ip-watch.org/2013/07/22/report-seeks-to-advance-discussions-on-shared-traditional-knowledge/> [hereafter IP Watch], referring to Manuel Ruiz Muller, *Protecting Shared and Widely Distributed Traditional Knowledge: Issues, Challenges and Options* (draft manuscript ICTSD, 2013).

132 See Joseph Henry Vogel et al., 'The Economics of Information, Studiously Ignored in the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing' 7/1 *Law, Environment and Development Journal* 52 (2011), available at <http://www.lead-journal.org/content/11052.pdf>.

133 Nagoya Protocol, note 1 above, Article 10.

134 See IP Watch, note 131 above.

proposal is the possible transfer of control over traditional knowledge to the state further marginalising customary institutions, as Forsyth argues has occurred under the Pacific Island Model law.¹³⁵ To avoid such an end it would be important that any multilateral fund, if established, be managed by Indigenous peoples themselves and be dedicated to the strengthening of their traditional knowledge systems.

8

BIOCULTURAL PROTOCOLS AND CODIFICATION OF CUSTOMARY LAW

A variety of means may be employed to help bridge the gap between customary law and positive law systems. These include empowerment of traditional decision making authorities; extension of Indigenous peoples' jurisdiction; enabling Indigenous peoples to apply customary law to third parties in cases involving infringement of their resource and knowledge rights; development of judicial capacity to apply customary law; formal inclusion of Indigenous experts in judicial processes; and the establishment of mixed judicial bodies with state and Indigenous judges. Indigenous peoples may themselves take the initiative to adopt measures conducive to greater recognition and enforcement of customary law through, among other measures, the development of community protocols.

Towards the end of the 1990s the notion of Biocultural Protocols emerged from the work of the Cusco based non-governmental organization Asociacion Andes and the communities of the Potato Park in The Peruvian Andes.¹³⁶ Terms such as

biocultural, community and customary protocols are now widely used to describe a range of measures adopted to protect Indigenous peoples' rights over their biological and genetic resources and traditional knowledge.¹³⁷ These include contracts incorporating customary law principles and values, rules for conducting research, codes of conduct for researchers, and procedures for seeking access to and use of traditional knowledge without requiring that customary law itself be codified.¹³⁸

Protocols may be seen as a form of partial codification of custom to the extent that they lay down procedures defining steps to be followed in accordance with custom in order to process applications to carry out research, collect and/or use traditional knowledge, biological and genetic resources. Protocols of this nature enable the custodians of biocultural heritage to define conditions for prior informed consent and benefit sharing, and to place restrictions on access and use of resources and knowledge. Protocols may include information on the relevant law and the scope of the rights claimed by Indigenous peoples. It may provide details on the material covered and may establish areas of knowledge and resources and even geographical areas that are off limits, as may for example be the case in protection of sites with significant sacred and/or cultural importance. Taking the initiative to develop community protocols provides the custodians of traditional knowledge with an opportunity to influence the development of national, regional and international law and policy in this area. Community protocols may be seen as a bridge between customary law and positive law regimes. As such their development is an aid to effective regulation of traditional knowledge and biocultural issues at all levels.

Community protocols may prove particularly influential where developed by Indigenous peoples whose traditional territories span one or more

¹³⁵ Forsyth, note 128 above, at 205.

¹³⁶ See Alejandro Argumedo and Michel Pimbert, *Protecting Indigenous Knowledge Against Biopiracy in the Andes* (London: IIED, 2006), available at <http://pubs.iied.org/pdfs/14531IIED.pdf>. See also Alejandro Argumedo and Tammy Stenner, *Association Andes: Conserving Indigenous Biocultural Heritage in Peru* (London: IIED, 2008), available at <http://pubs.iied.org/pdfs/14567IIED.pdf>.

¹³⁷ See Krystyna Swiderska et al., *Biodiversity and Culture: Exploring Community Protocols, Rights and Consent, Participatory Learning and Action 65* (London: IIED, 2012), available at <http://pubs.iied.org/pdfs/14618IIED.pdf>.

¹³⁸ *Id.*

national boundaries, or where they involve more than one Indigenous peoples or local community within a single state. In 2002 the Awajun Indigenous people in Peru proposed the development of a protocol amongst all Jibaro peoples (Shuar, Achual Awajun, Huambisa and Candoshi) whose territories span the Peruvian-Ecuadorian border. They also proposed that a series of workshops should be held with Indigenous peoples throughout Peru to promote the development of a canopy of overlapping protocols to regulate access to resources and knowledge across Indigenous peoples' traditional territories. Similarly proposals were made for the development of an Inuit-wide Biocultural Protocol on traditional knowledge governance during the Fourth General Assembly of the Inuit Circumpolar Conference in Barrow, Alaska in 2006.¹³⁹

The idea to develop people-wide protocols has much to commend it. A people-wide protocol could provide a uniform framework for regulating the rights of specific Indigenous peoples in relation to resources and knowledge that may be shared. This need not impede the adoption of locally specific arrangements according to local cultural, social and economic reality as well as the management of locally specific endemic resources and secret traditional knowledge. Adoption of such protocols would have the potential to significantly influence the design of national, regional and international law and policy. They would send a strong message to international bodies, negotiating forums and to national governments and other actors regarding Indigenous peoples' view of how prior informed consent procedures should work.¹⁴⁰

The Nagoya Protocol creates an obligation upon states to support community development of

biocultural protocols.¹⁴¹ Empowering Indigenous peoples and local communities to develop biocultural protocols on issues such as traditional resource management, access to their lands and territories, resource extraction, climate change projects, as well as access to and use of traditional knowledge and genetic resources, will in the long run assist national and regional authorities and the international community to develop appropriate mechanisms for protection of Indigenous peoples' rights while giving due regard to customary law. The Global Environment Facility, international aid agencies, governments and international institutions as well as the research and private sector should all be called upon to make funding available to support the development by Indigenous peoples and local communities of such protocols. In the long run this may prove to be one of the most effective tools for securing effective protection of Indigenous peoples' cultural, resource and knowledge rights and appropriate respect and recognition for customary law.

To assist this process the UN Permanent Forum on Indigenous Issues and the Working Group on Article 8 (j) could usefully work in collaboration with relevant international organisations, governments, and Indigenous peoples to prepare a report on community protocols already in existence. Indigenous peoples of Australia, Canada, New Zealand, Panama and the US have been amongst the leaders in the development of community protocols. Case studies of these and similar experiences from around the world might usefully be examined with a view to the development of model protocols.¹⁴² Indigenous peoples and local communities could use

¹³⁹Pers. comm. Violet Ford, Inuit Circumpolar Council (Canada), Barrow, Alaska, July 2006.

¹⁴⁰For discussion and information on community biocultural protocols, visit the Biocultural heritage website at <http://www.biocultural.iied.org/community-biocultural-protocols>. See also Kabir Bavikatte and Harry Jonas eds, *Biocultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy*, UNEP and Natural Justice (2009), available at http://naturaljustice.org/wp-content/uploads/pdf/BCPs_community_approach2009.pdf.

¹⁴¹Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of: (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge. See Nagoya Protocol, note 1 above, Article 12(3).

¹⁴²See Mikey Salter and Johanna Von Braun, 'Biocultural Community Protocols: Bridging the Gap Between Customary, National and International Law', 14 *Effectius Newsletter: Effective Justice Solutions* (2011), available at http://www.effectius.com/yahoo_site_admin/assets/docs/BioculturalCommunityProtocols_JohannaVonBraun_Effectius_Newsletter14.21255827.pdf.

these in the development of locally appropriate protocols to govern traditional knowledge and access and benefit sharing issues. Some work in this area has already begun and a number of websites now exist providing information on community protocols.¹⁴³ Existing reports on protocols aside, there is a clear need for independent review of experiences with the development of protocols and the processes for their development. This is key to ensuring that protocols do indeed respond to Indigenous peoples' concerns and priorities and do not undermine or inadvertently modify customary law and traditional resource and knowledge management practices.

Provision of support to Indigenous peoples and local communities to develop biocultural protocols will assist not only traditional knowledge custodians but also international, regional and national efforts to regulate traditional knowledge. Protocols are however merely a portal between customary law and state law. As such they should not be seen as a solution in themselves but rather a step towards a solution. For protocols to function effectively they will need to be understood and supported by Indigenous peoples themselves and by national and international authorities and law. The proof of their utility will be seen if and when a court case arises involving issues of customary law, rights to access genetic resources and/or traditional knowledge. It will be at that stage that the effectiveness of biocultural or other community protocols as a means to demonstrate and secure enforcement of relevant customary law based principles and processes may be assessed.

In the long run, empowering the custodians of traditional knowledge may prove to be the most effective means for securing development of a functional international system to respect and protect traditional knowledge. It is important in this vein to avoid adopting a one-size-fits-all approach, and to allow for the evolution of local initiatives driven by local needs rather than forcing Indigenous peoples to adopt protocols fitting a specific template. In this vein, participants in a series of regional and

sub-regional workshops on the role of customary law in the protection of traditional knowledge in Andean and Pacific Island countries took the view that any research into the nature and body of customary law should be designed from the ground up in collaboration with Indigenous peoples and should, to the greatest extent feasible, be carried out by Indigenous peoples themselves.¹⁴⁴

9

INTERCULTURAL LEGAL PLURALISM AND EQUITY

In a truly intercultural pluralistic legal environment customary law and positive law will need to interact and draw upon their respective strengths, principles and equitable instruments, to ensure good governance. Carpenter et al. have argued cogently for the adoption of a stewardship model of property based in part on Indigenous peoples' own customary laws and traditions, as the basis for protection of their rights. Their proposal is for a 'customised' view of cultural property adopting what they term a 'more relational vision of property law' where the ordering of interests is based upon 'various human and social values, including nonmarket values'.¹⁴⁵ Carpenter et al. attempt to develop a notion of heritage rights protection which caters both to Indigenous concerns to prevent commoditization of sacred and significant elements of culture, while recognizing the growing involvement and desire by Indigenous peoples to control the market in their cultural goods.

The notion of legal pluralism as a collective of legal worlds, in which Indigenous peoples' rights to their legal regimes is limited to their own internal affairs and has no bearing on third parties, is not in tune with the needs and reality of today's multicultural legal melange. The interrelationship of legal regimes and the contested nature of rights, duties and principles, of law and morals, demand a more

¹⁴³ See for example, the following websites: <http://www.community-protocols.org/> and <http://www.biocultural.iied.org/community-biocultural-protocols>.

¹⁴⁴ Tobin, note 62 above, at 73.

¹⁴⁵ See Kristen A. Carpenter et al., 'In Defense of Property' 118 *Yale Law Journal* 100, 105 (2009).

nanced approach. This need has been expressed in terms such as intercultural equity¹⁴⁶ and intercultural justice,¹⁴⁷ and to a somewhat lesser extent in the notion of biocultural justice.¹⁴⁸ It is a world of legal interfaces that cannot be imposed but must be negotiated, tested and modulated in response to the realities of differing worldviews, value systems and legal visions.

For Tsosie, the grounding of culture in the spiritual and legal order of Indigenous peoples, seen as emanating from the earth itself, explains their concern that deconstruction or harm of any aspect of their cultural systems may have 'profound consequences for the cultural survival of Native people'.¹⁴⁹ She claims that the frequent disregard of these interrelationships by the dominant society's courts demonstrates the need for an intercultural legal framework exercising 'intercultural justice' in order to 'alleviate the historical and contemporary grievances and harms that continue to affect' Indigenous peoples.¹⁵⁰ This notion of intercultural justice goes beyond a call for recognition of Indigenous peoples' own legal regimes and their role in internal regulation of their affairs. It amounts in fact to a call for collaboration with tribal court systems and attention to the moral and ethical frameworks underlying customary justice systems, including such notions as restorative justice, 'equal respect, group solidarity, good relations, and compatibility with 'natural' (that is, universal) principles, [which] may be used to understand and provide redress for cultural harm'.¹⁵¹

Developing frameworks for the application of customary law principles in the interfaces between customary law and positive law and the cross-fertilisation of legal regimes may be seen as the implementation in practice of Indigenous peoples'

human rights grounded in customary law. By taking the initiative and defining the criteria for the recognition of their cultural and intellectual property rights, Indigenous peoples are placing pressure on states to respect and recognise the role of customary law in securing their human rights. In essence they are helping to define the parameters of customary international law by forcing a reaction from the states to their initiatives. Although customary international law arises from state practice it is not hard to see Indigenous peoples vying for a role in its definition. Having secured their seat in international negotiation forums for the drafting of UNDRIP, the Nagoya Protocol and the work of the WIPO IGC, Indigenous peoples have every reason to ask in what manner their own customary laws may influence the crystallisation of customary international law.

CONCLUSIONS

More than twenty years after the adoption of the Convention on Biological Diversity the rights of Indigenous peoples over their biological and genetic resources and traditional knowledge are still largely unprotected. Draft European Union legislation has brought into question the commitment of states to the effective implementation of the Nagoya Protocol's provisions to secure the rights of Indigenous peoples and local communities. Furthermore, draft instruments for the protection of traditional knowledge being developed within the WIPO IGC have since 2010 been shorn of references to customary law, demonstrating further resistance among states to the recognition of customary law. The resistance being shown by the European Union in particular to the recognition of customary law contrasts with the marked increase in national and regional recognition of customary law, as well as increased recognition in international instruments. Indigenous peoples and those supporting them will need to be vigilant to ensure that implementation of the Nagoya Protocol and the development of new instruments for the protection of traditional knowledge do not once again marginalise the role of customary law in global governance. The on-going negotiations at the WIPO IGC are currently the best available forum within which to address the challenges associated with securing effective recognition for customary law in the governance of

146 See Tobin, note 30 above, at 294.

147 See Tsosie, note 126 above, at 408.

148 See Kabir Bavikatte and Daniel F. Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' 7/1 Law, Environment and Development Journal 35 (2011), available at <http://www.lead-journal.org/content/11035.pdf>.

149 See Tsosie, note 126 above, at 396, 403-4.

150 *Id.*, at 408.

151 *Id.*, at 409.

Indigenous peoples' genetic resources and traditional knowledge and for overcoming the Nagoya gap in compliance mechanisms relating to such resources and knowledge. The process is however seriously flawed due to the difficulties associated with securing ample participation of Indigenous peoples, an issue that must be addressed if the WIPO negotiations are to gain any legitimacy at all in the eyes of Indigenous peoples.

Despite centuries of marginalization, distortion and modification, customary law has survived and continues to play an important and dynamic role as a source of law in many parts of the world. The effectiveness of customary law as a tool for securing human rights depends upon the extent to which it is recognised and supported by national, regional and/or international law and is enforced by relevant authorities. To this end, it will be important that any obligations developed at the international level are complemented by financial and in kind support necessary to ensure implementation and enforcement in developing countries. There are significant practical and legal hurdles to be overcome if largely unwritten legal concepts and rules are to be given force in the administration of justice and protection of Indigenous peoples' resource and knowledge rights in national and foreign courts. However, international law itself includes many unwritten elements. The unwritten nature of customary law is not in itself, therefore, a good reason for refusing its recognition.

Securing effective respect for and recognition of customary law will require inventiveness and willingness to find the means to bridge the divide between positive and customary legal regimes and their respective decision-making and enforcement authorities. Building functional interfaces between these regimes and authorities will require acceptance of their interdependence. Customary law is a fact, and it is a fact that requires addressing with due respect and recognition. It can no longer be seen as the bottom of the barrel. It must be raised in the hierarchy of laws to a point commensurate with the rights it enshrines, including the rights of sovereign Indigenous peoples with full rights of self-determination.

Adoption of a global system of disclosure of origin requirements can help ensure the existence of prior informed consent of Indigenous peoples and local communities for access to and use of their genetic resources and traditional knowledge. Any such regime must require not only disclosure of origin but also evidence of prior informed consent if it is to play a meaningful role in securing compliance with Indigenous peoples' rights and users obligations as set out in international law. It is somewhat ironic and to an extent appropriate that the most potent mechanism for preventing biopiracy may turn out to lie within the very regimes that have fostered misappropriation and usurpation of rights over genetic resources and traditional knowledge. Disclosure requirements that create incentives for users to seek prior informed consent of the custodians of traditional knowledge, when coupled with obligations that such consent conform with the customary laws of Indigenous peoples and local communities themselves will indeed go a long way to ensuring *sui generis* protection of their rights over genetic resources and traditional knowledge.

International law has clearly recognised that the realisation of Indigenous peoples' human rights can only be achieved with due respect and recognition for their customary laws. The Nagoya Protocol has turned the duties to respect and recognise customary law into a binding legal obligation. Any access to or use of Indigenous peoples' genetic resources or traditional knowledge which does not conform with these requirements is therefore illegal. The legal community, international organisations, states, investors, researchers, NGOs, organized religious groups, and all those whose activities affect Indigenous peoples and local communities, will need to adopt a due diligence standard to ensure the existence of prior informed consent in accordance with the laws and protocols of Indigenous peoples and local communities in order to ensure compliance with national, regional and international law. Failure to do so may result in actions for breach of human rights, claims for relief under tort law and the threat of loss of investments and of rights over the products of research and development activities, including any relevant intellectual property. Don't say you weren't warned!

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