‘THE LAW GIVETH AND THE LAW TAKETH AWAY’: THE CASE FOR RECOGNITION OF CUSTOMARY LAW IN INTERNATIONAL ABS AND TRADITIONAL KNOWLEDGE GOVERNANCE

Brendan Tobin

Abstract

Historically, international law has served as a legitimizing tool for colonialism and abrogation of Indigenous peoples’ rights. Developments in international human rights law over the past 50 years have at last recognized Indigenous peoples’ rights to their lands, territories, resources, knowledge, customs, laws, and, most importantly, self-determination. The extent of these rights has been most clearly articulated in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Protocol on access to genetic resources and benefit sharing (ABS), which is currently being finalized by the Working Group on ABS under the auspices of the Convention on Biological Diversity, is the first international instrument to be negotiated since the adoption of UNDRIP that directly addresses Indigenous peoples’ human rights. The extent to which the ABS Protocol recognizes and reflects the rights set out in UNDRIP will be an important indicator of the international community’s commitment to the realization of Indigenous peoples’ human rights and recognition of the fundamental role that customary law plays in ABS and traditional knowledge governance. Negotiation of the ABS Protocol provides an important opportunity for the international community to correct, at least in part, the historic abuse of Indigenous peoples under international law. The paper concludes that good legal governance, capable of securing equitable benefit sharing and the protection of subsisting native title rights over genetic resources and traditional knowledge, requires a ‘rule of law’ based upon multicultural legal pluralism, which recognizes and draws upon sources of legal principles, equity, contract, and dispute resolution found in both customary and positive legal regimes.

“Aboriginal peoples might function like the miner’s canary. When the most vulnerable among us suffer from the toxins present in our legal environment, their suffering serves as an important warning about the health of the larger legal climate.”

~ John Borrows

This situation may soon change, due to ongoing negotiations on the regulation of access to genetic resources and benefit sharing (ABS) under the auspices of the Convention on Biological Diversity (CBD) Working Group on ABS (WGABS) and on the protection of traditional knowledge at the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC). The WGABS has prepared a draft ABS Protocol to be submitted for adoption at the 10th Conference of the Parties (COP 10) to the

3 Although this article focuses primarily on the WGABS draft ABS Protocol, the analysis and conclusions are also relevant to the ongoing negotiations of the WIPO IGC.
4 This article refers to the Draft Protocol prepared by participants in WGABS 9 (resumed session) in Montreal in July, 2010. See UNEP/CBD/WGABS/3, April 26, 2010.
CBD in Nagoya in October, 2010. The IGC, meanwhile, has a mandate to prepare an instrument or instruments for the protection of traditional knowledge and traditional cultural expressions by 2011. These processes are the first involving the development of international instruments to expressly address Indigenous peoples’ human rights since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the United Nations General Assembly in 2007.

A historic overview of international law and Indigenous peoples’ rights provides the necessary backdrop for an examination of Indigenous peoples’ rights over genetic resources and traditional knowledge and their treatment under the draft ABS protocol and an analysis of the role of customary law in ABS and traditional knowledge governance. Amongst the key issues raised by Indigenous peoples for attention within the Protocol include:

• the need for express recognition of Indigenous peoples’ property rights over their traditional knowledge and genetic resources;
• measures for ensuring access to justice in cases of misappropriation; and
• adequate recognition for customary law.

If not adequately addressed, these issues will create legal uncertainty, facilitate continuing biopiracy, and leave Indigenous peoples without any meaningful avenue of redress where their rights have been breached. This paper focuses primarily on the latter issue and suggests a formula for the recognition of customary law in international instruments that reflects international human rights obligations and emerging customary international law. It concludes that if the CBD, through its ABS Protocol, fails to seize this opportunity to secure effective recognition of Indigenous peoples’ rights, it may soon find itself facing the task of having to negotiate a stand-alone Protocol on traditional knowledge.

INTERNATIONAL LAW AND INDIGENOUS RIGHTS

Since the time of Aristotle, legal philosophers have recognized three pillars of legal governance: natural law (universal moral principles), customary law (unwritten laws considered binding by those subject to them), and positive law (stipulated laws). The balance between natural, customary, and positive law has fluctuated according to political and legal realities over time and across around the world. During the Middle Ages in continental Europe, for example, customary law was the predominant source of law, though still subordinate to natural law, which came to be seen as God’s law. From the 17th century on, customary law began to be displaced or amalgamated by positive codified civil law in continental Europe. In England, however, general principles of custom provided the basis for common law, which was then spread around the world during the colonial period. While specific or local customs may at times override common law in England, recognition of customary law in its colonial territories both during and in the post-colonial period has not been uniform.

During the early colonial period, 15th- to 16th-century leading theorists such as Bartolome de las Casas (c. 1484-1566) and Francisco De Vitoria (c. 1492-1546), who were influenced by classical views of the legal order in which both customary law and positive law were seen as subordinate to natural law, argued for recognition of Indigenous peoples’ “dominium” over their lands. In the 17th century, Hugo Grotius, (1583-1645), who is often referred to as the father of international law, also argued in favour of recognition of Indigenous peoples’ dominium, taking the view that discovery was not a legal basis for obtaining legal title of ownership. Grotius was espousing a naturalist framework in which “basic rights inhere in men as men, not by reason of their race, creed or color, but by reason of their humanity.” Both De Vitoria and Grotius, however, also ascribed to the theory of ‘just war’, which served to legitimize usurpation of Indigenous peoples’ dominium. This provides an early and telling example of the law giving with one hand and taking away with the other.

During the 18th century, international law, according to James Anaya, shed “its naturalist frame as it changed into a state-

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8 Quoted in Gilbert, 2006, page 9.
9 Gilbert, 2006, pages 9 to 12.
According to Martin Chanock, however, what was being recognized was “not common law, nor custom, nor statute – [it was] a law of and for subordinates – racially and culturally, which was seen as suitable to their state of evolution.” In this sense, customary law was a colonial construct serving as the basis for a two-tier legal regime, with one law for the colonial power and another for subordinate, colonized peoples. Wherever customary law met colonial law, the latter dominated. Furthermore, customary law was subject to a rule of repugnancy that determined its applicability based upon European codes of ‘civilization’.

Decolonization marked an important chapter in the rewriting of international law, but it did not necessarily lead to increased recognition or protection of Indigenous rights or of their customary legal regimes. Common Article 1 of the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights established the right of all peoples to self-determination. At the time, however, it was not considered a right of Indigenous peoples, but rather of the whole population of a colonized state. Over time, the international agencies responsible for monitoring compliance with the Covenants, the Human Rights Committee and the Committee for Economic, Social and Cultural Rights, have both recognized that Indigenous peoples have a right to self-determination. More recently, UNDRIP has clearly recognized Indigenous peoples’ rights to self-determination and to their land and traditional territories, as well as the legally binding status of the doctrine of terra nullius.

The negation of Indigenous peoples’ rights required the negation of their customary laws. This was assisted by the legal fictions of discovery, in cases where lands were already inhabited, and of conquest, even where there had been no war of conquest or any formal cession of lands. International law developed and was interpreted to legitimize colonial expansion and was easily ignored when convenient in order to usurp Indigenous peoples’ rights. The resultant discrimination of Indigenous peoples made a mockery of the notion of a true rule of law.

Where deemed necessary to the colonial enterprise, customary law was recognized on pragmatic rather than legal grounds. According to Martin Chanock, however, what was being recognized was “not common law, nor custom, nor statute – [it was] a law of and for subordinates – racially and culturally, which was seen as suitable to their state of evolution.” In this sense, customary law was a colonial construct serving as the basis for a two-tier legal regime, with one law for the colonial power and another for subordinate, colonized peoples. Wherever customary law met colonial law, the latter dominated. Furthermore, customary law was subject to a rule of repugnancy that determined its applicability based upon European codes of ‘civilization’.

Recognition of statehood for the purposes of international law was dependent on fitting into a European mould of what was civilized; it was not applicable to what Wheaton calls “an unsettled horde of wandering savages not yet formed into civil society.” The rise of such positivist legal theory served to marginalize both natural law and customary law and to legitimize the exclusion of Indigenous peoples from the remit of international law. This exclusion was coupled with the development of the notion of trusteeship over Indigenous peoples and the treatment of their lands as terra nullius.

In essence, Western powers had written Indigenous peoples out of international law, denying any oversight by natural law or recognition of ancestral rights and native title arising from the customary laws of Indigenous peoples themselves. In the words of Patrick Macklem, “The doctrine of terra nullius represented the legal conclusion that indigenous peoples possessed no international legal existence. International law, therefore, deemed their lands to be vacant, and neither conquest nor cession was necessary to acquire the sovereign power to rule indigenous people and territory.”

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treaties entered into with them and the obligation of states to honour and respect such treaties. In doing so, UNDRIP has formally written Indigenous peoples back into international law and commenced the process towards securing a rule of law that is cognizant and respectful of the framework of multicultural legal pluralism surrounding relations between Indigenous peoples, the states within which they reside, and the international community. Against this backdrop, negotiation within the WGABS of an international ABS Protocol is the first major test of international commitment to the realization of Indigenous peoples’ human rights as set out in UNDRIP.

**Indigenous Rights over Genetic Resources and Traditional Knowledge**

The CBD was the first international instrument to recognize a right of Indigenous peoples in relation to traditional knowledge and it has subsequently declared itself to hold primary responsibility for the protection of traditional knowledge related to biological diversity. The CBD did not create or recognize a property right over traditional knowledge as such. Apart from a handful of exceptions such as in Peru, the Philippines, Panama, India, and Costa Rica, Indigenous peoples’ rights over their traditional knowledge remain largely unprotected in national law. Protection of Indigenous peoples’ rights over their genetic resources and traditional knowledge is both dependent upon and crucial to the realization of other human rights to food, education, health, human dignity, culture, land, territories, resources, and, above all, self-determination. Although the WGABS does not have a mandate to address all of these rights comprehensively, it will need to ensure that any Protocol it puts forward for adoption by the Conference of the Parties to the CBD does not run counter to their realization and is instead supportive and mutually reinforcing.

Article 31 of UNDRIP recognizes Indigenous peoples’ rights to maintain, control, protect, and develop their traditional knowledge, genetic resources, and intellectual property and requires states to establish effective measures to protect these rights. Although the Declaration does not define what is meant by ‘effective measures’, it is clear they will at least need to define and recognize rights over traditional knowledge and establish compliance mechanisms to ensure their enforcement. Due to the nature of research and trade in traditional knowledge, national measures in provider and user countries will need to be linked through a framework of international law.

CBD Decisions, interventions, and submissions of Indigenous peoples in WGABS negotiations, as well as in international human rights fora, suggest that customary law has an important role to play if measures are to be effective. In this vein, the CBD programme of work on Article 8(j) relating to the protection of traditional knowledge calls for a “holistic approach consistent with the spiritual and cultural values and customary practices of … indigenous and local communities.”

The Preamble to CBD Decision VI/10 recognizes that indigenous and local communities have their own systems for the protection and transmission of traditional knowledge as part of their customary law. Most importantly, Decision VI/10 invites Parties and governments, with the approval and involvement of indigenous and local communities representatives, “to develop and implement strategies to protect traditional knowledge, innovations and practices based on a combination of appropriate approaches, respecting customary laws and practices…” Furthermore, the Bonn Guidelines state that “the prior informed consent of indigenous and local communities … should be obtained, in accordance with their traditional

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18 Article 37, UNDRIP.
20 CBD Decision VI/10.
22 CBD Decision V/16. It should be noted that the CBD and negotiations under its auspices refer to “indigenous and local communities”, rather than to Indigenous peoples and local communities. This contrasts with UNDRIP – which refers specifically to Indigenous Peoples – and has been criticized by Indigenous organizations such as the International Indigenous Forum on Biodiversity.
23 CBD Decision VI/10, Section F, Paragraph 33.
practices,”24 which may be interpreted as including their customary laws.

Various negotiating and representative groups have called for recognition of customary law. First, the group of negotiators from African states (commonly referred to as ‘the African Group’), has called on the WGABS “to interpret Articles 15 and Article 8(j) of the CBD in a holistic manner that would ensure that ownership of and benefits derived from use of biological resources and associated traditional knowledge respect … customary laws, community protocols and traditional knowledge.”25 In addition, the International Indigenous Forum on Biodiversity (an umbrella group representing Indigenous peoples in negotiations under the CBD) has proposed that an ABS regime should require Parties to “take reasonable and effective legislative, administrative and policy measures to ensure that users of traditional knowledge … comply with prior informed consent requirements of indigenous and local communities, customary laws, [and] community protocols.”26 Likewise, the Coordinator of Indigenous Organizations of the Amazon River has called for recognition of the traditional institutions, forms of organization, and authorities of each Indigenous people and local community and the provisions under customary law in relation to prior informed consent and mutually agreed terms.27

With regard to genetic resources, although the CBD recognizes national sovereign rights, Indigenous peoples in many countries have property rights over biological resources and arguably over the genetic resources they contain. UNDRIP recognizes Indigenous peoples’ rights to the resources that they have traditionally owned or otherwise used or acquired (Article 26.1) and to redress where their resources have been confiscated, taken, or used without their free, prior and informed consent (Article 28.1). The United Nations Human Rights Committee, in concluding observations on the 1999 reports of Canada, Mexico, and Norway and the 2000 report of Australia, expressed the view that states are obliged to “implement and respect the right of indigenous peoples to self-determination, particularly in connection with their traditional lands and resources.”28 In addition, Art XVIII.4 of the Organization of American States-proposed Declaration on the Rights of Indigenous Peoples states, “The rights of indigenous peoples to existing natural resources on their lands must be especially protected.”

**Treatment of Indigenous Rights in the Draft ABS Protocol**

The CBD has given the WGABS a mandate to negotiate an international regime on both ABS and Article 8(j). Article 8(j) places obligations upon countries to promote the wider use of traditional knowledge relating to biological diversity with the consent of indigenous and local communities. Taken together with Decision VI/10, which declares the CBD to be the primary body responsible for the protection of traditional knowledge relating to biological diversity, this mandate places a clear obligation on the WGABS to develop measures for the protection of Indigenous peoples’ rights over their traditional knowledge. The International Indigenous Forum on Biodiversity has made specific proposals of measures that they believe must be reflected in the ABS Protocol in order to ensure that it enables the realization of Indigenous peoples’ rights, including:

- The protocol shall state in the preamble that the rights of Indigenous peoples and local communities are to be respected.
- Where traditional knowledge is being accessed, the prior informed consent of the Indigenous peoples and local communities must be obtained and this shall not be subject to national legislation.

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24 CBD Decision VI/24, Paragraph 31. While the CBD and negotiations under its auspices refer to “prior informed consent”, UNDRIP establishes a higher standard of “free, prior and informed consent”.
The protocol shall recognize the rights of Indigenous peoples and local communities to genetic resources.

The importance and relevance of traditional knowledge shall be fully integrated throughout the protocol, especially in the Compliance section.

The protocol shall recognize the existence and role of customary laws of Indigenous peoples and local communities.29

The draft Protocol follows the language of the CBD and refers to Indigenous ‘communities’ rather than ‘peoples’. This not only fails to respect the fact that international human rights law has recognized their status as ‘peoples’, but it also threatens to undermine their collective rights over traditional knowledge. The threat to collective rights may be seen from analysis of *sui generis* legislation to protect traditional knowledge in Peru.30 Peruvian Law 2781131 first recognizes traditional knowledge as the cultural patrimony of Indigenous people; it then provides that any community can negotiate for its access and use, without the need for consent of the Indigenous people as a whole. This runs contrary to the very notion of collective patrimonial rights32 and threatens to undermine traditional decision-making practices and the authority of customary laws. One means to avoid such an outcome would be for states to refer to Indigenous peoples as such and to explicitly give ‘due recognition’ to customary law in the development and implementation of measures on ABS and the protection of traditional knowledge. Giving ‘due recognition’ would require states to ensure that law and policy related to ABS and traditional knowledge is developed in accordance with – and does not run counter to – the rights of Indigenous peoples to regulate their affairs in keeping with their own customary laws, in so far as their customary laws are recognized under national, international, and constitutional law.

Another concern for Indigenous peoples is the lack of any specific reference to their rights over genetic resources in the draft Protocol. The Protocol merely provides that Parties, “where applicable, and subject to national legislation,” set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources (Article 5(e)). Indigenous peoples seek a more explicit recognition of their rights over genetic resources – one that is not subject to the Convention’s pervasive recognition of national sovereignty.


30  For a detailed study of conflicts between Peru’s law 27811 and customary decision-making, see Tobin and Taylor, 2009.


32  Indigenous peoples’ collective patrimony many be likened to national patrimony, which belongs to the nation as a whole. Such rights are generally inalienable and are not subject to embargo.
One option for achieving this would be to require states to exercise their sovereign rights over genetic resources in accordance with the rights of Indigenous peoples over the resources on their lands or territories, as well as those that they have traditionally used and those whose characteristics arise from their intervention.

The draft Protocol does not establish or recognize any self-standing right in favour of Indigenous peoples over their traditional knowledge. However, it does establish a set of obligations that, if implemented fully, would effectively provide them a de facto right over their knowledge. Article 5bis requires states to adopt legislative, administrative, or policy measures “with the aim of ensuring” that access to and use of traditional knowledge is subject to prior informed consent of and mutually agreed terms with indigenous and local communities. In practice, implementation of this provision could amount to the recognition of property rights over traditional knowledge and rights to govern access and use in accordance with customary laws. The same Article calls on states to take appropriate, effective, and proportionate measures “with the aim of ensuring” that traditional knowledge utilized within their jurisdiction has been accessed and utilized in accordance with the rights to prior and informed consent and mutually agreed terms. This provision also requires states to adopt administrative or legal measures to address situations of non-compliance. Besides its attention to issues of prior informed consent and mutually agreed terms, Article 5bis may be interpreted as creating an implicit obligation of states to adopt measures to prevent misappropriation of genetic resources and traditional knowledge. It does not, however, explicitly require states to do so. This is surprising considering that cases of biopiracy, seen as the unapproved and uncompensated use of genetic resources and or traditional knowledge, is most prevalent where access is secured without prior informed consent or mutually agreed terms.

In its provisions on compliance, the Protocol makes no reference to misappropriation of either genetic resources or traditional knowledge or to access to justice in such cases. It provides for access to justice only in disputes relating to mutually agreed terms. This runs counter to UNDRIP, which recognizes Indigenous peoples’ rights “to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with states or other parties, as well as to effective remedies for all infringements of their individual and collective rights.”

Differences exist on how to deal with traditional knowledge in the negotiations on an ABS Protocol. In general, Indigenous peoples and developing countries wish to see it treated as a cross-cutting issue, while some developed countries propose that it be dealt with in a stand-alone article or section. Although some aspects of rights over traditional knowledge such as the granting of prior informed consent warrant specific measures, concern exists that if it is dealt with in a stand-alone article, the level of protection afforded traditional knowledge may be significantly weakened.

**CUSTOMARY LAW AND ITS ROLE IN ABS AND TRADITIONAL KNOWLEDGE GOVERNANCE**

Indigenous peoples have consistently argued that customary law should play a central role in the regulation of their rights over genetic resources and traditional knowledge. The authors of a report for the CBD on the role of customary law in compliance measures for an ABS regime see it as having a significant role to play in issues related to prior informed consent and mutually agreed terms, as well as in cases of misappropriation. Customary law also has a central role to play in the development of national legislation to regulate ABS and protect traditional knowledge.

Whether or not the ABS Protocol is adopted in Nagoya, development of national law and policy on ABS and traditional knowledge must ensure compliance with customary law, in so far as it forms part of national law and regulates rights over relevant resources and knowledge. Processes of prior informed consent based upon principles and provisions of customary law and the negotiation of mutually agreed terms provide opportunities to extend the application of customary law to third-party users of genetic resources and traditional knowledge. In essence, users may be required to ‘contract into custom’ by the terms and conditions of access and use agreements. In cases of

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33 ‘Mutually agreed terms’ is a phrase used in the CBD for negotiated agreements based upon contractual terms, negotiated in good faith and without undue duress.
34 Draft ABS Protocol Article 5bis. UNEP/CBD/WGABS/3, April 26, 2010.
35 Article 40, UNDRIP.
misappropriation, customary law can also serve as a source of crucial information regarding any rights, restrictions, and fiduciary obligations relating to access to and use of genetic resources and traditional knowledge. This information may be central to the demonstration by Indigenous peoples of a breach of their rights and to enable a court, administrative authority, or dispute resolution mechanism to make informed, fair, and equitable decisions. The challenge for the ABS Protocol is to find means to articulate obligations relating to customary law that take into account the varying responsibilities of states and the differing levels of recognition of customary law in national jurisdictions. Guidance on how this may best be achieved can be gleaned from the provisions of UNDRIP.

UNDRIP requires states to give “due respect” to Indigenous peoples’ customs, laws, and traditions in recognizing their rights over “resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”38 Article 27 of the Declaration goes further by requiring states to establish, in conjunction with Indigenous peoples, “a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their … resources.”39 This appears to follow the requirements for recognition of Native title that have developed over the last 20 years or so, with customary law playing a central role in demonstrating the nexus between the relevant Indigenous peoples and their traditional lands and territories.40 It is thus arguable that where customary law demonstrates an ancestral right over genetic resources, then (except when it may be specifically overridden by national law) that right must be given due recognition in national ABS measures. An ABS Protocol should therefore establish an obligation for states to give due recognition to customary law in the recognition and adjudication of rights over genetic resources and traditional knowledge.

With regard to the resolution of disputes arising from the exercise of rights over resources and knowledge, Article 40 of UNDRIP requires that in conflicts with the state or third parties, “due consideration” shall be given to the customs, traditions, rules, and legal systems of the Indigenous peoples concerned and to international human rights. Although the term ‘due consideration’ is significantly weaker than either ‘due respect’ or ‘due recognition’, it is not toothless. West’s Law Dictionary defines ‘due consideration’ as “the proper weight or significance given to a matter or a factor as circumstances mandate.”41 The IGC draft elements on the protection of traditional knowledge utilizes a somewhat equivalent term, calling for “due regard” of customary law, which the English Court of Appeal has recently held to be more than a mere “box-ticking” exercise.42 An obligation to give due consideration would require judicial and administrative authorities to give appropriate weight to customary law when reaching their decisions.

The Co-chairs’ original draft for the ABS Protocol stated in Article 9.1 that, “in implementing their obligations… Parties shall give due consideration to indigenous and local community laws, customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.”43 During the 9th meeting of the WGABS, which resumed in Montreal in July, 2010, the phrase “due consideration” was replaced with “take into consideration”. While due consideration implies more than a mere box-ticking exercise, an obligation to ‘take into

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38 Article 26, UNDRIP.
39 Article 27, UNDRIP.
42 See R (Deborah Domb & Others) v The London Borough of Hammersmith and Fulham and The Equality and Human Rights Commission [2009] EWCA 941 (Civ), [2009] All ER (D) 42 (Sep). In his judgement, Rix LJ noted that “the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking, and that the duty must be performed with vigour and with an open mind.”
43 UNEP/CBD/WG-ABS/9/3.

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Figure 5. Left to right: WGABS Co-chairs Fernando Casas (Colombia) and Tim Hodges (Canada) confer with Lyle Glowka and Valérie Normand of the CBD Secretariat.
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consideration’ might potentially be met by the most perfunctory consideration of customary law. Equally problematic was a proposal for the replacement in Article 9.1 of “community laws, customary laws and, community protocols and procedures” with the more ambiguous term, “community level procedures”. If adopted, this would erase any reference to customary law and run contrary to state obligations under both CBD Decision VI/10 and UNDRIP.

Efforts to dilute reference to customary law in the draft ABS Protocol have come mainly from developed countries. On one hand, this concern relates to the legal complexities that would arise from giving recognition to unwritten customary law from foreign countries in national courts. On the other hand, it involves concerns of the potential implications of giving any recognition to Indigenous peoples’ customary laws, which, if fully recognized, would strengthen already strident demands for restitution of land and resource rights. Although he acknowledges the potential disruption that could be brought about by the recognition of customary law and of the ancestral rights it substantiates, John Borrows has argued that the failure to secure the rule of law effectively undermines legal certainty for all.44

The negotiation of the ABS Protocol will demonstrate whether the CBD can live up to its self-declared responsibility as the primary body for protecting traditional knowledge. Although the use of terms such as ‘due respect’, ‘due recognition’, or ‘due consideration’ causes concern in some quarters, the legal basis for opposition to their inclusion in the ABS Protocol appears largely unfounded. Use of these terms would serve to confirm, in varying degrees, countries’ commitments to comply with their obligations under national and international law. Such obligations would, however, be limited to those relating specifically to the role of customary law in the recognition and enforcement of rights over genetic resources and traditional knowledge. Furthermore, the use of the term ‘due’ in itself implies a level of conditionality on the weight to be given customary law in each instance, an issue which would then be determined in accordance with national law. This would be the case even when a diversity of customary legal systems with differing status exists under the overarching national law of a particular state. It is, however, clear that distinct levels of recognition are required for cases involving the status of customary law as it relates to the existence of rights over resources and knowledge and to its role in dispute resolution that involves exercising those rights.

Drawing on the provisions of UNDRIP, it is suggested that the ABS Protocol adopt a similar approach to the recognition of customary law. This would involve distinguishing between the obligations of states relating to the recognition and adjudication of rights over genetic resources and traditional knowledge, for which ‘due recognition’ of customary law is requisite, and to dispute resolution procedures for conflicts arising from exercise of those rights, where ‘due consideration’ of customary law may prove more appropriate.

**Conclusion**

The CBD has declared itself the primary body responsible for protection of traditional knowledge relating to biological diversity. The negotiation of the ABS Protocol will demonstrate whether it can, in fact, live up to that responsibility. The adoption of a Protocol on ABS at the CBD provides an important opportunity to secure Indigenous peoples’ rights over their traditional knowledge. However, as currently drafted, the ABS Protocol fails to do so and also fails to secure due recognition of the fundamental role that customary law has to play in the governance of Indigenous peoples’ rights; it also fails to provide Indigenous peoples with means for redress in cases of misappropriation of either their resources or knowledge. Good legal governance, capable of securing equitable benefit sharing and the protection of subsisting native title rights over genetic resources and traditional knowledge, requires a ‘rule of law’ based upon multicultural legal pluralism, which recognizes and draws upon sources of legal principles, equity, contract, and dispute resolution found in both customary and positive legal regimes.

The challenges and complexities associated with devising and implementing measures to secure Indigenous peoples’ rights are not small. However, these challenges cannot and should not be side-stepped forever. If the Parties to the CBD individually and collectively muster the political will necessary to address these challenges in the ABS Protocol by COP 10 in October, 2010, then it may be said, by inverting the age-old adage, that “the law taketh and the law giveth back”. Should they fail to do so, COP 10 is likely to be remembered as the birthplace of the Biopiracy Protocol and calls will soon be raised for the negotiation of a stand-alone international protocol on traditional knowledge. Either way, the rule of law

44 Borrows, 2002.
Safeguarding Indigenous Bio-Cultural Heritage in the South Pacific Small Island States

Erika J. Techera

Indigenous bio-cultural heritage involves the relationship between biological resources and associated traditional ecological knowledge. The inextricable link between biological and cultural diversity has been acknowledged in the natural and social sciences, as well as in international and national policy.1 The South Pacific is a biologically and culturally diverse region in which Indigenous peoples are closely connected to nature through cultural and spiritual values.2 Their reliance upon biological resources extends from sustenance and livelihoods to deeply rooted cultural practices involving the use of fauna and flora for ceremonies and celebrations.3 The traditional ecological knowledge across the region is also extensive, including, for example, complex information about food preparation using poisonous plants, significant medical knowledge held by traditional healers, and bio-cultural indicators for weather.4 However, globalization and modernization have resulted in shifting value systems; population growth,