

# Biopiracy by Law: European Union Draft Law Threatens Indigenous Peoples’ Rights over their Traditional Knowledge and Genetic Resources

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*The Nagaya Protocol is the first binding international instrument to formally recognise Indigenous peoples’ rights over their traditional knowledge and genetic resources. Draft European legislation to implement the Protocol fails to adequately secure these rights. Unless amended, the draft European law will serve to legitimise historic expropriation of genetic resources and traditional knowledge and may accelerate rather than prevent biopiracy. This article critiques the draft European law and explores how customary law and intellectual property may work in a complementary fashion to secure the rights*

*of Indigenous peoples and local communities and to bring legal certainty to the trade in traditional knowledge and genetic resources.*

## Introduction

The Nagoya Protocol on Access to Genetic Resources and Sharing of Benefits to the Convention on Biological Diversity, adopted in October 2010,<sup>1</sup> is the first binding international legal instrument to formally recognise the rights of Indigenous peoples and local communities over their genetic resources and traditional knowledge.<sup>2</sup> The Protocol requires states to ensure that access to and use of Indigenous peoples’ and local communities’ genetic resources and traditional knowledge is subject to their prior informed consent.<sup>3</sup> It also requires states to take the customary laws of Indigenous peoples and local communities into consideration in implementing the Protocol.<sup>4</sup>

In December 2012 the European Union published a draft legislative proposal for implementation of the Protocol. The original draft law has been criticised for, among other things, focusing primarily on enabling economic utilisation of genetic resources and traditional knowledge,<sup>5</sup> and restricting its temporal scope to genetic resources and traditional knowledge accessed after the Protocol comes into force.<sup>6</sup> Criticism has also been made of the draft law’s adoption of a very narrow definition of protectable traditional knowledge,<sup>7</sup> which renders it almost meaningless as a tool for the protection of traditional knowledge rights. It has also been criticised for its failure to “take into consideration” customary law in both its preparation and redaction.<sup>8</sup>

The weakness of the European Union’s initial draft is apparent in the opinions on the draft law prepared by the European Parliamentary Committees on Environment, Public Health and Food Safety, Agriculture and Rural Development, Development and Fisheries.<sup>9</sup> In an explanatory statement setting out the reasons and need for amendment of the draft law, the Rapporteur to the Committee on Environment, Public Health and Food

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<sup>1</sup> 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. <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> [Accessed December 5, 2013].

<sup>2</sup> The Nagoya Protocol does not use the term “Indigenous peoples” but refers instead to Indigenous and local communities. However, as Indigenous peoples have been recognised as “peoples” in international law (see, for example, the United Nations Declaration on the Rights of Indigenous Peoples) this article will consistently refer to Indigenous peoples and local communities except where citing specific text from the Protocol.

<sup>3</sup> Nagoya Protocol arts 6 and 7.

<sup>4</sup> Nagoya Protocol art.12.

<sup>5</sup> E.C. Kamau and G. Winter, “Comments on the Commission Proposal for the Regulation of the European Parliament and Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union”, COM(2012) 576 (December 4, 2012). Copy on file with author.

<sup>6</sup> Kamau and Winter, “Comments on the Commission Proposal for the Regulation of the European Parliament and Council on Access to Genetic Resources”, COM(2012) 576; see also “Open letter to the Committee on Environment, Public Health and Food Safety from individuals and organizations that work with or represent Indigenous peoples and local communities”, <http://naturaljustice.org/wp-content/uploads/pdf/Letter-to-EU-on-TK.pdf> [Accessed December 5, 2013].

<sup>7</sup> Natural Justice and Berne Declaration, “Access or Utilisation — What Triggers User Obligations? A Comment on the Draft Proposal of the European Commission on the Implementation of the Nagoya Protocol on Access and Benefit Sharing” <http://naturaljustice.org/wp-content/uploads/pdf/Submission-EU-ABS-Regulation.pdf> [Accessed December 5, 2013].

<sup>8</sup> “Open letter to the Committee on Environment, Public Health and Food Safety from individuals and organizations that work with or represent Indigenous peoples and local communities”, <http://naturaljustice.org/wp-content/uploads/pdf/Letter-to-EU-on-TK.pdf> [Accessed December 5, 2013].

<sup>9</sup> Brendan Tobin, “Bridging the Nagoya Compliance Gap: The fundamental role of customary law in protection of Indigenous peoples’ resource and knowledge rights”, (2013) 9(2) *LEAD* 144, <http://www.lead-journal.org/content/13142.pdf> (Accessed January 3, 2014).

<sup>10</sup> Sandrine Belier, Rapporteur, “Report on the 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, COM(2012)0576 — C7-0322/2012 — 2012/0278(COD)”, A7-0263/2013, European Parliament (July 16, 2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+REPORT+A7-2013-0263+0+DOC+XML+V0//EN> [Accessed December 5, 2013].

Safety argued that any law will need to “stick as closely as possible to both the spirit and the text” of the Nagoya Protocol.<sup>10</sup> In September 2013, the European Parliament, building on the Committees’ work, adopted 78 amendments to the draft law, ameliorating in part some of the draft law’s weaknesses.<sup>11</sup> Despite these numerous amendments the draft European Union law still provides little, if any, protection for most traditional knowledge and genetic resources of Indigenous peoples and local communities. Furthermore, it still includes no measures to promote, secure or facilitate Member States in meeting their obligations to take into consideration Indigenous peoples’ and local communities’ customary laws. As such it fails to meet both the both the spirit and the word of the Nagoya Protocol. As will be seen later, it also fails to comply with relevant international human rights law.

This article examines the draft European law in the light of Member States’ obligations to protect the rights of Indigenous peoples and local communities over their traditional knowledge and genetic resources under both the Nagoya Protocol and international human rights legislation. It commences with an overview of the Nagoya Protocol’s provisions on the protection of Indigenous peoples’ rights over their genetic resources and traditional knowledge. It continues with analysis of the original draft law as prepared by the European Commission and the significance of the amendments made by the European Parliament. It goes on to consider the status of customary law under international law and the obligations of European Member States to recognise and protect Indigenous peoples’ human rights and their customary laws. It discusses challenges for securing recognition of customary law and the need to establish meaningful measures for ensuring compliance with the Nagoya Protocol by users and Member States. It concludes that the adoption of the European law as drafted is likely to act as a spur to increased biopiracy in the short term. It further concludes that the European Union is in danger of losing all credibility with Indigenous peoples and local communities unless it shows itself willing and capable of living up to the commitments it has made to secure the rights of Indigenous peoples and local communities under international law.

## Nagoya Protocol, customary law and the protection of traditional knowledge

The Nagoya Protocol establishes a binding international regime regulating issues of access and benefit sharing associated with the use of genetic resources and traditional knowledge. Parties (i.e. states that have ratified the Protocol) are required to ensure that the “benefits arising from utilization of genetic resources and subsequent commercialization *shall be shared* in a fair and equitable way with the Party” providing such resources.<sup>12</sup> Use of genetic resources requires prior informed consent of the party providing resources and negotiation of mutually agreed terms.<sup>13</sup> These obligations only apply, however, where access and benefit sharing relating to genetic resources is regulated in the country of origin (i.e. a country in which the resources are found in situ or where they have developed their distinctive characteristics).<sup>14</sup> The Protocol establishes a detailed list of obligations that states must comply with if they wish to require prior informed consent for access to their genetic resources.<sup>15</sup> As relatively few countries have adopted functional national access and benefit sharing regimes, and many developing nations face more urgent issues, this legal lacuna may end up facilitating and indeed fuelling biopiracy.<sup>16</sup> It may be for such reasons that the Nagoya Protocol appears to adopt a more protective stance when dealing with the rights of Indigenous peoples and local communities over their genetic resources and traditional knowledge.

The Nagoya Protocol requires states to ensure that the prior informed consent or approval of Indigenous peoples and local communities has been obtained and mutually agreed terms have been entered into for access to and use of their genetic resources (art.6.2)<sup>17</sup> and traditional knowledge (art.7).<sup>18</sup> These obligations apply both to states in which Indigenous peoples and local communities reside and those countries into which their knowledge and genetic resources are imported.<sup>19</sup> In marked contrast to the treatment of genetic resources in general, the obligations to secure the prior informed consent of Indigenous peoples and local communities for access to their resources and traditional knowledge are not made conditional on the existence of national regulations in the countries in which they reside. Various reasons may be put forward for this contrast in treatment. First, Indigenous peoples and local communities’ rights over their resources and knowledge are largely grounded in

<sup>10</sup> Belier, “Report on the proposal for a regulation on Access to Genetic Resources, COM(2012)0576” (2013), p.54.

<sup>11</sup> P7\_TA(2013)0373, Amendments adopted by the European Parliament on September 12, 2013 on the 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, COM(2012)0576 — C7-0322/2012 — 2012/0278(COD), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0373+0+DOC+XML+V0//EN> [Accessed December 5, 2013].

<sup>12</sup> Nagoya Protocol art.5 (emphasis added).

<sup>13</sup> Nagoya Protocol art.6.1.

<sup>14</sup> Nagoya Protocol art.6.1.

<sup>15</sup> Nagoya Protocol arts 6.1 and 6.3.

<sup>16</sup> Gurdial Singh Nijar, *The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: An Analysis* (CEBLAW, University of Malaysia, 2011), <http://biogov.uclouvain.be/multistakeholder/presentations/Gurdial-Nijar-NagoyaProtocolAnalysis-CEBLAW-Brief.pdf> [Accessed December 5, 2013].

<sup>17</sup> Nagoya Protocol art.6.2; see Annex 1 for text.

<sup>18</sup> Nagoya Protocol art.7; see Annex 1 for text.

<sup>19</sup> Nagoya Protocol arts 6 and 7.

their own legal regimes rather than national law. These rights have been described as a form of native title that springs from Indigenous peoples and local communities' own ancestral laws and international legal instruments rather than any act of government.<sup>20</sup> Secondly, international human rights law creates specific obligations for all states to protect the rights of Indigenous peoples and local communities over their resources and knowledge, and to do so in a manner that respects and recognises their own legal regimes.<sup>21</sup> Thirdly, Indigenous peoples and local communities cannot always rely on national governments to secure their interests against foreign corporations and users of their resources and knowledge. It is therefore incumbent on each country to prevent within its jurisdiction the misappropriation of their resources and knowledge, and secure their rights to control access and utilisation to such resources and knowledge and their rights to equitable participation in sharing of benefits arising from its utilisation.

Throughout the negotiation of the Nagoya Protocol, representatives of Indigenous peoples and local communities consistently drew attention to the need for any regime to respect their own legal regimes and support realisation of their human rights.<sup>22</sup> Among the most important outcomes arising from their participation in the negotiation of the Protocol is art. 12, which requires states in implementing their obligations to:

“[T]ake into consideration indigenous and local communities customary laws, protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.”<sup>23</sup>

In order to comply with art. 12, states will need to ensure consideration of customary law not only in the development of national implementing legislation, but also in relevant administrative, judicial and alternative dispute resolution proceedings. The Protocol has placed customary law firmly at the centre of national and global governance of traditional knowledge and associated genetic resources.

## European Union implementation of the Nagoya Protocol

In late 2011 the European Commission began an online consultative process to assist in the development of draft legislation for implementation of the Nagoya Protocol.<sup>24</sup> The outcome of this process was published in October 2012 as a draft legislative proposal.<sup>25</sup> Notably, neither the background documentation nor the questionnaire for the consultation process makes any reference to the customary laws and protocols of Indigenous peoples and local communities. Furthermore, there was no specific question in the questionnaire requesting views on the nature, scope or form of measures required to ensure effective protection of the rights of Indigenous peoples and local communities. It is notable that only one of the 40-plus submissions made in response to the questionnaire (the vast majority of submissions came from within the European Union) specifically focused on the rights of Indigenous peoples and local communities.<sup>26</sup>

The valiant struggle of Indigenous peoples and local communities for recognition of their rights over their genetic resources and traditional knowledge at the international level, of which the European Union regulators must be aware, has unfortunately found little resonance in the draft regulation. The explanatory statement to the draft law prepared by the Commission uses the lack of an agreed international definition of traditional knowledge as the basis for restricting the regulation to traditional knowledge defined in access contracts.<sup>27</sup> This excludes all but a miniscule fraction of traditional knowledge from its ambit. This approach not only disenfranchises Indigenous peoples and local communities, it fails to recognise that although many key terms, such as “invention”, “product”, “process” and “gene” are not fully defined in international law, this has not precluded their protection by the intellectual property rights system.<sup>28</sup>

At the heart of the draft European law is a requirement that users demonstrate “due diligence” in complying with relevant national access legislation in the country in which genetic resources and traditional knowledge were legitimately accessed.<sup>29</sup> This would, on the face of it, seem to offer a relatively robust level of protection. However, the draft law defines “traditional knowledge” for the

<sup>20</sup> Terri Janke, “Mabo Oration 2011: Follow the stars: Indigenous culture, knowledge and intellectual property rights”, <http://www.adcq.qld.gov.au/resources/a-and-tsi/mabo-oration/2011-mabo-oration-terri-janke> [Accessed December 5, 2013].

<sup>21</sup> See, for example, United Nations Declaration on the Rights of Indigenous Peoples arts 26, 27, 31, 34, [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf), and International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries arts 8, 15, 16, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) [Both accessed December 5, 2013].

<sup>22</sup> Merle Alexander, Preston Hardison and Matthias Ahren, “Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, across Jurisdictions, and International Law”, (UNEP/CBD/WG-ABS/7/INF/5) (Secretariat to the Convention on Biological Diversity, Montreal 2009).

<sup>23</sup> Nagoya Protocol art. 12.

<sup>24</sup> Proposal for a Regulation of the Parliament and of the Council on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization in the Union, COM(2012) 576 final, p.4, [http://ec.europa.eu/environment/biodiversity/international/abs/pdf/PROPOSAL\\_FOR\\_A\\_REGULATION\\_EN.pdf](http://ec.europa.eu/environment/biodiversity/international/abs/pdf/PROPOSAL_FOR_A_REGULATION_EN.pdf) [Accessed December 5, 2013].

<sup>25</sup> Proposal for a Regulation on Access to Genetic Resources, COM(2012) 576 final, p.4, [http://ec.europa.eu/environment/biodiversity/international/abs/pdf/PROPOSAL\\_FOR\\_A\\_REGULATION\\_EN.pdf](http://ec.europa.eu/environment/biodiversity/international/abs/pdf/PROPOSAL_FOR_A_REGULATION_EN.pdf) [Accessed December 5, 2013].

<sup>26</sup> See submission of the *Grupo Intercultural Almaciga to the Public Consultation on the Implementation and Ratification of the Nagoya Protocol on Access to Genetic Resources and Benefit Sharing arising out of their Utilization* (ABS), p.6, answer to question 1, [http://ec.europa.eu/environment/consultations/abs\\_results\\_en.htm](http://ec.europa.eu/environment/consultations/abs_results_en.htm) [Accessed December 5, 2013].

<sup>27</sup> Proposal for a Regulation on Access to Genetic Resources, COM(2012) 576 final, Recital 13 and art.3(8).

<sup>28</sup> For discussion of the fluidity of definition and interpretation of terms in intellectual property see for example Mario Biagioli, “Between Knowledge and Technology: Patenting Methods, Rethinking Materiality” (2012) 22(3) *Anthropological Forum* 285.

<sup>29</sup> Proposal for a Regulation on Access to Genetic Resources, COM(2012) 576 final, art.4

purposes of protection as traditional knowledge “described in the mutually agreed terms applying to the use of genetic resources”.<sup>30</sup> This effectively excludes all traditional knowledge that is not the subject of an access agreement. To be precise it excludes all traditional knowledge accessed without prior informed consent and mutually agreed terms. Where there is no contract for access to traditional knowledge, the draft European law would therefore provide no protection against biopiracy.

Proposed amendments to the draft law considered by the European Parliament demonstrate a concern among many parliamentarians to protect the rights of Indigenous peoples and local communities over their genetic resources and traditional knowledge. One early proposal for amendment of the draft law went so far as to propose criminal sanctions for biopiracy.<sup>31</sup> While avoiding use of the term “biopiracy”, the Parliament has adopted a number of amendments requiring Member States to take measures to prevent the illegal use of genetic resources and associated traditional knowledge.<sup>32</sup> This includes a new Recital 8a, which states that:

“Utilisation of illegally acquired genetic resources, or subsequent commercialisation of products based on such resources or associated traditional knowledge should be prohibited.”<sup>33</sup>

The Parliament has included a definition of “illegally acquired genetic resources” which it describes as “genetic resources and traditional knowledge associated with genetic resources acquired in contravention of applicable international and national law on access and benefit sharing in the country of origin”.<sup>34</sup> Parliament also adopted a new art.4(1), which boldly states: “Utilisation of illegally acquired genetic resources shall be prohibited in the Union.”<sup>35</sup> Article 9 of the draft law, in both the original and revised form, would allow for seizure of illegally acquired genetic resources and suspension of specific use activities, while art.11, setting out penalties, provides for their confiscation.<sup>36</sup>

The Parliament’s amendments include a new art.14(db) which states that where genetic resources or traditional knowledge are utilised illegally or contrary to the provisions of prior informed consent or mutually agreed terms then the Indigenous people or local community competent to grant access and sign mutually agreed terms are entitled to bring an action to prevent the illegal use. This is an important provision recognising the standing of Indigenous peoples and local communities from foreign

jurisdictions to take actions in European Union Member States for illegal use of their resources or traditional knowledge.<sup>37</sup> Illegal acquisition of genetic resources (which as defined in the draft law includes traditional knowledge) has been included by the Parliament within the framework of European law criminalising activities that threaten the environment.<sup>38</sup> These are very positive moves. All the foregoing amendments will, however, do little to protect rights over traditional knowledge as long as the definition of protectable traditional knowledge remains that which is the subject of mutually agreed terms.

### Prevention of biopiracy only where regulated in the country of origin

As drafted, the proposed European law requires users to demonstrate “due diligence to ascertain the existence of prior informed consent and mutually agreed terms” for access to and use of Indigenous peoples’ and local communities’ genetic resources and traditional knowledge.<sup>39</sup> However, under the draft law this requirement only applies where relevant national legislation exists in the countries in which the relevant genetic resources and traditional knowledge are obtained.<sup>40</sup> Requirements to ensure compliance with national law in the country in which traditional knowledge is obtained are set out in art.16.1 of the Nagoya Protocol, which obliges states to:

“[T]ake appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of Indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such Indigenous and local communities are located.”

Article 16.1 mirrors similar provisions in art.15.1 relating to genetic resources. Both provisions create obligations for states to adopt legislation to ensure that the use within their territories of genetic resources or traditional knowledge conforms to the laws of the country from which they were legitimately sourced. This is not,

<sup>30</sup> Proposal for a Regulation on Access to Genetic Resources, COM(2012) 576 final, art.3(8).

<sup>31</sup> See Belier, “Report on the proposal for a regulation on Access to Genetic resources, COM(2012) 576” (2013); European Parliament, Committee on the Environment, Public Health and Food Safety, May 6, 2013, Amendment 8, Recital 8a (new): “Biopiracy consisting of either unauthorized acquisition of genetic resources or unauthorized utilization or subsequent commercialisation of products based on such resources or associated traditional knowledge, should be prohibited and made subject to criminal sanctions in accordance with directive 2008/99/EC ...”

<sup>32</sup> P7\_TA(2013)0373, Amendments 18, 19, 44, 47, 63, 73.

<sup>33</sup> P7\_TA(2013)0373, Amendment 19, Recital 8a (new).

<sup>34</sup> P7\_TA(2013)0373, Amendment 44 art.3 — point 8a (new).

<sup>35</sup> P7\_TA(2013)0373, Amendment 47, art.4 — para.1 (new).

<sup>36</sup> P7\_TA(2013)0373, Amendment 65, art.11(2).

<sup>37</sup> P7\_TA(2013)0373, Amendment 73, art.14(db).

<sup>38</sup> P7\_TA(2013)0373, Amendment 77, art.16, which includes an amendment to Directive 2008/99 on the protection of the environment through criminal law as follows:

“(1) in Article 3, the following point is added: ‘(j) Illegal acquiring of genetic resources’.”

<sup>39</sup> P7\_TA(2013)0373, Amendment 48, Article art.4 — para.1.

<sup>40</sup> P7\_TA(2013)0373, Amendment 48, Article art.4 — para.1.

however, the limit of state obligations under the Protocol. As we saw earlier, arts 6.2 and 7 of the Protocol require states to “take measures with the aim of ensuring” that access to genetic resources and traditional knowledge of Indigenous peoples and local communities is subject to their prior informed consent and that mutually agreed terms have been established.<sup>41</sup> No qualification is made subordinating either provision to arts 15.2 and 16.1. States’ obligations to secure their implementation are not, therefore, in any way linked to or dependent upon the existence of national access legislation in countries where relevant Indigenous peoples and local communities reside.

The obligations of states to adopt measures to implement the provisions of arts 6.2 and 7 are based upon Indigenous peoples’ and local communities’ recognised rights under international law to control access to and use of their resources and knowledge, even where these may have been accessed outside their own areas of immediate control.<sup>42</sup> While the Protocol recognises the sovereign rights of states over genetic resources,<sup>43</sup> this does not extend to traditional knowledge. Furthermore, constitutional, national, international and/or customary law may limit states’ sovereign powers with regard to genetic resources found within Indigenous peoples’ traditional lands and marine areas. Therefore an absence of national legislation or regulation in a foreign country does not signify the lack of rights or law regarding Indigenous peoples and local communities’ rights over their traditional knowledge and resources. In no way can the lack of national legislation be seen as obviating states’ obligations to adopt measures to ensure that within their jurisdiction the rights of Indigenous peoples and local communities to govern access to and use of their genetic resources and traditional knowledge are secured.<sup>44</sup> This, it is posited, must be done with due attention to their own customary laws, international law (including human rights and customary international law), as well as constitutional and other relevant national laws.

As originally drafted, the European law treats arts 15.1 and 16.1 of the Nagoya Protocol as overriding arts 6.2, 7 and 12, thereby removing any obligation to require evidence of prior informed consent or mutually agreed terms for use of the genetic resources and traditional knowledge of Indigenous peoples and local communities if there is no domestic law regulating access to such resources or knowledge. This can hardly have been the intention of the Protocol’s negotiators. Sustaining such an interpretation would amount to a denial of any responsibility for European Union Member States to take action to prevent and rectify breaches of the human rights of Indigenous peoples where those rights are not regulated

in the country where the infringed party is located. To accept such a position would be to condone breaches of the human rights of Indigenous peoples within European Member States until such time as the relevant breach is regulated in the domestic legislation of the country in which the affected Indigenous peoples normally reside.

Large collections of Indigenous peoples’ and local communities’ genetic resources and traditional knowledge are already held in databases, museums, gene banks and other ex situ repositories in third countries. As drafted, the proposed European law would obviate any responsibility to ascertain the existence of prior informed consent or mutually agreed terms for such collections where this is not a requirement in that third state. This would be discriminatory in the extreme, and a reading of the Protocol supporting such an outcome would bring the European Union into disrepute. Article 16 of the Nagoya Protocol must on all grounds therefore be read as complementary to and not as conditioning obligations under arts 6.2 and 7. Failure to rectify these weaknesses in the European Union draft will not only clear the way for continuing biopiracy, it will result in the legitimisation of historic expropriation of genetic resources and traditional knowledge. In the explanatory statement to the amendments to the draft law prepared by European Parliamentary Committee on Environment, Public Health and Food Safety, the Rapporteur, Sandrine Belier, argued that the law must be carefully scribed in order to prevent possible legitimisation of earlier illegal acquisition of genetic resources.<sup>45</sup> Considering the definition of illegal acquisition of genetic resources as including traditional knowledge, the committee may be presumed to have intended to prevent the legalisation of previous illegal acquisitions of traditional knowledge as well. The product of their deliberations does not, however, achieve this end.

The amendments to the draft law by the European Parliament define “illegal use” as any use in contravention with applicable national and international law which appears to reinstate state obligations to take measures to ensure users obtain prior informed consent and mutually agreed terms for use of Indigenous peoples and local communities’ genetic resources and traditional knowledge as required under the Nagoya Protocol.<sup>46</sup> The Parliament also included an amendment requiring users to ascertain that genetic resources and traditional knowledge were accessed with prior informed consent and mutually agreed terms as part of the due diligence process.<sup>47</sup> This requirement was qualified, however, by limiting the users’ obligations to ascertaining the existence of prior informed consent and mutually agreed terms as defined by national law.<sup>48</sup> Considering the widespread lack of national access

<sup>41</sup> Nagoya Protocol arts 6.2 and 7.

<sup>42</sup> See for example UNDRIP arts 31 and 34.

<sup>43</sup> Nagoya Protocol, art. 6.1.

<sup>44</sup> Dr Evanson Kamau and Professor Gerd Winter, “Comments on the Commission 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 Derived from their Utilization in the Union”, COM (2012) 576, FUE, University of Bremen Version, December 4, 2012 (copy on file with author).

<sup>45</sup> Belier, “Report on the proposal for a regulation on Access to Genetic resources, COM(2012)0576” (2013), Explanatory Statement, p.56.

<sup>46</sup> P7\_TA(2013)0373, Amendment 44, art.3 — point 8a (new).

<sup>47</sup> P7\_TA(2013)0373, Amendment 48, art.4 — para. 1.

<sup>48</sup> P7\_TA(2013)0373, Amendment 48, art.4 — para. 1.

legislation the impact of the Parliament's amendments is cosmetic rather than substantive. Analysis of the draft law and the amendments put forward by the European Parliament demonstrate a bias towards securing continued access to genetic resources and traditional knowledge for commercial and other users rather than protecting the rights of Indigenous peoples and local communities. This is made patently clear in art.2 of the draft law, as amended, which states that the regulation does not apply to genetic resources from a country of origin that has decided not to adopt domestic access rules in conformity with the requirements of the Nagoya Protocol.<sup>49</sup> The genetic resources and traditional knowledge of Indigenous peoples and local communities in countries which have specifically stated their intention not to sign up to the Nagoya Protocol would under the current European draft law be fair game for biopirates. This would apply for instance to genetic resources and traditional knowledge sourced from Bolivia where the Government has stated that it will not subscribe to the Nagoya Protocol insofar as it promotes commercialisation of genetic resources, and that it will only adhere to it if it reflects a non-mercantile approach within the framework of a multilateral agreement to promote distribution of benefits.<sup>50</sup> Far from preventing biopiracy, the European Union draft law may, therefore, result in its acceleration as unscrupulous collectors intensify their activities to exploit genetic resources and traditional knowledge in the absence of national regulations in countries rich in biological and cultural diversity. In light of these considerations, European Union regulators need to go back to the drawing board and reflect more clearly on their aims and their obligations, not least with regard to the recognition of customary law as required by international law.

### International legal obligations to recognise customary law

Requirements to give due recognition to customary law in the Nagoya Protocol reflect provisions already set out in international human rights instruments. The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) recognises Indigenous peoples' rights to self-determination and to their own juridical systems.<sup>51</sup> Similarly, the International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) requires states to give due regard to Indigenous peoples' customary

laws in the application of laws and regulations that affect them.<sup>52</sup> Within the texts of the UN Declaration and ILO Convention 169, provisions may also be found recognising Indigenous peoples' rights over their, lands, natural resources and traditional knowledge and the responsibility of states to ensure these are governed with due respect and recognition for their laws, customs and land tenure regimes.<sup>53</sup>

Taken together with relevant provisions of the Nagoya Protocol, the UN Declaration and ILO Convention 169 create clear obligations for European Member States to recognise and secure Indigenous peoples' rights over their genetic resources and traditional knowledge. This must be done with due respect, recognition and consideration of Indigenous peoples' own legal regimes.

All Member States of the European Community are signatories to the UN Declaration. While the Declaration is not in itself legally binding, it is widely seen as a true description of the status of international human rights law as it pertains to Indigenous peoples.<sup>54</sup> Furthermore, three European countries, Denmark, the Netherlands and Spain, are parties to ILO Convention 169, which creates binding legal obligations relating to the protection of Indigenous peoples' human rights. In a resolution adopted in January 2013, the European Parliament stressed the need for the European Union and its Member States to ensure that regulations on traditional knowledge "comply with international commitments on promotion of and respect for the rights of Indigenous peoples", including the UN Declaration and ILO Convention 169.<sup>55</sup> Failure to do so will leave individual Member States open to actions before treaty bodies including the Human Rights Committee, the Committee on Elimination of all forms of Racial Discrimination and the Committee on Economic Social and Cultural Rights. Member States may also find themselves the subject of legal proceedings before the European Court of Human Rights and national courts for failure to adopt required measures to secure Indigenous peoples' human rights, including failures to meet obligations to ensure recognition and respect for customary law.

Despite the obligations under the Nagoya Protocol requiring consideration of customary law, the process for consultation and drafting of the draft European law has demonstrated scant understanding of its importance. Only one proposed amendment to include wording on customary law is referenced in the rapporteurs' reports.<sup>56</sup> This was, however, highly significant as it proposed defining "illegally acquired genetic resources and

<sup>49</sup> P7\_TA(2013)0373, Amendment 37, art.2.

<sup>50</sup> See Submission by the *Government of Bolivia to the Secretariat of the Convention on Biological Diversity regarding the implementation of the Aichi Biodiversity Targets*, <http://www.cbd.int/sbstta/doc/submission-bolivia-es.pdf> [Accessed December 5, 2013].

<sup>51</sup> UN Declaration arts 3, 31.

<sup>52</sup> ILO Convention 169 art.8.

<sup>53</sup> ILO Convention 169 arts 8, 15, 16; UN Declaration arts 26, 27, 31 and 40.

<sup>54</sup> Elsa Stamatopoulou, "Taking Cultural Rights Seriously" in Steven Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing Ltd, 2010), p.112.

<sup>55</sup> *European Parliament Resolution of January 15, 2013 on development aspects of intellectual property rights on genetic resources: the impact on poverty reduction in developing countries* (2012/2135(INI)), para 20, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0007+0+DOC+XML+V0//EN> [Accessed December 5, 2013].

<sup>56</sup> See European Parliament, Amendment 120 (Kriton Arsenis), art.3—para.1—point 8a (new) in Committee on the Environment, Public Health and Food Safety, Amendments 77–191, in Draft Report, Sandrine Belier (PE508.195v02-00).

traditional knowledge” to include genetic resources and associated traditional knowledge acquired in contravention of applicable customary laws, protocols and procedures of Indigenous peoples and local communities.<sup>57</sup> The justification for the proposal drew attention to the importance of implementing art.12 of the Protocol.<sup>58</sup> It did not, however, get beyond the committee stage. The Parliament did, however, adopt an amendment including a new Recital in the draft law that recognises the importance of respecting the rights of Indigenous peoples and local communities as set out in ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples, both of which require recognition and respect for customary law.<sup>59</sup>

The only specific reference to art.12 of the Nagoya Protocol in the draft law comes in Amendment 76 to art.16(3), which provides for periodic review of the law’s implementation. According to this provision the Commission shall consider reviewing “implementation of the provisions of this Regulation concerning traditional knowledge” in the light of advances in other relevant international organisations and the need of further action on genetic resources and traditional knowledge “with a view to implementing Article 5.1, Article 6.2, Article 7 and Article 12 of the Nagoya Protocol and respecting the rights of Indigenous and local communities”.<sup>60</sup> Once again the issue of indigenous peoples’ and local communities’ rights have been put on the back burner. What, they might rightly ask, do Indigenous peoples and local communities have to do to ensure that their rights, already clearly laid out in international law, are respected protected and fulfilled at the national level?

Although customary law is not specifically mentioned in the draft European law, it may still be covered by implication. For example, the draft law requires users to exercise due diligence to ascertain that genetic resources and traditional knowledge have been accessed in accordance with applicable access and benefit sharing legislation or regulatory requirements.<sup>61</sup> Depending upon the status of Indigenous peoples’ customary laws, these may well be considered part of applicable access law and regulations in the countries where they reside. More than 100 national constitutions, for example, already recognise Indigenous peoples’ customary legal regimes in some form or other.<sup>62</sup>

## Where custom is the law

Customary law governs rights to lands, resources and knowledge, in many jurisdictions.<sup>63</sup> Member States need to take this into consideration in the development of national legislation. While both commercial and non-commercial users need to ensure compliance with customary law if they are to protect the results of their investments and research. There is, therefore, an immediate need for European Union authorities to provide guidance on how Member States and users should approach the question of customary law. The draft law fails to provide such guidance and Member States would do well to call upon the European Union authorities to carry out necessary research and ensure effective compliance with the international obligations the Union has assumed. Failure to do would, in essence, consign the Nagoya Protocol to the fate suffered by hundreds of treaties entered into by European Member States with Indigenous peoples during the colonial era, most of which were later unilaterally broken by colonial powers and their successor settler states.<sup>64</sup>

A key provision of the United Nations Declaration on the rights of Indigenous peoples is a requirement that states comply with the treaties they have entered into with Indigenous peoples.<sup>65</sup> Although Indigenous peoples are not parties to the Nagoya Protocol, their participation in the negotiation process was vital for it to gain legitimacy as an instrument for the regulation of their rights over genetic resources and traditional knowledge. Indeed, concern that the treaty might not adequately protect their rights led Indigenous peoples to walk out of the negotiations on several occasions. On each occasion they were enticed to return to the negotiating table with promises of greater attention to their concerns. These concerns were reflected most clearly in the Protocol’s provisions requiring their prior informed consent for access to and use of their traditional knowledge and genetic resources and in the recognition of their customary laws.

Indigenous peoples and local communities participating in the negotiation of the Nagoya Protocol must have hoped that the Treaty negotiated within the United Nations would have to be honoured. The European law as drafted, however, largely circumvents the Protocol’s provisions for the protection of Indigenous peoples’ and local communities’ rights over their knowledge and resources. It also demonstrates a lack of adequate

<sup>57</sup> Ibid

<sup>58</sup> Ibid, 31.

<sup>59</sup> See Amendment 8, Recital 3 in Committee opinions and proposed amendments detailed in Belier, “Report on the proposal for a regulation on Access to Genetic resources, COM(2012)0576” (2013) p.62; and P7\_TA(2013)0373.

<sup>60</sup> P7\_TA(2013)0373, Amendment 76, art.16(3).

<sup>61</sup> Proposal for a Regulation on Access to Genetic Resources, COM(2012) 576 final, art.4.1.

<sup>62</sup> Katrina Cuskelly, “Customs and Constitutions: State recognition of customary law around the world” (Bangkok, Thailand: IUCN, 2011), [http://cmsdata.iucn.org/downloads/customs\\_and\\_constitutions\\_15\\_09\\_10.pdf](http://cmsdata.iucn.org/downloads/customs_and_constitutions_15_09_10.pdf) [Accessed December 5, 2013].

<sup>63</sup> Brendan Tobin, “The Role of Customary Law in Access and Benefit Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries” (Geneva: WIPO — UNU, 2013), [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/Customary\\_law\\_in\\_ABS\\_and\\_TK\\_Governance\\_Perspectives\\_from\\_Andean\\_and\\_Pacific\\_Island\\_countries\\_April\\_20x\\_2013.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/Customary_law_in_ABS_and_TK_Governance_Perspectives_from_Andean_and_Pacific_Island_countries_April_20x_2013.pdf) [Accessed December 5, 2013].

<sup>64</sup> Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002), p.79; see also Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press), p.111: see also p.202, fn.362, where, referring to treaties in Africa, he cites the SCI list for the following number of Treaties: Belgium 3, France 5, Germany 75, Britain 85, Italy 327 and the Netherlands 339.

<sup>65</sup> UN Declaration art.37.

consideration for Indigenous peoples' and local communities' customary laws both in its development and with regard to Member States' implementation. It is hard to escape the feeling that the European Union draft law has been prepared with a view to minimising disruption to commercial users of traditional knowledge and genetic resources. It also seems that the drafters of the law want to prevent national courts in Member States from having to deal with the complexities associated with recognising customary laws. For Indigenous peoples and local communities the draft law must surely seem like just another example of the self-serving interpretation of international law by European Member States, an interpretation calculated to marginalise their legal regimes and once again deny them their legal rights.

For Indigenous peoples and local communities within the European Union the law provides even less protection, if that is possible. The draft law recognises Member States as having the sole responsibility for the regulation of access to genetic resources and traditional knowledge of Indigenous peoples and local communities living within their jurisdiction. It provides no guidance on how states are to fulfil their obligations under the Nagoya Protocol to require prior informed consent for access to relevant genetic resources and traditional knowledge and mutually agreed terms. If Member States decide not to regulate access within their territories, then following on from the European Union's own interpretation of the Nagoya Protocol, as evidenced in the draft law, Indigenous peoples and local communities in those countries would have no means of securing protection of their rights. It seems the European Union has not yet grasped the true extent of Indigenous peoples' and local communities' rights and of the Union's obligation to protect and defend those rights as a signatory to the Nagoya Protocol and to relevant international human rights instruments.

## Where to from here?

Opportunities still exist for the European Parliament and the Council of Europe to correct the draft law and the treatment of the rights of Indigenous peoples and local communities. While challenging, this task is far from insurmountable. It does, however, require the political commitment, funding and bureaucratic support necessary to revise the draft law with ample participation of Indigenous peoples and experts in customary law and human rights. Anything less will amount to a failure to comply with the obligations under the Nagoya Protocol to "take into consideration" customary law and protocols of Indigenous peoples in its implementation. Work is also needed to provide guidance for Member States on responsibilities and modalities for taking customary law

into consideration in national implementation. To this end, the European Union may usefully consider commencing a comprehensive programme of research, consultation and capacity building to identify and overcome challenges associated with the recognition of Indigenous peoples' and local communities' customary laws and protocols. While such research may focus initially on issues relating to the implementation of the Nagoya Protocol, this is a precedent with implications for all areas of commercial, research and development activity that may impact on Indigenous peoples. Of primary importance will be the analysis of issues such as standing before the courts, admission and taking of evidence, proof of law, respect for traditional practices and the interpretation of customary law and the potential for customary law to be made the law of contract.<sup>66</sup>

Despite the obvious desire of the European Commission and Parliament to skirt around the issue, Member States, the judiciary and regional human rights courts are likely to welcome guidance on the challenges and opportunities for securing recognition of the customary law of Indigenous peoples and local communities in accordance with their international legal obligations. To this end, the European Union could usefully commission a detailed study on existing, potential and comparative experiences in the recognition of customary law in a variety of legal traditions, in particular the civil and common law legal systems. Such a study should involve consultation with legal practitioners, members of the judiciary, Indigenous peoples, administrators and experts in alternative dispute resolution. One of the primary goals of such a study would be to identify best practices in the development and management of functional interfaces between state legal systems and customary legal regimes. Any such study may seek to provide information on complex issues such as rules of evidence, expert witnesses and recognition of judgments, including foreign judgments, based in whole or in part on customary law. Also of much importance will be the determination of capacity building needs and the promotion of capacity building for legal practitioners the judiciary and arbitrators on issues of customary law and its application.

## Nagoya compliance gap

A key gap in the Nagoya Protocol is the lack of a functional mechanism to enforce users' compliance with their obligations to ensure the existence of prior informed consent and mutually agreed terms prior to the use of genetic resources and traditional knowledge. The draft European law offers an opportunity to address these issues. With regard to users' compliance, the European Parliament has called for the adoption of binding

<sup>66</sup> See further Alexander, Hardison and Ahrén, "Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law across Jurisdictions, and International Law" (UNEP/CBD/WG-ABS/7/INF/5, 2009); Brendan Tobin, "Setting Protection of TK to Rights — Placing Human Rights and Customary Law at the Heart of TK Governance" in E.C. Kamau and G. Winter (eds), *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing* (Earthscan, 2009).



disclosure obligations to protect rights relating to genetic resources and traditional knowledge.<sup>67</sup> The Parliament has also called upon European negotiators to take a positive stance in ongoing negotiations on the adoption of disclosure requirements in binding international legal instruments.<sup>68</sup> Among amendments to the draft law the Parliament has included a new provision which tasks the Commission to:

“[S]eek arrangements with the European Patent Office and the World Intellectual Property Organization to ensure that references to genetic resources and their origin are included in patent registrations.”<sup>69</sup>

This relatively weak form of what are known as “disclosure of origin” requirements is intended to bring about greater transparency regarding the use of genetic resources and, when linked to prohibitions on the use of illegally acquired genetic resources, may have some deterrent effect. It does not, however, shift the burden of proof regarding the right to use genetic resources from their legitimate owners to the user, a key objective of the original proposals for the adoption of disclosure of origin requirements.<sup>70</sup> As such it does little to level the playing field between commercial users and those entitled to share in benefits derived from use of their resources. Furthermore, the limitation of obligations to disclose use only extends to patent applications and does not cover applications for other types of intellectual property such as that awarded to new plant varieties. Most notably the European draft law makes no mention of any requirements for patent applicants to disclose the use of traditional knowledge in intellectual property applications.

Up to 50 countries, including a number of European countries, have already adopted some form of national disclosure obligations relating to genetic resources and/or traditional knowledge.<sup>71</sup> Support for the adoption of binding disclosure obligations now exists among a majority of Member States of the World Trade Organization. In light of the European Parliament’s resolution on intellectual property, genetic resources and traditional knowledge issues, further revision of the draft European law to include stricter provisions on disclosure of origin would seem warranted.<sup>72</sup> This might include amendments to the scope of coverage to embrace traditional knowledge, and to the scope of disclosure to include requirements for evidence of prior informed consent and mutually agreed terms. It is also to be hoped that in international fora European negotiators will take guidance from the Parliament’s call for the adoption of a positive approach on issues of disclosure of origin. One

benefit of the adoption of strong compliance measures, such as enhanced disclosure requirements in intellectual property law, is likely to be a reduction in the number of cases involving customary law from foreign jurisdictions coming before the courts in European Member States.

Another major gap in the Nagoya Protocol is the lack of any meaningful enforcement mechanism to secure compliance by states. This is a problem common to multilateral environmental treaties and explains the desire of developing countries to address these matters within the framework of the World Trade Organization (WTO), which has its own conflict resolution mechanism. However, with the WTO process well and truly stalled for now, securing compliance by states with their international obligations will require more proactive measures from regional authorities. To this end, revision of the European draft law in order to provide specific direction for state implementation of obligations relating to customary law would add to the possibilities of achieving effective national implementation. The adoption of binding European legislation would open legal avenues for Indigenous peoples and local communities to seek recourse for Member State failures to take measures to secure their rights before European judicial authorities.

Taking the steps necessary to ensure that Member States adopt measures requiring prior informed consent and mutually agreed terms as a condition for access and use of the genetic resources and traditional knowledge of indigenous peoples and local communities, whether resident within the European Union or elsewhere, as well as requirements to “take into consideration” their customary laws and protocols, will be crucial to securing effective recognition of their rights in all Member States. In order to secure the rights of Indigenous peoples and local communities, from both within and outside the European Union, European courts need to be in a position to address complex issues pertaining to the recognition and consideration of customary law. In the absence of clear European regulation, those wishing to challenge failings by individual Member States to implement their obligations with regards to respect, recognition and consideration of customary law may still take up the issue before national courts, international treaty bodies and regional human rights institutions, where there is a growing willingness to promote the effective realisation of Indigenous peoples’ human rights.

<sup>67</sup> *European Parliament Resolution of January 15, 2013 on development aspects of intellectual property rights on genetic resources: the impact on poverty reduction in developing countries* (2012/2135(INI)).

<sup>68</sup> *European Parliament Resolution of January 15, 2013 on development aspects of intellectual property rights on genetic resources* (2012/2135(INI)).

<sup>69</sup> P7\_TA(2013)0373, Amendment 68, art.12 — para.2a (new).

<sup>70</sup> Brendan Tobin, “Certificates of Origin: A Role for IPR Regimes in Securing Prior Informed Consent” in J. Mugabe et al. (eds), *Access to Genetic Resources: Strategies for Sharing Benefits* (Nairobi: ACTS Press, 1997).

<sup>71</sup> David Vivas, “Bridging the Gap on Intellectual Property and Genetic Resources in WIPO’s Intergovernmental Committee (IGC)” (ICTSD, January 2012), p.31, <http://ictsd.org/downloads/2012/02/bridging-the-gap-on-intellectual-property-and-genetic-resources-in-wipos-intergovernmental-committee-igc.pdf> [Accessed December 5, 2013].

<sup>72</sup> *European Parliament Resolution of January 15, 2013 on development aspects of intellectual property rights on genetic resources* (2012/2135(INI)).

## Conclusion

The customary laws of Indigenous peoples and local communities are increasingly recognised as dynamic and vibrant sources of law at the heart of legal ordering for Indigenous peoples and local communities around the world. For centuries such customary laws have been negated, marginalised and frequently distorted by colonial powers, settler states and dominant national legal regimes. Human rights law and environmental law are now helping to take the blinkers off the international legal system and allow customary law to regain its rightful status as a source of law not only at the national level but also at the global level. For many the notion that customary law is a fundamental part of and has a significant role to play in national and international legal governance may prove unwelcome. It is, however, the legal reality dictated by the Nagoya Protocol and international human rights law, as well as in many national constitutions. It is vital therefore that states, the private sector, non-governmental and Indigenous peoples organisations, research institutions and their respective legal advisers apprise themselves of what Borrows describes as the “Resurgence of Indigenous Law”.<sup>73</sup>

Addressing the complex issues regarding recognition and consideration of customary law in the implementation of national law on protection of the rights of Indigenous peoples and local communities requires commitment, funding and leadership. Failure to provide these will leave European Member States, their administrative authorities and national courts without the guidance needed to address these complex issues. It will perpetuate uncertainty for users and is sure to lead to more, not less, litigation. Above all, failure to address these issues places the European Union in danger of losing all credibility among Indigenous peoples and local communities who cannot help but come to the conclusion that even when binding rules have been negotiated, somehow or other the developed world will wriggle its way out of its commitments.

Adoption of the European Union draft law in its present form would involve all European Member States, not just the former colonial powers, in a collective denial of the rights of Indigenous peoples and local communities. This can and should be avoided by addressing the weaknesses in the draft law and by the European Union adopting a human rights approach to the continuing development of any regime on access to genetic resources and protection of traditional knowledge.<sup>74</sup> This regime must capture not only the word but also the spirit of the Protocol. It must also provide respect for the laws and rights of the traditional custodians of genetic resources and traditional knowledge. Who are these custodians? They are the unsung conservationists of biocultural heritage both within and outside the European Union without whose daily efforts to conserve biodiversity much of this heritage will be lost forever. Respecting their rights, as the

governments of the world promised to do in instruments such as the Nagoya Protocol, the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169, is the least that states can do if they wish to respect and protect cultural diversity, internalise the true costs of biodiversity conservation efforts and bring fairness and equity to the trade in genetic resources and traditional knowledge.

## Annex 1: Text of relevant articles of International legal instruments

### *Nagoya Protocol*

#### Article 6

1. In the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.
2. In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

#### Article 7

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

#### Article 12.1

In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

<sup>73</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

<sup>74</sup> Tobin, “Setting Protection of TK to Rights” in *Genetic Resources, Traditional Knowledge and the Law* (2009).

**Article 15**

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.
2. Parties shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.
3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.

**Article 16**

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.
2. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.
3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.

***UN Declaration on the Rights of Indigenous Peoples*****Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

**Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, 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 lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

**Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

### Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

### *ILO Convention 169*

#### Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

#### Article 15

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

## **Annex 2: Text of relevant provisions of 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**

Amendments made by the European Parliament are shown in bold italics.

### *Article 2 Scope*

This regulation applies to genetic resources over which states exercise sovereign rights and to traditional knowledge associated with genetic resources that are accessed after the entry into force of the Nagoya Protocol for the Union. It also applies to the benefits arising from the utilization of such resources and to traditional knowledge associated with genetic resources

This Regulation does not apply to genetic resources for which access and benefit-sharing is governed by a specialised international instrument to which the Union is a Party.

*This Regulation does not apply to genetic resources from a country of origin which decided not to adopt domestic access rules in conformity with the requirements of the Nagoya Protocol in place or to commodity trade in general. Due regard should be paid to useful and relevant ongoing work or practices under other international organisations.*

### *Article 3 Definitions*

- (8) “traditional knowledge associated with genetic resources” means traditional knowledge held by an indigenous or local community that is relevant for the use of genetic resources and that is as such described in the mutually agreed terms applying to the use of genetic resources;
- (8 a) *“illegally acquired genetic resources” means genetic resources and traditional knowledge associated with genetic resources acquired in contravention of the applicable international and national law on access and benefit-sharing in the country of origin;*

### *Article 4 Obligations of Users*

1. Users shall exercise due diligence to ascertain that genetic resources and traditional knowledge associated with genetic resources used were accessed with *prior informed consent and based on mutually agreed terms as defined by applicable access and benefit-sharing legislation or regulatory requirements and that benefits are fairly and equitably shared upon those agreed terms.* Users shall seek,

keep, and transfer to subsequent users *all information and documents* relevant for access and benefit-sharing *and for compliance with the provisions of this Regulation*.

#### **Article 14 Complementary Measures**

- (db) *ensure that, in situations where genetic resources and associated traditional knowledge are utilised illegally, or not in compliance with prior informed consent or mutually agreed terms, providers who are competent to grant access to genetic resources and sign mutually agreed terms are entitled to bring an action to prevent or stop such utilisation, including through injunctions, and to seek compensation for any damages resulting therefrom, as well as, where appropriate, for the seizure of the genetic resources concerned;*

#### **Article 16 Reporting and Review**

1. Every *five* years after its first report the Commission shall, on the basis of reporting on and experience with the application of this Regulation, review the functioning and effectiveness of this Regulation. In its reporting the Commission shall in particular consider the administrative consequences for *specific sectors*, public research institutions, small or medium-sized enterprises and micro-enterprises. It shall also consider *the need to review the implementation of the provisions of this Regulation concerning traditional knowledge associated with genetic resources in light of developments in other relevant international organizations* and the need for further Union action on access to genetic resources and traditional knowledge associated with genetic resources *with the view to implementing Article 5.2, Article 6.2, Article 7 and Article 12 of the Nagoya Protocol and respecting the rights of indigenous and local communities*.