

**CUSTOMARY LAW & THE INTELLECTUAL PROPERTY SYSTEM
IN THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS AND
KNOWLEDGE**

ISSUES PAPER

Draft only

This draft document is circulated informally for initial comments only; comments can be provided to grtkf@wipo.int. It does not represent any official views or proposals and is intended only to contribute to consultations and discussions on the issues covered.

Customary law and the intellectual property system: the context of this paper

Customary law and intellectual property: a brief overview

Customary laws and protocols are central to the very identity of many Indigenous, local and other traditional communities. These laws and protocols concern many aspects of their life as communities. They can define rights and responsibilities of community members on important aspects of their life, culture and world view: customary law can relate to use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters.

Maintaining customary laws and protocols can be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of many communities. One recent study concluded that ‘customary protocols with respect to intangible property are prevalent throughout Aboriginal communities in Canada, and that they have been – and continue to be – important socially, economically and politically.’¹ Customary laws and protocols can define how traditional cultural heritage is shared and developed, and how traditional knowledge systems are appropriately sustained and managed within a community.

So maintaining customary laws and protocols even within the original community is an important concern; it is often a key aspect of preserving the community’s very cultural identity. But communities have also called for various forms of respect and recognition of their customary laws and protocols – beyond the scope of the communities themselves. This can be a complex issue in national constitutional law, and may arise, for example, in claims over land and natural resources.

The call for wider respect and recognition of customary laws and protocols has also been a consistent feature of international policy discussions on protection of traditional cultural

¹ Brian Thom and Don Bain, *Aboriginal Intangible Property in Canada: An Ethnographic Review*, at http://strategis.ic.gc.ca/epic/Internet/inippd-dppi.nsf/en/h_ip01199e.html

expressions (TCEs) or expressions of folklore (EoF),² traditional knowledge (TK)³ and related genetic resources.⁴ For example, when the World Intellectual Property Organization (WIPO) consulted with custodians and holder of TCEs and TK on their needs and expectations relating to the intellectual property (IP) system, one common theme was the need for recognition of customary law. Why? The experiences and perspectives of indigenous, traditional and other cultural communities are of course as diverse as those communities themselves. But many communities have expressed concern that the bare content of their distinctive cultural heritage and knowledge systems should not be considered in isolation from the customary community context. From this perspective, the form or representation of a cultural expression, and the content of knowledge, should not be appropriated without recognition of the legal and cultural context that helps define them as distinctively ‘traditional.’

So communities have called for wider respect and recognition of their customary law and practices as one aspect of the appropriate protection of their TCEs and their TK. Of all the aspects of a community’s collective cultural and intellectual heritage, their cultural expressions and knowledge are most easily appropriated by third parties – exactly because they are intangible and more readily copied. A sacred site that is of importance to an indigenous community cannot be violated by a third party in a foreign country; but a sacred symbol, or sacred knowledge, can be appropriated and used in a remote location, far from the indigenous community; a sacred cultural expression can be replicated in large quantities for commercial purposes. One well-known case in the field of TCEs concerns a sacred motif, protected under indigenous customary law, that was copied onto carpets produced in a foreign country.

What role should customary law, protocols and practices play in the wider protection of TCEs and TK? This is a challenging question; it raises a host of policy and legal issues. But key stakeholders – above all, the holders and custodians of TK and TCEs themselves – have stressed that respect and recognition of customary law is integral to appropriate protection of TCEs, TK and related genetic resources against misuse and misappropriation by others. The customary context may indeed help clarify or define what these terms actually mean: what makes cultural expressions ‘traditional’ or knowledge ‘traditional’ may be the very fact that they are developed, maintained and disseminated in a customary, intergenerational context; and often that context will be defined and shaped by customary law, protocols and practices. So even the basic question in discussing protection of TK and TCEs – what do those terms refer to – may entail a better understanding of the nature of customary law.

² In line with the emerging practice of using these terms as synonyms, this paper uses the terms traditional cultural expressions (TCEs) and expressions of folklore (EoF) interchangeably, without prejudging the scope or appropriate use of either term.

³ Traditional knowledge is used in this paper to include the more specific term Indigenous knowledge, and refers to bodies of knowledge and knowledge systems maintained by indigenous and local communities.

⁴ Genetic resources are defined at the level of international law in the Convention on Biological Diversity and the FAO International Treaty.

As noted, customary laws and protocols are an intrinsic part of the life, values, world view and the very identity of many traditional, local and indigenous communities. By one definition, customary laws are ‘customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.’⁵ A major debate arises over that ‘as if’: what makes a customary practice a ‘law’ and gives it binding effect, and when is it ‘just’ practice? And if it is obligatory, who is bound by it, within and beyond the relevant community? Customary practices may effectively govern or guide many aspects of a community’s life, but they may be so engrained within the community and embedded in the way it lives and works, that they may not be perceived as stand-alone, codified ‘laws’ as such. The binding effect of a customary practice may only be fully perceived when the practice is contravened. This could occur, for example, when traditional knowledge is used by third parties in a way that conflicts with the customary protocols that determine how it is used and transmitted within the community: this can lead to calls for the customary protocols to be respected by such third parties, as either a legal or an ethical obligation.

This paper seeks to cover the full range of customary laws, protocols and practices, without seeking to prejudge whether they are actually binding as law, or should be binding as law, or are simply a reflection of the way certain people happen to live, Various rules and practices are likely to fall within a wide spectrum between formal legal obligations and simple community practices: this discussion is intended to cover this full spectrum, without passing judgement on any particular perspective on this complex legal question.

Issues for consideration: in general

This paper identifies a number of issues that may be important for future consideration; these are set out after each section. Some general issues include:

- How do customary law and practices define, shape and sustain TK and TCEs within traditional communities? How can this role be better understood by external parties? Where communities themselves wish to strengthen the role of customary law in the governance of their TK and TCEs, what resources or other forms of support would they find helpful?
- What are the existing ways of recognizing or respecting customary law and practices in the external environment, beyond the traditional community? What possible pathways could be developed? To what extent is this a matter of law – national and sub-national laws, public international law, private international law? To what extent is it a matter of greater awareness, ethical guidelines, or capacity building?
- How can customary law and practices be recognized specifically within the intellectual property system? What legal or operational contexts are relevant? What are the lessons of practical experience?

⁵ (Black’s Law Dictionary, 7th edition, 1999)

- What aspects or elements of customary law and practices can be understood and applied beyond the social and cultural context of the community which develops and follows them? What aspects or elements can only be understood within that community?

WIPO work on TK and TCEs: background to this issues paper

In 1998 and 1990, WIPO representatives consulted with holders and custodians of TCEs and TK in 60 locations around the world on their needs and expectations relating to IP. Many underscored the importance of customary laws and practices, and the need for their own laws and practices to be better understood and respected by the wider community. The lessons learned from these WIPO consultations were gathered in a report entitled ‘Needs and Expectations of Traditional Knowledge Holders,’ which was first distributed for widespread stakeholder commentary, and then, in 2001, published in a revised form, reflecting the comments received: this remains a key resource that continues to guide work and inform debate in this area.⁶ Responding to many requests for WIPO to initiate work in this area, this report included a recommendation for the preparation of a ‘study of customary laws and protocols in local and traditional communities, including conclusions relevant for the formal IP system.’ Preliminary work was undertaken on these issues in the context of approved WIPO programs of work.⁷

WIPO’s work in the general field of TK and TCEs had taken on a new dimension in 2000, when the Member States of WIPO agreed to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC). The IGC convened for the first time in 2001, taking up many questions concerning IP and the protection of TK and TCEs. Debate in the IGC has highlighted the need for respect and recognition of customary laws, practices and protocols concerning the protection of TK and TCEs. At its third session, in 2002, the IGC approved the development of a “study on the relationship between customary laws and protocols and the formal intellectual property system” in accordance with document WIPO/GRTKF/IC/3/10.

This paper is just one step in developing this study. It is made available to facilitate discussion and exploration of the issues, and to provide some background information; it is not intended to be authoritative, comprehensive, or final in form, and critical review and suggestions for clearer, more accurate or more complete revisions of the paper are warmly invited.

This paper therefore seeks to identify key issues for consideration, and to contribute to discussion about customary laws and protocols as they may apply to the protection of TK

⁶ WIPO publication no. 768(E), also available in French and Spanish. This is accessible at <http://www.wipo.int/tk/en/tk/ffm/report>, and hard copies can be ordered from that site.

⁷ The approved WIPO Program and Budget for 2000-2001 included the development of “a study on customary law and regulatory systems that apply to the protection of knowledge, innovations and creativity in local and traditional communities, including conclusions relevant for the formal intellectual property system” (Main Program 11).

and TCEs. It also deals more generally with the interaction between customary laws and protocols and intellectual property (IP) laws and mechanisms. There is a much broader debate about the recognition of indigenous or customary law, which can arise in the context of indigenous governance, the rights of indigenous peoples, the preservation of cultural identity and intellectual and spiritual heritage, and self-determination. This paper does aim to learn from and respond to this wider agenda and to learn from discussion of the broader issues, but it does not attempt to survey the full debate nor to capture its essence. Instead, this paper has a more specific focus, in view of its background, and it is not intended as a contribution to the wider debate about customary law. It accordingly concentrates on the specific issues relevant to protection of TK and TCEs against misuse and misappropriation. In highlighting this specific aspect of the role of customary laws and practices, this paper is not intended to overlook, limit or confine the scope of the important broader debate and analysis of the role of customary laws and protocols, but rather to respond and contribute to this dialogue from one perspective.

Customary law in the work of the IGC

Many participants in the work of the IGC, including regional groups of WIPO Member States⁸ and representatives of Indigenous communities, have emphasized the role of customary laws, practices and protocols, and have continued to call for specific work or to raise specific issues or concerns in this area.⁹ Following a practice agreed upon at its seventh session, the IGC now commences each session with a panel, chaired by a representative of an Indigenous or local community, that discusses the experiences and concerns of the traditional holders and custodians of TK, TCEs and genetic resources. Respect for customary law was a key issue at the most recent panel discussion. In various forms, it is a feature of many national and regional laws that protect TK and TCEs. It has also been a consistent claim of representatives of the holders and custodians of TK and TCEs.

Responding to regional, national and community experiences, the broader international legal environment, and existing legislative and policy documents, the IGC has developed draft principles and policy objective for the protection of TK and TCEs: these draft provisions were commissioned by the IGC at its sixth session, were reviewed as a first draft at its seventh session, and were subject to an intersessional multistakeholder commentary process leading to revised drafts that were in turn reviewed at the Committee's eighth session. These draft materials deal with the policy environment and legal mechanisms for the protection of TK and TCEs against misappropriation and misuse. The following extracts from these draft materials illustrate how customary laws and practices may be recognized in a broader policy context, without limiting the scope of possible approaches:

⁸ For example, Asian Group (WIPO/GRTKF/IC/1/13, para. 22), African Group (WIPO/GRTKF/IC/3/15).

⁹ See document WIPO/GRTKF/IC/2/16, paragraphs 90, 94, 100, 108 and 152; WIPO/GRTKF/IC/7/15, paragraphs 31, 54, 61, 68, 72, 73, 74, 75, 78, 93, 95, 99, 109, 110, 111, 112, 132, 135, 139 and 164; WIPO/GRTKF/IC/8/15 Prov. paragraphs 33, 36, 39, 52, 75, 88, 91, 93, 100, 101, 103, 104, 120, 151, 152, and 157.

Protection of TCEs/EoF¹⁰

- Protection should ‘respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities’
- Protection should be guided by the principles of responsiveness to aspirations and expectations of relevant communities, of recognition of the specific nature and characteristics of cultural expression, and of respect for customary use and transmission of TCEs/EoF
- Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:¹¹ (i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and (ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.
- Measures for protection should not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;
- uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection ... [should use] customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

Protection of traditional knowledge¹²

- Protection should ... respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems; ... [it should] contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge

¹⁰ See in particular documents WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/7/3

¹¹ The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

¹² See in particular documents WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/7/5

holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

- Protection should be guided by the principles of respect for customary use and transmission of traditional knowledge, and of recognition of the specific characteristics of traditional knowledge
- The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

These are extracts from draft provisions that are under discussion within the IGC and may be further developed; they have no formal status and have not been adopted or endorsed in any way. But they may help illustrate some of the perspectives and approaches that are shaping work in this area, and could suggest possible frameworks for appropriate recognition of customary laws and practices within a broader structure for protection of TK and TCEs against misuse and misappropriation.

Customary law has been repeatedly cited as one potential element of an holistic approach to protecting TK. The Conference of Parties of the CBD has indicated that protection of TK should be ‘based on a combination of appropriate approaches Including the use of existing intellectual property mechanisms, *sui generis* systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice.’¹³ Similarly, IGC documents have noted the ‘irreducibly holistic quality’ of TK, and have explored a comprehensive approach that includes ‘existing IP systems (including an array of IP rights and the law of unfair competition), adapted IP systems with *sui generis* elements, and new, stand-alone *sui generis* systems, as well as non-IP options, such as trade practices and labeling laws, liability rules, use of contracts, customary and indigenous laws and protocols, regulation of access to genetic resources, and remedies based on such torts as unjust enrichment, rights of publicity, and blasphemy.’¹⁴ A number of proposals for *sui generis* protection of TCEs and of TK refer to customary law as the legal basis for such protection.

While there is no settled international definition of TK and TCEs, the existence of customary law governing how a community should maintain, develop, transfer and disseminate knowledge and cultural expressions may be an important factor in determining what knowledge or cultural expressions should be particularly recognized as having ‘traditional status.’ For instance, a draft principle on protection of TK refers to the particular need to protect knowledge “which is integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by

¹³ CBD COP Decision VI/10A, para 33.

¹⁴ WIPO/GRTKF/IC/6/4, paragraph 5.

customary or traditional practices, protocols or laws.”¹⁵ A draft principle on protection of TCEs similarly focuses on the protection of cultural expressions that are “maintained, used or developed by [a] community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”¹⁶

Understanding customary law and strengthening its community role

A key priority is to learn from the diverse experiences and concerns of indigenous and other traditional communities that have developed and live by customary laws and practices. This is clearly an important step in understanding the status and potential role of such laws and practices. Such an approach underwrote the original fact-finding consultations with traditional holders of TK and TCEs in 1998-99. It is also consistent with the IGC’s approach in commencing its sessions with panel presentations from the perspective of traditional and local communities. For the purposes of this issues paper, it may be useful to underscore the continuing value of learning from these communities about the nature of customary law and practices, and their role in defining rights, responsibilities and ways of maintaining, disseminating and using TK and TCEs.

Participants in the debate have also stressed the need to consolidate and strengthen, as appropriate, the recognition and maintenance of customary laws and practices within the original communities. Some have reported that it can be difficult to sustain and promote customary law and practices, particularly during times of social changes, relocation, and external and internal stresses on those communities. Thus, the approach taken in many cases is to document or otherwise record the customary laws and practices of traditional communities, and to extend their application in the context of formal interactions with the wider legal and policy environment. Recognition, promotion, and protection of customary laws and practices is increasingly an element of national, regional and international policies and programs concerning the interests of indigenous and local communities, including policies and programs promoting the appropriate use and protection of TK and TCEs as an element of sustainable community development.

The appropriate protection of TK and TCEs against misuse and misappropriation has a practical and capacity-building component – so that communities have sufficient actual capacity to identify and defend their interests by the full range of available legal measures. Similarly, strengthened recognition, promotion within the community and wider understanding of customary law and practices may also depend in part on appropriate capacity-building initiatives and the availability of resources and other forms of support.

¹⁵ WIPO/GRTKF/IC/8/5, Annex, page 23

¹⁶ WIPO/GRTKF/IC/8/4, Annex, page 11

Issues for consideration: promoting understanding and maintenance of customary law

General

- If a community which holds TK and TCEs wishes to bolster or enhance the role of customary law and practices in maintaining and protecting TK and TCEs, what resources and what forms of external support do they call for?
- How does customary law interact with the existing conventional IP system? What specific issues and legal mechanisms are relevant?

Beyond the community

- What is the level of understanding of customary law in policy and legal processes beyond the original communities? What are the priority areas for increasing this understanding?
- What mechanisms are available to continue wider learning from communities' experiences and concerns regarding customary law and practices?
- How to promote, in particular, more widespread understanding of the nature of customary law and practices relating to TK and TCEs, while also maintaining respect for the diversity and local characteristics of these laws and practices?

Within the community

- What options and resources are available to assist communities in maintaining and promoting the continuing role of customary laws and practices in the life of community members?
- What continuing challenges do communities face in sustaining and promoting customary law and practices, in particular regarding the maintenance, dissemination and appropriate use of TK or TCEs?
- What national, regional and international programs and processes have included the recognition, promotion or protection of customary laws and practices, especially in the context of promoting, protecting or safeguarding TK or TCEs? What options have been explored, and what lessons learned?

OVERVIEW OF THE ISSUES

This section considers some of the substantive issues concerning customary law and practices that may be relevant to the use and dissemination of TK and TCEs.

What is customary law? When is it law; for whom is it law?

Customary law, by one definition, is 'customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.'¹⁷

¹⁷ Black's Law Dictionary, 7th edition, 1999

By another account, “customary law consists of established patterns of behaviour that can be objectively verified within a particular social setting. The modern codification of civil law developed out of the customs, or *coutumes* of the middle ages, expressions of law that developed in particular communities and slowly collected and written down by local jurists. Such customs acquired the force of law when they became the undisputed rule by which certain entitlements (rights) or obligations were regulated between members of a community.”¹⁸ Another term used is ‘consuetudinary law’ (from the Latin, *consuetudo*: custom), referring to law the validity of which is established by custom (in contrast to specific legislation or statutory law). A recent workshop defined customary law as “locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.”¹⁹

A decisive factor in determining whether certain customs do have status as law is whether they have been viewed by the community as having binding effect, or whether they simply describe actual practices. A similar concept applies at the level of international law, where customary law that binds states develops from the consistent practice of states who both follow a customary pattern but in doing so also accept that it has a binding quality (known technically as *opinion juris*, or belief that it is a law). Thus the World Court is required to apply (among other things) “international custom, as evidence of a general practice accepted as law.”²⁰ However, customary international law is only mentioned here by way of illustration; this paper concerns the customary law of indigenous and local communities, as distinct from international law as such.

‘Customary protocols’ is a more general term, referring to agreed practices, procedures, rules and obligations that apply within communities and can govern a range of matters that are relevant to the development, maintenance and use of TCEs and TK. Customary protocols may simply describe community practices and rules without judging whether they are defined as ‘customary law’ as such.²¹

Customary law and protocols extend more broadly than just to TK and TCEs, and extensive. In addition, a focus on TK and TCEs as such may be viewed as too narrow. A recent workshop defined the term ‘collective bio-cultural heritage’ as “knowledge, innovations and practices of indigenous peoples and local communities which are often held collectively and inextricably linked to traditional resources and territories; including

¹⁸ http://en.wikipedia.org/wiki/Customary_law

¹⁹ Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May 2005

²⁰ Statute of the International Court of Justice, Art. 38.

²¹ According to one description, ‘customary protocols’ refers ‘to rules in relation to rights or powers, and responsibilities or duties associated with the acquisition, use, transfer, management and ownership of cultural expressions or traditional knowledge. Where these protocols are embedded in more formal systems of social relations, the term ‘customary laws’ is used.’ *Aboriginal Intangible Property in Canada: An Ethnographic Review*, <http://strategis.ic.gc.ca/epic/Internet/inippd-dppi.nsf/en/ip01201e.html>

the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities.”²²

Issues for consideration: nature of customary law

- How to characterize or define customary law?
- What makes it binding on members of the original community?
- What makes it binding on third parties, beyond the original community?
- Can customary law have influence or effect on third parties short of binding legal effect?
- What is the boundary between *description* of a customary practice and *prescription* of customary legal obligations?

Customary law and the character of traditional knowledge

What makes TK or TCEs ‘traditional’ is above all the fact that they are developed, maintained and customarily disseminated within traditional communities. This context is seen as integral to TK and TCEs, so that appropriate protection may require showing respect and recognition for the legal, cultural and social context that applies within the original community. Frequently, this original context includes customary law and protocols: the kind of norm that determines, for the traditional community, how knowledge and cultural expressions should be maintained and disseminated, as part of how the community conceives of itself as a community. Such customary law or practices may be codified or not; they may be written or oral; they may be expressly articulated or implicit in a community’s practices; they may be formally recognized by external legal systems in various ways, or currently not recognized by the community; it may be linked with other legal systems, including national constitutions and national laws and regulations. The normative force of customary law may be felt within a community in particular, but may also create a legal or moral expectation that it will be recognized beyond the original community. The full effect of customary law may only be understood with reference to the social and community context: as one commentator observes, ‘to understand why customary law rights such as those in folklore are binding, it is necessary to examine more closely the nature and significance of the social and political structure in tribal societies.’²³

For some commentators, and in some legal texts, customary law or practice is an implicit or explicit component of TK and TCEs, or helps define ownership or other custodial rights over TK and TCEs. For example, in the Pacific Regional Framework, traditional owners of TK or TCEs are defined as “(a) the group, clan or community of people or (b) the individual who is recognized by a group, clan or community of people as the individual in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group,

²² Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May 2005

²³ Kuruk P, African Customary Law and the Protection of Folklore, Copyright Bulletin, XXXVI, No. 2, 2002.

clan or community.”²⁴ One commentator, considering folklore protection in some African countries, observes that the “scope of rights in folklore can be determined only with reference to the customary practices of specific communities.... Folklore forms part of the customary law of ... communities and quite naturally will be subject to that system of law.”²⁵

An IGC study on the definitions of the term traditional knowledge²⁶ commented that “there have been calls in the work of the Committee for there to be some recognition of customary law²⁷ as an element in the definition and protection of TK. If there is to be reflection of customary law in the characterization of traditional knowledge, this would necessarily involve a more general form of definition at the international level, given the diverse and distinct quality of customary laws; equally, if weight is to be given to local cultural factors, this could also entail a general umbrella definition at an international level. This general approach was foreshadowed in document WIPO/GRTKF/IC/1/3 (itself echoing comments in the ‘WIPO Report on Intellectual Property Needs and Expectations of Traditional Knowledge Holders’²⁸): “Given this highly diverse and dynamic nature of traditional knowledge it may not be possible to develop a singular and exclusive definition of the term. However, such a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of intellectual property.”²⁹

Issues for consideration: customary law and the nature of TK and TCEs

- How can customary law and practices help in understanding or defining:
 - the nature of TK and TCEs;
 - forms of custodianship, ownership or collective tenure of TK and TCEs;or
 - the nature of a traditional community’s rights and obligations regarding TK and TCEs?

The principle of locality

This ‘local’ character of TK and TCEs has led to the suggestion that the protection of TK and TCEs should be guided by the customary normative context, and apply what has

²⁴ The Pacific Community, Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002

²⁵ Kuruk P., African Customary Law and the Protection of Folklore, Copyright Bulletin, XXXVI, No.2, 2002, at 5.

²⁶ WIPO/GRTKF/IC/3/9

²⁷ See document WIPO/GRTKF/IC/2/16, Paragraphs 90, 94, 100, 108, 152

²⁸ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001)

²⁹ See document WIPO/GRTKF/IC/1/3, paragraph 65

been termed the principle of locality: ‘to resolve any disputes over the acquisition and use of indigenous people’s heritage according to the customary laws of the indigenous peoples concerned.’³⁰ For instance, the Pacific Regional Framework provides that if not all traditional owners have been identified or there is a dispute about ownership the matter must be referred “to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties.” Realizing a principle of locality would suggest that customary law and practice should be used to resolve disputes with parties beyond the traditional reach of a community’s customary law. A recent workshop referred to the need to “recognise the jurisdiction of customary law outside traditional territories where ‘biopiracy’ of TK and GRs occurs.”³¹ This raises the question of what it means, in practical and legal terms, to recognize customary law outside its traditionally accepted domain or jurisdiction – a question discussed further below.

Customary laws may also be linked to the specific social structures that apply and transmit law between successive generations. They may also have links to the traditional land and environment associated with indigenous and local communities. By the same token, customary laws and practices may be a factor in establishing tenure over traditional lands, or other rights relating to land and resources.

The ‘local’ character of customary law also highlights its potential role in relation to the conservation, sustainable use and equitable benefit sharing relating to *in situ* genetic resources. This has both a practical and capacity-building component, and a legal component, including referral to customary law and practices as the basis of community rights. According to one commentator, “the majority of the ongoing initiatives for the development of access to genetic resources regimes do consider the incorporation of some recognition of community rights, at least in the form of prior informed consent and the right to benefits, suggesting that this field may well expand. To date, several African countries are in the process of enacting access laws that specifically incorporate the recognition of traditional practices and systems of conservation and utilisation of natural resources. There is also a growing trend by the donor and development community to incorporate elements of traditional practices and concepts in their programmes and projects. Such incorporation recognises the inherent value of traditional approaches, as well as their appropriateness to the success of community-oriented (and even national and regional-level) programmes and projects on conservation and sustainable utilisation of natural resources. These trends will most likely influence emerging regimes and frameworks for access and benefit sharing in the region. The nature, extent, and form of their incorporation, though, are likely to remain a matter of national policy and legislation in the individual countries. The recognition of community rights forms one of the pillars of the African Model Law, which is expected to influence the direction or form the basis

³⁰ Dr. E.A.Daes, ‘Defending Indigenous Peoples’ Heritage,’ *Protecting Knowledge: Traditional Resource Rights in the New Millennium*, Union of British Columbian Indian Chiefs, February 2000.

³¹ Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May 2005

of legislation in many countries when they finally get around to instituting or finalising the necessary regulatory regimes on ABS.³²

Another aspect of recognizing a principle of locality could be ensuring that laws and other legal mechanisms – including *sui generis* laws aimed at protecting TK or TCEs/folklore – should not interfere with the continuing operation of customary law and practices, and should indirectly or directly supporting their continuation. This has several implications, that may set important boundaries for laws intended to protect TK or TCEs/folklore against misappropriation, misuse or illicit utilization by others:

- first, they may need to avoid creating legal impediments to continuing use within the customary or traditional context (accordingly, many *sui generis* laws contain explicit exceptions for continuing customary uses of TK or TCEs/folklore)
- second, they may need to focus on restraining illicit usage beyond the customary or traditional context, rather than seeking to duplicate customary law in determining how TK or TCEs are used in the customary context.

For example, the WIPO-UNESCO Model Provisions on Folklore protect expressions of folklore against illicit exploitation and other prejudicial actions when utilization is “made both with gainful intent and outside their traditional or customary context;” in other words, they do not seek to regulate or determine the use of expressions of folklore (or TCEs) within the traditional or customary context.³³ For many communities, that context is governed directly by their customary law and they may resist attempts to codify or redefine their own customary law for application within the traditional or customary context.

The principle of locality could also be relevant when setting the conditions for access to TK and TCEs, including defining legal obligations that apply when TK or TCEs are first accessed by those beyond the community. Customary laws and practices could help determine the legal conditions that apply.³⁴

Issues for consideration: the principle of locality

- What experience has there been with a ‘principle of locality’?
- How can customary law be better recognized or strengthened within its original context?

³² Kent Nnadozie, Integrating African Perspectives and Priorities into Genetic Resource Regulations: A Resource Guide for Policymakers

³³ The Commentary to the Model Provisions distinguishes between the two contexts as follows: “Traditional context” is understood as the way of using an expression of folklore in its proper artistic framework based on continuous usage by the community. For instance, to use a ritual dance in its traditional context means to perform it in the actual framework of the rite. On the other hand, the term “customary context” refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as for instance usual ways of selling copies of tangible expressions of folklore by local craftsmen.’ Subsequent commentators have since questioned this distinction, however: see WIPO/GRTKF/IC/3/10, at p. 46.

³⁴ See WIPO/GRTKF/IC/7/15, at para 95.

- What role does local customary law play in guiding more general legal and policy development?
- What is it for customary law to have jurisdiction outside traditional territories? What models are available for guidance?
- Should a principle of locality also set boundaries or limitations for laws and other measures intended to protect TK and TCEs, so that they do not pre-empt or contradict customary laws, or disrupt or impede customary practices?

Approaches to recognizing customary laws and protocols

What is it to ‘recognize’ customary laws? For some participants in the debate, this is the key question – if customary law and the community context are integral to TK and TCEs, and appropriate protection depends on recognition of or respect for the customary aspect, what mechanisms should apply? In particular, what options are there that would mean that third parties, even in foreign jurisdictions, to recognize or respect customary practices, or in some way to be legally bound by a community’s customary law that applies to the use of their knowledge or cultural expressions?

The options could be considered at several levels:

- the traditional or indigenous legal system itself, including any customary laws and practices that govern the creation, holding, use and transmission of cultural expressions or knowledge: for the communities concerned, at least, these may be considered as directly binding law;
- recognition of pre-existing customary law as defining continuing rights within a broader legal context;³⁵
- a separate legal system could recognize and externally apply rights and obligations that already exist within on the customary TK system, but recognizing them directly as having legal effect (i.e. extending the legal effect of existing customary law beyond its traditional circle);³⁶
- distinctly recognized legal rights and obligations that correspond to rights and obligations under customary law context, but which have a separate legal basis; by this approach, the prior existence of a customary law right or obligation is established as a

³⁵ For instance, *Mitchell v. M.N.R.* (Supreme Court of Canada), per McLachlin CJ: “English law... accepted that the Aboriginal peoples possessed pre-existing laws and interests, and recognized their continuation... aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.”

³⁶ For instance the *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources* provides that “[t]he State recognizes and protects community rights ... as they are enshrined and protected under the norms, practice an customary law found in, and organized by the concerned local and indigenous communities, whether such law is written or not”

matter of fact, and helps to determine rights and obligations within a separate legal system; the customary law is not a true source of law in itself;³⁷

- separate rights and obligations may be recognized and granted according to distinct, objective criteria; these would have no direct legal relationship to the customary law context, but would be consistent in practice with the policy goals of recognizing and respecting customary laws and practices (for example, a number of *sui generis* laws for protection of TK have exceptions to permit customary practices to continue notwithstanding the distinctly recognized TK right);
- the substantive norms and principles of customary law could be documented and codified to provide the basis of newly negotiated or legislated legal mechanisms;
- the procedures established under customary law and protocols could be applied in broader contexts, such as consultations on prior informed consent and benefit-sharing, and dispute settlement.

In practice, different elements of customary law may be recognized in different ways. For example, customary laws concerning inheritance could directly determine ownership of IP or could determine the very legal identity of a community as a right holder; customary laws imposing an obligation of confidentiality may be effectively extended to prevent disclosure beyond the traditional circle; and customary laws governing use of a sacred symbol may be drawn on as factual background to deny registration of the symbol as a trade mark by a third party.

It may be helpful to draw a distinction between procedural aspects of customary law, and substantive obligations. For example, from a procedural point of view, customary law may govern how consultations should be undertaken, how disputes should be settled, how competing claims should be reconciled, and what penalties or remedies should be applied. In principle, such procedural aspects could be applied to subject matter that was not within the traditional scope of customary law – for example, in determining the equitable sharing of benefits from the commercial exploitation of TCEs or TK, or in determining the distribution of damages in the case of infringement of IP rights.

The much richer experience of recognition of customary law in areas of law other than IP may shed light on untapped possibilities for IP law: for example, resources and environmental law, property law and the law of inheritance or succession, the application of customary law in dispute settlement and in criminal law, the law of contracts, trusts and equity, and general civil and family law.

³⁷ “Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty...” *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014, per Brennan J. at p. 64; *cf.* in the recognition of equitable interests in copyright, *Bulun Bulun* (note 45 *infra*) at 210-11 treats “the law and custom of the Ganabingu people as part of the factual matrix which characterizes the relationship as one of mutual trust and confidence. It is that relationship which the Australian legal system recognizes as giving rise to the fiduciary relationship, and to the obligations which arise out of it...”

Issues for consideration: legal recognition of customary law

- What forms of ‘recognition’ of or ‘respect’ for customary law have worked in practice? What models could be explored?
 - continuing customary practices within the actual life of a community
 - appropriate recordal or documentation of customary law and practice
 - direct application of customary law as legally binding on the community
 - legal mechanisms to extend the legal scope of customary law obligations:
 - within domestic law
 - through international law
 - customary law as providing factual input to other laws
 - customary rights and obligations as exceptions within other legal systems
 - customary law as providing policy guidance to other legal systems
 - applying customary law procedures in other legal processes
 - customary law as providing substantive norms and principles for broader application
 - customary law and practices guiding the interpretation and application of laws that apply beyond the community maintaining those customs
- What legal, practical, ethical and constitutional factors have been relevant?
- What forms of ‘recognition’ of or ‘respect’ for customary law have been applied in practice? What models could be explored?

The scope of recognition of customary law and practices

Customary laws can govern many aspects of community life – dispute settlement, land tenure and other rights, inheritance, family law, and political and social relations generally. Customary law is often described as forming part of an holistic world view of indigenous communities, suggesting that it can only be fully understood and comprehensively applied within the community itself. It is challenging to consider how the full body of a community’s customary law and practices could be made to apply integrally to third parties beyond that community and the traditional reach of its customary jurisdiction. This may concern constitutional questions or, for those in foreign countries, the field of private international law. In addition, there may be limits to how those outside the community can fully respect and respond to the complex social, political, cultural and spiritual context that shapes and defines customary laws and practices.

Some of these areas of law may be relevant to third parties living and working beyond the community, but much of it may not: for instance, those involving family relations or governing use of ancestral lands. But within the broader sweep of customary law, there may also be very specific, clearly identified obligations relating to how a community’s knowledge or cultural expressions must be handled. It can be possible to recognize these as specific obligations on third parties. One straightforward example is secret sacred material: while such material has much richer significance for an indigenous community, in ways that an outsider , it is fully possible for an outsider to be placed under a strict

obligation of confidentiality, enforceable under external laws that in some way ‘take account’ of the customary law obligation not to disclose this material.³⁸ Another example is the recognition of the traditional custodial rights and obligations of an indigenous community within national copyright law.

Recognizing customary laws and protocols beyond IP law

In general, the recognition of customary laws and protocols relevant to TK and TCEs may apply well beyond the IP law, but in ways that may help clarify the possibilities for the IP system as well. For example, the Conference of the Parties of the CBD³⁹ has requested the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions to consider non-intellectual-property-based *sui generis* forms of protection of traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biodiversity; and further develop, as a priority issue, elements for *sui generis* systems, which include:

Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity with respect to: (i) customary rights in indigenous/traditional/local knowledge; (ii) customary rights regarding biological resources; and (iii) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources.

Other contexts may be relevant for the recognition of customary law. For example, an alternative dispute settlement resolution mechanism may be tailored to deal with the specific aspects of disputes over TCEs, TK and related genetic resources, with rules of procedure that respond to the interests involved, in particular by accommodating customary law relating to substantive obligations, to procedural considerations, and to decision-making processes, while creating such certainty and legally-binding outcomes as are required. *Sui generis* protection may pivot on the right to be consulted or to give or withhold free prior informed consent in relation to access to, recordal of, or use of TCEs or TK, rather than by creating distinct property rights as such.

Other examples of mechanisms for respecting customary law relevant to TK or TCEs that apply outside the framework of IP law can include:

- obligations under agreements such as knowledge transfer agreements to respect and comply with relevant elements of the source community’s customary law as a direct contractual obligation on the party gaining access to TCEs or TK: for instance, this may include an undertaking not to disclose TK contrary to the requirements of customary law, or an undertaking not to use TCEs in an inappropriate commercial manner or in a manner that is incompatible with the values and mores of the community;
- access regimes for genetic resources and associated TK which require consultation with TK holders and accord to indigenous and local communities a right of prior informed consent may provide that customary law procedures must be followed as far as possible in the consultation process and in reaching a decision on whether, and if

³⁸

³⁹ See paragraph 6 (b) of decision VII/16 H,

so on what terms, to grant consent; consent may be conditional on respect for applicable customary law;

- the use of the law of confidentiality and law governing fiduciary relationships to restrain use of TCEs or TK, including unauthorized publication contrary to customary law;⁴⁰
- the development of electronic databases, archives or other repositories of TK or TCEs which have access control mechanisms that mirror customary law, for instance in restricting access to sacred knowledge to certain eligible elders only;⁴¹ and
- ethical guidelines, institutional policies or industry standards, under which a researcher may be ethically bound to follow or respect the customary laws of the source community, even without a specific legal obligation; such an approach may buttress or reinforce legal obligations, or extend their practical effect beyond the scope of their legal jurisdiction.

These mechanisms essentially use customary law as a source of obligations or restrictions to be applied by different means, rather than applying customary law directly as law. However, some participants in the debate have called for legal recognition of customary law directly to those outside the community, potentially as directly binding law. On the other hand, reservations have been expressed about “unqualified and extraterritorial application of indigenous and customary laws and protocols.” Existing experience shows a wide spectrum of practical options between the two end-points of direct, extraterritorial legal effect of customary law, and no acknowledgement of customary law at all.

The options available to policymakers include the construction of combined systems that amalgamate external legal structures with elements of customary law, drawn on variously as fact and as a source of law. In the context of protection of TCEs or TK, the options can be characterized as

- Full and direct application as law:* The full and direct application of customary laws to all questions concerning the acquisition, maintenance and enforcement of rights in TK and TCEs, including by external parties, and any disputes concerning those rights (for instance, through indigenous or tribal authorities, or other customary institutions). This would involve recognizing customary law as law, within the original community on which it is seen as binding law, but also potentially beyond the community with direct effect on external parties;
- Applying elements of customary law as substantive law:* certain elements of customary law may create substantive legal obligations within separate IP laws for the

⁴⁰ *Foster v. Mountford and Rigby* (1976) 29 FLR 233

⁴¹ For instance, the customary law element of the ‘digital repatriation’ movement described in ‘Ancient traditions preserved,’ Australian IT, June 10, 2003, at www.news.com.au: ‘the entire intellectual system of Elcho Island’s various clans is being reconceived in digital form, and shaped into an elaborate, multi-level database,’ with discrete levels for public, private and secret knowledge; see also the Tualip Tribes *Cultural Stories* project, and the Indigenous Collections Management Project (Jane Hunter, Bevan Koopman, Jane Sledge “Software Tools for Indigenous Knowledge Management,” September 2002 and Kathryn Wells, “A Model and Pilot Options for a Digital Image and Text Archive of Indigenous Arts and Knowledge; A Progress Report”, 1997).

protection of TK and TCEs, for instance, an obligation under customary law not to disclose secret-sacred material could be recognized as having binding effect beyond the traditional scope of the customary law;

(iii) *Applying elements of customary law in legal procedures:* customary law or practices may guide or facilitate legal procedures that strictly take place beyond the reach of the customary law as such. For instance, consultations and dispute settlement concerning overlapping claims to TK or TCEs, concerning appropriate forms of equitable benefit-sharing or concerning the role of external parties, could make use of customary procedures and mechanisms. Alternative dispute resolution may provide a framework for the consensual application of customary law beyond its original legal reach;

(iv) *Drawing on elements of customary law to determine facts:* customary law or practices may establish relevant facts that are then taken into account in separate legal systems. For example, the existence of custodial obligations under customary law have been used as a factual basis for awarding additional damages in the case of copyright infringement. Customary law may be one factor in establishing the status of an indigenous or other traditional community as having a collective legal identity or as having a specific status within a law to protect TK or TCEs.

(v) *Promoting customary law and practices within communities:* This would entail non-legal measures to promote understanding of and adherence to customary law and practice by members of a community, in accordance with the wishes of that community. This could include appropriate forms of documentation of customary law and practices, with the aim of supplementing traditional means of transmission. It may also include incorporating customary law and practices as part of school curricula, community-based media, and other forms of community education and communication. Access to any documented customary law and practices for individuals beyond the community would normally require prior informed consent.

(vi) *Promoting respect customary law beyond communities:* This would entail using non-legal measures to promote understanding of and respect for customary law and practices by third parties, beyond the community itself. For instance, research guidelines or academic protocols may include information on customary law and practices, and may encourage researchers to seek guidance from communities on their customary law and practices, and to comply with such law and practices as far as possible in their work.

(vii) *Applying customary law to guide the interpretation of laws:* Customary laws may be drawn on, as a source of either law or fact, to guide the interpretation or application of laws applying beyond the traditional jurisdiction of the customary law; a number of examples of how customary law may guide the application of intellectual property laws follow below. Customary law may, for instance, determine ownership or other entitlements; determine remedies that apply; guide legal procedures and consultative processes; guide a judgment as to originality of a work and substantiality of copying; determine appropriate penalties and redress for cultural harm; determine the status of a community as a collective legal entity; or guide the determination of appropriate exceptions or user rights based on customary laws and practices.

In practice, as noted, there is a range of options that would allow a legal system to give discrete recognition to distinct aspects of customary law, rather than wholly integrating customary law as such, or entirely setting it aside. Existing IP law systems have already acknowledged customary law, as a specific point of reference rather than as a complete legal system, in a number of practical contexts. These include reference to customary law:

- to establish legal standing⁴² of a collective entity (such as a tribe or community) recognized under customary law, even on the part of an unincorporated entity,⁴³ or to establish other relevant legal capacity: this may be important where an IP or other law requires recognition of a collective or community as a ‘legal person’;
- to apply customary dispute settlement mechanisms to resolve or reconcile competing claims of ownership, and to resolve disputes more generally between or within traditional communities;⁴⁴
- to assert an equitable interest (*in rem*) in IP that is nominally owned by another, or a more general fiduciary relationship (*in personam*) between traditional owners and an individual IP right holder;⁴⁵
- to sustain a claim of breach of confidence relating to secret sacred material,⁴⁶ and to recognize customary law considerations as ‘substantial concerns’ in sustaining a claim of confidentiality;⁴⁷
- to confer legal identity on a community as the basis of collective ownership of an IP right;⁴⁸
- as the basis of a general right over biological resources and TK,⁴⁹ including specific rights to grant access to biological resources⁵⁰ and the application of prior informed consent for access, as well as general rights to benefit from TK;
- to enshrine a distinct right for continuing customary use in spite of or in parallel with formally recognized rights in TK;

⁴² *Onus v. Alcoa of Australia Ltd.* ((1981) 149 CLR 27): ‘the members of the [Gournditichjmara] community are the guardians of the relics according to their laws and customs and they use the relics. I agree ... that in these circumstances the applicants have a special interest in the preservation of these relics, sufficient to support *locus standi*,’ *per* Mason J.

⁴³ *Foster v. Mountford and Rigby* (1976) 29 FLR 233, concerning the Pitjantjatjara Council.

⁴⁴ See Republic of the Philippines, *Indigenous Peoples’ Rights Act*, Section 65

⁴⁵ *Bulun Bulun v. R&T Textiles Pty Ltd* (1998) 41 IPR 513

⁴⁶ *Foster v. Mountford and Rigby*, note 43 *supra*

⁴⁷ *Gordon Coulthard v. The State of South Australia*, note **Erreur ! Signet non défini.** *supra*

⁴⁸ Note the latitude accorded to the definition of ‘association’ in the Paris Convention (Article 7*bis*) for collective marks, requiring the protection of collective marks “belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment” even where “such association is not established in the country where protection is sought or is not constituted according to the law of the latter country.”

⁴⁹ Article 8, *African Model Legislation*, note **Erreur ! Signet non défini.** *supra*.

⁵⁰ Article 8(1)(ix), *African Model Legislation*, note **Erreur ! Signet non défini.** *supra*.

- as the basis for a claim against public order, cultural offence⁵¹ or vilification, or more specifically to determine entitlement for damages based on “personal and cultural hurt,”⁵² including establishing the basis for and quantum of damages; and
- to determine the status of a claimant as a member of an Indigenous or other traditional community, to identify a community as being an eligible local or traditional community,⁵³ or to establish a specific Indigenous or aboriginal right.⁵⁴

These examples illustrate how customary law considerations can be acknowledged in practice within legal systems that are theoretically distinct. Customary law potentially has application in the operation of IP law on such matters as the legal identity of communities as such, ownership or inheritance of rights, equitable interests in an IP right, and a continuing right to use material covered by an IP right.

Existing *sui generis* systems for protection of TCEs and TK have various approaches to recognizing customary law. The Philippines *Indigenous Peoples’ Rights Act* of 1997 establishes a ‘right of restitution of cultural, intellectual, religious and spiritual property’ taken *inter alia* ‘in violation of [indigenous] laws, traditions and customs,’ (Section 32). Access to indigenous knowledge is subject to prior informed consent obtained in accordance with customary laws (Section 35). Customary laws and practices must be used in settling disputes (Section 65). Regimes that regulate biological and genetic resources may require prior informed consent of traditional communities for access to TK.⁵⁵ This may entail the application of customary law in the process for determining the community’s consent, even without any explicit reference. Under Costa Rica’s Biodiversity Law⁵⁶ *sui generis* community IP rights and the question of ownership are determined by a participatory process with indigenous and small farmer communities. Custom is recognized as a source of law for establishing a *sui generis* community IP right, which ‘exists and is legally recognized by the mere existence of the cultural practice or knowledge’ and does not need ‘prior declaration, explicit recognition nor official registration.’ The registration of collective IP and TK rights under Panamanian law⁵⁷ requires the rules of use of the collective right to be determined in part with reference to the ‘history (tradition) of the collective right.’ Some laws for protecting TK and TCEs/folklore recognize customary practices as exceptions to *sui generis* rights, so

⁵¹ For example, New Zealand’s *Trade Marks Act 2002* (Section 17(1)(b)) establishes absolute grounds for refusal of a trade mark that would “offend a significant section of the community, including Māori.

⁵² *M*v Indofurn Pty Ltd* (1995) 30 IPR 209, discussed in Terri Janke, ‘Minding Culture,’ WIPO/GRTKF/STUDY/1, 2002.

⁵³ The definition of local community in Brazil’s *sui generis* law refers to a group that traditionally organizes itself through successive generations and through its own customs and preserves its social and economic institutions (Article 7(iii)).

⁵⁴ For example, the definition of ‘aboriginal right’ in *R. v Van der Peet*, (1996) 2 SCR 507, subsequently elaborated in *Delgamuukw v British Columbia* ([1997] 2 SCR 1010) to incorporate both common law and aboriginal perspectives, including prior aboriginal law.

⁵⁵ E.g. the need for ‘prior informed consent of the representative organizations of the indigenous peoples possessing collective knowledge,’ Article 6 of Peru’s Law No. 27,881 of 2002, *Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources*

⁵⁶ Law No 7788 of 1998, at Articles 82 to 84.

⁵⁷ Article 7(iiii), Executive Decree No.12 (2001) regulating *Law No. 20 of June 26, 2000, on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge*

that the creation of new forms of protection does not unwittingly create a legal barrier to continuing customary practices.

Issues for consideration: customary law and intellectual property law

- What forms of relationship between customary law and intellectual property law have been encountered in practice? What models could be explored?
- What lessons can be drawn from recognition of customary law in relation to other (but potentially related) areas of law, such as family law, the law of succession, the law of land tenure and natural resources, constitutional law, human rights law and criminal law, as well as dispute resolution in general?
- What experiences have been reported concerning the role of customary law in relation to intangible property, and rights and obligations relating to intangible property such as cultural expressions, traditional knowledge, and specific material such as motifs, designs, as well as the tangible form of expressions such as handicrafts, tools, and forms of dress?
- What role for customary law has been recognized in existing and proposed *sui generis* laws for the protection of traditional knowledge and traditional cultural expressions/expressions of folklore?