

CUSTOMARY LAW, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: AN OUTLINE OF THE ISSUES

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Customary law and intellectual property system: the issues

What is customary law?

Defining and characterising “customary law” would itself be the subject of an extended study. The present study does not attempt to define “customary law”, but some general comments on its character may be helpful.

First, the idea of “customary law” that is under consideration concerns the laws, practices and customs of indigenous peoples and local communities. It is not, for instance, the same idea as “customary law” in the international context. “Customary international law” has a more precise and technical meaning in the realm of rules governing relations between distinct States, referring to those aspects of international law that are based on custom or practice between States. The Charter of the United Nations annexes the Statute of the Permanent Court of International Justice, which requires it, when deciding disputes in accordance with international law, to apply (among other things) “international custom, as evidence of a general practice accepted.” Some experts have suggested that there are or should be linkages or overlap between customary international law and the customary law of indigenous peoples and local communities, but in general these two distinct areas of law and practice should not be confused with one another.

Customary law is, by definition, intrinsic to the life and custom of indigenous peoples and local communities. What has the status of “custom” and what amounts to “customary law” as such will depend very much on how indigenous peoples and local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities. According to one definition, “custom” is a “rule of conduct, obligatory on those within its scope, established by long usage. Are valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law. General customs are those of the whole country, as, e.g. the general custom of merchants. Particular customs are the usage of particular traits. Local customs are customs of certain parts of the country.”¹

Approaches to defining or characterising “customary law” typically make some reference to an established pattern within a community which is seen by the community itself as having a binding quality. For instance, customary laws are defined variously by some authorities as

- “customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”², and
- “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.”³

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,

¹ Osborne's Concise Law Dictionary, Ninth Edition (Sweet and Maxwell, 2001)

² Black's Law Dictionary, 8th edition, 2004

³ http://en.wikipedia.org/wiki/Customary_law

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.”⁴

This section of the study explores the interaction between the customary law and protocols of indigenous peoples and local communities, and intellectual property (IP) systems. The issues to be considered include:

- What is the nature of the customary law and protocols of indigenous peoples and local communities, and other communities bound by such laws? Can common themes or elements be identified, or are customary laws and protocols simply too diverse?
- What relationships between customary law and IP law have been encountered in practice? What models could be explored?
- How has customary law been recognized or applied in other 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 the law and practice of dispute resolution in general? How does customary law define the very legal or cultural identity of indigenous peoples and local communities? What lessons does this wider experience offer to the law and practice of IP?
- 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 knowledge⁵ (TK), and specific material such as motifs, designs, narratives, as well as the tangible form of expressions such as handicrafts, tools, and forms of dress?
- How do *sui generis* laws for the protection of TK and traditional cultural expressions⁶ (TCEs)/expressions of folklore (EoF) apply or otherwise recognize customary law?
- For the holders of TK/TCEs/genetic resources⁷ (GRs) themselves, what is the preferred role or roles of customary laws and protocols:
 - As a basis for sustainable community-based development, strengthened indigenous peoples and local communities’ identity, and promotion of cultural diversity?
 - As a distinct source of law, legally binding in itself – on members of the original community, and on individuals outside the community circle, including in foreign jurisdictions?

⁴ For example, Protecting Community Rights over Traditional Knowledge:

Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May 2005,

⁵ “Traditional knowledge”, as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (TK in a general sense or *lato sensu*). In other words, TK in a general sense embraces the content of knowledge itself as well as TCEs, including distinctive signs and symbols associated with TK. In the present document, “TK” in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. TK can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.

⁶ “Traditional cultural expressions” refer to tangible and intangible forms in which TK and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms “TCEs” and “expressions of folklore” (EoF) are used as interchangeable synonyms.

⁷ Article 2 of the Convention on Biological Diversity (1992) defines “genetic resources” as “genetic material of actual or potential value”.

- As a means of factually guiding the interpretation of laws and principles that apply beyond the traditional reach of customary law and protocols?
- As a component of culturally appropriate forms of alternative dispute resolution?
- As a condition of access to TK and TCEs?
- As the basis for continuing use rights, recognized as exceptions or limitations to any other rights granted over TK/TCEs or related and derivative subject matter?

Role of customary law in protecting traditional knowledge and traditional cultural expressions

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000. Negotiations are currently underway in the IGC towards the development of an international legal instrument for the effective protection of TK and TCEs, and to address the IP aspects of access to and benefit-sharing of GRs.

The WIPO draft articles on the protection of TK and TCEs and a number of national *sui generis* laws and the conventional IP law set out several possible roles for customary law which have already been developed or applied in practice. Customary law can serve as:

- The fundamental legal basis or source of law for indigenous peoples and local communities' legal rights over TK or TCEs.
- A factual element in establishing indigenous peoples and local communities' collective rights over TK or TCEs.
- One element of the definition of TK or TCEs, or can otherwise establish the relationship to indigenous peoples and local communities that is central to the concept of TK and TCEs.
- A means of determining or guiding the procedures to be followed in securing indigenous peoples and local communities' free prior informed consent.
- The basis of specific user rights or exceptions, exempting the continuing customary uses and practices from other legal restrictions on the use of TK or TCEs.
- Guide for the assessment of cultural or spiritual offence or damage caused by inappropriate forms of use of TK or TCEs.
- A determinant of or guide for how benefits from the use of TK or TCEs should be equitably shared within a community.
- A means of determining appropriate forms of remedies, sanctions or restitution following the breach of rights over TK or TCEs.
- An avenue for resolving disputes over ownership or other forms of custodianship over TK or TCEs.
- A guide on the transmission of rights over TK or TCEs from one generation to a following generation.

Customary law and intellectual property: a brief overview

Customary laws and protocols are central to the very identity of many indigenous peoples and local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities of members of indigenous peoples and local communities 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. Customary law can help define or characterize the very identity of the community itself. Further, for many indigenous peoples and local communities, it may be meaningless or inappropriate to differentiate their laws as

“customary”, suggesting it has some lesser status than other law – it simply constitutes their law as such.

Maintaining customary laws and protocols can therefore be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of indigenous peoples and local communities. Customary laws and protocols can define how traditional cultural heritage is shared and developed, and how TK systems are appropriately sustained and managed by indigenous peoples and local communities.

So maintaining customary laws and protocols even within the original community is an important concern; it is often a key aspect of preserving the cultural and legal identity of indigenous peoples and local communities. But indigenous peoples and local communities have also called for various forms of respect and recognition of their customary laws and protocols – beyond the scope of indigenous peoples and local 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 TCEs, TK and related GRs. For example, when WIPO consulted with the holders of TCEs and TK on their needs and expectations relating to IP system, one common theme was the need for recognition of customary law⁸. Why? The experiences and perspectives of indigenous peoples and local communities are of course as diverse as themselves. But many indigenous peoples and local communities express concern that the bare content of their distinctive cultural heritage and knowledge systems should not be considered in isolation from the customary and 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 indigenous peoples and local communities have called for wider respect and recognition of their customary law and practices as one aspect of the appropriate protection of their TK and TCEs. Of all the aspects of indigenous peoples and local communities’ collective cultural and intellectual heritage, their TK and TCEs are most easily appropriated by third parties – exactly because they are intangible and more readily copied. A sacred site that is of importance to indigenous peoples and local communities cannot be violated by a third party; but a sacred symbol, or sacred knowledge, can be appropriated and used in a remote location, far from indigenous peoples and local communities; a sacred cultural expression can be replicated in large quantities for commercial purposes. One well-known case in the field of the law of TCEs concerns a sacred motif, protected under indigenous customary law which was copied onto carpets produced in a foreign country.⁹

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 GRs against misuse and misappropriation by others. The customary context may indeed help clarify or define what these terms actually mean: what makes cultural expressions and knowledge “traditional” may be the very fact that they are developed, maintained and disseminated in a customary and intergenerational context;

⁸ See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge Holders” (WIPO publication no. 768(E)).

⁹ See Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>

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.

As noted, customary laws and protocols are an intrinsic part of the life, values, world view and the very identity of many indigenous peoples and local communities. By one definition, customary law is “law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”.¹⁰

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 indigenous peoples and local communities? A customary practice may effectively govern or guide many aspects of indigenous peoples and local communities’ life, but it may be so engrained within indigenous peoples and local communities and embedded in the way it lives and works, that it 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 TK is used by third parties in a way that conflicts with the customary laws that determine how it is used and transmitted by indigenous peoples and local communities: this can lead to calls for the customary laws 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 laws, or should be binding as laws, 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.

Example of customary law

The customary law of the Quechua peoples of the Andean region provides one example of a customary law system. Key principles of Quechua law include the following:

- *Reciprocity*: encompasses the principle of equity, and provides the basis for negotiation and exchange between humans, and with the Pachamama (Mother Earth);
- *Duality*: indicates that everything has an opposite which complements it; behaviour cannot be individualistic, for example, in the union between man and woman; and that other systems or paradigms can be accepted;
- *Equilibrium*: refers to balance and harmony, in both nature and society – e.g. respect for the ‘Pachamama’ and mountain gods; resolving conflicts to restore social harmony; and complementarities (e.g. between ecological niches). Equilibrium needs to be observed in applying customary laws, all of which are essentially derived from this principle.

Source: Alejandro Argumedo, “The Potato Park as a *Sui Generis* System for the Protection of Traditional Knowledge”

¹⁰ Black’s Law Dictionary, 8th edition, 2004

Aspects of the intellectual property system

No attempt is made in this study to define IP or to describe its legal characteristics in any detail. IP laws ultimately operate through national laws and legal systems, and can differ considerably between different countries. But some brief observations on some salient points of IP law may be useful:

- IP is a set of legal mechanisms that typically “protect” subject matter by determining the conditions under whether third parties can use a protected material, if at all. In other words, the law gives the right holder a say over whether, and if so how, this material is used by others. IP rights do not normally give their owners themselves a positive right to use the protected material (for example, copyright might exist in an obscene or grossly offensive book, but this does not give the author a positive right to distribute the book to the public).
- The IP right therefore gives its owner a right to determine and authorize whether and how the protected material is commercialized, if at all. It may be used to commercialize and disseminate one’s own material in the way one chooses, and as a means of preventing others from commercializing one’s knowledge or expressions.
- IP may be a true property right – a tradable right to exclude third parties altogether – or a more limited right, such as an entitlement to take action against third parties or to claim an equitable level of remuneration. IP systems overlap with the more general law of unfair competition. IP systems can also provide for a right of integrity (the right to object to misuse or offensive distortion of one’s work) and a right of attribution (the right to be identified as author of a work). Generally, IP rights run for a certain term, after which the protected material goes into the public domain; but some forms of IP (e.g. trademarks and trade secrets) run for an indefinite period, provided the protected material remains eligible.
- IP systems can acknowledge or recognize common forms of ownership or other collective entitlements, such as when unfair competition, geographical indications and trademark laws acknowledge the interests of an agricultural community. Other cases have concerned indigenous peoples and local communities’ collective interests in protecting sacred materials under copyright laws and the laws of confidentiality.

Issues for consideration: in general

The interplay between customary law and protocols and IP systems is complex. This paper identifies some of the issues that may be important for future consideration; these are set out after each section. But there are some underlying and general themes that lie behind these more detailed issues. Discussion and exploration of these broader themes may also be helpful. These issues include:

- How do customary law and practices define, shape and sustain TK and TCEs within indigenous peoples and local communities? How can this role be better understood by external parties? Where indigenous peoples and local 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 indigenous peoples and local communities? What possible pathways could be developed? To what extent is this a matter of laws

- national and sub-national laws, public international laws, private international laws? 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 IP system? What legal or operational contexts are relevant? What are the lessons of practical experience?
- What aspects or elements of customary law and practices can be understood and applied beyond the social and cultural context of indigenous peoples and local communities who develop and follow them? What aspects or elements can only be understood by indigenous peoples and local communities?

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

In 1998 and 1999, WIPO conducted fact-finding missions to 28 countries to identify intellectual property needs and expectations of TK/TCEs holders. Many underscored the importance of customary law and practices, and the need for their own laws and practices to be better understood and respected. The lessons learned were gathered in a report.¹¹ 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.¹²

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 IGC. The IGC convened for the first time in 2001, taking up many questions concerning IP and the protection of TK and TCEs. The IGC is undertaking text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of TK, TCEs and GRs.¹³ 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.

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 exiting intellectual property mechanisms, sui generis systems, customary law, the use of contractual arrangements, registers of traditional knowledge, and guidelines and codes of practice”.¹⁴ 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

¹¹ See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge Holders” (WIPO publication no. 768(E)).

¹² 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).

¹³ See the website of the IGC, <http://www.wipo.int/tk/en/igc/>.

¹⁴ CBD COP Decision VI/10A, para 33.

laws and protocols, regulation of access to genetic resources, and remedies based on such torts as unjust enrichment, rights of publicity, and blasphemy”.¹⁵

This paper 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 and TCEs. It also deals more generally with the interaction between customary laws and protocols and IP laws. There is a much broader debate about the recognition of customary laws, which can arise in the context of self-governance, the rights of indigenous peoples and local communities, the preservation of cultural identity and intellectual and spiritual heritage, and self-determination.

This paper aims to learn from and responds 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 laws. It accordingly concentrates on the specific issues relevant to the 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.

Understanding customary law and strengthening its community role

A key priority is to learn from the diverse experiences and concerns of indigenous peoples and local communities that have developed 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 the holders of TK and TCEs in 1998 and 1999¹⁶. It is also consistent with the IGC’s approach in commencing its sessions with presentations by a panel of representatives of indigenous peoples and local communities.¹⁷ For the purposes of this paper, it may be useful to underscore the continuing value of learning from indigenous peoples and local 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. Some have reported that it can be difficult to sustain and promote customary laws and practices, particularly during times of social changes, relocation, and external and internal stresses on indigenous peoples and local communities. Thus, the approach taken in many cases is to document or record the customary laws and practices of indigenous peoples and local 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 peoples and local communities, including policies and programs promoting the appropriate use and protection of TK and

¹⁵ WIPO/GRTKF/IC/6/4, paragraph 5.

¹⁶ See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge Holders” (WIPO publication no. 768(E)).

¹⁷ See WIPO’s website http://www.wipo.int/tk/en/ngoparticipation/ind_loc_com/index.html.

TCEs as an element of sustainable development of indigenous peoples and local communities.

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

The social context of customary law

One of the challenges in recognizing customary law beyond the traditional context is that it is a form of law that can be deeply embedded in the way of life and social values of what may be a relatively small community, in which personal relationships may be the most important form of disseminating and enforcing acceptable standards of behaviour.

For example, according to one account, “Kiowa law developed and functioned within a small scale society in which individuals were in intense interaction and often dependent upon each other for successful exploitation of the environment. This social situation shaped both the goals of the legal system and its mechanisms of social control. The goal of the system was to maintain peace in the community and heal breaches in the social fabric, rather than to right wrongs. The usual mechanisms of social control consisted of ridicule, loss of prestige and ostracism. These mechanisms were effective within a community of small size in which individuals generally knew each other and many of whom were also linked by ties of kinship and personal obligation.”¹⁸

According to a recent report regarding the Northern Territory of Australia, Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory, not just those in Aboriginal communities. This is because it defines a person’s rights and responsibilities, and it defines a person’s relationships to everybody else in the world.”¹⁹

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?

¹⁸ Candace Greene and Thomas Drescher, *The Tipi with Battle Picture: the Kiowa Tradition of Intangible Property Rights*, 10-11.

¹⁹ NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003)

- 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 indigenous peoples and local communities in maintaining and promoting the continuing role of customary laws and practices in the life of the members of indigenous peoples and local communities?
- What continuing challenges do indigenous peoples and local 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 have been 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?

As noted in the introduction, by one definition, customary laws comprises “customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws”.²⁰ Customary laws are also defined as consisting 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.”²¹ 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 laws 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.”²²

A decisive factor in determining whether certain customs have status as laws is whether they have been viewed by indigenous peoples and local communities 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

²⁰ Black’s Law Dictionary, 8th edition, 2004

²¹ http://en.wikipedia.org/wiki/Customary_law

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

Court is required to apply (among other things) “international custom, as evidence of a general practice accepted as law.”²³ However, customary international law is only mentioned here by way of illustration; as discussed in the introduction, this study concerns the customary law of indigenous peoples and local communities, rather than international law as such.

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 indigenous peoples and local communities, 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”.²⁴

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 TK or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.”²⁵ 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

²³ Statute of the International Court of Justice, Art. 38.

²⁴ Kuruk P, African Customary Law and the Protection of Folklore, Copyright Bulletin, XXXVI, No. 2, 2002.

²⁵ The Pacific Community, Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002

communities.... Folklore forms part of the customary law of ... communities and quite naturally will be subject to that system of law.”²⁶

An IGC study on the definitions of the term TK²⁷ commented that “there have been calls in the work of the Committee for there to be some recognition of customary law²⁸ as an element in the definition and protection of TK. If there is to be reflection of customary law in the characterization of TK, 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”²⁹): “Given this highly diverse and dynamic nature of TK 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.”³⁰

Customary law may therefore be an element of the very definition of TK or TCEs – in other words, what sets knowledge or cultural expressions apart as being ‘traditional’ may be the existence or operation of customary law. This approach is apparent in draft definitions of TK and TCEs that have been considered by the WIPO IGC. For instance, it is suggested that protection should be available for TK which is, among other things, “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 customary or traditional practices, protocols or laws.” And those who benefit from protection may also be determined by customary law: thus the provisions suggest that protection of TCEs “should be for the benefit of the indigenous peoples and traditional and other cultural communities ... in whom the custody, care and safeguarding of the TCEs are entrusted in accordance with their customary law and practices.”

These references do not suggest that the definition of TK or of TCEs should be limited just to that which is governed by customary law, but rather that the existence of customary law could be a strong indicator in identifying TK and TCEs, and the relevant forms of custodianship and other legal relationship between communities and TK and TCEs.

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

²⁶ Kuruk P., African Customary Law and the Protection of Folklore, Copyright Bulletin, XXXVI, No.2, 2002, at 5.

²⁷ WIPO/GRTKF/IC/3/9

²⁸ See document WIPO/GRTKF/IC/2/16, Paragraphs 90, 94, 100, 108, 152

²⁹ 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)

³⁰ See document WIPO/GRTKF/IC/1/3, paragraph 65

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 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.’³¹ 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.”³² 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* GRs. 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 GRs 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 of legislation in many countries when they finally get around to instituting or finalising the necessary regulatory regimes on access and benefit-sharing.”³³

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 – 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 against misappropriation, misuse or illicit utilization by others:

³¹ 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.

³² Protecting Community Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May 2005

³³ Kent Nnadozie, Integrating African Perspectives and Priorities into Genetic Resource Regulations: A Resource Guide for Policymakers

- 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)
- 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.³⁴ 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.³⁵

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?
- 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?

³⁴ 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.

³⁵ See WIPO/GRTKF/IC/7/15, at para 95.

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;³⁶
- 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);³⁷
- 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 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;³⁸
- 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

³⁶ 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.”

³⁷ 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”

³⁸ “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 47 *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...”

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.

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
- What legal, practical, ethical and constitutional factors have been relevant?
- forms of “recognition” of or “respect” for customary law have been applied in practice? What models could be explored?

Pathways for recognition of customary law

The various legal pathways or mechanisms for recognition of customary law³⁹ include:

- Constitutional: recognition of customary law within a national or other constitution as a distinct source of law, in general terms, or constitutional recognition with limited reference to specific areas of law, such as family and other social relationships, land law and environmental management, and indigenous governance.

³⁹ This section draws on Law Reform Commission of Western Australia, “Aboriginal Customary Laws” (2005), Part III.

- Judicial: common law or judicial recognition, in which customary law is used within the bounds of juridical discretion in reaching a decision.
- Statutory: specific statutes may recognize the role of customary law for specific purposes, such as in recognizing family relationships or rights of inheritance established under customary law.
- Administrative: customary law is recognized or referred to in the implementation of administrative responsibilities).

“Functional recognition” of customary law refers to the specific recognition of the effect of customary law in specific contexts, such as in the procedures for communities’ prior informed consent, for determining equitable sharing of benefits. “Affirmative recognition” refers to steps taken to recognize customary law with the goal of empowering traditional or indigenous communities and to strengthen the legal basis for their social and economic development. “Reconciliatory recognition” refers to forms of recognition of customary law that are undertaken to foster reconciliation between sectors of society, in particular between indigenous communities and others.

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.⁴⁰ 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 CBD⁴¹ has requested the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions to

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

⁴¹ See paragraph 6 (b) of decision VII/16 H.

consider non-intellectual-property-based *sui generis* forms of protection of TK, 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 GRs, 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 GRs 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 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;⁴²
- 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;⁴³ 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,

⁴² *Foster v. Mountford and Rigby* (1976) 29 FLR 233

⁴³ 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).

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

(i) *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;

(ii) *Applying elements of customary law as substantive law:*

Certain elements of customary law may create substantive legal obligations within separate IP laws for the 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 has 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 beyond customary law 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.

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 standing⁴⁴ of a collective entity (such as a tribe or community) recognized under customary law, even on the part of an unincorporated entity,⁴⁵ 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;⁴⁶
- 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;⁴⁷
- to sustain a claim of breach of confidence relating to secret sacred material,⁴⁸ and to recognize customary law considerations as ‘substantial concerns’ in sustaining a claim of confidentiality;⁴⁹
- to confer legal identity on a community as the basis of collective ownership of an IP right;⁵⁰

⁴⁴ *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.

⁴⁵ *Foster v. Mountford and Rigby* (1976) 29 FLR 233, concerning the Pitjantjatjara Council.

⁴⁶ See Republic of the Philippines, *Indigenous Peoples’ Rights Act*, Section 65

⁴⁷ *Bulun Bulun v. R&T Textiles Pty Ltd* (1998) 41 IPR 513

⁴⁸ *Foster v. Mountford and Rigby*, note 45 *supra*

⁴⁹ *Gordon Coulthard v. The State of South Australia*,

⁵⁰ 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.”

- as the basis of a general right over biological resources and TK,⁵¹ including specific rights to grant access to biological resources⁵² 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;
- as the basis for a claim against public order, cultural offence⁵³ or vilification, or more specifically to determine entitlement for damages based on “personal and cultural hurt,”⁵⁴ 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,⁵⁵ or to establish a specific Indigenous or aboriginal right.⁵⁶

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.

Customary law under existing sui generis systems

Existing *sui generis* systems for protection of TCEs and TK have various approaches to recognizing customary law. Some examples are given here:

- Regimes that regulate biological and GRs may require prior informed consent of traditional communities for access to TK.⁵⁷ This may entail the application of customary law in the process for determining the community’s consent, even without any explicit reference.
- 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). When disputes arise, “customary laws and practices shall be used to resolve the dispute.” (Section 65)

⁵¹ Article 8, *African Model Legislation*, note *supra*.

⁵² Article 8(1)(ix), *African Model Legislation*, note *supra*.

⁵³ 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.

⁵⁴ *M*v Indofurn Pty Ltd* (1995) 30 IPR 209, discussed in Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>.

⁵⁵ 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)).

⁵⁶ 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.

⁵⁷ 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*

- Under Costa Rica's Biodiversity Law⁵⁸ *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 law⁵⁹ 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 that the creation of new forms of protection does not unwittingly create a legal barrier to continuing customary practices.
- One objective of the *Peruvian Sui Generis Law* is "to promote the fair and equitable distribution of the benefits derived from the use of ... collective knowledge".⁶⁰ The Law recognizes customary laws and protocols in the context of benefit-sharing, stating that "indigenous peoples ... may have recourse to their traditional systems for the purposes of the distribution of benefits".⁶¹
- The Pacific Regional Model, 2002 defines traditional owners of TK or expressions of culture as the group, clan or community, or individual recognized as part of group, clan or community, in whom the custody or protection of the TK or expressions of culture are entrusted in accordance with customary law and practices. Disputes over ownership of TK or expressions of culture are to be resolved according to customary law or other means.
- Exceptions in *sui generis* laws for continuing customary use by TK holders is contained in Article 2(2)(ii) of the African Model Legislation⁶²; Article 4 of the Brazilian Provisional Measure; Article 4 of the Peruvian Law; and the Thai *sui generis* law.⁶³

Customary law and protocols in ADR procedures

Alternative dispute resolution (ADR) refers to the settlement of disputes outside the formal judicial system. ADR procedures include:

- Mediation: a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.
- Arbitration: a neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on the dispute.

⁵⁸ Law No 7788 of 1998, at Articles 82 to 84.

⁵⁹ 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*

⁶⁰ Article 5(b), Peruvian Sui Generis Law

⁶¹ Article 10, Peruvian Sui Generis Law. See also Article 39 which provides that administration of benefit-sharing through the Fund for the Development of Indigenous Peoples "shall to the extent possible use the machinery traditionally used — by indigenous peoples — for allocating and distributing collectively-generated benefits."

⁶² "No legal barriers shall be placed on the traditional exchange system of the local communities in the exercise of their rights" (Article 21(2)) and "the legislation does not affect "access, use and exchange of knowledge and technologies by and between local communities;" (Art.2(2)(ii))

⁶³ Article 4, Peruvian *Sui Generis* Law: excludes from this regime "the traditional exchange between indigenous peoples of the collective knowledge protected under this regime"

A single procedure may commence with mediation and, where the dispute is not settled through the mediation, may then proceed to arbitration.

Several characteristics of ADR procedures may assist in the recognition of customary law and protocols in a dispute over TK and TCEs. ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. This means that customary law and protocols can be incorporated into ADR proceedings:

(i) to provide direct guidance concerning the substantial issues in a dispute (such as custodianship over TK or TCEs, the sharing of TK and TCEs across national boundaries, determining what sharing of benefits should be considered equitable, and the practical interpretation of the principle of prior informed consent);

(ii) to establish appropriate dispute resolution procedures, such as forms of community consultation, consent and decisionmaking, that reflect customary procedures;

(iii) to guide the development and agreement upon appropriate remedies, which may include financial or non-financial forms of compensation and other acts of restitution, acknowledgement of cultural and spiritual concerns, expiation of cultural or spiritual offence, and undertakings to abide by certain practices in the future.

Through ADR, the parties can agree to resolve a dispute covering a number of different countries through a single procedure, thereby avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results. The legal recognition of customary law beyond its traditional community reach may be complex or problematic if it entails diverse forms of recognition in multiple jurisdictions, as this may require distinct application of customary law principles in different court cases. A single ADR process would enable all.

The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders.

ADR's consensual nature makes it less appropriate if one of the two parties is extremely uncooperative, which may occur in the context of an extra-contractual infringement dispute. In addition, a court judgment will be preferable if, in order to clarify its rights, a party seeks to establish a public legal precedent rather than an award that is limited to the relationship between the parties. ADR may be particularly relevant when those accessing TK, TCEs and GRs agree, as a condition of this access, to comply with

Customary law and the exercise of collective rights over TK and TCEs

The recognition of the customary law of indigenous peoples and local communities can arise in a very practical way in the context of IP law. Some examples are discussed in a series of case studies prepared for Terri Janke – Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions.⁶⁴ The reader is referred to the full publication

⁶⁴ Terri Janke, Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>

for details and background, but some of the general observations on the role of customary law may be of interest for the present study:

On the role and responsibilities of the community in determining how traditional stories and images may be used, the author comments:

Under Aboriginal law, the right to create artworks depicting creation and dreaming stories, and to use pre-existing designs and totems of the clan, resides with the traditional owners as custodians of the images. The traditional owners have the collective authority to determine whether these images may be used in an artwork, by whom the artwork may be created, by whom it may be published, and the terms, if any, on which the artwork may be reproduced.

The extent to which an artwork bearing a pre-existing design can be reproduced will depend upon the subject matter of the work. For instance, an artwork that is associated with a public story or ceremony might have fewer restrictions than an artwork that embodies a dreaming or creation story.

Aboriginal artwork will often depict secret parts of a dreaming that will only be recognised and understood by those who are initiated into the relevant ceremonies, or at least have a close knowledge of the cultural significance of the story. It is therefore important that any reproduction is accurate in every respect and done with full, proper permission of the artist and community so as not to offend the traditional owners.⁶⁵

The obligation to ensure that traditional stories and images are used in an appropriate way therefore translates into a responsibility on the part of the traditional custodians or owners to safeguard their cultural traditions and beliefs, known to Australian Indigenous peoples and local communities as "the dreaming." As the Australian Federal Court decision notes:

If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over or no knowledge of what occurred.⁶⁶

Often, as in this case, the interaction between customary law and IP law arises especially from the sense that customary law does not merely entitle traditional custodians to take action to defend appropriated or reproduce material against inappropriate use, but positively obliges them to take steps. This leads in some cases to an emphasis on custodial responsibilities as against legal entitlements. The same experience was reported in relation to traditional performances of the Wik people of the Torres Strait. The author notes that

Under Wik customary law, the right to control elements of ceremony or performances rests with certain individuals who are referred to as senior. The authority vests in these senior custodians under a complex system of authority and relationships. Each element of the performance - the song, the dance, the body painting and the feathered head-dresses - can only be reproduced and disseminated with the consent of the senior custodians and in some instances, in the presence of custodians as only certain individuals can authorize reproduction of each element. When a senior

⁶⁵ Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, at 14, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>

⁶⁶ *M* and Others v Indofurn Pty Ltd and Others* (1993) 130 ALR 659 at 663

custodian passes away, this authority is passed on to another person to continue the responsibility of guarding the elements of ceremony.

In performing the dance, the performers have a duty to the audience to prepare them for what they are about to see and hear. According to John Von Sturmer, an anthropologist, the dancers have a duty to the audience to protect those who have not previously seen the ceremony. They can do this by putting underarm smell on everybody. A photograph of the ceremony is seen as a reproduction and if the images are circulated prior to the performances, then the dancers cannot exercise this care for those people who have never seen the ceremony.

Those who hold the responsibility for the use of the elements of the ceremony are not in control of the dissemination of these elements. Joe Ngallametta, Wik elder, notes that there are serious consequences for the unauthorized reproduction of the elements of ceremony.⁶⁷

The case studies reported further illustrate how what is seen in conventional IP law as “a right of reproduction” may be seen under customary law as an obligation to prevent the publication and dissemination of material in a way that would be offensive to and contrary to the values and beliefs of the community:

Under Wik custom, a person’s image is regarded as an extension of his or her spirit and any reproduction of images should be done in consultation with them. Additionally it is offensive, within their custom, to display images of deceased persons. Therefore the depiction and reproduction in this case of the image of the main dancer, now deceased, is offensive and contrary to Wik custom.⁶⁸

A further example, that of a certification mark intended to attest to authenticity of indigenous works, illustrates how in principle that branch of IP law concerning distinctive signs and symbols - the law of geographical indications and trademarks (including certification and collective marks) - can be used to confirm compliance with customary law:

Once approved, an applicant must comply with the rules for use of the [indigenous authenticity] label. The rules have incorporated terms for complying with Indigenous customary law. In particular, ... the Label can only be used for works which purport to encode, depict or reflect ceremony, legal knowledge, customs, stories, dreaming or ritual of traditional owners of land and are produced in accordance with any customs or laws of the relevant traditional owners and where permission of the traditional owners has been given for the creation of the work.⁶⁹

Certification marks or geographical indications illustrate how national and international legal mechanisms may give practical recognition of rules in customary law that govern how TK is to be defined and used; and enable such rules to have effect beyond their traditional reach. A geographical indication or certification mark may only be applied legitimately to a product if it conforms with the rules established for that mark or indication. Such rules could include customary laws and practices that are embodied in the product to which the mark or

⁶⁷ Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, at 88, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>

⁶⁸ Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, at 89, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>

⁶⁹ Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, at 142, available at <http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>

indication is applied. Anyone seeking to create an impression that their product was endorsed by the community concerned, or authentically complied with customary rules, would fall foul of the rights associated with the geographical indication or certification mark. Geographical indications and certification marks can be protected in numerous jurisdictions with the assistance of international arrangements. This analogy shows the simple possibility of a legal framework providing for customary law standards to be effectively transmitted through the operation of international law and enforced under foreign domestic law to the benefit of the original community.

CONCLUSION

Forms of recognition

In summary, there are diverse experiences in the recognition of customary law that could be relevant to IP law systems, and relevant to sui generis systems for protection of TK and TCEs. The forms of “recognition” include:

- Recognition as directly applicable law
- Recognition as a source of law
- Recognition as the factual background for interpreting and applying laws
- Constitutional recognition
- Statutory recognition
- Functional recognition
- Administrative recognition

Enhancing the effect of customary law

Relevant practical and legal initiatives to enhance the effect of customary law may include:

- Support for continuing customary law and practices within the actual life of a community
- The appropriate recordal or documentation of customary law and practice
- Direct application of customary law as legally binding on the community, in effect continuing its customary legal effect
- Specific legal or other mechanisms to extend the legal scope of customary law obligations: (i) within domestic law or (ii) through international law to apply in other jurisdictions. When applied beyond their original scope or customary jurisdiction, customary law may be applied as a source of law, as providing factual input to other laws, as defining exceptions within other legal systems, as providing policy or administrative guidance to other legal systems, as introducing customary procedures in other legal processes, or as providing substantive norms and principles for broader application
- Alternative ADR may also take direct account of customary law to provide direct guidance (i) concerning the substantial issues in a dispute (such as custodianship

over TK or TCEs, the sharing of TK and TCEs across national boundaries, and the practical interpretation of the principle of prior informed consent); (ii) concerning procedural questions, such as appropriate forms of consultation and community decisionmaking and consent); and (iii) concerning appropriate remedies, such as financial or non-financial forms of restitution and compensation, acknowledgement and expiation of cultural or spiritual offence).

Fundamental issues for consideration

This paper has identified a range of issues for further consideration, under each section. Some central issues for consideration in general concerning customary law and IP law:

- What forms of relationship between customary law and IP 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, TK, 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 TK and TCEs?
- For the holders of TK/TCEs/GRs themselves, what is the preferred role or roles of customary laws and protocols:
 - As a basis for sustainable community-based development, strengthened community identity, and promotion of cultural diversity?
 - As a distinct source of law, legally binding in itself – on members of the original community, and on individuals outside the community circle, including in foreign jurisdictions?
 - As a means of factually guiding the interpretation of laws and principles that apply beyond the traditional reach of customary law and protocols?
 - As a component of culturally appropriate forms of alternative dispute resolution?
 - As a condition of access to TK and TCEs?
 - As the basis for continuing use rights, recognized as exceptions or limitations to any other rights granted over TK/TCEs or related and derivative subject matter?

Some resources

This is an initial, incomplete and unrepresentative list of potentially useful resources, and suggestions for additional references would be much appreciated.

Laws and legal texts

African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources

Costa Rica Law No 7788 of 1998 on Biodiversity

New Zealand *Trade Marks Act 2002* (Section 17(1)(b))

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

Panama, *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*; and Executive Decree No.12 (2001) regulating this law.

Peru, Law No. 27,881 of 2002, *Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources*

Republic of the Philippines, *Indigenous Peoples' Rights Act*, 1998

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Delgamuukw v British Columbia ([1997] 2 SCR 1010)

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

Mabo and Others v. Queensland (No. 2) (1992) 175 CLR 1 F.C. 92/014

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J. Christian Wichard and Wend Wendland, Mediation as an Option for Resolving Disputes between Indigenous/Traditional Communities and Industry Concerning Traditional Knowledge in Barbara T. Hoffman (ed), Art and Cultural Heritage Law, Policy and Practice (2005), at 475

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), WIPO publication no. 768(E)

WIPO North American Workshop on Intellectual Property and Traditional Knowledge Ottawa, Canada, September 7 to 9, 2003, Summary of Workshop Proceedings