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INTRODUCTION

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INTRODUCTION

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This special issue of LEAD originates in a workshop organised at the University of Warwick in June 2011.^{*} The workshop sought to focus attention on the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (NP, or the Protocol), adopted at the tenth Conference of the Parties of the Convention on Biological Diversity (CBD, or the Convention) on 29 October 2010. In implementing the third objective of the Convention, the Protocol aspires to deliver a fair and equitable sharing of flows of biological resources and knowledge and the benefits that flow at multiple levels: between local communities and their threatened biodiversity and science and industry; between biodiversity rich states and states hosting biotechnological corporations and global scientific networks; between communal ownership regimes and private intellectual property. Negotiated under a high level of disagreement, the Protocol is a landmark after two decades of struggles to operationalise access and benefit sharing (ABS) regimes. Unsurprisingly for a global legal instrument, the Protocol has its ambiguities and presents a challenge in translating norms into practice. In bringing together a diversity of social scientists and practitioners, the workshop seeks to illuminate some of these challenges and inform the debate.

The Convention entered into force in December 1993 and presently has 193 Parties, of which, around 60 have adopted national ABS regulations. Among these 60 countries, there are negligible number of user countries, such as Australia and Norway.¹ In a

study of 15 major countries, Vivas-Eugui succeeded in identifying around 700 non-commercial permits or contracts involving biological materials, which stands in stark contrast to approximately 24 commercial ABS access permits or contracts during this period.²

Another (rough, but reliable) indicator of the state of affairs are patents involving biological materials. Examining 11 million patent documents worldwide published between 1976 (thus, prior to the CBD) and 2010, Oldham, Hall & Forero identified 767,955 patent documents containing references to biological species.³ Both these empirics are evidence of patterns of use and, of course, evidence of the failure of the CBD in providing effective policy instruments for compliance and enforcement. It is in this context, among others, that the CBD and the Protocol have opened possibilities to explore novel legal and institutional paths. Following avenues of enquiry opened up by law/society scholarship, the CBD and its related instruments and forums are here seen as contested sites of constant struggle where contradictory interests and contrasting narratives and epistemologies co-habit; though, not equally or harmoniously. Thus, regulatory challenges present a field of inquiry in themselves about causes, proposals for streamlining research on genetic resources flows and interpretations of cognitive and political dissent. All this gets complicated by the cross-cutting political demands and complex interplay between the scope of matters at hand: food and agriculture, health, property rights, poverty alleviation, indigenous rights, gender rights, and ecological vulnerability.

The Protocol currently has 26 ratifications and 92 signatures (as of 29 November 2013) and enters into force 90 days after the 50th party's ratification.⁴ It presents a series of legal concepts and tools to re-think ABS implementation. It is clearly a milestone in providing a binding instrument, in clarifying terms, in advancing the rights of indigenous peoples and local communities (ILCs), in setting a basis for

* The workshop was made possible through the financial support of the Legal Research Institute and the Centre for the Study of Globalisation and Regionalisation, with the Institute of Advanced Study hosting the event. We are indebted to Theologia Iliadou for her incredible organisational skills and research support. A particular thanks is due to Philippe Cullet for the space of a special issue and to Jessy Thomas and Lovleen Bhullar for their editorial assistance. Doris Schroder and Graham Dutfield, both commentators at the workshop, have been generous with their time in writing commentaries to close the special issue. To our contributors, we note our abiding appreciation for diligently working up their papers into the keen interventions that they are.

1 D. Vivas-Eugui, 'Bridging the Gap on Intellectual Property and Genetic Resources in WIPO's Intergovernmental Committee (IGC)', 34 *Issue Paper* 1, ix, 10 (Geneva: International Centre for Trade and Sustainable Development, 2012).

2 *Id.*

3 P. Oldham, S. Hall and O. Forero, 'Biological Diversity in the Patent System' 8(11) *PLoS One* 1, 2-3 (2013).

4 Secretariat of the Convention on Biological Diversity (30.11.2013), available at <http://www.cbd.int/convention/parties/list/default.shtml>.

monitoring and compliance and in opening doors to multilateralism and to dialog with specialised instruments of other legal areas.⁵ No doubt that there are deficiencies and shortcomings, such as non-definition of the temporal scope and concerns about enforcing compliance. Further, as its implementation allows countries and regions a wide field of interpretations, research and reflection as proposed in this special issue are of major relevance.

Genetic resources and associated traditional knowledge are often hegemonically characterised as economic assets. For that matter, the CBD enters into force at the very cusp of the Agreement on Trade-Related Intellectual Property Rights. As such, it punctuates the co-terminus developments, from the 1970s onwards, of new techniques of sequencing, recombining and synthesising biological materials and shifting doctrines in intellectual property law, that treat such materials as patentable subject matter, thus, generating a new frontier for capitalist expansion and accumulation. In this vein, the CBD sits (somewhat uncomfortably) as smoothening the legal terrain for investments and market transactions for the global assemblage of the Life Science industry.⁶ An early intervention had expressed concern about the paradigmatic domination of a 'pay to conserve' ethic that furthers the processes of commodification.⁷ To explain, assigning property rights is complemented by the creation of markets, which enables these transactions to be fulfilled, thus neoliberalising nature.⁸ Biodiversity-rich developing countries were partly complicit in these manoeuvres seeing this as an opportunity to foster research and

development in securing technology transfer and to be compensated for the costs of environmental protection. From a strictly capitalistic perspective it is more profitable to substitute forests with exportable crops than to implement environmental conservation. So, if conservation is a global aim, then policy instruments such as ABS and ecosystem services are expected to provide financial compensation. However, the willingness of user countries to comply with ABS regulations has been negligible and then there is the USA as the big free-rider who has not ratified the Convention.

Alongside these discourses on the emergent global biodiversity regulatory architecture are narratives that make visible the struggles of ILCs in negotiating their presence and their rights. Vindicating this narrative, the Nagoya Protocol can be heralded as the first binding instrument to inscribe customary law and community protocols into global biodiversity law and specifying obligations of prior informed consent,⁹ and making for a moment of postcolonial global law making.¹⁰ Mapping this concern into history would recall the colonial expropriation of genetic resources from the global South where, in many instances, botanical gardens were implicated in the Empire's efforts to control stocks of key industrial, plantation and medicinal crops,¹¹ playing a veritable 'botanical chess game' in securing access to and then moving plants across continents.¹² With these practices enduring and transforming, there have also been allegations of biopiracy, which refers to the unauthorised extraction of genetic resources and associated

5 E. Kamau and G. Winter, 'An Introduction to the International ABS Regime and a Comment on its Transposition by the EU', published in this issue of LEAD Journal at 106.

6 U. Brand and C. Görg, 'Post-Fordist governance of nature: The Internationalization of the State and the Case of Genetic Resources - A Neo-Poulantzian Perspective' 15/4 *Review of International Political Economy* 567 (2008).

7 K. McAfee, 'Selling Nature to Save It? Biodiversity and Green Developmentalism' 17/2 *Environment and Planning D: Society and Space* 133 (1999).

8 N. Castree, 'Neoliberalising Nature: The Logics of Deregulation and Reregulation' 40/1 *Environment and Planning A* 131 (2008) [hereafter Castree 2008a] and N. Castree, 'Neoliberalising nature: processes, effects, and evaluations' 40/1 *Environment and Planning A* 153 (2008) [hereafter Castree 2008b].

9 B.M. Tobin, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous peoples' Resource and Knowledge Rights', published in this issue of LEAD Journal at 142.

10 Kabir Bavikatte and Daniel F. Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' 7/1 *Law, Environment and Development Journal* 35 (2011).

11 L.H. Brockway, *Science and Colonial Expansion: The Role of the British Botanic Gardens* (New York: Academic Press 1979).

12 P.R. Mooney, 'The Law of the Seed: Another Development and Plant Genetic Resources' 1983/1-2 *Development Dialogue* 1, 84-88 (1983).

traditional knowledge often through patents and without either consent or compensation.¹³ Partly as counter-discourse, the deployment of 'biopiracy' critiques a neoliberal re-framing of these exploitative transactions as 'development';¹⁴ thus, simultaneously interrogating the legitimacy of these transactions and drawing attention to the systemic inequity that underlies them.¹⁵ In as much as the rhetoric of biopiracy channels debates concerning ownership in and dispositional rights to genetic resources it raises the question of what would be considered fair from the point of view of cultural minorities. Addressing these challenges warrants efforts to bridge what is not only trans-boundary in terms of transactions and networks, but also requires an emerging cosmopolitan legal system that stands in tension with the dominant state-centred legal order.

There are ways to illustrate the challenges that exist and lie ahead. Consider, for instance, the heterogeneity of modes of ownership and customary practices related to genetic resources and associated traditional knowledge, which confound the logics of Western legal systems. Or the spectrum of values that co-constitute the materials and associated knowledge that go beyond their mere extractive and economic value. Not only would these place limits to the predatory and accumulative nature of capital; but, they ask law to explore new frontiers of knowing and legality. In noting these challenges, we remain acutely cognisant of the vulnerabilities, the political and economic exclusions, and the marginalisation of the peoples and communities and the deterioration of the natural environments they are embedded in, which raise many questions: how to redesign regulatory frameworks in order to increase their effectiveness and legitimacy? What then are the conditions for *fairness* and intercultural equity? In what ways do we achieve intercultural legal pluralism? It is to questions like these that the

papers in this special issue are directed at. They shed insights, narrate stories, recall cases, remind us of the achievements and make note of the tasks ahead. In the remainder of this introduction, we first summarise the papers and then proceed to outline central themes.

The special issue commences with the contribution of Evanson Kamau and Gerd Winter (p. 106) that critically reads the Protocol and then proceeds to evaluate the proposed implementing legislation of the European Union. For them, the major achievements of the Protocol are its binding nature and precision in defining key concepts. For example, across several different articles, 'utilisation' of genetic resources is expansively treated so as to include derivatives via the definition of biotechnology, thus, as they argue, allowing for a link to be made between benefit sharing, in general, to the downstream chain of value addition. Although not strictly defined the duty of user states to ensure compliance and monitoring (Article 5) is an additional core issue of the Protocol. Even while ABS is premised on bilateral arrangements, they note that the Protocol is open to multilateral solutions, such as common pools of genetic resources and of traditional knowledge. In assessing the EU Commission Proposal of October 2012 to implement the Protocol, Kamau and Winter draw attention to the promise of due diligence obligations on users and authorities, as well as instruments such as unique identifiers, best practices and registering collections. Among the shortcomings, they note lack of clarification of the competence of Member States and that it provides a temporal scope that are disadvantageous to the interests of providers (one year after its EU approval).

Complementing the parsing out of provisions in the Nagoya Protocol by Evanson Kamau and Gerd Winter is Morten Tvedt's contribution on property rights. By theoretically delineating different elements that co-constitute 'ownership' across a spectrum of types of rights, Tvedt offers us templates to fulfil the Protocol's aspirations for fair and equitable benefit sharing. A well-noted observation about the CBD and the NP is that the exercise of sovereignty is substantially premised on the contracts that will be offered to access genetic resources and associated traditional knowledge,

13 G. Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* 52 (London: Earthscan, 2004).

14 Cori Hayden, *When Nature Goes Public: The Making and Unmaking of Bio-prospecting in Mexico* (New Jersey: Princeton University Press, 2003).

15 Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Toronto: UBC Press, 2005) and Daniel Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (London: Routledge, 2010).

hence, the critical significance of power/knowledge in setting out core principals, such as defining key terms, clarifying the object/purpose of the contract, etc. It is through an example of the sale of a Norwegian breeding company, AquaGen, that Tvedt provides lessons for future contract making. The sale of the company also led to the transfers of ownership of salmon breeding lines (and their privatisation) that were initially generated through publicly funded research. Though the Nature Act does secure public rights in 'unbred' material, Tvedt notes the ambiguity of the scope of these rights. In another example, a patent granted to Intervet in 1995 on a fish virus to treat Pancreas disease, Tvedt demonstrates how the skilful construction of claims that include 'closely related strains that have similar genotypical or phenotypical characters' allow the patent to monopolise an entire field of research, and, in this instance, win infringement proceedings against Pharmaq, a Norwegian company, for their subsequent fish virus. These examples provide lessons on the pitfalls to be avoided in developing contracts and other legal instruments concerning ABS arrangements.

The papers by Brendan Tobin (p. 142) and Roger Chennells (p. 163) overlap in their concerns about customary law and the working experience with ABS arrangements in practice; thus, informing efforts towards an intercultural legal pluralism. In providing an appraisal of the role of, the limits to, and the challenges for, customary law in positive law, Tobin notes its increasing recognition in international and regional legal instruments and presence in a large number of national constitutions. The Protocol is the first binding international law to oblige states to 'take into consideration' customary law and community protocols (Article 12). Further, by ensuring prior informed consent, the Protocol empowers ILCs to exercise control over access and use of their knowledge and resources, and extends this obligation to the foreign jurisdictions of user states. However, the Protocol also suffers weaknesses as it leaves enforcement up to national law and courts. Tobin draws attention to a number of measures and mechanisms that would further the efforts towards intercultural legal pluralism. For instance, biocultural certificates and community protocols, which enable the partial codification of customary law, could also bridge the compliance gap

of the NP. Additionally, mandatory disclosure of prior informed consent compliance in patent applications would be useful. By way of caution, Tobin is mindful that the interfaces between indigenous customary law and positive law are contingent and temporal, and require a flexible form of institutionalisation.

Much can be learned from how ABS arrangements actually operate – and here, Roger Chennells reviews the experience of three cases in South Africa (and its neighbouring countries): Hoodia, Sceletium and Pelargonium. The experience across these three cases are quite different – not only in terms of the dynamics of traditional knowledge, but also in terms of the mix of actors and institutions involved, and, of course, in terms of the legitimacy (or not) of the terms of access and resulting benefit sharing. To illuminate these distinctions, Chennells creates three fictional tales that allow him to focus attention on core questions. For instance, cutting across the cases is the question of identifying the traditional community and knowledge holders. The San have utilised the term 'primary knowledge holders' to distinguish themselves from other knowledge holders. However, there has been a sharing and circulation of knowledge practices – as exemplified in the Pelargonium case. In the case of Sceletium, even while the initial access arrangements were with Nama-speaking traditional healers, the company (HGH pharmaceuticals) proceeded to enter into an ABS agreement with the San, recognising them as the 'primary knowledge holders'. Interestingly, the San have insisted on awarding 50 per cent of their royalty earnings to the villages of Nourivier and Paulshoek. Chennells ends his paper with a proposal that seeks to borrow legal principles of English equity law to guide the resolution of competing traditional knowledge claims by the indigenous peoples. This, he argues, may cohere better with the 'open forum' and consensus making approach of negotiations by the indigenous peoples and deliver procedural justice.

Like other contributors to the special issue, Saskia Vermeylen (p. 185) also celebrates the NP for its recognition of multiple and overlapping legal systems, of drawing up binding obligations for law to work in accordance with indigenous and local communities' customary laws, community protocols

and procedures. With this promise in hand, Vermeylen maps out the challenge ahead and, using case law concerning Native Titles in Canada and the San/Hoodia example, explains why positivist law tends to limit the inclusion of different narratives. As such, for a cosmopolitan legality to exist there must be a sharing of authority. Through a critical reading of cases concerning Native Titles in Canada, Vermeylen notes how the Aboriginal title claims are recognised, but only within the legal and political contours of the Canadian state and contained in a particular discourse of property rights and economic value. The parallels, as Vermeylen demonstrates, with the case of the San peoples and benefit-sharing arrangements for Hoodia are remarkable: the cosmological stories and narratives are largely discounted and only those narratives concerning proprietary rights are accepted. In this, we are also reminded that exclusion has the dialectic of securing the integrity and, of course, authority of law. With the Protocol's inclusion of customary law, Vermeylen expresses concerns about its marginalities, about a partial and insufficient discursive inclusion.

Engaging parallels with Vermeylen's thesis of excluded/included narratives are evident in the paper co-authored by Ullrich Brand and Alice Vadrot, published in this issue of LEAD Journal at p. 202, – though, their focus is the hegemonic structuration of global biodiversity politics. Attending to the long drawn out process of setting up the Intergovernmental Platform for Biodiversity and Ecosystem Services (IPBES), they map how interfaces between (scientific) knowledge production and policy-making define what is to be governed (and protected) and how. Noting the increasingly economic approach of 'pay to conserve', their effort is devoted to providing causal explanations: how particular knowledge-frames get privileged and circulate to give form to political institutions. In this regard, the analytical tool of 'epistemic selectivities' relates to mechanisms which privilege particular forms of knowledge, problem perceptions, and narratives over others. Bearing upon the Nagoya Protocol, they see how similar economic paradigms have been privileged even while there is legal affirmation of the values and practices of ILCs. In both the IPBES and the Protocol, commodification, utilitarian interests and property

rights are established as the primary imperative for the conservation of biodiversity; thus, seeking to silence and make invisible non-monetary values and the stewardship practices and related knowledge systems.

The next two papers by John B. Kleba (p. 221) and Bram de Jonge (p. 241) concern themselves with moral principles of fairness and equity with regard to ABS. Kleba's aim is to simultaneously build a bridge between empirical work and moral philosophy, whilst also integrating the challenges for intercultural legal pluralism with a sense of political economy. This framing emerges from recognition that the CBD's leitmotif of fairness is only accompanied by a thin set of procedures (e.g. prior informed consent) and premised on (individual) entitlements and benefit-sharing. Establishing a critical dialog with John Rawls radical liberal idea of justice leads Kleba to contest an Eurocentric construction of ideas of fairness – not only in terms of its cultural premises but also in terms of its limited political sensibilities. A fair global biodiversity architecture would be one that is equally premised on concepts of justice of non-Western cultures. However, this sharing of authority towards intercultural legal pluralism, Kleba argues, is also contingent on political equality; thus urging global communities to secure the full participation of ILCs. Drawing on empirical material from Brazil on existing ABS, there is a sense that the various vulnerabilities of ILCs are of concern. Key to fairness is the difference principle interpreted by him as the conditions of realising citizenship and participation – of which, to some extent, the Protocol offers some promise in terms of material and non-material elements.

Analysing the ABS regime from the perspective of moral principles Bram de Jonge argues that the current bilateral exchange model of the CBD can never be fair and equitable, as it excludes policy and legal tools to address the principles of need and equity. The CBD is narrowly focused on entitlements and bilateral exchanges, and although the NP opens new avenues, such as global multilateral benefit-sharing mechanisms, it sustains the principle of entitlement of the CBD. Noting the ontological realities of these transactions, de Jonge suggests that a more efficient model of ABS

regulation should be user focussed. Fair and equitable benefit-sharing involves burden sharing; thus, a greater moral burden in implementing ABS should shift to richer and developed countries, which are the main beneficiaries of these transactions. de Jonge proposes thus to redesign ABS towards a multilateral regulatory framework grounded in the examples of the International Treaty for Plant Genetic Resources for Food and Agriculture and guided by Article 10 of the Nagoya Protocol. It is further suggested to establish a creative menu of benefit sharing allocation attentive to broad legal and moral criteria such as special needs and orphan shares (cases where the provider of the utilised resources is unknown, undisclosed, or in dispute) and varying case-by-case according to particular products and targets.

The special issue ends with short commentaries from Doris Schroeder and Graham Dufield – the two having participated in the workshop and critically commented on the papers at their first airing. In the remainder of this introduction, we speculate on some transversal themes that run across the papers. An overarching theme of the papers is codifying the practices enshrined in community protocols and articulated in customary law: How the agency of the indigenous peoples and local communities will be nourished and sustained, such that their heterogeneity persists and procedural justice is not evacuated. Brendan Tobin and Saskia Vermeulen draw upon the experience of the indigenous peoples' claims for land titles and the limited traction that courts offer by translating 'native titles' into property rights. The few successes may be critically read as 'confined to a restricted economy of property ownership and [racialised] subjectivity embedded during colonial settlement' and without apprehending the basis of dispossession itself.¹⁶ At the same time, other readings are possible and the Sceletium case presented by Roger Chennells constitutes an example of empowerment of ILCs in which they have appropriate means to engage in national and regional struggles to inscribe their cultural practices of negotiation and consent. With this in mind, their papers – along with Kleba and Chennells – are a reminder of the cultural, doctrinal and cognitive

clashes in access and benefit sharing arrangements. On the other hand, Tvedt's paper is a reminder of the complications in navigating across different possible regimes of property rights; hence, their cautious welcoming of the Nagoya Protocol in inscribing hybridity into international law and paving the way for a intercultural legal pluralism. For instance, even while state sovereignty in genetic resources remains the cornerstone – given the CBD's provisions – space has been opened up for recognition of customary law. Channelling the work of Boaventura de Sousa Santos, John B. Kleba ponders on the possibilities of different legal orders 'sharing authority'. For Kleba, there is an imperative in fulfilling the CBD's promise of fairness that cross-cultural principles and norms are incorporated into our practices, that a genuine inter-cultural ethic of legal pluralism is adopted. Probing the positivist origins of law, Saskia Vermeulen draws out the magnitude of the challenge for a cosmopolitan and intercultural legal order that does justice to the means of knowing of the indigenous peoples. It is not that law cannot comprehend narratives and story-telling; but rather that law adopts a privilege ordering whereby only certain narratives are accepted and acceptable. With reference to the case of Hoodia, Vermeulen notes that San narratives present not only a politics of translation/exclusion, but their endurance itself threatens the law's authority and metric of singular norms. Bringing the indigenous peoples' oral testimonies and ways of knowing into court are potential moments of legal rupture. However, the experience of challenging biopiracy in courts of law tends to demonstrate that such evidence often fails to be considered. In this regard, recall that one of the Neem patents to be revoked by the European Court of Justice was premised on the evidence of a small industrialist in India and neither the eloquent testimony of Vandana Shiva nor the oral evidence of peasant farmers of long-held practices.¹⁷

A guiding principle that these papers share is a concern about fairness and its translation as procedural justice. For instance, Chennells draws out

16 Brenna Bhandar, 'Plasticity and Post-Colonial Recognition: 'Owning, Knowing and Being' 22/3 *Law and Critique* 227, 228-29 (2011).

17 Shalini Randeria, 'The State of Globalization: Legal Plurality, Overlapping Sovereignities and Ambiguous Alliances between Civil Society and the Cunning State in India' 24/1 *Theory, Culture & Society* 1 (2007).

that Article 5 of the Nagoya Protocol requires identifying communities for documenting their 'established rights'. These can be challenging from a particular epistemological position that fails to either appreciate or acknowledge customary practices of sharing and circulation. We return to this problematic elsewhere in the introduction – and here illuminate a sub-theme: cognitive dissonance and epistemic selectivity. Brand and Vadrot, in their paper, present us with a causal mechanism that seeks to explain the formation, reproduction and circulation of particular paradigms that substantially frame regulatory architecture. Many have argued that a logic of 'pay to conserve' seems to have prevailed in substantially shaping the regulatory architecture of biodiversity governance¹⁸ to produce a system where 'selling nature, to save it' is paradigmatic.¹⁹ The logic of pay to conserve in ABS is contradictory in itself. On one hand it commodifies nature as resource/information. On the other, it imposes on economic actors and markets to raise costs so far dismissed as externalities, an essential step (but not the only necessary one) towards making the economy environmentally sustainable. Negotiations around the NP and the IPBES demonstrate that the terms of the debate are often pre-arranged and confined by hegemonic forms of scientific knowledge and policy visions. Though making for a sceptical reading of global biodiversity politics, there is recognition that the CBD and its various forums are contested terrains and that hegemony does not necessarily entail domination. The Convention's objectives of biodiversity conservation and sustainable development are placed in a fuzzy relationship between economics, ethics and the environment. Does sustainable development requires transcending capitalism? Despite all the efforts in translating the natural environment and resources into marketable assets, environmental protection still stands in contradiction to economic growth. Consider the fact that among the UN's Millennium Development Goals biodiversity protection represents one of the main failures.²⁰ And the struggles for the rights of the indigenous

peoples and traditional communities have become inseparable from struggles for environmental protection.²¹ Even when anti-hegemonic ideas such as 'Pachamama' are silenced in particular forums, as Brand and Vadrot note of Bolivian interventions at the second plenary meeting of the IPBES, Kleba points out that such indigenous concepts of ecological ethics constitute an inextricable ground for cross-cultural and intergenerational justice.

A second thematic in the papers draws us to the spaces that have been prised open and made available at Nagoya. In a different, but overlapping, context, Sunder has argued that limiting our analysis to a utilitarian frame of commodification is exceedingly narrow and fails to comprehend a highly complex process.²² In this vein, it is necessary to critically evaluate the NP for what it (textually) achieves and opens as possibilities for political agency. The contributions of Evanson C. Kamau and Gerd Winter and Bram de Jonge give us fresh insights into the construction of principles for ABS in the NP and complementing these is Tvedt's thesis on property regimes and the interplay between sovereignty and contracts. Among the core opportunities the NP has opened, and noting that the expansion of the rights of the indigenous and local communities has been already mentioned, we highlight two major issues: multilateralism and the focus on users.

In noting the ontological conditions of genetic resources in that they are transborder, that their informational content has quasi-public good properties, and, their historical collections and continuing circulation, among others, some of the contributors seek a multilateral solution that builds on elements in the NP. Even as ABS is largely premised on bilateral principles, Kamau and Winter remind us of the imperative for a multilateral framework noting, among others, that some

18 See Castree 2008a, note 8 above and Castree 2008b, note 8 above.

19 See McAfee, note 7 above.

20 United Nations, *Millennium Development Goals Report 2010* at 1, 55 (New York: UN, 2010).

21 M.C. da Cunha & M.W.B. de Almeida, 'Indigenous People, Traditional People and Conservation in the Amazon' 129/2 *Daedalus: Journal of the American Academy of Sciences* 315, 320-321, Special Issue - Brazil: Burden of the Past, Promise of the Future (2000).

22 Madhavi Sunder, 'The Invention of Traditional Knowledge' 70/2 *Law and Contemporary Problems* 97 (2007).

resources and traditional knowledge may necessarily be transborder and global networks of *ex situ* collections and biological data exist (cf. Article 10, NP). In fact, the concept of common pools, which cross-cut from indigenous sharing practices to collaborative global scientific networks, may ground a more effective and fair way to re-design the ABS framework.²³ Noting that the line between common rights and public rights is often blurred depending on right claims and power, Tvedt, reflecting on the experience in Norway, depicts how that ambiguity in the contours and definitions of public rights can be self-defeating in different contexts.

Building an ethical argument on provisions in the NP, Bram de Jonge suggests a shift in focus from exchange to use and constructing a set of responsibilities on users. This, he further argues, possess a number of pragmatic benefits in that documentation may be easier and monitoring possibly more efficient. With this attention on utilisation and user states, Kamau and Winter provide a critical reading of the proposed EC directive [COM(2012) 576] for the implementation of the NP, and Tobin contrasts the EC directive with a more recent resolution of the European Parliament concerning the protection of the rights of the indigenous peoples, shedding light on the non-linearity of legal texts and negotiation processes.

A third theme emerges from a mix of moral critique and the consideration of the ontological and sociological conditions of the ABS realm. In this regard, John B. Kleba recalls that even while 'fairness' is the leitmotif of the CBD, it only sets out procedural principles – some of which the NP has inscribed. Noting the contested nature of defining fairness, the task is to elaborate moral principles which may increase efficacy and democratic consent of ABS regulatory agency. De Jonge and Kleba agree that moral principles of equity, equality and needs, so far coming short in the regulatory framework of ABS, should guide creative forms of implementing the NP. An excessive focus on market assets should be replaced by a focus

on citizenship in favour of the least advantaged (Kleba), the responsibility of users (Bram; Kamau & Winter) and stronger multilateralism. Equity and political equality address the high economic asymmetry between countries and stakeholders. The needs principle recalls linking the biological and knowledge-based conditions in assuring access to food and health (de Jonge). The difference principle highlights the conditions for equal citizenship, from participation in policy making and in research to the support of cultural heritage rights (Kleba). Finally, the fair sharing of benefits would fulfil a central aim of the Convention; but, hinges on incorporating a mix of monetary and non-monetary benefits that respond to particularities of each case.

23 E. Kamau & G. Winter eds, *Common Pools of Genetic Resources - Equity and Innovation in International Biodiversity Law* 55, 58ff (London: Routledge, 2013).

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