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## **Justice, Equity and Benefit-sharing under the Nagoya Protocol to the Convention on Biological Diversity**

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## **BENELEX Working Paper N. 5**

# ***Justice, Equity and Benefit-sharing under the Nagoya Protocol to the Convention on Biological Diversity***

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## **Abstract**

This article attempts to bridge the multi-disciplinary debate on environmental justice and the traditional international legal debate on equity with a view to analysing the legal concept of fair and equitable benefit-sharing in international law. To that end, the article uses the Nagoya Protocol to the Convention on Biological Diversity as a testing ground for: i) unpacking different notions of justice that may be pursued through fair and equitable benefit-sharing from access to genetic resources and the use of associated traditional knowledge, and ii) relating different notions of justice to the different functions that equity plays in international law. The aim is to test the potential wider application, in other areas of international law that refer to benefit-sharing, of linking a pluralist notion of environmental justice to different functions of equity. It is argued that this helps systematically unveil implicit legal design choices in relation to the pursuit of justice through international law-making, and interpret international legal instruments in ways that can contribute to negotiate concrete understandings of justice on a case-by-case basis.

## **Keywords**

Benefit-sharing, biodiversity, equity, justice, Nagoya Protocol, mutual supportiveness, indigenous people

## Justice, Equity and Benefit-sharing under the Nagoya Protocol to the Convention on Biological Diversity

Elisa Morgera

### 1. Introduction

The Convention on Biological Diversity<sup>1</sup> (CBD) has not attracted sufficient scholarly attention as a prolific international law-making engine.<sup>2</sup> It has been remarkably successful in building consensus<sup>3</sup> among the totality of States in the international community, with the notable exception of the United States,<sup>4</sup> in gradually developing international biodiversity law so as to ensure mutual supportiveness among different international environmental agreements,<sup>5</sup> and with human rights.<sup>6</sup> Innovative law-making under the CBD can also be understood as the product of an international process that is quite open to inputs from non-State actors, notably representatives of indigenous peoples and local communities,<sup>7</sup> and that has increasingly formalized opportunities to develop international law from the bottom up.<sup>8</sup> In 2010 this law-making activity culminated in the adoption of a new legally binding

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<sup>1</sup> Convention on Biological Diversity (Rio de Janeiro, 5 June 1992, in force 29 December 1993) 1760 UNTS 79 (hereinafter, CBD or the Convention).

<sup>2</sup> Morgera and Tsioumani, "Yesterday, Today and Tomorrow: Looking Afresh at the Convention on Biological Diversity" YIEL 2011, Vol. 21, p. 3 and ff.

<sup>3</sup> On the law-making power of consensus see Boyle and Chinkin, *The Making of International Law* Oxford, 2007, p. 260.

<sup>4</sup> Although note anecdotal evidence that the US takes into account the CBD: for instance, the United States supported the use of the CBD scientific criteria on ecologically and biologically significant areas in the context of the UN General Assembly's Working Group on Marine Biodiversity in Areas beyond National Jurisdiction (see *Summary of the Fourth Meeting of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction*, 31 May - 3 June 2011 25(70) Earth Negotiations Bulletin (6 June 2011) at 7).

<sup>5</sup> Morgera, "Ambition, Complexity and Legitimacy of Pursuing Mutual Supportiveness through the EU's External Environmental Action" in Van Vooren, Blockmans and Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension*, Oxford, 2013, p. 194 and ff.. See also Montini, 'The Rise of "Internal Environmental Conflicts" in the Green Economy Scenario' in this volume.

<sup>6</sup> Albeit usually without having recourse to human rights-based language: Morgera, "Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law" in Alland et al (eds), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy*, Boston, 2014, p. 983 and ff.

<sup>7</sup> This is particularly the case of the CBD Working Group on Article 8(j): see "Report of the seventh meeting" (2012) UN Doc UNEP/CBD/COP/11/7, paragraph 20.

<sup>8</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, Nagoya, 29 October 2010, in force 12 October 2014) UN Doc UNEP/CBD/COP/DEC/X/1 (2010), hereinafter Nagoya Protocol, Article 20.

agreement under the Convention, the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing (ABS).<sup>9</sup>

In broad approximation, the Nagoya Protocol regulates transnational bioprospecting – the search for plants and animals that are found in one State and from which commercially valuable compounds are obtained in another State. In doing so, the Nagoya Protocol seeks to balance different equity concerns: first, equity between those States where most of the world's biodiversity is found (which are often developing countries) and other States (often developed countries) where research and commercial development of genetic resources takes place; second, equity within States, with regard to indigenous peoples and local communities that hold traditional knowledge that can be used to identify potentially useful properties of a genetic resource; and third, the realization of potential global benefits in terms of developments in the food, medicine, and energy sectors, as well as contributions to the conservation of biodiversity and its sustainable use.

Like other normative developments under the CBD, however, the Nagoya Protocol is characterised by heavily qualified and convoluted language, which presents real challenges for interpreters and implementers. As a result, its relevance for addressing the above-mentioned equity concerns is difficult to assess. To that end, it is proposed here to analyse the Nagoya Protocol, and in particular the legal concept of fair and equitable benefit-sharing<sup>10</sup> that it enshrines, by drawing on the multi-disciplinary debate on justice and linking it with the traditional debate on equity in international law.

The connection between equity and justice is an ever-present and never-settled question for lawyers, or as elegantly put by Rossi,

Equity has forever been associated with the pursuit of justice and this connection signals that it is one of the great features of human identity. But like the definition of justice itself, equity's full meaning remains sublimely elusive<sup>11</sup>

And yet there seems to be little systematic discussion linking the legal debate on the role of equity in international law and the growing, multi-disciplinary scholarship on global justice.<sup>12</sup> What is attempted in this paper is a pragmatic approach to bridging these two streams of scholarship with a view to testing its usefulness as a lens to analyse the evolution of the legal concept of benefit-sharing in international law. In particular, the Nagoya Protocol will serve as a testing ground to prove two inter-related arguments. First, the need to engage with other disciplines in understanding whether and to what extent multiple notions of justice may be pursued simultaneously in international environmental law (section 2 below). Second, the usefulness of relating different notions of justice to the different functions that equity is

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<sup>9</sup> Morgera, Tsioumani and Buck, *Unraveling The Nagoya Protocol: A Commentary of the Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity*, Boston, 2014; and Morgera, Buck and Tsioumani (eds), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and National Implementation*, Boston, 2013.

<sup>10</sup> Morgera, "Conceptualizing Benefit-Sharing as the Pursuit of Equity in Addressing Global Environmental Challenges", BENELEX Working Paper 1, SSRN, 2014.

<sup>11</sup> Rossi, *Equity and International Law: A Legal Realist Approach to International Decision-making*, Ardsley, 1993.

<sup>12</sup> Walker, *Intimations of Global Law*, Cambridge, 2015, p. 166, cautioned about the 'gulf between global law and global justice and profound difficulties involved in closing the gap.' Although see Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations*, Oxford, 2015.

traditionally seen to play in international law (section 3 below). The aim is to demonstrate the potential wider application of this approach to other areas of international law where the legal concept of fair and equitable benefit-sharing is used (section 4 below), from a two-fold perspective. First, this approach may help unveil systematically implicit legal design choices in relation to the pursuit of justice through international law-making. Second, it may help identify interpretations of international legal instruments that can contribute to negotiate concrete understandings of justice on a case-by-case basis (through implementation or adjudication).

## 2. Justice under the Nagoya Protocol

Environmental justice is often defined in legal scholarship, in first approximation, as the fair distribution of environmental burdens and benefits between States, as well as within States,<sup>13</sup> taking into account conditions of scarcity and inequality.<sup>14</sup> Fair and equitable benefit-sharing is therefore one way to *frame* environmental justice, by singling out the advantages (the positive outcomes or implications) of tackling global environmental challenges so as to help motivate participation by different stakeholders.<sup>15</sup> As a frame, benefit-sharing has the potential to facilitate 'convergence upon a *shared cooperative agenda*...[which depends on] each party's perception of the *benefits* it can secure from cooperation.'<sup>16</sup> As Nollkaemper has aptly explained, frames 'play an essential, though not always recognized, role in the development of international law': they 'highlight parts of reality over others... so as to promote particular evaluations and policies, and ... have distinct normative and regulatory implications.'<sup>17</sup>

At the same time, however, it has been noted that confusion surrounds how benefit-sharing itself is understood in terms of diverse forms of justice.<sup>18</sup> This may be due to the fact that during the negotiations leading to the adoption of the Nagoya Protocol, as with many other international treaties, attention was focused on *how* to deliver justice, rather than on explicitly discussing *what conception of justice* was being pursued in the first place.<sup>19</sup> Nonetheless, the main argument put forward here is that benefit-sharing under the Nagoya Protocol conflates different dimensions of justice. Such conflation may appear problematic as, while it remains implicit, it does not facilitate a systematic analysis of the relative weight that may have been attributed to one rather than another conception of justice. But from a philosophical and political perspective, a pluralist notion of justice is increasingly seen as desirable: different

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<sup>13</sup> Based on the discussion in Nollkaemper, "Sovereignty and Environmental Justice in International Law" in Ebbeson and Okowa (eds), *Environmental Law and Justice in Context*, Cambridge, 2009, p. 253 and ff., p. 254.

<sup>14</sup> Shelton, "Describing the Elephant: International Justice and Environmental Law" in Ebbeson and Okowa, *cit. supra* note 13, p. 55 and ff., pp. 58-59.

<sup>15</sup> Laurie et al, "Tackling Community Concerns about Commercialisation and Genetic Research: A Modest Interdisciplinary Proposal", paper presented at *Scientific Advancements in Medicine: Legal and Ethical Issues*, University of Birmingham, 2005, p. 4.

<sup>16</sup> Sadoff and Grey, "Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits" *Water International*, 2005, Vol. 30, p. 420 and ff., p. 420 (emphases added).

<sup>17</sup> Nollkaemper, "Framing Elephant Extinction" (2014) 3 *ESIL blogpost*.

<sup>18</sup> McCool, "Distributing the Benefits of Nature's Bounty: A Social Justice Perspective", paper presented at the International Symposium on Managing Benefit-sharing in Changing Social Ecological Systems, Windhoek, 5-7 June 2012, p. 3.

<sup>19</sup> Suisseea, "Negotiating the Nagoya Protocol: Indigenous Demands for Justice" *Global Environmental Politics*, 2014, Vol. 14, p. 102 and ff., p. 104.

notions of justice, in theory, feed into each other and should be conceived as necessarily complementary.<sup>20</sup> A brief discussion of the relevant literature on a pluralist notion of environmental justice will thus be provided, so as to delineate the different dimensions of justice that appear relevant for present purposes (section 2.1). On that basis, an interpretation of different provisions of the Nagoya Protocol will be proposed in order to unpack the different notions of justice that benefit-sharing may pursue simultaneously under the Nagoya Protocol (section 2.2) and those that appear to have limited, if any, relevance in that context (section 2.3).

### ***2.1 A pluralist notion of environmental justice***

As much still remains to be understood in the relatively recent debate on environmental justice from a legal perspective,<sup>21</sup> the present contribution will not shoulder the ambitious goal of relating the vast multi-disciplinary literature on justice to the legal concept of benefit-sharing from a theoretical perspective. The more modest, preliminary step taken in that direction in this section is that of arguing that the legal concept of fair and equitable benefit-sharing implicitly conflates different notions of justice. Unpacking them and gauging relationships and tensions among them may help pave the way for a more methodical dialogue about the potential contribution of this legal concept to environmental justice.

To that end, the present reflection takes as its starting point the synthesis of the justice literature offered by environmental justice scholars who argue in favour of a pluralist notion of justice based on the complementarity and inter-connectedness of multiple conceptions of justice.<sup>22</sup> In particular, attention will focus on the need to better understand the interactions between distributive justice, recognition, procedural justice and a composite notion of 'contextual justice'.<sup>23</sup>

As alluded to in the preliminary definition of environmental justice provided at the beginning of this section, distributive justice has taken the lion's share of attention.<sup>24</sup> Distributive justice focuses on the fair allocation of various social goods and bads,<sup>25</sup> its preconditions, principles and qualifications, considering who are the qualifying participants in a world of scarce

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<sup>20</sup> Fraser, "Social justice in the age of identity politics: redistribution, recognition, participation", Discussion Paper FS I 98-108 (1998); and D Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature*, Oxford, 2007.

<sup>21</sup> Ebbeson, "Introduction: Dimensions of Justice in Environmental Law" in Ebbeson and Okowa, *cit. supra* note 13, p. 1 and ff., p. 35; also Falk, "The Second Cycle of Ecological Urgency: An Environmental Justice Perspective" in Ebbeson and Okowa, *cit. supra* note 13, p. 39 and ff., p. 42; and Michelot (ed), *Équité et environnement*, Brussels, 2012.

<sup>22</sup> Eg, Schlosberg, *cit. supra* note 20; McDermott, Mahanty and Schreckenber, "Examining Equity: A Multidimensional Framework for Assessing Equity in Payments for Ecosystem Services" *Environmental Science and Policy*, 2013, Vol. 33, p. 416 and ff.; and Pascual et al, "Social Equity Matters in Payments for Ecosystem Services", *Bioscience* 2014, Vol. 64, p. 1027 and ff.

<sup>23</sup> McDermott, Mahanty and Schreckenber, *cit. supra* note 22, p. 419.

<sup>24</sup> Which has also been the case in relation to the Convention on Biological Diversity: Vermeylen and Walker, "Environmental Justice, Values and Biological Diversity: The San and Hoodia Benefit-sharing Agreement" in JoAnn Carmin; Julian Agyeman (eds), *Environmental inequalities beyond borders: local perspectives on global injustices*, Cambridge (Mass.), 2011. p. 105 and ff., pp. 107-108.

<sup>25</sup> This refers to the debate ignited by Rawls, *A Theory of Justice*, Oxford, 1971. See discussion in Schlosberg, *cit. supra* note 20, pp. 11-29.

resources characterised by vast inequalities in wealth.<sup>26</sup> This theoretical effort, however, has been increasingly challenged by the notion of justice as recognition. Recognition has called attention to social, cultural, symbolic and institutional causes underlying instances of unjust distribution that relate to diffuse reality of domination and oppression (patterns of non-recognition and disrespect of certain groups, stereotypical public and cultural representations of these groups, denial of their rights and denigration of their ways of life).<sup>27</sup> Both with regard to distribution and recognition, procedural justice is also factored in or implied: due process and fair procedures with fair opportunities for all parties involved are largely seen as a precondition for social and institutional recognition and fair distribution.<sup>28</sup> In effect, justice theorists across the board ultimately emphasize the crucial role of participation for evaluating trade-offs between different concepts of justice and other principles in a specific context, in the absence of universal ethical grounds.<sup>29</sup> Furthermore, the notion of "contextual" justice has been proposed in the ecosystem services literature<sup>30</sup> to capture a combination of pre-existing social, economic and political conditions that influence an actor's ability to enjoy all other (substantive and procedural) dimensions of justice. This notion arguably encompasses two sets of issues. On the one hand, it points to embedded power asymmetries, possibly also of a historical nature, that may not be captured by the dimension of justice as recognition. In this cases, it may be argued that corrective justice may be relevant, as the restoration of equality among parties by recognising that one party has suffered an injustice from the other and by establishing a direct correlation between the recognised injustice and its remedy.<sup>31</sup> In addition, contextual justice draws on theories of capabilities, that see justice as the distribution of opportunities for individuals and groups to freely pursue their chosen way of life and wellbeing.<sup>32</sup> The notion of contextual justice has, furthermore, the merit of emphasizing the mutual influences between all the above notions of justice it underpins.<sup>33</sup>

This general overview should be then related to the growing literature on benefit-sharing, in particular under the Nagoya Protocol, and justice.<sup>34</sup> In that content, recourse is made to another notion of justice - commutative justice as an arrangement that is mutually beneficial to the specific parties involved in a situation of exchange.<sup>35</sup> Also from that viewpoint, the

<sup>26</sup> Schroeder and Pogge, "Justice and the Convention on Biological Diversity", *Ethics and International Affairs* 2009, p. 267, pp. 274-275.

<sup>27</sup> This refers to the debate spurred by Young, *Justice and the Politics of Difference*, Princeton, 1990; Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition*, Abingdon, 1997; and Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Boston, 1995. See discussion in Schlosberg, *cit. supra* note 20, pp. 13-20.

<sup>28</sup> Ebbson, *cit. supra* note 21, p. 12. For a discussion of how participatory justice emerges in other theories of justice, see Schlosberg, *cit. supra* note 20, pp. 25-29.

<sup>29</sup> As synthesized in McDermott, Mahanty and Schreckenber, *cit. supra* note 22, pp. 419 and 424; see also discussion of reflexivity and engagement in Schlosberg, *cit. supra* note 20, pp. 187-212.

<sup>30</sup> McDermott, Mahanty and Schreckenber, *cit. supra* note 22, p. 320.

<sup>31</sup> Weinrib, "Corrective Justice in a Nutshell" *University of Toronto Law Journal* 2002, Vol. 52, p. 349 and ff.

<sup>32</sup> This refers to the debate around Nussbaum and Sen, *The Quality of Life*, Oxford, 1993; see discussion in Schlosberg, *cit. supra* note 20, pp. 29-34.

<sup>33</sup> See McDermott, Mahanty and Schreckenber, *cit. supra* note 22, p. 419; and image in Pascual et al, *cit. supra* note 22, p. 1028.

<sup>34</sup> See, for instance, the special issue of *Law, Environment and Development Journal*, 2013, Vol. 9, titled "Fairness in Biodiversity Politics and the Law: Interrogating the Nagoya Protocol" available at <http://www.lead-journal.org/2013-2.htm>

<sup>35</sup> Schroeder, "Benefit-sharing: It's Time for a Definition", *Journal of Medical Ethics* 2007, Vol. 33, p. 205 and ff., p. 207; McCool, *cit. supra* note 18, p. 9; Vermeylen and Walker, *cit. supra* note 24, pp. 108-109 and 122; and Schroeder and Pogge, *cit. supra* note 26; and Stoll in: "Access to Genetic Resources and Benefit-Sharing: Underlying Concepts and the Idea of Justice," in E Kamau and G Winter (eds), *Genetic Resources, Traditional*



need to reflect on the inter-connections among this and other dimensions of justice has been underlined with the aim of starting a debate on the relations between justice, equity and international law on benefit-sharing.<sup>36</sup>

The underlying contribution of this body of literature lies in identifying the limitations of the law in pursuing multiple dimensions of justice by genuinely factoring in the immense complexities of developing universal norms that are cognizant and apt to deal with local power dynamics and different cultural perspectives that make the pursuit of justice in context essentially a social process.<sup>37</sup> In this connection, however, when reference is made to the role of equity from a legal perspective, attention is paid to the municipal notion of equity in Anglo-American law,<sup>38</sup> whereas "in the context of international law, it is essential to rid one's mind of [such] specialized meaning."<sup>39</sup> Instead, it is necessary to connect the debate on justice with the specific notion of equity in international law with a view to complementing the identification of weaknesses in international law with a full understanding of its potential. As a step in that direction, the "commonly understood vocabulary" that has emerged from the brief discussion in this section will be used to unpack different dimensions of justice, identify any omissions, and tease out underlying assumptions<sup>40</sup> with regards to fair and equitable benefit-sharing under the Nagoya Protocol.

## ***2.2 Recognition, commutative justice, distributive justice and procedural justice in the Nagoya Protocol***

A reading of the title of the Nagoya Protocol suffices to deduce that the Nagoya Protocol aims at realizing *commutative* justice: it suggests, to put it crudely, that benefits are shared in exchange for access to genetic resources. As it may be intuitive that without access to genetic resources there could be no benefits to share, the overall construct of the Protocol is intended to regulate relations of exchange, and is premised on a bilateral relationship between a user and a provider country (through a notion of inter-State benefit-sharing).<sup>41</sup> But the preamble of the Protocol mysteriously 'acknowledges the linkage' between access and benefit-sharing,<sup>42</sup> suggesting that the relationship between the two may be more complicated than it appears at first. And in effect a more holistic reading of the Protocol indicates that more than a bilateral exchange is at stake. Other provisions in the Protocol indicate the intention to factor the production of global public goods that benefit the whole international community into ABS

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*Knowledge and the Law: Solutions for Access and Benefit Sharing*, London, 2009, p. 3; and "ABS, Justice, Pools and the Nagoya Protocol," in E Kamau and G Winter (eds), *Common Pools of Genetic Resources Equity and Innovation in International Biodiversity Law* (Abingdon, 2013), 305.

<sup>36</sup> McCool, *cit. supra* note 18, p. 9; Schroeder and Pogge, *cit. supra* note 26; Kleba, "Fair Biodiversity Politics with and beyond Rawls", *Law Environment and Development Journal* 2013, Vol. 9, p. 223 and ff.

<sup>37</sup> Vermeulen and Walker, *cit. supra* note 24, pp. 109 and 122

<sup>38</sup> McDermott, Mahanty and Schreckenber, *cit. supra* note 22, pp. 417-418; and Kleba, *cit. supra* note 36, p. 224.

<sup>39</sup> Thirlway, *The Sources of International Law*, Oxford, 2014, p. 104 and note 53.

<sup>40</sup> That was also the purpose of the framework proposed by McDermott, Mahanty and Schreckenber, *cit. supra* note 22, p. 417.

<sup>41</sup> This is particularly the case of Article 6(3): see Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 157-169. See the critique from a justice perspective of the bilateral approach of the Nagoya Protocol in De Jonge, "Towards a Fair and Equitable ABS Regime: Is Nagoya Leading us in the Right Direction?," *Law Environment and Development Journal* 2013, Vol. 9, p. 243 and ff.

<sup>42</sup> Nagoya Protocol 8th preambular para (unnumbered in the original: see Morgera, Tsioumani and Buck, *cit. supra* note 9, pp. 387-389.

transactions,<sup>43</sup> such as the contribution of benefit-sharing to the conservation and sustainable use of biological diversity,<sup>44</sup> but also the realization of sustainable development broadly conceived, and contributions to food security, public health and the fight against climate change.<sup>45</sup> According to a teleological interpretation of the Protocol, therefore, the commutative justice pursued through benefit-sharing is one that at the same time foresees a bilateral exchange and an underlying, global exchange. In that connection, commutative justice serves to reward (and thereby recognise), including through technology transfer,<sup>46</sup> the contributions of provider countries as ecosystem stewards<sup>47</sup> and suppliers of unique materials needed to advance scientific knowledge and environmental protection to the benefit of humanity as a whole.<sup>48</sup>

Commutative justice is also tightly linked to justice as *recognition* in the intra-State dimension of benefit-sharing, enshrined in the Protocol with regards to indigenous and local communities.<sup>49</sup> It can be argued that the innovative provisions of the Protocol on benefit-sharing with indigenous and local communities serve to recognise and reward these communities for their contributions as ecosystem stewards with respect to the genetic resources held by them and for sharing their traditional knowledge in ways that benefit humanity as a whole in terms of conservation and sustainable use of biodiversity.<sup>50</sup> In addition, the Protocol contains other provisions embodying recognition, such as the acknowledgement of communities' worldview that genetic resources and traditional knowledge are inseparable,<sup>51</sup> although they are regulated separately under the Protocol. The latter seems to indicate conceptual and political difficulties in embodying indigenous and local communities' understanding into the operative text of the treaty. Some of the benefits non-exhaustively listed in the Nagoya Protocol may further contribute to recognition, such as the joint ownership of intellectual property rights<sup>52</sup> and what is laconically termed "social recognition."<sup>53</sup> Furthermore, the Protocol contains an obligation for Parties to take into consideration communities' customary laws, protocols and procedures,<sup>54</sup> and a qualified prohibition of restricting customary uses and exchanges of genetic resources among communities.<sup>55</sup> This provision has been hailed as the first occurrence in international environmental law of inter-cultural legal pluralism,<sup>56</sup> but has also raised concerns about the

<sup>43</sup> Morgera, "Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law" EJIL, 2012, Vol. 23, p. 743 and ff.

<sup>44</sup> Which is enshrined in the objective of the Protocol (Article 1).

<sup>45</sup> Nagoya Protocol preambular paras. 7 and 14.

<sup>46</sup> Nagoya Protocol Article 23; and Morgera, Tsioumani and Buck, *cit. supra* note 9, pp. 314-321.

<sup>47</sup> Under the CBD guidelines on the ecosystem approach, benefit-sharing is seen as a way to reward ecosystem stewards: see Principles of the Ecosystem Approach (CBD Decision V/6 (2000)), para 9 and discussion in Morgera, Conceptualizing Benefit-sharing, *cit. supra* note 10, pp. 22-25. This is also the point made by Schroeder and Pogge, *cit. supra* note 26, p. 276.

<sup>48</sup> This is recognized in particular in Nagoya Protocol Article 8(a). See Morgera, Tsioumani and Buck, *cit. supra* note 9, pp. 179-184.

<sup>49</sup> Nagoya Protocol Articles 5(2), 5(4) and 7.

<sup>50</sup> This understanding derives from tracing back the origin of these provisions in the Protocol to Article 8(j) of the CBD and the CBD decisions on the ecosystem approach (CBD Decision V/6 (2000) and CBD Decision VII/11 (2004)); see discussion in Morgera, Conceptualizing, *cit. supra* note 10, p. 24.

<sup>51</sup> Nagoya Protocol preambular paragraph 22.

<sup>52</sup> Nagoya Protocol Annex, 1(j) and 2(q).

<sup>53</sup> Nagoya Protocol Annex 2(p).

<sup>54</sup> Nagoya Protocol Article 12(1); see Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 217-227.

<sup>55</sup> Nagoya Protocol Article 12(4); see Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 227-228.

<sup>56</sup> Bavikatte and Robinson, "Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing" *Law, Environment and Development*, 2011, Vol. 7, p. 35 and ff.

'magnitude of challenges for a cosmopolitan and intercultural legal order that does justice to the means of knowing of indigenous peoples' on the basis of terms agreed in international law that are 'pre-arranged and confined by hegemonic forms of scientific knowledge and policy visions.'<sup>57</sup> In this specific regard, then, international law cannot simply be "imposed but must be negotiated, tested and modulated in response to the realities of differing worldviews, value systems and legal visions."<sup>58</sup>

Fundamentally, however, the question of recognition with regards to indigenous and local communities under the Protocol rests, at the very least, on the recognition of their rights under international human rights law.<sup>59</sup> The Protocol text is at best ambivalent in that respect. Its preamble points to the relevance of the UN Declaration of the Rights of Indigenous Peoples and to Parties' commitment not to interpret the Protocol in ways that can diminish or extinguish their rights.<sup>60</sup> And another provision requires that the provisions of the Protocol do not affect obligations deriving from other international agreements, except where the exercise of those obligations would cause a serious damage or threat to biological diversity.<sup>61</sup> But the operative provisions that are most relevant with regards to human rights are very heavily qualified, in particular when questions of ownership of genetic resources are at stake.<sup>62</sup> An interpretation of these provisions based on systemic integration between the Protocol and relevant, applicable international human rights instruments - which is also called for by the Protocol itself<sup>63</sup> - could, at least in theory,<sup>64</sup> serve to tackle these concerns. Systemic integration thus appears an indispensable ingredient for intra-State benefit-sharing to contribute to justice as recognition, as will be discussed in more detail in section 3 below. That said, it cannot be over-emphasized that the contextual application of an interpretation based on systematic integration remains fraught with difficulties as the generalized version of justice embodied in an international instrument encounters diversity of values, experiences and cultures that cannot be reduced to stereotyped notions of what communities and traditional knowledge are.<sup>65</sup>

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<sup>57</sup> Kleba and Rangnekar, "Introduction," *Law Environment and Development Journal* 2013, Vol. 9, p. 98 and ff, p. 103-104 referring to Vermeylen, "The Nagoya Protocol and Customary Law: The Paradox of Narratives in the Law", *Law Environment and Development Journal* 2013, Vol. 9, p. 185 and ff.; and Brand and Vadrot, "Epistemic Selectivities and the Valorisation of Nature: The Cases of the Nagoya Protocol and the Intergovernmental Science-Policy Platform for Biodiversity and Ecosystem Services", *Law Environment and Development Journal* 2013, Vol. 9, p. 204 and ff.

<sup>58</sup> Tobin, "Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in the Protection of Indigenous Peoples' Resources and Knowledge Rights," *Law Environment and Development Journal* 2013, Vol. 9, p. 144 and ff, p. 162.

<sup>59</sup> Savaresi, "The International Human Rights Law Implications of the Nagoya Protocol," in Morgera, Buck and Tsioumani, *2010 Nagoya Protocol*, *cit. supra* note 9, p. 53 and ff.; Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 382-384.

<sup>60</sup> Nagoya Protocol preambular paras. 26 and 27.

<sup>61</sup> Nagoya Protocol Article 4(1).

<sup>62</sup> Nagoya Protocol Articles 5(2) and 6(2) references to 'established rights'. See also Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights," *Expert Mechanism on the Rights of Indigenous Peoples*, 4th session, Geneva (July 2011).

<sup>63</sup> Nagoya Protocol Article 4(3).

<sup>64</sup> Note International Law Commission, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law" (2006) UN Doc A/CN.4/L.682, paras 277-282, cautioning against treaty clauses leaving it to a future "law-applier" to ensure mutual supportiveness because of a danger of structural bias.

<sup>65</sup> Vermeylen and Walker, *cit. supra* note 24, p. 107.

With regards to *distributive* justice, it has been argued that benefit-sharing is not only about granting access to valued goods, such as the products or profits derived from research and development of genetic resources and traditional knowledge,<sup>66</sup> but also the fulfilment of basic needs.<sup>67</sup> And in this regard the Protocol not only makes reference to provider countries and communities holding traditional knowledge, but also to the fulfilment of basic needs. Some of the non-monetary benefits listed in the Protocol could address the basic needs within provider countries and relevant communities: contributions to the local economy, food and livelihoods security, and research directed towards priority needs, taking into account domestic uses of genetic resources in provider countries.<sup>68</sup> In addition, the preamble makes reference to the potential of ABS transactions to contribute to global needs with regard to scientific progress and innovation, poverty reduction, food security and public health, as well as the importance of technology transfer and cooperation for adding value to genetic resources in developing countries and building their research capacities,<sup>69</sup> which are potentially benefits of a global nature.<sup>70</sup> The operational provisions of the Protocol on special considerations are also relevant from a distributive justice perspective. Parties are to consider expeditious benefit-sharing towards those in ‘need,’ in particular developing countries, in the context of health-related emergencies, and strike a balance between the Protocol’s bilateral ABS architecture and the continuation of exchanges of genetic resources for food and agriculture, with a view to contributing ultimately to food security.<sup>71</sup> Taken together, these are multiple elements of distributive justice, which concern both the countries and communities directly involved in an ABS deal, and in some cases much broader, if not global, constituencies. Admittedly, however, these obligations have been framed so as to leave a significant amount of discretion with regards to their implementation.

All these substantive dimensions of justice compressed within the legal concept of benefit-sharing ultimately rely for their realization on *procedural* justice. In that regard, it must be noted that the provisions of the Protocol on prior informed consent appear significantly concerned with ensuring procedural justice towards those seeking access to resources,<sup>72</sup> and may be considered “thin” from a justice perspective.<sup>73</sup> In addition, the language concerning the prior informed consent of indigenous and local communities is heavily qualified.<sup>74</sup> That said, these provisions are the first, explicit treaty language in international law on prior informed consent in relation to traditional knowledge and genetic resources held by

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<sup>66</sup> This is notably the case of the monetary benefits listed in the Annex to the Nagoya Protocol, under 1 such as payment of royalties or joint ventures, but also of non-monetary benefits such as the sharing of research and development results, and access to scientific information relevant to the conservation and sustainable use of biodiversity: Nagoya Protocol Annex, 2(a) and (k).

<sup>67</sup> Schroeder and Pogge, *cit. supra* note 26, p. 277.

<sup>68</sup> Nagoya Protocol, Annex 2(l), (o) and (m).

<sup>69</sup> Nagoya Protocol preambular recitals 5, 7 and 14.

<sup>70</sup> For a skeptic reading of this language in the Protocol from a distributive justice perspective, see generally Kleba, *cit. supra* note 36.

<sup>71</sup> Nagoya Protocol Article 8(b-c) and Morgera, Tsioumani and Buck, *Unraveling, cit. supra* note 9, pp. 185-191; and Wilke, “A Trace of Distributive Justice in the Nagoya Protocol: Rules for Health Emergencies,” contribution to workshop on “Fairness and Bio-Knowledge”, University of Warwick, Coventry, 16-17 June 2011.

<sup>72</sup> Nagoya Protocol Article 6(3); and Morgera, Tsioumani and Buck, *Unraveling, cit. supra* note 9, p. 157-169.

<sup>73</sup> Kleba and Rangnekar, *cit. supra* note 57, p. 102.

<sup>74</sup> Nagoya Protocol Article 6(2) and 7; and Morgera, Tsioumani and Buck, *Unraveling, cit. supra* note 9, pp. 145-156 and 170-174.

indigenous and local communities.<sup>75</sup> Furthermore, the Nagoya Protocol appears to assume that procedural justice in determining the specific details of benefit-sharing among the parties to the exchange will permeate the establishment of mutually agreed terms (MAT)<sup>76</sup> - private-law contracts. The Protocol itself does not provide, however, any criteria in that regard either at the stage of the regulation of MAT negotiations in domestic ABS frameworks, their establishment or their enforcement through international cooperation.<sup>77</sup> Much is thus left to contractual freedom, and it remains to be seen if and how State Parties to the Protocol will take the opportunity to limit private parties' freedom in this regard. The Protocol, though, requires Parties individually and collectively (through the Protocol's governing body) to explore model contractual clauses<sup>78</sup> and voluntary instruments,<sup>79</sup> as well as awareness-raising<sup>80</sup> and training activities,<sup>81</sup> that may provide a bottom-up source of inspiration for fair and equitable benefit-sharing contracts.

Even if this potentially participatory process for determining contextually fair contractual provisions can be seen as a promising way forward, particularly in light of the variety of sectors involved in ABS and situations of indigenous and local communities, procedural justice remains a particularly challenging goal when one considers the well-documented inequality in bargaining power that characterizes ABS transactions. These are due to asymmetries in technological capacities among user and provider countries, unequal access to information on scientific and technological value and the commercial potential of genetic resources among those seeking and those authorised to grant access.<sup>82</sup> And this is in addition to unequal access to resources and the knowledge (including legal knowledge and legal assistance) needed to negotiate ABS transactions.<sup>83</sup> These factors clearly point to the inter-linkages between procedural and contextual justice, whose relevance in the Nagoya Protocol is discussed next.

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<sup>75</sup> The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, considered the recognition of the right to prior informed consent over traditional knowledge as 'positive aspects' of the adoption of the Protocol: Human Rights Council, "Follow-up report on indigenous peoples," (2012) UN Doc A/HRC/C/21/55, para. 59.

<sup>76</sup> Nagoya Protocol Article 5(1-2 and 5) and preambular para. 10.

<sup>77</sup> The Nagoya Protocol provisions concerning MAT are invariably of a procedural character: Article 5, Article 6(3)(g); Article 15 and Article 18. Some reference to substantive guarantees only transpires in the Protocol provision on supporting indigenous and local communities in securing fairness and equity when negotiating MAT (Nagoya Protocol Article 12(3)(b) and in more timid way on capacity building for developing countries (Nagoya Protocol Article 22(4)(b) and specific reference to equity in voluntary terms in Nagoya Protocol Article 22(5)(b)).

<sup>78</sup> Nagoya Protocol Article 19.

<sup>79</sup> Nagoya Protocol Article 20.

<sup>80</sup> Nagoya Protocol Article 21.

<sup>81</sup> Nagoya Protocol Article 22(4)(c) and 22(5)(b).

<sup>82</sup> Stoll, "ABS, Justice, Pools," *cit. supra* note 35, p. 309; and Stoll, "Access to Genetic Resources and Benefit-Sharing," *cit. supra* note 35, p. 12.

<sup>83</sup> Cariño et al, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization: Background and Analysis* (The Berne Declaration, Bread for the World, Ecoropa, Tebtebba and Third World Network, 2013), accessed 30 November 2013, <[www.evb.ch/cm\\_data/Nagoya\\_Protocol\\_complete\\_final.pdf](http://www.evb.ch/cm_data/Nagoya_Protocol_complete_final.pdf)>, 5. On the North-South asymmetries and other conflicting objectives behind the ABS provisions of the CBD, see generally De Jonge, "What Is Fair and Equitable Benefit-Sharing?" *Journal of Agricultural and Environmental Ethics* 2011, Vol. 24, p. 127 and ff.; and De Jonge and Louwaars, "The Diversity of Principles Underlying the Concept of Benefit Sharing," in Kamau and Winter, *Genetic Resources, Traditional Knowledge and the Law*, *cit. supra* note 35, p. 38 and ff.

### 2.3 Missing the contextual justice dimension?

Whether the Nagoya Protocol, and the legal concept of benefit-sharing enshrined in it, also comprise a dimension of *contextual* justice is a question that will be addressed by focusing in turn on capabilities, corrective justice and the need to address other structural causes of injustice.

With regard to capabilities, the Protocol provisions on capacity building,<sup>84</sup> funding<sup>85</sup> and technology transfer<sup>86</sup> appear relevant. In particular, it should be noted that the Protocol addresses capacity building in detail, linking it to implementation and compliance, the negotiation of MAT, the development and enforcement of domestic ABS frameworks, and the development of endogenous research capabilities.<sup>87</sup> In addition, the Protocol not only addresses this question at the inter-State level, but also specifically calls upon State Parties to facilitate the involvement of indigenous and local communities in cooperation on capacity-building<sup>88</sup> and support the self-identification of their capacity needs and priorities.<sup>89</sup> Vested interests, however, may emerge in practice when user countries act as providers of financial and technological assistance as well as capacity-building.<sup>90</sup> User countries providing such assistance could create conditions in provider countries that unduly favour the access side of the exchange, particularly when provider countries find themselves dependent on external support or are offered ready-made solutions that may not fit their particular circumstances.<sup>91</sup> It remains to be seen in future practice whether the involvement of multilateral bodies providing guidance<sup>92</sup> or channelling resources<sup>93</sup> may be able to balance procedural and contextual justice in this regard.

*Corrective* justice could also have played a role in the Nagoya Protocol, and benefit-sharing could have served as compensation for a historical asymmetry between provider and user countries. Colonialism fostered the collection and appropriation of cultural and natural heritage into museums, zoological and botanical gardens and other ex situ collections in colonizing countries.<sup>94</sup> Colonization, mandatory assimilation, relocation policies, and globalization forces have also resulted in the marginalization of indigenous peoples and local communities and the erosion of their cultures, governance and traditional knowledge

<sup>84</sup> Nagoya Protocol Article 22, particularly 22(4)(b) and (5)(b), (i) and (j). See Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 305-313. From a justice perspective, see Kleba, *cit. supra* note 36, p. 235.

<sup>85</sup> Nagoya Protocol Article 25. Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 325-332.

<sup>86</sup> Nagoya Protocol, Article 23. Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 314-21 and 325-32.

<sup>87</sup> Nagoya Protocol Article 22(4).

<sup>88</sup> Nagoya Protocol Article 22(1).

<sup>89</sup> Nagoya Protocol Article 22(3).

<sup>90</sup> E Morgera, "The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test" *Cambridge Yearbook of European Legal Studies* 2014, Vol. 16, p. 109 and ff.

<sup>91</sup> Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, p. 313.

<sup>92</sup> For instance, the governing body of the Nagoya Protocol: see the Strategic Framework for Capacity-Building and Development to Support the Effective Implementation of the Nagoya Protocol on Access and Benefit-Sharing in Decision NP-1/8 (2014), Annex.

<sup>93</sup> The Global Environment Facility: see discussion in Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 327-329.

<sup>94</sup> Cariño et al, *Nagoya Protocol*, *cit. supra* note 83, 2.

systems.<sup>95</sup> During the negotiations of the Nagoya Protocol, the African Group and civil society argued that benefit-sharing under the Protocol should also have addressed historical situations, with a view to expanding the range of situations in which the benefit-sharing obligations of the Protocol would apply, and addressing possible loopholes related to existing *ex situ* collections developed countries' gene-banks. For these reasons the negotiations on the temporal scope of the Protocol were particularly contentious.<sup>96</sup> In the end, most commentators agree that the Protocol does not apply to genetic resources acquired prior to the entry into force of the Convention.<sup>97</sup> But it remains debatable whether benefit-sharing obligations arise under the Protocol for new or continuing uses of genetic resources and traditional knowledge acquired in the interim period between the entry into force of the CBD and that of the Protocol,<sup>98</sup> which could provide some corrective justice for more recent appropriations of genetic resources and traditional knowledge. Until that is clarified, by a decision of the Protocol governing body or its compliance mechanism for instance, the role of corrective justice under the Protocol remains an open question.

Finally, it could be asked whether the Nagoya Protocol also attempts to tackle other preconditions determining an uneven playing field in the ABS context, and in this case certain systems created in other areas of international law can be seen as determinant of unequal power relationships. As has already been noted by Schroeder and Pogge with regard to the CBD,<sup>99</sup> there is no attempt in the Protocol to trigger a reform of the global economic order concerning bio-based research, and in that vein benefit-sharing under the Nagoya Protocol is seen as a "very partial remedy."<sup>100</sup> The most glaring example of this approach can be found in the minimalistic treatment of intellectual property rights (IPRs) under the Protocol. IPRs to improved germplasm<sup>101</sup> have enabled private IPR holders to enforce their rights in developed countries, whereas developing countries' claims based on the international notion of national sovereignty over genetic resources encounter significant barriers in foreign jurisdictions where the IPR holders are based. This scenario is further complicated when (ab)use of the IPR system has resulted in the misappropriation of traditional knowledge of indigenous and local communities.<sup>102</sup> This asymmetry is likely to worsen in the face of the growth and increasing dominance of multinational corporations in the biotech sector.<sup>103</sup> Against this contextual situation that is largely seen as unjust,<sup>104</sup> the

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<sup>95</sup> For a comprehensive account of the threats and challenges that indigenous peoples face and the response of the international community, see UN Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples* (UN, 2009), accessed 6 March 2014, <[www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf)>.

<sup>96</sup> Nagoya Protocol Article 3; and Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 77-80.

<sup>97</sup> The Protocol reference to 'genetic resources within the scope of Article 15 of the Convention' (Article 3) presupposes the existence of a Party to the Convention, ie, that the Convention has entered into force. That being said, the possibility cannot be excluded that this discussion may be reopened in the context of Nagoya Protocol Article 10: see Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 201-202.

<sup>98</sup> Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 77-80.

<sup>99</sup> Schroeder and Pogge, *cit. supra* note 26, p. 280.

<sup>100</sup> *Ibid.*

<sup>101</sup> Petit et al, *Why Governments Can't Make Policy: The Case of Plant Genetic Resources in the International Arena*, International Potato Center, 2001, pp. 10 and 19.

<sup>102</sup> For a discussion from a justice perspective, see Cullet, "Environmental Justice in the Use, Knowledge and Exploitation of Genetic Resources," in Ebbeson and Okowa, *cit. supra* note 13, p. 371 and ff.

<sup>103</sup> Oberthür and Rosendal, "Conclusions," in Oberthür and Rosendal (eds), *Global Governance of Genetic Resources: Access and Benefit Sharing After the Nagoya Protocol*, Abingdon, 2013, p. 231 and ff., p. 241.

<sup>104</sup> See the vast majority of countries in the international community arguing for amendment to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights in this regard, discussed by Pavoni, "The

Nagoya Protocol avoids almost all reference to IPRs, thus losing a ‘golden opportunity’ to provide an authoritative mandate for its Parties to adopt national measures that may depart from the relevant law of the World Trade Organization (WTO) and afford protection in the context of a possible WTO law dispute.<sup>105</sup>

While benefit-sharing under the Nagoya Protocol is certainly only a partial response, it cannot be excluded that it may still work as a pragmatic, interim solution having the potential to gradually erode structural conditions of injustice from the inside. Systematically applied in light of the interpretative opportunities identified in this section, benefit-sharing could set off virtuous dynamics nurtured by positive, mutual interactions between justice of exchange and recognition, as well as distributive and procedural justice. At the inter-State level, provider countries could truly benefit from ABS transactions in the long term, if they are recognised and rewarded for their global contributions to the conservation of genetic resources and gradually build their own biotech capacities through their bilateral collaborations with user countries, as well as contributing together with user countries to the realization of other global goals such as poverty reduction, health protection and food security. And at the intra-State level, culturally appropriate and endogenously determined<sup>106</sup> benefits shared with indigenous and local communities that allow access to their genetic resources and traditional knowledge according to their values, norms and decision-making processes could help better recognize and realize these communities' rights to the lands and natural resources they traditionally use and occupy, while improving material conditions for their livelihoods and self-determination.

The necessary and appropriate conditions for this vision to materialize remain to be fully identified. As are the opportunities and risks with regards to potential and actual global benefits that may arise from bilateral exchanges, or the identification (and risks of exclusion) of the beneficiaries of specific bilateral exchange.<sup>107</sup> To that end, the instruments that international law offers are to be better understood. In particular, it appears necessary to rely on general international law to fully appreciate the opportunities and limitations of the Nagoya Protocol with regard to justice. So the second argument put forward here is that the correspondence between different notions of justice and different understandings of the role of equity in international law needs clarification.

### 3. Revisiting the legal debate on equity

The questions that emerged from unpacking the different dimensions of justice pursued by benefit-sharing under the Nagoya Protocol will now be addressed from a more traditional legal perspective. In this context, equity is commonly considered as a general principle of

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Nagoya Protocol and WTO Law,” in Morgera, Buck and Tsioumani, *cit. supra* note 9, p. 185 and ff., p. 209 (fn 117).

<sup>105</sup> *Ibid*, p. 212.

<sup>106</sup> Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname: Interpretation of the Judgment*, 12 August 2008, paras 25-27; Refinement and elaboration of the ecosystem approach, CBD Decision VII/11 (2004), Annex, para 1(8) and 2(1); and Tkarihwaïé:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD Decision X/42 (2010), Annex, paragraph 14.

<sup>107</sup> These questions are central to the investigations carried out under the BENELEX project: [www.benelex.ed.ac.uk](http://www.benelex.ed.ac.uk).



international law<sup>108</sup> (and therefore applicable even when it is not specifically invoked in the text of a certain treaty) that helps to address the inflexibilities of law when facing the specificities of individual cases.<sup>109</sup> Admittedly, the precise meaning and actual impact of equity in international law remains a matter of debate, but it seems useful to boil down theoretical questions to a practical consideration: equity is recognised as 'part and parcel of legal reasoning,' whose logical necessity resides in a 'shared approach to a general need of a strictly legal nature.'<sup>110</sup> This serves to underline two key characteristics of equity in international law. First, it serves to provide 'new perspectives and potentially fresh solutions to tricky legal problems' to the benefit of all States, not just to the advantage of - and sometimes to the disadvantage of - powerful States.<sup>111</sup> Second, equity is found *in* or derived from applicable international law, not outside it:<sup>112</sup> in other words, non-legal elements of justice (or subjective notions of justice)<sup>113</sup> cannot enter explicitly legal reasoning.<sup>114</sup> For this reason, the above attempt to identify interpretative hooks for discussing different notions of justice in a treaty appears indispensable for negotiating concrete understandings of justice by relying on international law.

Equity in international law is often understood as a series of equitable principles that allow the balancing of competing rights and interests at stake in a specific case,<sup>115</sup> with a view to integrating ideas of justice into a relationship regulated by international law.<sup>116</sup> The fact that benefit-sharing is now consistently referred as "fair and equitable benefit-sharing" in international law<sup>117</sup> seems to indicate that it is to be understood as such an equitable principle. Although fairness and equity are usually used interchangeably in international environmental law,<sup>118</sup> it is suggested that this also needs some unpacking. Following Francioni's suggestion, it seems useful to draw some considerations from the evolution of the similarly worded notion of "fair and equitable treatment" in international investment law,<sup>119</sup> which has been subject to extensive international adjudication. In particular, it should be highlighted that this standard has become a self-standing, powerful tool in balancing the interests of private investors and host governments. And, in the connection, it has been fleshed out as encapsulating "substantive points of contact" with international human rights law in relation to equity, namely non-discrimination, due diligence, procedural fairness, and

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<sup>108</sup> Eg ICJ, North Sea Continental Shelf Cases, para 85; Thirlway, *cit. supra* note 37, p. 78.

<sup>109</sup> Eg Akehurst, "Equity and General Principles of Law" ICLQ, 1976, Vol. 25, p. 801 and ff.

<sup>110</sup> Thirlway, *cit. supra* note 39, pp. 99 and 104.

<sup>111</sup> Burke, *An Equitable Framework for Humanitarian Intervention*, Oxford, 2014, pp. 250- 251.

<sup>112</sup> Thirlway, *cit. supra* note 39, p. 106; ICJ, North Sea Continental Shelf Cases, para 88.

<sup>113</sup> The understanding of equity as decisions to be taken *ex aequo et bono* (that is, "in good conscience" on the basis of elements external to the law) subject to the explicit consent of the parties involved in light of ICJ Statute Article 38(2); and Kotzur, "Ex Aequo et Bono" in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2012, online edition.

<sup>114</sup> ICJ, Frontier Dispute (Burkina Faso/Republic of Mali); Arajärvi, "The Lines Begin to Blur? Opinio Iuris and the Moralization of Customary International Law" EUI Working Paper, SSRN, 2011; and Thirlway, *cit. supra* note 39, p. 86.

<sup>115</sup> Burke, *cit. supra* note 111, pp. 197-198.

<sup>116</sup> Klager, *Fair and Equitable Treatment in International Investment Law*, Cambridge, 2013, p. 130.

<sup>117</sup> Anaya, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples" (2010) UN Doc A/HRC/15/37, paras. 67 and 76-78, who affirmed that 'the only clear international standard applicable to benefit-sharing is that such sharing must be "fair and equitable".'

<sup>118</sup> Eg, Soltau, *Fairness in International Climate Change Law and Policy*, Oxford, 2009, p. 141.

<sup>119</sup> Francioni, "International Law for Biotechnology: Basic Principles" in Francioni and Scovazzi (eds), *Biotechnology and International Law*, Oxford, 2006, p. 3 and ff., p. 24.

proportionality.<sup>120</sup> And as the treaties referring to fair and equitable benefit-sharing do not elaborate on what equity and fairness mean in their specific contexts, referring back to general concepts of equity and fairness as interpreted by international tribunals is a necessary step,<sup>121</sup> particularly when they appear to have validity across different areas of international law.

For present purposes, attention is paid to how the interpretation of fair and equitable treatment under international investment law links back to the theories of justice surveyed at the beginning of this paper. To that end, building upon Klager's insightful interpretation<sup>122</sup> of Franck's seminal work on equity in international law,<sup>123</sup> it can be argued that the use of the two expressions "fair and equitable" serves to make explicit both procedural dimensions of justice (fairness) that determine the legitimacy of certain courses of action, as well as substantive dimensions of justice (equity).<sup>124</sup> And while, as discussed above, these are inextricably linked notions of justice, from a legal perspective they also point to an inherent tension: fairness as procedural justice supports stability within the legal system (predictable and clear procedures), whereas equity as substantive justice tends towards change (recognition or enhanced realization of rights, (re-)allocation of power over resources).<sup>125</sup> This tension can only be resolved through a "fairness discourse" - a process of negotiation "premised on the moderate scarcity of world's resources and existence of a global community sharing some basic perceptions of what is unconditionally unfair" and that at the very least allows for "meaningful scrutiny of whether or not a certain conduct is ultimately fair."<sup>126</sup> Within this discourse, two conditions apply for determining what would be unconditionally unfair. First, a no-trumping condition, whereby no participant can make claims that automatically prevail over the claims made by other participants; and this applies also to claims based on national sovereignty.<sup>127</sup> The latter is particularly important as it overrides the presumption of freedom of action by States.<sup>128</sup> Second, a maximum condition, whereby inequalities in the substantive outcome of the discourse (so, the sharing of benefits) are only justifiable if they provide advantages to all participants.<sup>129</sup> In the words of Klager, therefore, the use of the expression "fair and equitable" is "an invitation by the international law-makers to proceed by way of a fairness discourse based on a Socratic method."<sup>130</sup> This finding resonates with the concept of fair and equitable benefit-sharing emerging from international biodiversity law as a concerted and dialogic process aimed at reaching consensus in identifying what benefits are at stake and how they can be allocated among different State and non-State actors.<sup>131</sup> It also chimes with the different theories of justice discussed above,

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<sup>120</sup> Dupuy and Viñuales, "Human Rights and Investment Disciplines: Integration in Progress" in Burgenberg, Griebel and Reinisch (eds), *International Investment Law: A Handbook*, Oxford, 2015.

<sup>121</sup> Sands and Peel with Fabra and MacKenzie, *Principles of International Environmental Law*, Cambridge, 2012, p. 119.

<sup>122</sup> Klager, *cit. supra* note 116, pp. 141-152.

<sup>123</sup> Franck, *Fairness in International Law and Institutions*, Oxford, 1995.

<sup>124</sup> Klager, *cit. supra* note 116, p. 141.

<sup>125</sup> *Ibid*, pp. 121, 130, 123.

<sup>126</sup> *Ibid*, p. 144.

<sup>127</sup> *Ibid*, p. 163.

<sup>128</sup> Burke, *cit. supra* note 111, p. 250.

<sup>129</sup> Klager, *cit. supra* note 116, p. 145.

<sup>130</sup> *Ibid*, p. 146.

<sup>131</sup> Morgera, Conceptualizing, *cit. supra* note 10, p. 43.

which appear to converge on the need for self-reflexive and participatory engagement with different concepts of justice and possible trade-offs among them.<sup>132</sup>

Going back to a strictly legal perspective, the fairness discourse in international law may either be dispute-specific (adjudication through interpretation of existing rules) or normative and general (law-making).<sup>133</sup> It therefore links to the emerging general principle of mutual supportiveness, which in its interpretative dimension basically encapsulates the international customary rule on treaty interpretation of systematic integration,<sup>134</sup> but also adds a law-making dimension operating across different sub-systems of international law.<sup>135</sup> With regards to the former, as equitable principles are open-textured,<sup>136</sup> even when they are included in the text of a treaty, treaty language alone does not suffice to determine their exact meaning. Rather, when further support cannot be found in the terms of the specific legal instrument at stake, reference to other sources of international law is necessary to give more specific content to equitable principles. In other words, equitable principles are filled with content by establishing a linkage with different international legal sub-systems (biodiversity law, human rights law, economic law, etc) and as such, play a key role in preserving the unity of the international legal order.<sup>137</sup> In addition, as international law sub-systems are in constant evolution and the inter-linkages among them also contribute to their continuous adapting to changed circumstances, equitable principles are also evolutionary.<sup>138</sup> That said, systemic integration has its limitations, both in terms of the conditions of its application (which needs to be determined on a case-by-case basis taking into account a 'substantial legal relationship' between the norm to be interpreted and other norms, as well as the extent to which one norm may influence the interpretation of another)<sup>139</sup> and in terms of outputs (a coherent interpretation of different sets of obligations may be virtually impossible in a specific case).<sup>140</sup> More fundamentally, it is an *ex post* approach that leaves significant discretion to the interpreter.<sup>141</sup> The function of equity as a fairness discourse in terms of law-making appears therefore to be a necessary, but significantly less explored, avenue.

Against this background, the traditional classification of the functions of equity in international law will be interrogated as fairness discourse. Three functions are conventionally ascribed to equity.<sup>142</sup> First, equity operates *infra legem* (or within the law),

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<sup>132</sup> Schlosberg, *cit. supra* note 20, pp. 184-196; McDermott, Mahanty and Schreckenber, *cit. supra* note 22, p. 419 referring to Fraser's "participatory parity", Sen's "public reasoning" and Rawls' "overlapping consensus".

<sup>133</sup> Klager, *cit. supra* note 111, p. 145.

<sup>134</sup> VCLT Article 31(3)(c): see International Law Commission, *cit. supra* note 56, paras 37 ff and paras. 410 and ff; C McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", ICLQ, 2005, Vol. 54, p. 279 and ff.

<sup>135</sup> Pavoni, "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the WTO-and-Competing-Regimes Debate?", EJIL, 2010, Vol. 21, p. 649 and ff.

<sup>136</sup> United States-Import Prohibition on Certain Shrimp and Shrimp Products, Appellate Body Report (adopted 6 November 1998) WT/DS58/AB/R, para 130.

<sup>137</sup> Wolfrum, "General International Law (Principles, Rules and Standards)" in Wolfrum (ed), *Max Planck Encyclopedia*, *cit. supra* note 101, para. 63.

<sup>138</sup> As it allow for the consideration of its normative environment as it stands at the time of application, not as it stood at an earlier time: Klager, *cit. supra* note 116, p. 109; C McLachlan, *cit. supra* note 134, pp. 302 and 312.

<sup>139</sup> These challenges are highlighted by Dupuy and Viñuales, *cit. supra* note 120.

<sup>140</sup> Simma, "Foreign Investment Arbitration: A Place for Human Rights?", ICLQ, 2011, Vol. 60, p. 573 and ff., p. 591.

<sup>141</sup> *Ibid.*

<sup>142</sup> ICJ, North Sea Continental Shelf case, para. 88; ICJ, Frontier Dispute (Burkina Faso/Republic of Mali), para. 28.

when it affects the interpretation of existing rules particularly where these leave a margin of discretion to authorities. Second, it operates *praeter legem* (or beyond the law), when it creatively fills gaps in the law. And, third, exceptionally, it operates *contra legem* (or against the law), when it serves to correct or derogate from applicable law,<sup>143</sup> and possibly also to modernize law in the light of changed circumstances.<sup>144</sup> The distinction is easier in theory than in practice, partly because legal scholarship on equity remains limited and partly because, for the greatest part, the academic debate has conceived of equity from an adjudication perspective.<sup>145</sup> Even within the latter perspective, distinguishing between these functions is not straightforward because they 'merge into one another to some extent.'<sup>146</sup> In addition, an extensive understanding of legal interpretation could cover all functions of equity, downplaying more creative uses of equity for the progressive development of international law. Nonetheless, this distinction may be helpful to engage with in order to be more alert to the slightest nuance along the continuum between the interpretation, integration, correction and making of rules of international law as they progressively develop.<sup>147</sup>

In the case of benefit-sharing under the CBD and the Nagoya Protocol (but also in the context of other international agreements<sup>148</sup>), there is very little international adjudication. On the other hand, there is increasing State practice in the form of international (hard or soft) law-making.<sup>149</sup> Benefit-sharing, therefore, provides an ideal case study to revisit the traditional discussion on the functions of equity, with a view to applying it to international treaty- and soft law-making, against the background of the ongoing debate on the fragmentation or unity of international law (that is, the debate on whether the proliferation of increasingly specialized international regimes could create conflicts between international norms).<sup>150</sup>

The following sub-sections will interrogate whether benefit-sharing serves to operationalize equity within, beyond or even against the law,<sup>151</sup> and question these functions in light of different notions of justice.<sup>152</sup> Different provisions of the Nagoya Protocol on benefit-sharing seem to prove that at the very least benefit-sharing can operate as equity within and beyond the law (*infra* and *praeter legem*), and in so doing contribute to recognition, distributive and procedural justice, and possibly corrective justice. These will be discussed in turn below, and

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<sup>143</sup> Eg, Francioni, "Equity" in Wolfrum (ed), *The Max Planck Encyclopedia*, *cit. supra* note 101; and Shelton, "Equity" in Bondansky, Brunnee and Hey (eds), *The Oxford Handbook of International Environmental Law*, Oxford, 2007, p. 640 and ff.

<sup>144</sup> Francioni, *cit. supra* note 143, para. 29.

<sup>145</sup> Burke, *cit. supra* note 111, p. 253.

<sup>146</sup> Akehurst, *cit. supra* note 109, pp. 802 and 810.

<sup>147</sup> Francioni, *cit. supra* note 143, para 21.

<sup>148</sup> The exception is represented by two recent human rights cases: Inter-American Court of Human Rights, Case of the Saramaka People v Suriname, Judgment of 28 November 2007 ('Saramaka case'); and African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. no 276/2003 (25 November 2009 - 'Endorois case'); discussed in Morgera, Conceptualizing, *cit. supra* note 10, pp. 25-28.

<sup>149</sup> See generally Morgera, Conceptualizing, *cit. supra* note 10; and the mind maps produced by the BENELEX project available at [http://www.benelex.ed.ac.uk/mind\\_maps](http://www.benelex.ed.ac.uk/mind_maps).

<sup>150</sup> International Law Commission, *cit. supra* note 64; and Dupuy, *L'Unité de l'ordre juridique international: cours général de droit international public*, Leiden, 2003.

<sup>151</sup> The question had already been posted by Francioni, *cit. supra* note 143, para. 28.

<sup>152</sup> Note in this regard, ILC, *cit. supra* note 64, para 480: 'By making sure that the outcome is linked to the legal environment, and that adjoining rules are considered - perhaps applied, perhaps invalidated, perhaps momentarily set aside - any decision also articulates the legal-institutional environment in view of *substantive preferences, distributionary choices and political objectives*.' (*emphasis added*).

followed by a brief, speculative discussion of benefit-sharing as equity against the law (*contra legem*) and its relation to contextual justice.

### 3.1 *Benefit-sharing as equity infra legem*

With regard to equity within the law, the framing of fair and equitable benefit-sharing as the objective of the Protocol<sup>153</sup> suggests that the intended function is indeed an interpretative one.<sup>154</sup> So beyond the specific benefit-sharing obligations that can be found in the Protocol,<sup>155</sup> benefit-sharing serves to guide Parties in balancing different interests at stake with regard to the implementation and application of other open-ended provisions of the Protocol. This is the case of the obligation to put in place national measures on access, on international cooperation on compliance with national ABS measures of other State Parties, and on financial and technological solidarity, which should arguably be assessed on the basis of whether they identify reasonable and appropriate measures to genuinely contribute to realize fair and equitable benefit-sharing.<sup>156</sup> In that connection, benefit-sharing serves to provide a benchmark for applying proportionality: the measures to be adopted at the national level need to be suitable and necessary to share benefits fairly and equitably - that is, to realize justice of exchange, distributive and procedural justice as discussed above. So understood, benefit-sharing as equity *infra legem* sets material limits to States' margin of discretion and provides a yardstick to scrutinize the suitability of domestic measures<sup>157</sup> in pursuing both bilateral and global benefits for the purposes of both commutative and distributive justice.

The clearest example of the interpretative function of the objective of fairly and equitably sharing benefits, however, concerns indigenous and local communities as beneficiaries under the Protocol. The qualified language surrounding communities' "prior informed consent or approval and involvement" vis-a-vis the genetic resources held by them and their traditional knowledge, and the reference to their "established rights" over such genetic resources are to be interpreted in light of the fair and equitable benefit-sharing objective of the Protocol and its bearing on mutual supportiveness with applicable international human rights law. This will serve to enlarge the scope of benefits to be shared with communities in fairness to their internationally recognised property or cultural rights over traditional land and natural resources.<sup>158</sup> This reading is confirmed by the preambular reference in the Protocol to the UN Declaration on the Rights of Indigenous Peoples,<sup>159</sup> and to the affirmation that nothing in the Protocol will be constructed as diminishing or extinguishing the existing rights of indigenous and local communities. In this case, benefit-sharing as equity *infra legem* may contribute to commutative and distributive justice, as well as to justice as recognition. In addition, to the extent to which fair and equitable benefit-sharing under the Nagoya Protocol influences the interpretation of the provisions related to the prior informed consent of *local* (as opposed to indigenous) communities, beyond the unclear recognition of these communities under

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<sup>153</sup> Nagoya Protocol Article 1; and Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 48-58.

<sup>154</sup> As a key expression of the object and purpose of a treaty: VCLT Article 31(1).

<sup>155</sup> Nagoya Protocol Article 5.

<sup>156</sup> Morgera, Tsioumani and Buck, *cit. supra* note 9, pp. 377-381.

<sup>157</sup> Klager, *cit. supra* note 116, p. 237.

<sup>158</sup> Morgera, Tsioumani and Buck, *cit. supra* note 9, pp. 122-126.

<sup>159</sup> Nagoya Protocol preambular paragraph 26; United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Res. 61/295 (13 September 2007).

international human right law,<sup>160</sup> it makes an original contribution to justice as recognition by progressively developing international law at the intersection of human rights and biodiversity.<sup>161</sup>

More difficult, however, is to understand whether the interpretative function of benefit-sharing can cater to procedural justice, as the Protocol fundamentally leaves the details of the negotiations for the identification of benefits and modalities of sharing them to private, contractual negotiations (MAT). In the words of Francioni,

This solution ... leaves uncertain whether equity is to be understood as *infra legem*, ie operating in the context of applicable principles and rules of international law, including the rules on the treatment of aliens and the rules governing the status of international public goods, or outside the law as an autonomous and unstructured source of principles which are assumed to inspire contractual arrangements.<sup>162</sup>

In effect, not only does the Nagoya Protocol omit any substantive criteria to ensure that the establishment of equitable MAT,<sup>163</sup> but on the procedural side, it does not provide any explicit mechanism to ensure fair negotiations of MAT.<sup>164</sup> Nonetheless, it could be argued that interpreting States' obligations under the Nagoya Protocol in light of the objective of fairly and equitably sharing benefits would imply an active role of State Parties' governments in ensuring procedural justice also at the stage of private contractual negotiations through control and monitoring of private parties as part of States' due diligence under international law,<sup>165</sup> particularly when international human rights law is relevant and applicable. The Protocol seems to explicitly point to less interventionist approaches in this regard, limited to encouragement to private parties,<sup>166</sup> which can imply the creation of specific incentives to that end, or at the very least the removal of obstacles or disincentives, including in other related areas of national law.<sup>167</sup> Nothing in the Protocol, however, prevents Parties from taking bolder approaches in ensuring procedural justice at the point at which MAT are established, and supportive arguments based on equity within the law and procedural justice could provide a strong basis to that end.

### ***3.2 Benefit-sharing as equity praeter legem***

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<sup>160</sup> It has been convincingly argued that international human rights law does not yet clearly recognise local communities as right holders (Bessa, *Traditional Local Communities in International Law*, PhD thesis European University Institute, Florence, 2013), although there appear to be no principled reasons for international human rights not to evolve in that direction: De Schutter, "The Emerging Human Right to Land", *International Community Law Review*, 2010, Vol. 12, p. 303 and ff., pp. 319, 324-325 and 382-384.

<sup>162</sup> Francioni, *cit. supra* note 143, para. 28.

<sup>163</sup> Nagoya Protocol Article 5(1-2 and 5) and 10th preambular recital. See Tvedt, "Beyond Nagoya: Towards a Legally Functional System of Access and Benefit-Sharing" in Oberthür and Rosendal, *cit. supra* note 103, p. 158 and ff.

<sup>164</sup> Morgera, Tsioumani and Buck, *cit. supra* note 9, p. 376.

<sup>165</sup> *Ibid*, pp. 131-132, 167-169 and 283-292.

<sup>166</sup> As specifically mandated by Nagoya Protocol Article 9 in relation to directing benefits towards conservation and sustainable use: *ibid*, pp. 192-196.

<sup>167</sup> A series of domestic laws will likely affect the effective functioning of domestic ABS frameworks, such as general environmental law, social-welfare law, property law, administrative law, commercial law, contract law, etc: Young, "An International Cooperation Perspective on the Implementation of the Nagoya Protocol" in Morgera, Buck and Tsioumani, *The 2010 Nagoya Protocol*, *cit. supra* note 9, p. 451 and ff, pp. 462-463.

With regards to equity beyond the law, the provision of the Nagoya Protocol that foresees benefit-sharing as a global mechanism appears to operationalize equity in its gap-filling function. In effect, Article 10 of the Protocol calls upon Parties to determine whether a gap exists in international law with regard to situations in which the utilization of genetic resources occurs in transboundary situations or in situations in which it is not possible to obtain or grant prior informed consent. Should Parties arrive to that conclusion, a global benefit-sharing mechanism is to be established to fill such a gap for the purposes of pursuing equity to the benefit of the conservation and sustainable use of biodiversity globally.<sup>168</sup> Among the outstanding questions that Parties to the Nagoya Protocol are considering with a view to determining a possible gap, the question of whether the Protocol should serve to share benefits from the use of genetic resources in *ex situ* collections is on the table. There is, therefore a possibility in that connection to address certain questions related to the temporal scope of the Protocol and possibly for corrective justice to be realized to some extent.

In addition, the outstanding questions Protocol Parties are considering under Article 10 also include that of marine genetic resources in areas beyond natural jurisdictions.<sup>169</sup> A gap in this regard, with notable distributive justice connotations, is concurrently under discussion in the framework of the UN General Assembly, which has recently launched formal negotiation of a new international legally binding treaty.<sup>170</sup> This development begs the question: can benefit-sharing, as framed under the Nagoya Protocol, serve as equity *praeter legem* outside the framework of the Protocol? In other words, could some of the provisions on fair and equitable benefit-sharing of the Nagoya Protocol fill gaps in the international law of the sea, in the context of the development of a new implementing agreement to the UN Convention on the Law of the Sea? An answer in the positive seems to be the opinion of several States involved in relevant discussions under the General Assembly.<sup>171</sup> In addition, the text of the Nagoya Protocol itself, in regard to relationships with future, specialised ABS agreements, seems to point to the same conclusion.<sup>172</sup> In that connection, it can be argued that the Protocol subjects its Parties to an obligation to negotiate future, specialized ABS instruments in a manner that proactively supports the realization of fair and equitable benefit-sharing in accordance with the objective of the Protocol.<sup>173</sup>

### 3.3 *Benefit-sharing as equity contra legem*

Speaking of equity against the law may be quite far-fetched. From the viewpoint of systematic integration, this interpretative technique should not be used to modify an existing treaty,<sup>174</sup> but to modify its application,<sup>175</sup> although the distinction is easier to draw in the

<sup>168</sup> De Jonge, , *cit. supra* note 41, pp. 251-253.

<sup>169</sup> Intergovernmental Committee for the Nagoya Protocol, Recommendation 2/3 *The need for and modalities of a global multilateral benefit-sharing mechanism (Article 10)*.

<sup>170</sup> Morgera, " Benefit-Sharing in marine areas beyond national jurisdiction: where are we at? Part I-II-III" BENELEX blog posts available at <http://www.benelexblog.law.ed.ac.uk>; and Scovazzi, "Negotiating Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction: Prospects and Challenges" in this volume.

<sup>171</sup> See Scovazzi, *cit. supra* note 170, p. .

<sup>172</sup> Nagoya Protocol Article 4(2).

<sup>173</sup> Morgera, Tsioumani and Buck, *cit. supra* note 9, pp. 97-109.

<sup>174</sup> Simma, *cit. supra* note 140, p. 584.

<sup>175</sup> Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed, London, 1992, p. 40 cited by Thirlway, *cit. supra* note 39, p. 98; and Higgins' separate opinion in ICJ, Case Concerning Oil Platforms, para. 49, cautioning against invoking the concept of treaty interpretation to "displace applicable law".

abstract that in practice. With regard to international law-making, instead, States can conclude a treaty for the purpose of producing effects not in accordance with the law that was previously binding upon them, as long as the international rules that are deviated from are not those to which no derogation is admitted or are owed to third Parties.<sup>176</sup> But in this case too matters are complicated if one considers that several international law-making processes may be underway simultaneously in different fora, in the context of different international regimes, the outcome of which could have an impact on the relations between different areas of international law.

In either case, the question as to whether benefit-sharing as framed in the Nagoya Protocol could also operationalize equity *contra legem* is a very difficult one, which currently can only be answered in a speculative manner. Nevertheless, it will be attempted here to engage with this function in order to return to the questions of contextual justice identified in the previous section, notably in the context of the relationship between the Protocol and other international regimes, particularly outside the area of international environmental law. With regard to law-making, the fact that the Protocol shied away from offering a legal basis for derogating from international law on IPRs arguably suggests that using benefit-sharing as equity *contra legem* could have been theoretically possible, but States were not able to agree on it. It was argued during the negotiations that the question was being dealt under a more competent law-making forum, namely the World Intellectual Property Organization.<sup>177</sup> But as the fate of these (and other relevant<sup>178</sup>) negotiations remains quite uncertain at the time of writing, the foundations for enhanced mutual supportiveness between intellectual property rights and benefit-sharing could have been laid, at least for the interim, by the Nagoya Protocol.

Another hypothetical avenue for benefit-sharing to operationalize equity *contra legem* could be the relation between the Protocol and international investment law. The latter could be invoked by a user that can claim to act as a foreign investor and allege a conflict between a provider country's ABS measures and the terms of an applicable bilateral investment treaty.<sup>179</sup> As a matter of fact, the text of the Nagoya Protocol on relationships with existing international agreements<sup>180</sup> seems to support equity *infra legem* rather *contra legem* in this case. Parties should avoid any principled approach in assessing and addressing the relationship of the Nagoya Protocol with other existing international agreements, focusing on a pragmatic, case-by-case approach to mutual supportiveness through interpretation based on systemic integration.<sup>181</sup> Nonetheless, either in the case of IPRs or international investment law, it cannot be excluded that an international adjudicator in the future may rely on fair and equitable benefit-sharing, as developed in the Nagoya Protocol and interpreted in a mutually supportive fashion with relevant international human rights law, to derogate from difficultly reconcilable provisions in other international economic treaties.

#### 4. Preliminary findings and potential for further investigation

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<sup>176</sup> Simma, *cit. supra* note 140, p. 584.

<sup>177</sup> Namely, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: WIPO General Assembly, "Matters concerning intellectual property and genetic resources, traditional knowledge and folklore" (3 October 2000) WIPO Doc WO/GA/26/6.

<sup>178</sup> See *supra* note 92.

<sup>179</sup> Viñuales, *Foreign Investment and the Environment in International Law*, Cambridge, 2012, p. 205.

<sup>180</sup> Nagoya Protocol Article 4(1).

<sup>181</sup> Morgera, Tsioumani and Buck, *Unraveling*, *cit. supra* note 9, pp. 86-88.



While the preceding analysis has not attempted to offer a systematic engagement with the justice literature, it has shown the value to legal analysis of relating different notions of justice to different interpretations of existing international law and to different functions of equity pursued by it. Although this is hardly openly discussed in multilateral negotiations and rarely tackled in legal scholarship, the legal concept of fair and equitable benefit-sharing under the Nagoya Protocol is apt to combine different notions of justice, which in theory should feed into each other: recognition, commutative justice, distributive justice and procedural justice. Systematically unpacking these dimensions, explicitly discussing to what extent each can arguably be achieved under the specific provisions of the Protocol, and identifying other notions of justice (such as contextual justice) that have not been pursued through international law-making appear as indispensable steps to critically assess the evolution of the legal concept of fair and equitable benefit-sharing from a justice perspective. A further step is then required: revisiting the traditional debate on the functions of equity in international law focusing on the continuous sub-specialization of different international regimes, with a view to critically assessing whether different notions of justice imbue international law-making and contribute to ensuring unity across different international sub-systems.

This exercise may lay the foundations for a productive dialogue between international lawyers and other scholars and practitioners concerned with justice in conservation and environmental management more broadly. It serves to systematically unveil existing opportunities in international law that could contribute to achieving justice through equitable principles, which can be employed in negotiating concrete understandings of justice on a case-by-case basis. It further assists in revealing implicit legal design choices that limit the types of justice pursued in international law-making. As the above analysis shows, concrete opportunities for an interpretation of the Nagoya Protocol inspired by a pluralistic notion of environmental justice exist - which may appear quite a provocative finding when seen in the light of the criticisms concerning the limitations of the Protocol<sup>182</sup> and of the negotiating dynamics that led to its adoption.<sup>183</sup>

And there seems to be much scope to test this approach in other areas of international law where fair and equitable benefit-sharing has been increasingly referred to, as in the case of the international law of the sea, which was alluded to briefly above.<sup>184</sup> Another example may be in order to further substantiate this claim. In the context of the human rights of indigenous peoples,<sup>185</sup> benefit-sharing has been referred to as a safeguard. At first glance, this may appear

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<sup>182</sup> During the closing plenary, a number of delegations including the African Group, the Central and Eastern European Group, Venezuela, and Bolivia made statements for the record to underscore their doubts about the new instrument's quality: "Report of the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity" (20 January 2011) UN Doc UNEP/CBD/COP/10/27, paras 98-102; Singh Nijar, "An Asian Developing Country View on the Implementation Challenges of the Nagoya Protocol" in Morgera, Buck and Tsioumani, *cit. supra* note 9, p. 247 and ff.

<sup>183</sup> Eg, Oberthür and Rabitz, 'The Role of the European Union in the Nagoya Protocol Negotiations: Self-interested Bridge Building' in Oberthür and Rosendal, *cit. supra* note 103, p. 79 and ff.; Coolasaet and Pitseys, "Fair and Equitable Negotiations? African Influence and the International Access and Benefit-Sharing Regime" *Global Environmental Politics* 2015, Vol. 15, p. 38 and ff.

<sup>184</sup> See section 3.2 above.

<sup>185</sup> Saramaka case, para. 129; and Anaya, "Progress report on study on extractive industries" (2012) UN Doc A/HRC/21/47, para. 52. It should be noted that benefit-sharing is referred to as a safeguard also in relation to the international climate change regime: see Savaresi, "The Emergence of Benefit-Sharing Under the Climate Regime: A Preliminary Exploration and Research Agenda", BENELEX Working Paper 3, SSRN, 2014.

a reductionist reading of it: benefit-sharing is seen as subsidiary to the protection and realization of international rights, instead of an objective or a right of its own, and possibly also limited to a procedural function. By linking different notions of justice to different functions of equity, however, it is possible to engage in a more nuanced analysis. Benefit-sharing as a safeguard has been used to fill gaps (as equity *preater legem*) in one international human rights regime with reference to another international human rights regime<sup>186</sup> and international biodiversity law,<sup>187</sup> with a view to contributing not only to procedural but also to distributive justice and recognition. In the case of the Inter-American Convention on Human Rights, for instance, benefit-sharing has been referred to, in order to strengthen the protection of the rights of the Saramaka people over their natural resources against development projects, with a view to rewarding communities' role as ecosystem stewards, thereby recognizing at the same time their own inextricable relation with their territories and their contribution to global efforts to conserve and use sustainably biodiversity. And the same reasoning has been subsequently relied upon by the African Commission on Human and Peoples' Rights to fill a gap in the African human rights regime with regard to the recognition and protection of the rights of the Endorois people against conservation measures that appeared unjust in terms of distribution, recognition and procedure.<sup>188</sup>

This of course merely represents a point of departure for deeper analysis, but has the merit of directing attention to the relative weight of and tensions among the different notions of justice that may be pursued simultaneously by fair and equitable benefit-sharing in the context of the cross-fertilization between international biodiversity law and human rights law.<sup>189</sup> It may help international legal scholars reflect more critically and systematically on the limitations of international law in pursuing justice, and help justice scholars and practitioners to identify existing opportunities in international law, that rely on mutual supportiveness among specific instruments on benefit-sharing, other areas of international law and general international law.

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<sup>186</sup> Namely, the ILO Convention No. 169, that had not been ratified by the Suriname, Article 15, with regards to the American Convention on Human Rights, Article 21 on the right to property: Saramaka case, paras. 92-93, 130 and 138. See discussion in Morgera, *Conceptualizing*, cit. supra note 10, pp. 25-30.

<sup>187</sup> This is a much more subtle cross-fertilization, which arguably derives from the Court's reliance on CBD guidelines on socio-cultural and environmental impact assessments as a pre-condition for benefit-sharing: Inter-American Court of Human Rights, Case of the Saramaka People v Suriname, Interpretation of the judgment, 12 August 2008, para 41 and fn 23.

<sup>188</sup> African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. no 276/2003 (25 November 2009).

<sup>189</sup> The author is working on another paper that will address in depth these and related questions. For a succinct identification of key points for further research, see Morgera, "The legacy of UN Special Rapporteur Anaya on indigenous peoples and benefit-sharing", BENELEX blog post at <http://www.benelexblog.law.ed.ac.uk/2014/05/29/the-legacy-of-un-special-rapporteur-anaya-on-indigenous-peoples-and-benefit-sharing/>.