

## Fair and equitable benefit-sharing

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**Abstract:** This entry will discuss the widespread diffusion of the concept of fair and equitable benefit-sharing in different areas of international environmental law (notably, but not limited to, biodiversity) and its linkages with international human rights law. It will then suggest that notwithstanding different articulations of benefit-sharing in different areas of international law, a common normative core can be identified on the basis of converging interpretative materials. The entry will conclude by discussing the status of fair and equitable benefit-sharing in international law and identifying outstanding research questions.

**Keywords:** benefit-sharing; equity; biodiversity; human rights; indigenous peoples

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### 1. Introduction

This entry will discuss the widespread uptake of the concept of fair and equitable benefit-sharing in different areas of international environmental law (notably, but not limited to, biodiversity) and the linkages with international human rights law. It will then suggest that notwithstanding different articulations of benefit-sharing in different areas of international law, a common normative core can be identified on the basis of converging interpretative materials. The entry will conclude by discussing the status of fair and equitable benefit-sharing in international law and identifying outstanding research questions.

### ~~1-2~~ History

Benefit-sharing is best known to international biodiversity lawyers, but it has first made its appearance in international human rights law. The 1946 Universal Declaration of Human Rights referred to everyone's right to share in the benefits of scientific advancement<sup>1</sup> and the 1986 UN Declaration on the Right to Development referred to States' duty to ensure the 'active, free and meaningful participation in ...the *fair distribution of the benefits* resulting' from national development for their entire population and all individuals.<sup>2</sup> What benefit-

<sup>1</sup> Universal Declaration on Human Rights, UN Doc. A/810 (1948) Article 27(1) (emphasis added), which is reiterated in slightly different wording in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>2</sup> UN Declaration on the Right to Development, GA Res 41/128, 4 December 1986, Article 2(3) (emphasis added).

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sharing means in either context, however, remains unclear, although there are indications that these human rights are connected to international environmental law, notably technology transfer obligations.<sup>3</sup> Benefit-sharing is also embedded in the 1989 ILO Indigenous and Tribal Peoples Convention No 169,<sup>4</sup> which provides that indigenous and tribal peoples 'shall, wherever possible participate in the benefits' arising from the exploration and exploitation of natural resources pertaining to their lands. Notwithstanding its vagueness<sup>5</sup> and the limited membership of the ILO Convention, this provision has recently become quite prominent in the interpretation of other international instruments (the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the UN Declaration on the Rights of Indigenous Peoples)<sup>6</sup> in connection with the free prior informed consent of indigenous peoples.<sup>7</sup>

Early benefit-sharing obligations can also be found in the law of the sea. The 1982 UN Convention on the Law of the Sea (UNCLOS) created a complex international machinery for the 'equitable sharing of financial and other economic benefits derived from' mining activities in the deep seabed ('the Area'<sup>8</sup>), as part of the regime on the common heritage of humankind.<sup>9</sup> UNCLOS also includes another benefit-sharing obligation concerning areas within national jurisdiction:<sup>10</sup> it mandates States to share, through the multilateral benefit-sharing mechanism of the Area, revenues deriving from mining activities in the outer continental shelf.<sup>11</sup> Precise rules and procedures on benefit-sharing in both contexts remain to be developed,<sup>12</sup> although the International Seabed Authority has already engaged in non-monetary benefit-sharing in relation to exploration in the Area.<sup>13</sup>

As anticipated above, more substantial developments on fair and equitable benefit-sharing have occurred in the context of international biodiversity law. The 1992 Convention of Biological Diversity (CBD)<sup>14</sup> includes benefit-sharing obligations, which have been spelt out in a series of consensus-based, soft-law decisions adopted by 196 Parties<sup>15</sup> and in the legally

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<sup>3</sup> Report of the Independent Expert on Human Rights and International Solidarity to the General Assembly (2013) UN Doc A/68/176, para 27(d); Report of the High-level Task Force on the Implementation of the Right to Development on its Sixth Session: Right to Development Criteria and Operational Sub-criteria (2010) UN Doc A/HRC/15/WG.2/TF/2/Add.2, criteria 3(b)(i); UN Special Rapporteur in the field of cultural rights, Report on the Right to Enjoy the Benefits of Scientific Progress and its Applications (2012) UN Doc A/HRC/20/26, paras 1 and paras 25, 30-43.

<sup>4</sup> International Labour Organization's (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382.

<sup>5</sup> Swebston (1990) 703-706.

<sup>6</sup> American Convention on Human Rights 1969, 1144 UNTS 123; UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UN Doc. A.61/L.67/Annex, 12 September 2007.

<sup>7</sup> Eg IACtHR, *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007 and subsequent case law cited below.

<sup>8</sup> United Nations Convention on the Law of the Sea (UNCLOS) 1982, 21 ILM 1261 (UNCLOS) Article 140(1).

<sup>9</sup> UNCLOS Articles 136-141.

<sup>10</sup> UNCLOS Article 82(1) and (4).

<sup>11</sup> Chircop (forth 2017).

<sup>12</sup> UNCLOS Article 160 (2)(f)(i) and (g); ISA, 'Towards the development of a regulatory framework for polymetallic nodule exploitation in the Area' (2013) UN Doc ISBA/19/C/5; and Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea, International Seabed Authority Technical Study No. 4 (2009).

<sup>13</sup> Regulation 27 of the Regulations on prospecting and exploration for polymetallic nodules and Regulation 29 of the Regulations on prospecting and exploration for sulphides and crusts; and annex 4 of these regulations; Recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration, Document ISBA/19/LTC/14 (2013); see Harrison (2015).

<sup>14</sup> Convention on Biological Diversity (CBD) 1992, 1760 UNTS 79.

<sup>15</sup> As opposed to the limited membership of the ILO Convention (20 countries).

binding Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing (Nagoya Protocol).<sup>16</sup> Most attention has focused on fair and equitable benefit-sharing in relation to bioprospecting, i.e. transnational bio-based research and development (R&D). This has relied, in the context of the CBD and its Nagoya Protocol, on *bilateral*<sup>17</sup> contractual arrangements for sharing with the country providing genetic resources, and with the indigenous peoples and local communities providing genetic resources held by them and associated traditional knowledge, benefits arising from R&D conducted in another country. Furthermore, multilateral benefit-sharing approaches in relation to bioprospecting have emerged in more specialized areas. The International Treaty on Plant Genetic Resources for Food and Agriculture embodies the most sophisticated elaboration of benefit-sharing as a *multilateral* system for listed crops of global importance for food security (such as rice, potato and maize).<sup>18</sup> At the crossroads of biodiversity and health, the World Health Organization (WHO) 2011 Pandemic Influenza Preparedness Framework (PIP Framework) embodies a multilateral system for sharing samples of pandemic influenza viruses and benefits arising from it, most notably the sharing of vaccines produced from research on the viruses.<sup>19</sup> Another multilateral benefit-sharing mechanism related to bioprospecting in marine areas beyond national jurisdiction is likely to emerge from current negotiations under the UN General Assembly.<sup>20</sup>

In addition, benefit-sharing has also emerged under the CBD as a component of the ecosystem approach,<sup>21</sup> in conjunction with the benefit-sharing arising from the use of indigenous peoples' and local communities' traditional knowledge.<sup>22</sup> This is in recognition of the relationship between the stewardship of traditionally occupied or used natural resources and the production and dissemination of traditional knowledge,<sup>23</sup> which embodies *traditional lifestyles*<sup>24</sup> (a *communal way of life*<sup>25</sup>) based on the link between communities' shared cultural identity, the biological resources that they use,<sup>26</sup> and their customary rules about traditional knowledge and natural resource management.<sup>27</sup> In this connection, benefit-sharing serves as *recognition and reward* for the use of traditional knowledge and customary sustainable management and conservation of natural resources. Along similar lines but based on different premises (right to property and right to culture), benefit-sharing has been increasingly

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<sup>16</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization 2014, CBD Decision X/1 (2010) Annex I; see Morgera, Tsioumani and Buck (2014).

<sup>17</sup> Although note the possibility for a multilateral benefit-sharing mechanism to be established under Nagoya Protocol Article 10: see Morgera, Tsioumani and Buck (2014), at 197-208.

<sup>18</sup> International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) 2001, 2400 UNTS 303.

<sup>19</sup> World Health Organization (WHO), Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits, WHO Doc. WHA64.5, 24 May 2011.

<sup>20</sup> UN General Assembly Resolution 66/231 of 2011, para 167 and Resolution 69/292 of 2015. For a discussion, eg, De la Fayette (2009).

<sup>21</sup> Principles of the Ecosystem Approach, CBD Decision V/6 (2000), para 9. Morgera (2017).

<sup>22</sup> Bonn Guidelines on Access and Benefit-sharing, CBD Decision VI/24 (2002) Annex, para 48; and Tkarihwaï:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, CBD Decision X/42 (2010), annex, para 14; Principles of the Ecosystem Approach (n 21), Principle 8; Refinement and elaboration of the ecosystem approach (n 22), rationale to Principle 4. For a discussion, Morgera (2016a).

<sup>23</sup> Gibson (2011), at 434-435.

<sup>24</sup> On the basis of the wording of CBD Article 8(j).

<sup>25</sup> CBD Secretariat, How tasks 7, 10 and 12 could best contribute to work under the Convention and to the Nagoya Protocol, UN Doc. UNEP/CBD/WG8J/8/4/Rev.2, para. 23 (2012).

<sup>26</sup> In the light of the placement of CBD art 8(j) in the context of *in situ conservation* (CBD art 8).

<sup>27</sup> See generally Tobin (2014).

recognised by international human rights judicial and quasi-judicial bodies<sup>28</sup> as an implicit component of indigenous peoples' rights to their lands, territories and natural resources.<sup>29</sup> In the human rights context, however, benefit-sharing is mainly seen to *protect* communities against third parties' natural resource development (mining and logging) or conservation measures that can negatively affect communities' way of life.<sup>30</sup> The extent to which these developments at the crossroads of international biodiversity and human rights law may also explain the emergence of benefit-sharing in a variety of international legal developments in the areas of water,<sup>31</sup> fisheries,<sup>32</sup> climate change,<sup>33</sup> land and food,<sup>34</sup> and corporate accountability,<sup>35</sup> remains a matter for further investigation.

This brief historical overview indicates that international benefit-sharing obligations have arisen at different points in time in a variety of contexts, and are currently characterized by different levels of sophistication. There are four triggers for international benefit-sharing obligations, namely:

- 1) bioprospecting (whether of a transnational character, which is currently the most developed and studied area of international law,<sup>36</sup> or in areas beyond national jurisdiction, which is an area of international law under development);
- 2) natural resource use, broadly conceived (be that beyond areas of national jurisdiction, such as deep-seabed mining, or within national jurisdiction, such as logging and terrestrial mining, with the latter being insufficiently studied by international lawyers);
- 3) conservation measures that are proposed or put in place in indigenous peoples' territories,<sup>37</sup> which are receiving increasing attention in international policy debates;<sup>38</sup> and

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<sup>28</sup> African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya), and Minority Rights Group International, *Endorois Welfare Council v. Kenya*, Communication no. 276/2003, 25 November 2009; IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment (Merits, Reparations and Costs), 25 November 2015.

<sup>29</sup> Namely, UNDRIP Articles 25-26: see Report of the UN Special Rapporteur on Indigenous Peoples Rights, UN Doc. A/HRC/15/37 (2010), paras. 76-77.

<sup>30</sup> Morgera (2016b).

<sup>31</sup> Ramsar Convention on Wetlands of International Importance, Resolution X.19: Wetlands and River Basin Management: Consolidated Scientific and Technical Guidance (2008), Annex, para. 25; Wouters and Moynihan (2013).

<sup>32</sup> Food and Agricultural Organization (FAO), *Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication* (2013), para. 5.1.

<sup>33</sup> E.g., UN Reducing Emissions from Deforestation and Forest Degradation (REDD), Programme Social and Environmental Principles and Criteria, Criterion 12 (2012); Adaptation Fund Board, *Adaptation Fund Environmental and Social Policy* (2013), para. 13.

<sup>34</sup> FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT), UN Doc. CL 144/9 (C 2013/20) (2012), Appendix D, Art. 8.6; UN Rapporteur on the Right to Food, *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge*, UN Doc. A/HRC/13/33/Add.2 (2010), para. 33; Tsioumani (2014).

<sup>35</sup> Eg Report of the Special Rapporteur on Indigenous People' Rights (n 21), paras 73-75; and Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making* (2010) UN Doc A/HRC/15/35. See discussion in Morgera (2013) and (2014).

<sup>36</sup> E.g., Kamau and Winter (2009); Nijar (2013).

<sup>37</sup> CBD Work Programme on Protected Areas, CBD Decision VII/28 (2004), Annex; Inter-American Court, *Kaliña and Lokono*; and African Commission, *Endorois*.

<sup>38</sup> UN Special Rapporteur on Indigenous Peoples' Rights, Victoria Tauli-Corpuz, Report to the General Assembly, UN Doc. A/71/229 (2016).

- 4) the production and use of knowledge: this is not only the traditional knowledge of indigenous peoples and local communities (although this is the area that has attracted the lion's share of international law-making and scholarly attention), but also other forms of knowledge in the context of the human right to science (extending, for instance, to inter-State obligations of technology transfer).<sup>39</sup>

### 4.3. Content<sup>40</sup>

The proliferation of references to benefit-sharing has been accompanied by a remarkable lack of conceptual clarity and terminological inconsistencies.<sup>41</sup> One challenge in determining whether this is a relatively uniform concept in international law derives from the fact that benefit-sharing is applied to a variety of resources that are differently qualified internationally: common heritage of mankind, shared resources, and resources the protection of which is considered a common concern of humankind. In addition, benefit-sharing applies to a variety of relationships that are differently impacted by international law:

- 1) relations among countries (inter-State benefit-sharing) that are characterized by sovereign equality and, in key areas, by the controversial principle of common but differentiated responsibility;
- 2) relations between a government and a community (intra-State benefit-sharing) within its territory, whose relationship is characterized by the State's sovereign powers and international obligations over natural resources<sup>42</sup> and the relevance, to different extents, of international human rights law;
- 3) relations between communities and private companies<sup>43</sup> that may be protected by international investment law and that, even when that is not the case, are increasingly understood in the light of business responsibility to respect human rights<sup>44</sup> (benefit-sharing as part of companies' due diligence); and
- 4) relations within communities (intra-community benefit sharing),<sup>45</sup> which raises questions of the interaction among communities' customary laws, and national and international law.<sup>46</sup>

International human rights law has mainly focused on intra-State benefit-sharing, while the law of the sea has been mainly concerned with inter-State benefit sharing. On the other hand, under the international biodiversity regime, the normative development of benefit sharing has

<sup>39</sup> Morgera (2015).

<sup>40</sup> This section draws on Morgera (2016a).

<sup>41</sup> De Jonge (2011); Schroeder (2007), at 208.

<sup>42</sup> Francioni (2016), Barral (2016).

<sup>43</sup> International Finance Corporation (IFC), Performance Standard 7 (2012), paras 18–20; FAO, International Fund for Agricultural Development, UN Conference on Trade and Development and the World Bank, Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods and Resources (PRAI) (2010), principle 6; UN Global Compact Office, Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples (2013), at 76–77; Report of the Special Rapporteur on Indigenous Peoples' Rights (n 21), paras 73–75.

<sup>44</sup> UN Human Rights Commission (UNHRC), Protect, Respect and Remedy, a Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (2008), endorsed by Resolution A/HRC/RES/8/7 (2008); UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (2011), endorsed by Resolution A/HRC/RES/17/4 (2011).

<sup>45</sup> E.g., Committee on Food Security (CFS), Principles for Responsible Investment in Agriculture and Food Systems (2014), paras iv, 23.

<sup>46</sup> E.g., Nagoya Protocol, Art. 12(1).

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addressed both to a significant extent, although not necessarily in clear and systematic terms. Notwithstanding these challenges, an examination of the treaty bases and plethora of interpretative materials in different areas of international law points to normative convergence on a common core of fair and equitable benefit-sharing.

### **3.2.1 Sharing**

“Sharing” conveys agency, rather than the passive enjoyment of benefits.<sup>47</sup> In that connection, several international legal materials refer (admittedly in a patchwork manner) to benefit-sharing as a concerted, iterative dialogue aimed at finding common understanding in identifying and apportioning benefits. In other words, benefit-sharing is not about unidirectional (likely, top-down) or one-off flows of benefits. It is rather a process to lay the foundation for a *partnership* among different actors in the context of power asymmetries.<sup>48</sup> In the inter-State context, this arguably refers to the idea of a global partnership enshrined in the Rio Declaration on Environment and Development.<sup>49</sup> Such reference has been understood both as a ‘new level of cooperation’ between developed and developing states<sup>50</sup> and a form of cosmopolitan cooperation,<sup>51</sup> which includes (controversial) public-private partnerships as well as other cooperative relations between States and civil society that are inspired by a vision of public trusteeship.<sup>52</sup> With regard to the intra-State dimension of benefit sharing, the term ‘partnership’ specifically refers to an approach to accommodate State sovereignty over natural sovereignty and indigenous peoples’ self-determination.<sup>53</sup>

### **3.2 Benefits**

Only a few international regimes clearly spell out which or what kind of benefits are to be shared, as in principle the determination of benefits and sharing modalities is seen as inherently contextual. Under the UNCLOS common heritage regime, the benefits are predominantly *economic* (mainly profit-sharing),<sup>54</sup> although the sharing of scientific information is also expected.<sup>55</sup> The CBD points to funding and technology transfer, as well as to the sharing of biotechnology.<sup>56</sup> The Nagoya Protocol contains the most elaborate list of benefits in an annex that distinguishes monetary and non-monetary benefits. The latter include sharing of research and development results, collaboration in scientific research and development, participation in product development, admittance to *ex situ* facilities and databases,<sup>57</sup> as well as capacity building and training.<sup>58</sup> The former encompasses joint

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<sup>47</sup> Mancisidor (2015).

<sup>48</sup> On the intra-State dimension of benefit sharing, see, e.g., Rapporteur on Indigenous Peoples’ Rights, Study on extractive industries and indigenous peoples (2013) A/HRC/24/41, paras 75–77, 92; Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Peoples, UN Doc. E/CN.4/Sub.2/AC.4/2001/2 (2001), para. 19. On the inter-state dimension, see, e.g., Report of the High-Level Task Force on the Implementation of the Right to Development on Its Second Meeting, UN Doc. E/CN.4/2005/WG.18/TF/3 (2005), para. 82.

<sup>49</sup> Rio Declaration on Environment and Development 1972, 11 ILM 1416 (1972), preamble and principles 7 and 27.

<sup>50</sup> Dupuy (2015), at 69, 71.

<sup>51</sup> Dupuy (2015), at 72; Francioni (2015), at 89.

<sup>52</sup> Sand (2015), 617, who refers as a concrete example to the ITPGRFA.

<sup>53</sup> Fitzmaurice (2013), at 375; Indigenous Peoples’ Rights Report (n 21), para. 53.

<sup>54</sup> UNCLOS Art. 140.

<sup>55</sup> Lodge (2012), at 740.

<sup>56</sup> CBD Articles 1 and 19.

<sup>57</sup> Nagoya Protocol Annex, 2(a-c) and (e).

ventures with foreign researchers and joint ownership of relevant intellectual property rights (IPR),<sup>59</sup> profits reaching the provider country in the form of access fees, up-front or milestone payments, royalties and license fees,<sup>60</sup> but also financial resources to contribute to conservation efforts (such as special fees to be paid to conservation trust funds).<sup>61</sup>

What seems to emerge from these varying approaches as a common thread, is that benefit-sharing obligations are linked to a *menu* of benefits, the nature of which can be economic and non-economic. This arguably aims at taking into account, through the concerted, dialogic process of sharing, the beneficiaries' needs, values, and priorities through a contextual selection of the combination of benefits that may best serve to lay the foundation for partnership. Similarly, international developments on "business responsibility to respect human rights"<sup>62</sup> have clarified that benefit-sharing, as part of the due diligence of companies operating extractive projects in or near indigenous lands, entails good faith consultations with communities with a view to agreeing on benefit-sharing modalities that make communities partners in project decision making, not only giving them a share in the profits (for instance, through a minority ownership interest).<sup>63</sup>

### 3.2.3 Fairness and equity

While terminology varies, the rationale for the emergence of benefit-sharing obligations in international law is largely seen as the operationalization of fairness and equity.<sup>64</sup> In other words, benefit-sharing can be seen as a tool to balance competing rights and interests<sup>65</sup> with a view to integrating ideas of justice into a relationship regulated by international law.<sup>66</sup> International treaties, however, leave the specific determination of what is fair and equitable to successive multilateral negotiations (in the context of multilateral benefit-sharing mechanisms), or to contractual negotiations (in the context of bilateral inter-State benefit-sharing and of intra-State benefit-sharing). In theory, the recourse to the twin expression '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>67</sup> In practice, no criteria or mechanism is provided at the international level to determine whether contextual benefit-sharing agreements are actually fair and equitable.<sup>68</sup>

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<sup>58</sup> Nagoya Protocol Annex, 2(d), (g-i), (n) and (j). Under the International Treaty on Plant Genetic Resources for Food and Agriculture, non-monetary benefits equally include exchange of information, access to and transfer of technology, capacity building.

<sup>59</sup> Nagoya Protocol Annex, 1(i) and (j).

<sup>60</sup> Nagoya Protocol Annex, 1(a-e).

<sup>61</sup> Nagoya Protocol Annex, 1(f).

<sup>62</sup> UN Human Rights Commission (UNHRC), Protect, Respect and Remedy, a Framework for Business and Human Rights, UN Doc. A/HRC/8/5 (2008), endorsed by Resolution A/HRC/RES/8/7 (2008); UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (2011), endorsed by Resolution A/HRC/RES/17/4 (2011).

<sup>63</sup> Indigenous Peoples' Rights Report, (n 21), para. 46; Rapporteur on Indigenous Peoples' Rights, Study on extractive industries and indigenous peoples (2013) UN Doc A/HRC/24/41, para. 75.

<sup>64</sup> Indigenous Peoples' Rights Report, (n 21), paras 67, 76–78; Committee on the Elimination of Racial Discrimination, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2 (2003), para. 16; UNPFII, Report of the International Workshop on Methodologies Regarding Free, Prior Informed Consent and Indigenous Peoples, UN Doc. E/C.19/2005/3 (2005), para. 46(i)(e); *Saramaka*, para. 140 ('reasonable equitable'); *Endorois*, paras 269, 297.

<sup>65</sup> Burke (2014), at 197–198 and 250–251.

<sup>66</sup> Klager (2013), at 130.

<sup>67</sup> Klager (2013), at 141.

<sup>68</sup> With the exception of the WHO PIP Framework (Article 6(1)), which makes reference to public health risk and needs, as principles for fair and equitable benefit-sharing.

Similarly to other equitable principles, fair and equitable benefit sharing is open-textured and evolutionary,<sup>69</sup> and may arguably be filled with content by establishing a linkage with different international legal sub-systems.<sup>70</sup> One could, for instance, rely on the evolution of the similarly worded notion of fair and equitable treatment in international investment law,<sup>71</sup> which was fleshed out by relying on international human rights standards such as procedural fairness, non-discrimination, and proportionality.<sup>72</sup> In effect, human rights standards can help determine minimum (albeit general) parameters of fairness, that tend to remain unspecified in international biodiversity law. With regards to equity, the need to establish a genuine *partnership*, whereby actors treat each other as equal<sup>73</sup> notwithstanding different power relations, points to the absence of overriding presumptions in favour of the State.<sup>74</sup> Rather, inequalities in the substantive outcome are only justifiable if they provide advantages to all participants,<sup>75</sup> as part of the State's exercise of national sovereignty as a "guarantee for the progressive realization of human rights," to the maximum of available resources.<sup>76</sup> Further study is needed, however, to clarify the extent to which different benefit-sharing obligations (in multilateral or bilateral mechanisms, inter- or intra-State agreements, etc) are effectively interpreted in light of human rights standards.

#### 2.4 Status

Benefit-sharing is employed in international law as a treaty objective,<sup>77</sup> an international obligation,<sup>78</sup> a right,<sup>79</sup> a safeguard,<sup>80</sup> or a mechanism,<sup>81</sup> which makes the determination of its status in international law quite difficult. This section will argue that different conclusions may be reached on the status of benefit-sharing depending on whether it has emerged as an inter-State obligation or an intra-State one. As a result, benefit-sharing is best understood as a general principle of international law that has affected in different ways different areas of international law.

Inter-State benefit-sharing obligations related to mining in the deep seabed and bioprospecting are embedded in international treaty law and State practice to an extent that they are arguably considered international customary norms.<sup>82</sup> On the other hand, it remains unclear if and how inter-State benefit-sharing relates to financial, technological and capacity-building obligations under multilateral environmental agreements, such as on climate change.

<sup>69</sup> *United States – Import Prohibition on Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 6 November 1998, WT/DS58/AB/R, para. 130.

<sup>70</sup> *North Sea Continental Shelf Cases*, Judgment, 20 February 1969, ICJ Reports 3, para. 88; Wolfrum (2010), para. 63; Thirlway (2014), at 106; Pavoni (2010).

<sup>71</sup> Francioni (2006), at 24.

<sup>72</sup> Dupuy and Viñuales (2015).

<sup>73</sup> E.g., see Special Rapporteur Anaya, (2009) UN Doc A/HRC/12/34, paras. 51 and 53; and Report of the High-level Task Force on the Implementation of the Right to Development on its Second Meeting, UN Doc. E/CN.4/2005/WG.18/TF/3, para. 82 (2005); UNDRIP preamble para. 25.

<sup>74</sup> Burke (2014), at 250.

<sup>75</sup> Klager (2013), at 145.

<sup>76</sup> ICESCR art 1(2).

<sup>77</sup> CBD, Art. 1; ITPGRFA, Art. 1; Nagoya Protocol, Art. 1.

<sup>78</sup> CBD, Arts 15(7), 8(j); Nagoya Protocol, Art. 5.

<sup>79</sup> International Labour Organization's (ILO) Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 28 ILM 1382, Art. 15(2); ITPGRFA, Art. 9.

<sup>80</sup> *Saramaka*, para. 129; *Endorois*, para. 227; Rapporteur on Indigenous Peoples' Rights, Study on Extractive Industries and Indigenous Peoples, UN Doc. A/HRC/24/41 (2013), para. 52.

<sup>81</sup> UNCLOS, Art. 140; ITPGRFA, Art. 10; Nagoya Protocol, Art. 10.

<sup>82</sup> Harrison (2015), at 7–9 and Pavoni (2006), 29 respectively.

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This argument emerges from ongoing discussions of the human right to science and the human right to international solidarity and from long-standing efforts to clarify the content of the right to development.<sup>83</sup> It could be argued that framing these obligations, that generally do not use benefit-sharing terminology, as benefit-sharing could serve to underscore the need for a concerted, dialogic and iterative process for identifying the technology, funding or capacity to be transferred according to context-appropriate modalities and beneficiaries' preferences.<sup>84</sup> This argument finds some reflection in an emerging practice of international benefit-sharing institutions increasingly playing a proactive and brokering role.<sup>85</sup> For instance, the country-led platform for the co-development and transfer of technologies, which has been gradually brought under the ITPGRFA constituted a network of public and private institutions that collaborate in delivering a combination of information sharing, capacity building and technology co-development and transfer. The platform aims at identifying the real needs of targeted beneficiaries (small farmers and their communities), assembling technology packets instrumental to fostering technology absorption capacity, as well as developing standardized conditions.<sup>86</sup> Overall, however, whether and to what extent inter-State benefit-sharing adds to or complements financial, technological and capacity-building obligations under multilateral environmental agreements, remains to be clarified. This question needs to be addressed in the context of the current debate on the content and scope of the common but differentiated responsibility principle,<sup>87</sup> which justifies the design of different international obligations on the basis of different countries' current socio-economic situations and historical contribution to a specific environmental problem.

With regard to intra-State benefit-sharing, limited and qualified treaty bases<sup>88</sup> have been increasingly complemented by authoritative interpretations put forward by human rights bodies of adjudicatory and advisory nature, including by relying on international soft-law guidance adopted by consensus by CBD Parties. In addition, intra-State benefit-sharing requirements related to the use of natural resources and traditional knowledge have been increasingly reflected in the standards of international development banks,<sup>89</sup> the requirements of international climate initiatives,<sup>90</sup> and guidelines on land tenure and agricultural investment.<sup>91</sup> In these contexts, benefit-sharing is generally considered a safeguard,<sup>92</sup> but it seems more apt to understand it as an inherent component of human rights connected to natural resources.<sup>93</sup> As such, benefit-sharing obligations can be construed as part and parcel

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<sup>83</sup> N 3.

<sup>84</sup> Morgera (2015) on the basis of the call made by De Schutter (2011), at 348

<sup>85</sup> Morgera (2016c).

<sup>84</sup> FAO, Reports of Meetings on the Establishment of a Platform for the Co-development and Transfer of Technology (2013), FAO Doc IT/GB-5/13/Inf.16; ITPGR Resolution 4/2015 (2015) FAO Doc IT/GB-6/15/Res 4.

<sup>87</sup> Hey (2010); and Stone (2004). See also chapter 22 in this volume.

<sup>88</sup> CBD treaty provisions contains significantly qualified language and their legal weight has been contested: Harrop and Pritchard (2011) and Chiarolla et al (2009) at 7.

<sup>89</sup> E.g., Inter-American Development Bank, Operational Policy on Indigenous Peoples (2006), para. VI(f); European Bank for Reconstruction and Development, Environmental and Social Policy (2014), performance requirement 7, para 15.

<sup>90</sup> Notably climate finance and REDD. See Savaresi (2014).

<sup>91</sup> VGGT and CFS.

<sup>92</sup> *Saramaka*, para. 129; *Endorois*, para. 227; Rapporteur on Indigenous Peoples' Rights, Study on Extractive Industries and Indigenous Peoples, UN Doc. A/HRC/24/41 (2013), para. 52.

<sup>93</sup> But not as a self-standing right in and of itself. This proposition quickly abandoned by former UN Special Rapporteur James Anaya: n 21, paras. 67 and 76-78.

of the prohibition of discrimination against indigenous peoples on racial grounds,<sup>94</sup> and to that extent benefit-sharing could partake in the customary and *ius cogens* nature of non-discrimination. In all other cases, intra-State benefit-sharing obligations can be conceived as part and parcel of the general principle of international law<sup>95</sup> of effective consultation.<sup>96</sup>

Ultimately, fair and equitable benefit-sharing can be considered, in its normative core that is common to its inter- and intra-State dimensions, a general principle of international law. Its meaning goes beyond a particular treaty regime in which it can be found, and is ‘recognized by international law itself’<sup>97</sup> as the manifestation of consensus among developed and developing countries.<sup>98</sup> As such, fair and equitable benefit-sharing may affect the exercise of States’ discretionary powers in relation to the development, interpretation, and application of international law in the absence of an applicable treaty basis.<sup>99</sup> As a general principle, benefit-sharing also applies to international organizations.<sup>100</sup> It exerts influence by providing ‘parameters’ (an objective to be taken into account and appropriate processes for doing so<sup>101</sup>) affecting the way governments, courts or international organizations make decisions.<sup>102</sup> It provides a “yardstick” contributing to “the evolution of a new balance of rights and duties in many fields of international law” in the context of “legal relationships of all kinds” and “in a world deeply divided by conflicting ideologies as well as conflicting interests.”<sup>103</sup>

### 3.5 Research agenda

The absence of instances in which fair and equitable benefit-sharing has been fully developed<sup>104</sup> or made satisfactorily operational<sup>105</sup> points to a significant research agenda. From a normative perspective, it is difficult to derive a common core with regard to its beneficiaries, for instance. Who is entitled to fair and equitable benefit-sharing, in addition to indigenous peoples? Who is comprised among ‘local communities’ under the CBD and ‘farmers’ under the ITPGR?<sup>106</sup> Recent international soft-law initiatives appear to have expanded the meaning of beneficiaries to include small-scale fishing communities<sup>107</sup> and ‘tenure right holders’ (that is, those having a formal or informal right to access land and other

<sup>94</sup> IACtHR, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment (24 August 2010), Sect. 3.1 and n. 37; see Fodella (2013), at 358.

<sup>95</sup> IACtHR, *Comunidad Garífuna de Punta Piedra y sus miembros vs Honduras* (Preliminary Exceptions, Merits, Reparations and Costs), 8 October 2015, para. 222.

<sup>96</sup> Pentassuglia (2011), 176.

<sup>97</sup> Wolfrum (2010) paras 28 and 33-36. See also Birnie, Boyle and Redgwell (2009), at 26-29; Burke (2014), at 3-4, 95, 115, 123 and 253.

<sup>98</sup> Although there is confusion among general principles of international law and customary international law, it can be argued that the former only requires *opinio iuris*, whereas the latter also requires consistent state practice: Birnie, Boyle and Redgwell (2009), at 28.

<sup>99</sup> Boyle and Chinkin (2007), at 222-225.

<sup>100</sup> De Schutter (2010), at 55.

<sup>101</sup> Birnie, Boyle and Redgwell (2009), at 127.

<sup>102</sup> In accordance with Article 31(3) VCLT: *ibid*, at 28.

<sup>103</sup> Friedmann (1963) at 287 and 289-290.

<sup>104</sup> See interpretative divergences and ongoing negotiations under the Nagoya Protocol discussed in Morgera, Tsioumani and Buck (2014).

<sup>105</sup> An inter-sessional process is currently underway on enhancing the functioning of the ITPGRFA Multilateral System. ITPGRFA, Resolution 2/2013 (2013).

<sup>106</sup> ITPGRFA, Art. 9.2: see Tsioumani (2016). Note also the ongoing international process to draft a Declaration on the Rights of Peasants and Other People Working in Rural Areas, UN Doc. A/HRC/WG.15/1/2 (2013).

<sup>107</sup> FAO, Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication (2013), para. 5.1.

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natural resources for the realization of their human right to an adequate standard of living and well-being).<sup>108</sup>

Another normative question concerns future generations. There are virtually no discussions of the contribution of benefit-sharing to inter-generational equity. While there are indications in international law (mostly as preambular text of treaties) that global benefits arising from benefit-sharing may be geared towards reaching a wider group than those actively or directly engaged in bioprospecting, natural resource management, environmental protection or use of knowledge,<sup>109</sup> it remains unclear to what extent global benefits may also extend to future generations. In effect, the nature of the benefits is commonly defined with regard to the parties to the triggering activity, but several immediate benefits shared among them are meant to preserve, restore, or enhance the conditions under which underlying global benefits (such as ecosystem services) are produced. Ultimately, legal analyses of benefit-sharing still remain to be systematically connected to ongoing theoretical discussions of different concepts of justice and possible trade-offs among them.<sup>110</sup>

From a practical perspective, much remains to be ascertained as to when and why benefit-sharing achieves its stated fairness and equity purposes. Situations in which it does not, and rather contributes to consolidating power and information asymmetries, are well-documented.<sup>111</sup> Risks attached to different benefits (and the costs and losses that may be associated with certain benefits<sup>112</sup>) have not been fully or systematically analysed. The interaction between benefit-sharing and procedural rights (access to information, decision making, and justice)<sup>113</sup> and legal empowerment approaches<sup>114</sup> is also understudied, which is very concerning in light of the documented misuse of intra-State benefit sharing to 'renegotiate' communities' human rights or put a price tag on them.<sup>115</sup>

With regard to inter-State benefit-sharing, the interplay and tensions between economic and non-economic benefits, as well as between their immediate and global relevance, remains to be clarified. On the one hand, non-monetary benefits such as technology transfer and capacity building, can be essential to enhance the ability of beneficiaries to share in monetary benefits in the long term.<sup>116</sup> On the other hand, they may create dependency on external, ready-made solutions that may not fit particular circumstances or that may allow for the exertion of undue influence by donor countries.<sup>117</sup> More empirical and inter-disciplinary research<sup>118</sup> is needed to assess when and under which conditions benefit-sharing, true to its equity rationale, provides 'new perspectives and potentially fresh solutions to tricky legal problems' to the benefit of all, not just to the advantage of the powerful.<sup>119</sup>

#### 4.6 Bibliography

<sup>108</sup> VGGT, Art. 8.6.

<sup>109</sup> Morgera (2016a).

<sup>110</sup> Morgera (2015b).

<sup>111</sup> From an intra-State benefit-sharing perspective, Martin *et al.* (2014), at 84–88.

<sup>112</sup> From an intra-State benefit-sharing perspective, Wynberg and Hauck (2014), at 158.

<sup>113</sup> Rio Declaration, Principle 10. Note that Sand considered Rio Principle 27 on a global partnership as the substantive basis for the exercise of the procedural rights enshrined in Principle 10. Sand (2015), at 630–631.

<sup>114</sup> This is particularly the case of the 'community protocols' for which an international obligation to support has been included in the Nagoya Protocol, Art. 12(3)(a).

<sup>115</sup> Orellana (2008), at 847.

<sup>116</sup> E.g., Nagoya Protocol, preambular recitals 5, 7, 14.

<sup>117</sup> Morgera, Tsioumani and Buck (2014), at 313, 331.

<sup>118</sup> Parks and Morgera (2015).

<sup>119</sup> Burke (2014), at 250–251.

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