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The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-sharing

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No systematic study discusses the evolution of fair and equitable benefit-sharing across various areas of international law (environment, human rights, oceans), as well as at different levels of regulation (regional and national laws and guidelines, private law contracts, transboundary codes of conduct, customary laws of indigenous peoples and local communities). This article explores the usefulness of an interdisciplinary approach to the study of norm diffusion for understanding how and why fair and equitable benefit-sharing is articulated in different sites. The article discusses mechanisms, actors and frames in norm diffusion, drawing on literature from sociology, international relations and law. The article uncovers underlying similarities in scholarship on norm diffusion across the disciplines considered. It also reflects on the value of an interdisciplinary approach that encourages legal scholars to consider the implications of power structures in the diffusion of law, while the nuances of legal knowledge may lead other social scientists to revisit accepted findings on norm diffusion. These findings appear particularly useful for informing an assessment of the potential of fair and equitable benefit-sharing to promote the conservation and sustainable use of natural resources in a fair and equitable manner in the face of power asymmetries.

INTRODUCTION

Fair and equitable benefit-sharing is a promising concept that may allow a fresh approach to the management of natural resources in ways that encourage and reward sustainable practices, while respecting human rights, thereby possibly contributing to the most intractable environmental issues of our time. The legal concept of fair and equitable benefit-sharing[1] has increasingly emerged in various areas of international environmental law – most visibly in international biodiversity law,[2] but also in relation to oceans, climate change, water, food and agriculture,[3] as well as in international processes on human rights and corporate accountability.[4] However, no generally accepted definition or systematic study of benefit-sharing exists. There are only a few, partial horizontal comparisons of international legal instruments enshrining benefit-sharing,[5] and some vertical comparisons about the implementation of relevant international

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[1] E. Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit-sharing', *European Journal of International Law* (forthcoming), found at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633939>.

[2] Notably, the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992; in force 29 December 1993); the 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, 29 October 2010; in force 12 October 2014) ('Nagoya Protocol'); and the International Treaty on Plant Genetic Resources for Food and Agriculture (Rome, 3 November 2001; in force 29 June 2004).

[3] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994), Articles 82.4 and 140.2; Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (UN Doc. A/CONF.151/26, 14 August 1992), at paragraph 12(d); Ramsar Convention on Wetlands of International Importance, Resolution X.19, Wetlands and River Basin Management: Consolidated Scientific and Technical Guidance (2008), Annex, at paragraph 25; CBD, Decision V/25, Biodiversity and Tourism (UN Doc. UNEP/CBD/COP/5/23, 22 June 2000), at paragraphs 4(b) and (d); UN-REDD, 'UN-REDD Programme Social and Environmental Principles and Criteria' (2012), Criterion 12; Adaptation Fund, 'Environmental and Social Policy' (2013), at paragraph 13; and Food and Agriculture Organization of the United Nations (FAO), 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' (2012), Article 8.6.

[4] See, e.g., Universal Declaration on Human Rights (UNGA Resolution A/RES/3/217 A, 10 December 1948), Article 27.1; Inter-American Court of Human Rights 28 November 2007, *Saramaka People v. Suriname*, Judgment No. 172, at paragraph 138; 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), at paragraph 274; and International Finance Corporation (IFC), 'Performance Standard 7' (2012), at paragraphs 18–20.

[5] See, e.g., A. Broggiato *et al.*, 'Fair and Equitable Sharing of Benefits from the Utilization of Marine Genetic Resources in Areas beyond National Jurisdiction: Bridging the Gaps between Science and Policy', 49 *Marine Policy* (2014), 182, who compare the Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture and the Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits.

legal instruments at the national level.[6] Producing more (and more comprehensive) comparative legal studies of fair and equitable benefit-sharing in and across international and national law, would, however, only cover part of the picture, as the understanding of fair and equitable benefit-sharing is also shaped by private law contracts, corporate codes of responsible conduct, protocols developed by indigenous peoples or local communities, eligibility requirements for international funding and project-specific guidelines – and by reciprocal interactions among all of the above. It should not be ruled out, for instance, that what today appears as an international legal concept of fair and equitable benefit-sharing has originated elsewhere, for instance, in the practices of indigenous peoples and local communities on the ground.[7]

As argued elsewhere, fair and equitable benefit-sharing has been identified as an ideal case study of global environmental law.[8] Just looking at its embodiment in the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing suffices to make the point. The implementation of the Protocol will entail complex and creative links between different areas of international law,[9] an inter-operable web of national laws of provider and user countries and contractual arrangements between private parties feeding into a system of internationally recognized certificates,[10] based on the respect for the customary laws of local and indigenous communities at all these regulatory levels.[11] In addition, the open-ended provisions of the Protocol will likely allow for a variety of legal approaches to implementation at different levels, through dynamic relations between local, national, transnational and international law. The Protocol's text itself specifically provides for opportunities for horizontal[12] and bottom-up[13] regulatory cross-fertilization. Clearly, better understanding this, as well as other legal manifestations of fair and equitable benefit-sharing from a global perspective, calls for critical and self-reflexive engagement with the opportunities, risks and limitations of comparative legal research methodologies,[14] as well as collaboration and peer learning with other disciplines that may be more equipped to assess empirically complexity and variability.[15]

Taking fair and equitable benefit-sharing in different normative and regulatory sites at different territorial levels as an illustrative case, this article examines the potential benefits of an interdisciplinary approach to the study of norm diffusion that draws on the literatures in law, international relations and sociology. In so doing, the article offers an original insight into the often-ignored points of contact among these disciplinary approaches. It argues that an interdisciplinary approach can help uncover the paths of the diffusion of the norm of benefit-sharing as well as the meanings attached to this norm in different sites. We do not endeavour to present an exhaustive review of the literature in these fields, discussing rather those sources that contribute particular insights to a study focused on uncovering a norm that is undergoing a process of diffusion and meaning negotiation. We highlight why the lens of norm diffusion may help to construct a holistic and nuanced investigation of the legal norm of benefit-sharing from a comparative perspective, by illustrating the paths, and actors logics of the diffusion of the norm, and how its meaning is built through social interaction in these (politicized) processes. We explore the opportunities for an interdisciplinary approach to shed light on social interactions that imbue legal norms with meaning in different settings both within and outside the international arena, arguing that a purely legal comparative study would be likely to miss such interaction. We are interested in both the paths of diffusion and the negotiation of the meaning of benefit-sharing precisely because no accepted definition yet exists.[16] We do not aspire at this stage to any normative evaluation of the potential of benefit-sharing in the race to protect natural resources in a fair and equitable manner for the same reason. No worthy evaluation can be made without first mapping the different framings of the norm of benefit-sharing, their political motivations and implications. The approach we outline here will be used to guide further research in this direction.

The article will first offer a working definition of fair and equitable benefit-sharing, based on an analysis of rele-

[6] E. Morgera, M. Buck and E. Tsioumani (eds.), *The 2010 Nagoya Protocol on Access and Benefit-sharing in Perspective: Implications for International Law and Implementation Challenges* (Brill/Martinus Nijhoff, 2012), Part III.

[7] See, e.g., B.H. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights and the Law of the Commons* (Cambridge University Press, 2013), at 221 and 237.

[8] E. Morgera, 'Global Environmental Law and Comparative Legal Methods', 24:3 *Review of European, Comparative and International Environmental Law* (2015). 254.

[9] See E. Morgera *et al.*, n. 6 above.

[10] Nagoya Protocol, n. 2 above, Articles 17.2–4.

[11] Ibid., Article 12.1.

[12] Ibid., Article 4.3, calling for paying due regard to 'useful and relevant ongoing work or practices under such international instruments and relevant international organizations'. For a discussion, see E. Morgera, E. Tsioumani and M. Buck, *Unraveling the Nagoya Protocol: Commentary on the Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Brill/Martinus Nijhoff, 2014), at 84–109.

[13] Nagoya Protocol, n. 2 above, Articles 19–20, mandating the governing body of the Protocol to consider developments in model contractual clauses, codes of conduct and guidelines. For a discussion, see E. Morgera *et al.*, n. 12 above, at 293–300.

[14] Both as a practice of 'reconciliation' of different legal phenomena 'without prejudice to the ongoing existence of that which is compared, in order to achieve the most just solution of whatever problem has arisen': P. Glenn, 'Comparative Legal Families and Comparative Legal Traditions', in: M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 422, at 433 and 439; and for its 'critical and demystifying potential': U. Mattei, 'Comparative Law and Critical Legal Studies', in: M. Reimann and R. Zimmermann, ibid., 816, at 819.

[15] See E. Morgera, n. 8 above.

[16] B. De Jonge, 'What is Fair and Equitable Benefit-sharing?', 24:2 *Journal of Agricultural and Environmental Ethics* (2011), 127; and D. Schroeder, 'Benefit-sharing: It's Time for a Definition', 33:4 *Journal of Medical Ethics* (2007), 205.

vant international treaty law. It will then illustrate our intuition about the usefulness of integrating law, international relations and sociology in the study of benefit-sharing as a norm that is diffusing, with a view to identifying research questions focusing on paths, logics and actors of diffusion, as well as on framing. The article concludes by highlighting the insights that can already be brought to bear from sociological and international relations approaches on a legal study of benefit-sharing and vice versa. It also offers a broader discussion of the potential value-added of the proposed interdisciplinary approach to the study of norm diffusion that may be of interest to other scholars beyond the specific case of benefit-sharing. In particular, we note an underlying convergence in the central paths in each of the disciplinary literatures discussed – a point that adds to ever more frequent calls for interdisciplinary research on the law.

A WORKING DEFINITION OF FAIR AND EQUITABLE BENEFIT-SHARING

Though it has been subject to significant normative elaboration in different areas of international law and can in the most general sense be understood as the fair and equitable distribution of benefits arising from the use of natural resources among State and non-State actors, there is no single definition of benefit-sharing. The difficulty lies in identifying the basis on which benefits should be shared, as well as differing understandings of what a benefit is and who the beneficiaries should be. Based on empirical studies, Wynberg and Hauck note that the term may denote 'a new way of approaching natural resource management and spreading the costs and benefits of using and conserving ecosystems and their resources across actors'.[17]

Against this background, it should first be noted that studies of benefit-sharing from a broad subject-matter perspective have been carried out mostly by non-lawyers,[18] whereas legal studies on benefit-sharing have been carried out only within sub-specialist areas.[19]

Based on a preliminary study of instances of fair and equitable benefit-sharing across different international treaties, however, fair and equitable benefit-sharing has been defined as

> the concerted and dialogic process aimed at building partnership in identifying and allocating economic and non-economic benefits among State and non-State actors, with an emphasis on the vulnerable (particularly, developing countries, indigenous peoples and local communities). Even in the context of bilateral exchanges, fair and equitable benefit-sharing encompasses multiple streams of benefits of local and global relevance, as it aims to benefit a wider group than those actively or directly engaged in bioprospecting, natural resource management, environmental protection or use of knowledge where a heightened and cosmopolitan form of cooperation is sought.[20]

In other words, despite its kaleidoscopic phenomenology, common features of fair and equitable benefit-sharing can be summed up in a concept that allows comparative research in international law, with a view to better understanding the interactions between equity, human rights and the environment.

In that connection, attention should also be drawn to distinct dimensions of fair and equitable benefit-sharing: among States (inter-State), and between States and indigenous peoples and local communities (intra-State). Among States, benefit-sharing can be seen as a tool that contributes to reaching consensus between developed and developing countries by rewarding the latter's efforts in addressing environmental challenges and contributing to global public goods through inter-State exchanges such as payments, information-sharing, financial solidarity, technology transfer and capacity building. Within States, benefit-sharing can be seen as a tool to contribute to the respect by governments and by business operators of the human rights of indigenous peoples and local communities in the conservation, sustainable use and regulation of natural resources. In the latter sense, it serves to reward communities for their stewardship of their traditional lands and natural resources through payments for ecosystem services, profit-sharing, recognition of traditional tenure and practices, joint ventures and job creation. A transnational dimension of benefit-sharing can also be identified between and beyond the inter- and intra-State dimensions. These include inter-State benefit-sharing systems established by international treaties that are operationalized through private law contractual negotiations; or inter-State benefit-sharing arrangements that ultimately channel benefits directly to indigenous peoples or local communities through an international mechanism.[21] Another transnational instance of benefit-sharing is represented by community pro-

[17] R. Wynberg and M. Hauck, 'Sharing Benefits from the Coast', in: R. Wynberg and M. Hauck (eds.), *Sharing Benefits from the Coast: Rights, Resources and Livelihoods* (UCT Press, 2014), 1, at 6.

[18] See, e.g., A. Martin *et al.*, 'Just Conservation? On the Fairness of Sharing Benefits', in: T. Sikor (ed.), *The Justices and Injustices of Ecosystem Services* (Earthscan, 2014), 69; B.A. Nkhata *et al.*, 'A Typology of Benefit Sharing Arrangements for the Governance of Social–Ecological Systems in Developing Countries', 17 *Ecology and Society* (2012), 1; and E. Van Wyk, C. Breen and W. Freimund, 'Meanings and Robustness: Propositions for Enhancing Benefit Sharing in Social–Ecological Systems', 8:2 *International Journal of the Commons* (2014), 576.

[19] Typical cases concern benefit-sharing under the International Treaty on Plant Genetic Resources for Food and Agriculture; see the review by E. Tsioumani, 'Exploring Benefit-sharing from the Lab to the Land (Part I): Agricultural Research and Development in the Context of Conservation and Sustainable Use' (2014), found at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524337>.

[20] See E. Morgera, n. 1 above, at 26.

[21] See E. Morgera, n. 1 above.

tocols, which operate through the interaction of international law, national law and the customary law of indigenous peoples and local communities. These are written documents in which indigenous peoples and local communities articulate their values, traditional practices and customary law concerning environmental stewardship, based upon the protection afforded to them by international environmental and human rights law, including on benefit-sharing.[22]

That said, benefit-sharing can be and has been used as a semantic sticking plaster for harmful practices, as a superficial means to garner social acceptability for certain natural resource developments or regulations, and even to rubber stamp inequitable and non-participatory outcomes that benefit 'stronger' parties (such as rich countries, powerful foreign investors).[23] An investigation of how benefit-sharing is understood and works in practice is thus also required to enrich the study of its manifestations in international law.

NORMS AND NORM DIFFUSION

Across the social sciences, norms are essentially understood as notions that define appropriate behaviour, be that by States, individuals or other actors. Providing some guide as to behaviour distinguishes a norm from a more general idea. Identifying legal norms is also a traditional and ever-elusive preoccupation of comparative law.[24] In the disciplines of particular interest here, norms may inform individual or organizational behaviour for sociologists and State behaviour for scholars of international relations.

In law, and particularly in international law, there have been debates as to what constitutes a legal norm, particularly when a norm is not legally binding. Clear-cut distinctions are notoriously difficult to draw, as legally binding norms in international environmental law are often not attached to formal sanctions, while soft-law norms may be quite effectively attached to informal monitoring or even sanctioning systems, and may evolve into hard norms over time.[25] With reference to transnational legal orders, Halliday and Shaffer distinguish legal norms from other types by noting they are produced by, and interact with, legal institutions, and take known legal forms; however, like all norms legal norms shape behaviour through processes that can be understood as social and political.[26] In line with an understanding of international law as a process implicit in the recognition that legal norms must change behaviour,[27] we rely on Brunnée and Toope's explanation that binding legal norms 'emerge from patterns of expectation developed through coordinated discussions and actions of states in a given issue-area' in the context of regimes that 'evolve along a continuum from dialogue and sharing of information to more defined frameworks for cooperation to binding norms in a more precisely legal sense'.[28] Legal norms, in this understanding, retain the qualities underlined in other social sciences linked to guiding human behaviour.

Benefit-sharing as a legal norm guiding behaviour currently occurs in a number of sites of international law, as well as in disparate areas of national law and different legal instruments and practices at local levels, which are often interlinked and mutually influencing. The appreciation of this dynamic reality points to the potential usefulness of a norm diffusion approach to question how the norm travels, and how the norm's meaning is defined in different sites. The study of norm diffusion grew within the social sciences precisely in order to understand how norms travel across different sites and become embedded in various contexts (or not), as well as how norms are interpreted or framed, and the roles of different actors in both. The remainder of the article discusses norm diffusion accordingly. The following section focuses on logics, paths and actors in diffusion, and draws attention to how the selected literature allows a consideration of factors that may otherwise go un- or under-studied by the legal, international relations or sociological scholar working solely within the

[22] See E. Morgera and E. Tsioumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Community Livelihoods', 19:2 *Review of European Community and International Environmental Law* (2010), 150.

[23] See, e.g., P. Schwartz, 'Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining', in: J. Ebbeson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge University Press, 2009), 429, at 438.

[24] U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal System', 45:1 *American Journal of Comparative Law* (1997), 5, at 13 and footnote 37, where the author refers to 'the largely sterile and boring discussion of what can be considered law. I assume . . . law includes whatever functions in the world's legal systems as law, i.e. whatever gives individuals incentives strong enough to affect their social behaviour.'

[25] C. Chinkin, 'Normative Development in the International Legal System', in: D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000), 21, at 31; and generally also J. Pauwelyn, R.A. Wessel and J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012).

[26] T.C. Halliday and G. Shaffer, *Transnational Legal Orders* (Cambridge University Press, 2015), at 4–10.

[27] See J.L. Dunoff and M.A. Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue', in: J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013), 3, who note contrasting views of international law and the importance of clear epistemology in interdisciplinary efforts uniting international law and international relations.

[28] J. Brunnée and S.J. Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building', 91:1 *American Journal of International Law* (1997), 26, at 31. For a more recent and in-depth discussion of legal norms, see J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law* (Cambridge University Press, 2010).

framework of his/her own discipline. A section discussing the role of framing then reflects on how to evaluate the embeddedness of norms. Rather than attempting an exhaustive review, we aim to present concepts and discussions from a range of social scientific disciplines focusing on law, political sociology and international relations with a view to assessing whether they may form a coherent whole to guide an investigation of benefit-sharing. While other disciplines (such as anthropology, economics, cultural geography) may also bring useful insights to such an endeavour, it has been contended that important aspects in the diffusion of benefit-sharing are political.[29] Political sociology and international relations allow a focus on the political aspects of norm diffusion at the international, national and local levels in a unified and systematic manner. This is in line with the increasing recognition in comparative law that the idea of 'legal transplants' is inadequate to capture the complexity of the circulation of legal ideas, as well as the need to account for domination and power disparity in that connection.[30]

We are particularly interested in exploring the integration of a political–sociological view of framing with a norm diffusion approach, as well as the opportunities offered by constructivist understandings of both international relations and international law. Constructivist theories focus on 'intersubjective understandings',[31] seeing both international relations and international law as processes rooted in social interaction: 'Law is formed and maintained through continuing struggles of social practice.'[32] Our choice here is linked to our understanding of benefit-sharing as a norm in diffusion whose meaning is still under discussion and thus under social construction. Constructivist theories and studies also provide the most suitable tools for our core research questions around how the norm of benefit-sharing is diffusing, and the understandings attached to it. By assuming social construction, the tools of constructivist approaches can be applied to a study that aims to uncover diffusion and meaning with a view to generating findings that may underpin further research. In that view, the current approach by no means excludes the possibility of further research, drawing on the findings of a study of benefit-sharing taking the current approach, but based in a more positivist ontology.

We order our reflections on an interdisciplinary approach to norm diffusion by focusing in turn on paths and logics, actors and framing, and supplementing them with specific considerations of benefit-sharing.

THE PATHS AND LOGICS OF NORM DIFFUSION

A clear point of departure for a study of fair and equitable benefit-sharing is to reflect on *how* and *why* the norm has come to be taken up in such a variety of different locations – that is, on the paths and logics of diffusion. While legal studies may uncover paths of diffusion, logics may be left aside. Understanding why a norm is taken up in different sites is key to an eventual evaluation of normative worth.[33]

These different dimensions illustrate the range of potential paths along which the norm of benefit-sharing may travel – from the top down, the bottom up or horizontally. The most familiar in law are horizontal and top-down scenarios, where the focus is how 'one legal order influences another in some significant way'.[34] Twining demonstrates that the concept of norm diffusion is particularly apt to better understand the relations and mutual interactions between different levels of legal ordering (which are not necessarily static or clearly defined) of human relations at different geographical levels.[35] Since benefit-sharing is a norm present in different regimes of international law and national law, and affects new iterations of local practices, the potential advantages of a norm diffusion approach are clear. As Twining notes elsewhere, traditionally legal literature has relied on a 'naïve' and State-focused model focusing on the transplantation of law from developed to developing countries.[36] Recent scholarship has moved away from an exclusive focus on national laws,[37] notably by turning to the wider social sciences in a bid to capture how law is socially and politically rooted.[38] Attention is thus turning to bottom-up and horizontal paths of diffusion and the logics that underpin them.

Where legal scholarship identifies the need to widen its considerations on norm diffusion to paths other than top-down diffusion, the tendency is to borrow from other disciplines. Westbrook sketches four scenarios of

[29] See F. Nelson, 'Introduction: The Politics of Natural Resource Governance in Africa', in: F. Nelson (ed.), *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa* (Earthscan, 2010), 3; and R. Wynberg and M. Hauck, n. 17 above.

[30] See U. Mattei, n. 14 above, at 827–828.

[31] See J.L. Dunoff and M.A. Pollack, n. 27 above, at 8.

[32] J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law*, n. 28 above, at 22.

[33] See M. Mehling, 'The Comparative Law of Climate Change: A Research Agenda', 24:3 *Review of European, Comparative and International Environmental Law* (2015), 341.

[34] W. Twining, 'Diffusion of Law: A Global Perspective', 36:49 *Journal of Legal Pluralism* (2004), 1, at 14.

[35] Ibid.

[36] W. Twining, 'Social Science and Diffusion of Law', 32:2 *Journal of Law & Society* (2005), 203, at 203–205.

[37] See, e.g., W.F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, 2006); see also E. Morgera, n. 8 above.

[38] See, e.g., M. Reimann, 'Comparative Law and Neighbouring Disciplines', in: M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012), 13.

diffusion: *imperium*, where authority is imposed by a sovereign (reminiscent of sovereign States as understood in realist theories of international relations); *fashion*, a legal system that changes according to what is perceived to be modern – which is not necessarily the most efficient norm (key in both sociology and constructivist international relations and thus to our model of norm diffusion; as discussed below); *system*, where globalization as an entirely new system is slowly generating and creating a novel body of norms; and finally *tribe*, where law is de-territorialized and travels with people rather than being attached to any one State or other polity. The latter, as Westbrook observes, recalls the concept of democracy denoting rule by *the people*, that is, as emanating from people rather than a State. By sketching different potential scenarios of norm diffusion, which map to the typologies in other areas of the social sciences, Westbrook's work demonstrates how an interdisciplinary norm diffusion approach can aid legal scholars to consider the interplay between legal regimes at different levels more thoroughly. His 'scenarios' also, we would add, lead to a consideration of political realities affecting relationships between States.[39]

It is the *fashion* scenario that comes to the fore in discussions of norm diffusion in sociology and international relations. Both, it is interesting to note, have witnessed somewhat similar lines of development, moving away from research explaining diffusion through efficiency and rationality (akin to the assumptions of superiority Twining describes, and Westbrook's imperium scenario, in turn akin to realist theories of international relations[40]). In the sociological literature, DiMaggio and Powell's classic work on institutional isomorphism suggests that organizational change can be better explained with reference to a 'logic of appropriateness' (normative concerns) than by sole reference to a 'logic of consequences' (efficiency concerns).[41] Similarly, in the international relations literature, Checkel observes that States' strategic calculations, rooted in a logic of consequences may, over time, become internalized, and a norm's reproduction will thus be rooted in a logic of appropriateness. In a second scenario, States or their agents adopt a role *seen* to be appropriate in order to simplify their tasks whether or not any internalization has taken place.[42] Finally, in a scenario of normative suasion, State agents will 'actively and reflectively internalize new understandings of appropriateness'.[43] They are, in other words, *convinced* that the new norm is right.

By incorporating considerations of different types of logic in norm diffusion, more nuanced understandings of the rises and tumbles of benefit-sharing in international law can be gained. For example, given its first origins in international human rights instruments,[44] benefit-sharing can be said to have a normative link to human rights, thereby emphasizing a logic of appropriateness rather than efficiency. Such a logic can be observed in the normative developments under the Convention on Biological Diversity (CBD) related to recognizing and supporting the ecosystem stewardship of indigenous peoples and local communities,[45] under the International Treaty on Plant Genetic Resources for Food and Agriculture with regard to farmers' rights,[46] and in the safeguards for indigenous peoples in connection with the climate change regime.[47] On the other hand, questions of efficiency may be equally, if not more, prominent in multilateral negotiations on benefit-sharing. Under the CBD, incentivizing community environmental stewardship is also seen as a means to enhance compliance with the law.[48] Under the International Treaty on Plant Genetic Resources for Food and Agriculture, negotiations are dominated at the time of writing by the inefficient functioning of the multilateral benefit-sharing system created under the treaty, as monetary benefits have not yet been accrued.[49] Furthermore, under the climate regime, it may be argued that a growing interest in the traditional knowledge of indigenous

[39] D.A. Westbrook, 'Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless', 47:2 *Harvard International Law Journal* (2006), 489. These 'scenarios' also recall mechanisms of norm diffusion explored using different terminology in various fields. Biedenkopf, for example, discusses 'learning, emulation and competition' as 'transfer mechanisms' in the journey of the idea of emissions trading from the European Union to the United States; see K. Biedenkopf, 'Emissions Trading – A Transatlantic Journey for an Idea?' (2012), found at: <http://www.polsoz.fu-berlin.de/en/v/transformeurope/publications/working_paper/WP_45_Biedenkopf1.pdf>.

[40] See W. Twining, n. 36 above; and D.A. Westbrook, n. 39 above.

[41] P.J. DiMaggio and W.W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', 48:2 *American Sociological Review* (1983), 147. See also J.G. March and J.P. Olsen, 'The New Institutionalism: Organizational Factors in Political Life', 78:3 *The American Political Science Review* (1984), 734.

[42] J. Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework', 59:4 *International Organization* (2005), 801.

[43] Ibid., at 812.

[44] Universal Declaration on Human Rights, n. 4 above, Article 27.1; Declaration on the Right to Development (UNGA Resolution A/RES/41/128, 4 December 1986), Article 2.3; International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, 27 June 1989; in force 5 September 1991), Article 15.2.

[45] See E. Morgera and E. Tsioumani, n. 22 above; E. Morgera, n. 1 above.

[46] See E. Tsioumani, n. 19 above.

[47] A. Savaresi, 'The Emergence of Benefit-sharing Under the Climate Regime: A Preliminary Exploration and Research Agenda' (2014), found at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524335>.

[48] Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, adopted by CBD Decision VII/12, Sustainable Use (Article 10) (UN Doc. UNEP/CBD/COP/7/21, 13 April 2004), Annex II, rationale to Principle 4.

[49] See E. Tsioumani, n. 19 above; see also S. Gagnon *et al*., 'Summary of the Sixth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture', 9:565 *Earth Negotiations Bulletin* (2015), at 12–14.

peoples and local communities is driven by a logic of effectiveness in advancing climate science.[50] In all these cases, both logics of efficiency and appropriateness combine to furnish more nuanced understandings of the interaction and possible tensions between the embodiments of benefit-sharing in different instruments of international environmental law and their human rights implications.

ACTORS OF NORM DIFFUSION

There is then some consensus that norms are often taken up by actors (an individual, State or organization) because they are seen as appropriate or right. This equates with a constructivist view: norms are built and spread by actors (or laws) in their interactions by somehow acknowledging or otherwise expressing this perceived worth. These ideas are explored in greater detail below, but at this point it is worth reiterating that this view of norms and their diffusion entails a similarly constructivist understanding of international law as a process. This is the view, as mentioned, taken by Brunnée and Toope, whose interactional theory of international legal obligation notes 'law's grounding in social interaction' and thus recognizes that both the law itself and various actors work to foster 'a sense of obligation'.[51] This constructivist epistemology may thus serve to underpin a study of the diffusion of legal norms premised on the understanding that international law is not static and cannot be understood through approaches that consider it as such, regardless of discipline.[52]

Complexity thus appears a necessary part of an account of norm diffusion where norms are understood to diffuse through a range of social interactions.[53] It seems, therefore, promising to account for a breadth of possible combinations of paths, logics and actors in norm diffusion otherwise overlooked in many purely legal studies. Concerning how the benefit-sharing norm may diffuse along different paths in the intra-State, inter-State and transnational dimensions, we now continue the necessary discussion of *actors* begun above. Common throughout the literature on norm diffusion in sociology and international relations is a focus on different types of individual and collective actors that play a role in spreading norms. More attention to norm entrepreneurs has also been paid by international lawyers.[54] For the intra-State dimension, the sociological literature provides potentially informative discussions on social networks as links between micro- and macro-levels, detailing how attention to social interaction can shed light on how legal norms spread. Djelic, for example, distinguishes between in-group and bridging networks. The first are dense, closely knit and potentially exclusive, while the second are looser and contain peripheral members from different networks. Peripheral in-group members and members of bridging networks facilitate diffusion, since they involve those with overlapping network memberships.[55] Through these contacts, both communicate norms arising in one group to another. Guiraudon, for example, shows that such processes are at work in the transnational diffusion of norms concerning foreigners' rights.[56]

Explicit analyses of norm diffusion in international relations are a relatively recent development and often concentrate on the logics behind diffusion rather than the shape of networks that might allow diffusion.[57] Earlier discussions can be identified in the English School's central concept of 'international society', which sees international society as 'a social contract among societies themselves each constituted by their own social contract', and norms therefore as constitutive in how this society functions.[58] Work in the English School stops short of discussing norms in a methodological view, however.[59] Practical discussions of the channels through which diffusion takes place are undertaken by constructivist scholars of international relations, and thus echo sociological work, for example, in work on transnational advocacy networks by Keck and Sikkink, or norm entrepreneurs by Finnemore and Sikkink.[60] Actors within these networks carry norms to new sites via networks, similarly to those discussed in the sociological literature.

The sociological and international relations literature thus draws our attention to the importance of social

[50] A. Savaresi, 'Traditional Knowledge in International Law: Lessons for the Climate Regime' (forthcoming).
[51] See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law*, n. 28 above.
[52] For another interdisciplinary approach that builds on a similar foundation, see T.C. Halliday and G. Shaffer, n. 26 above.
[53] J. Webb, 'Law, Ethics and Complexity: Complexity Theory and the Normative Reconstruction of Law', 52 *Cleveland State Law Review* (2004–2005), 227, at 230.
[54] E.M. Hafner-Burton *et al.*, 'Political Science Research on International Law: The State of the Field', 106:1 *American Journal of International Law* (2012), 47.
[55] M. Djelic, 'Social Networks and Country-to-Country Transfer: Dense and Weak Ties in the Diffusion of Knowledge', 2:3 *Socio-Economic Review* (2004), 341.
[56] V. Guiraudon, 'European Courts and Foreigners' Rights: A Comparative Study of Norm Diffusion', 34:4 *International Migration Review* (2000), 1088.
[57] F. Gilardi, 'Transnational Diffusion: Norms, Ideas, and Policies', in: W. Carlsnaes, B.A. Simmons and T. Risse-Kappen (eds.), *Handbook of International Relations* (Sage, 2012), 453.
[58] B. Buzan, *An Introduction to the English School of International Relations* (Polity Press, 2014), at 13.
[59] Ibid.
[60] M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998); M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', 52:4 *International Organization* (1998), 887.

networks in the diffusion of benefit-sharing among different levels. The example of community protocols illustrates this point. Community protocols, which articulate points relevant to benefit-sharing as described above, were first presented by nongovernmental organizations (NGOs) on the sidelines of intergovernmental negotiations at the international level: local-level practitioners succeeded in convincing regional groups to include community protocols in official negotiating positions.[61] As a result of the work of the NGOs on the ground and their efforts in bringing lessons learnt to the international negotiating table, community protocols were recognized in the text of an international treaty, the Nagoya Protocol.[62] At a later stage, then, the international legal recognition of protocols, as a locally grounded expression of ideas related to benefit-sharing, provides a different driver for norm diffusion. Focusing on either social networks or the law as the agent of diffusion here would thus have obscured the picture.

At this point in the discussion, we can identify significant points of contact among the selected disciplines. Scenarios or logics of norm diffusion such as Westbrook's imperium, fashion, globalization and tribe, where fashion forms the focus of substantive discussion in sociology and constructivist international relations, make an important contribution to an interdisciplinary approach to the diffusion of the legal norm of benefit-sharing. This contribution can be summarized as allowing the scholar to take account of social interactions within networks, which form the channels for diffusion, as well as allowing networks to exist at a variety of territorial levels. To develop this approach further, we now explore intricate accounts of norm diffusion across the literatures of interest. Legal accounts, as we have already noted, bring justified attention to the role of law as an active force at play in norm diffusion in its own right that is often missing from accounts in political sociology and international relations. At the same time, the political sociological literature on social movements complements this with useful tools to explain how a legal norm may become embedded in different local realities in intra-State benefit-sharing. The literature on social movements is of interest to an explanation of the diffusion of benefit-sharing precisely because it deals with collectives of individuals and how they build meaning amongst themselves in order to carry out collective action, which is often aimed at interaction with some form of authority. The constructivist international relations literature is useful in informing an understanding of inter-State benefit-sharing. All may inform transnational diffusion. These literatures deepen the approach by providing legal scholars with an additional handle to explain, eventually, variation in respect for legal norms. Where a legal norm is embedded (where it is accepted to be 'appropriate' in a particular social context) it is, perhaps, more likely to contribute to the existence of effectively implemented law.

Across the social scientific literature, the roles of both laws and actors are recognized in processes of norm diffusion. In the majority of the legal literature, the emphasis is clearly on the former: the law is seen as the agent of norm diffusion. More recent works in comparative law also include reflections on actors, thereby borrowing from other areas of the social sciences. Sarfaty offers an anthropological perspective on the study of the interplay between international, national and local norms. In particular, her ethnographic study of how norms are translated at the local level in the Pimicikamak Cree Nation in Canada into newly developed indigenous law serves to develop a model of *legal mediation* where 'a process of negotiation among multiple normative commitments and legal entities' takes place, and 'local actors play an important role in shaping how international norms become internalized within their communities'.[63]

Sarfaty's work is particularly useful to deepen our earlier reflection on community protocols as embodiments of a specific community's views of culturally appropriate benefit-sharing. When NGOs were pushing for the recognition of community protocols at the international level during the negotiations of the Nagoya Protocol, we can describe an instance where conscious efforts were made by relatively informal actors that were active both on the ground and at the international level to diffuse locally grounded understandings of benefit-sharing from the bottom up.[64] As community protocols came to be recognized in the Nagoya Protocol, a different dynamic may have been generated. Governments seeking to implement the treaty are likely to push for the use of community protocols at local levels via a variety of actors and institutional channels. There is likely to be pressure from above on communities to codify their understandings of benefit-sharing in community protocols and adapt local benefit-sharing norms to international standards that may be exogenously interpreted by governments or outsiders (as Sarfaty cautions).[65] The community protocols example thus shows not only the usefulness of considering a range of actors, but also of considering how their interactions weave together to push diffusion along different paths. We return to this in our discussion of framing below. First, we continue

[61] S.K. Bavikatte, *Stewarding the Earth: Rethinking Property and the Emergence of Biocultural Rights* (Oxford University Press, 2014).
[62] Nagoya Protocol, n. 2 above, Article 12.
[63] G.A. Sarfaty, 'International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation', 48:2 *Harvard International Law Journal* (2007), 442, at 444.
[64] See discussions below on varying paths of diffusion and active vs. passive diffusion.
[65] See G.A. Sarfaty, n. 63 above, at 482.

to explore the range of actors that may be classed as more formal or informal engines of diffusion.

In political sociology, scholars refer to collective actors ranging from institutional bodies to NGOs or social movements, and indeed the networks that grow within and between these,[66] as well as key individuals and arenas of communication where the appropriateness of a norm is communicated (e.g., mass media, academic works). Institutional channels in political sociology refer to less formal routes than those considered in international relations, since the discipline focuses on societal power in relation to the State, and includes work on the influence of lobbying (by business and social groups alike) and protest,[67] as well as via the media,[68] or indeed through theorization, which may drive diffusion by linking disparate actors and providing motivations for adoption.[69] A similar story exists in constructivist international relations accounts, referring to norm entrepreneurs, which may be individuals, NGOs, State actors,[70] and can also be found in foreign policy analysis work.[71]

Considering the potential role of arenas of communication mentioned above, the question of whether norm diffusion occurs more actively or passively arises. Where more classical legal studies see norms diffused through the law alone, and would not consider such questions, the studies outlined here as well as the example of community protocols highlight that the work of a variety of actors, and their different agendas, may also play a crucial role. So if we are to understand the 'social relevance' of a 'written law' (which is exactly our ultimate aim) an interdisciplinary approach is needed.[72] More passive instances of diffusion beyond the role of law find additional explanation in the political sociological literature on social movements. This literature notes that active diffusion may be sought by actors within movements, or may happen in a more passive – and occasionally undesirable – manner through external channels such as the media.[73] A possible example of passive diffusion could be the case of the benefit-sharing requirements adopted in the context of international initiatives on climate finance. These requirements were not mandated by any international instrument, but appear instead to have been adopted because of the practices of similar actors.[74]

Active diffusion is seen to take place when a norm is considered useful to both parties involved, and follows either a hierarchical form or a proximal form (mimicry).[75] As to how actors proceed in active and passive diffusion, Snow and Benford propose that *reciprocation* occurs when both the transmitter and the adopter of norms actively take an interest in the process. Where only the adopter takes an active interest, *adaptation* takes place, whilst *accommodation* describes the opposite situation. *Contagion*, finally, describes diffusion between two passive actors.[76] Deemed rare, such a scenario nevertheless fits in a constructivist account, since passive actors may adopt a norm after having been convinced of its appropriateness through its advertisement as such via communication arenas. Similarly, legal instruments may also work more actively (e.g., setting deadlines, providing funding, outlining sanctions for non-compliance) or passively (e.g., setting out examples of best practice).

A case of informal, active diffusion across sites of international law in connection with benefit-sharing that demonstrates the potential of such considerations may be represented by the first stage of the UN-REDD programme standards. These standards build on international human rights law, the CBD, and its relevant decisions in relation to the environmental and social impact of REDD+ (reducing deforestation and forest degradation) activities,[77] which include references to benefit-sharing. In a first stage, which led to the adoption of the standards, the process was somewhat informal: it was done by an informal lawmaking body that is not an international organization, but a consortium of different international organizations (though it is more formal than, say, an NGO), the mandate of which provided for a human rights-based approach but did not contain an obligation to refer to the CBD specifically. It was on the active side of the scale since the actor concerned had to pick and choose

[66] S.A. Soule, 'Diffusion Processes Within and Across Movements', in: D.A. Snow, S.A. Soule and H. Kriesi (eds.), *The Blackwell Companion to Social Movements* (Blackwell, 2004), 294.
[67] See, e.g., M.G. Giugni, D. McAdam and C. Tilly (eds.), *How Social Movements Matter* (University of Minnesota Press, 1999).
[68] D.A. Snow and R.D. Benford, 'Alternative Types of Cross-National Diffusion in the Social Movement Arena', in: D. della Porta and H. Kriesi (eds.), *Social Movements in a Globalizing World* (Palgrave Macmillan, 2009), 23.
[69] D. Strang and J.W. Meyer, 'Institutional Conditions for Diffusion', 22:4 *Theory and Society* (1993), 487.
[70] See, e.g., M. Finnemore and K. Sikkink, n. 60 above; A.E. Towns, 'Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below"', 66:2 *International Organization* (2012), 179; S. Zwingel, 'How Do Norms Travel? Theorizing International Women's Rights in Transnational Perspective', 56:1 *International Studies Quarterly* (2012), 115.
[71] For example, Mingst's linkage actors: see, e.g., K. Mingst, 'Uncovering the Missing Links: Linkage Actors and their Strategies in Foreign Policy Analysis', in: L. Neack, J.A.K. Hey and P.J. Haney (eds.), *Foreign Policy Analysis: Continuity and Change in its Second Generation* (Prentice Hall, 2012), 229.
[72] See M. Mehling, n. 33 above.
[73] See D.A. Snow and R.D. Benford, n. 68 above.
[74] See Adaptation Fund, n. 3 above; see A. Savaresi, n. 47 above.
[75] See S.A. Soule, n. 66 above.
[76] See D.A. Snow and R.D. Benford, n. 68 above.
[77] See, e.g., I. Fry, 'Reducing Emissions from Deforestation and Forest Degradation: Opportunities and Pitfalls in Developing a New Legal Regime', 17:2 *Review of European Community and International Environmental Law* (2008), 166; and C. Voigt (ed.), *Research Handbook on REDD-Plus and International Law* (Edward Elgar, forthcoming).

the standards, and horizontal in that both the CBD (the transmitter) and the UN-REDD programme (the adopter) are international bodies. In its second stage, after the UN-REDD standards were adopted, while levels of activity and formality remained equal, the path of diffusion moves towards top down, since the new international standards are now affecting understandings and practices of benefit-sharing on the ground.

Another potential case of increasingly formal, active diffusion, where actors pushed for the inclusion of benefit-sharing in the negotiation of a new agreement despite having no legal mandate, is that of the efforts by the Group of 77 developing countries (G77) to initiate negotiations for a new implementing agreement under the United Nations Convention on the Law of the Sea (UNCLOS). This implementing agreement was to address benefit-sharing from the use of marine genetic resources in areas beyond national jurisdiction.[78] During its early stages, this case can be seen as mid-way between formal and informal, since developing States acted within an international process of debate, but not of formal negotiations (namely, an 'informal working group' under the aegis of the United Nations General Assembly that convened over 10 years). These efforts succeeded in launching formal negotiations towards the adoption of a legally binding instrument in 2015.[79] Deepening our approach to examine different actors, paths and active or passive impulses behind diffusion, as well as different logics of diffusion, thus appears likely to lead to a richer map of the diffusion of benefit-sharing than would be produced within the boundaries of single disciplines.

To summarize, laws and a variety of actors may effect diffusion in manners that range from active to passive, via different mechanisms that all include some form of social interaction. We have alluded to the variety in the paths along which norm diffusion may take place: from the top down, the bottom up or horizontally. The case of community protocols discussed above illustrates the first two paths. With regard to horizontal diffusion (between international organizations, between States or across different and simultaneous multilateral negotiations, for example), one could make reference to the reciprocal influences and trade-offs between parallel negotiations of/under the Nagoya Protocol and those under the UN General Assembly on marine genetic resources, the World Health Organization on pandemic influenza viruses and the International Treaty on Plant Genetic Resources for Food and Agriculture.[80]

All of these combinations may occur at different times and locations in the story of the diffusion of benefit-sharing. In this vein, it is worth noting that most studies of norm diffusion – regardless of discipline – are retrospective. Benefit-sharing, on the contrary, is a norm we see as currently diffusing in environmental law. While the norm is fixed and established in some areas of international law, it is much less so in other areas. A model that allows the consideration of different scenarios of norm diffusion in different instances where the norm is appearing is thus necessary, and is facilitated by classifying examples along the three criteria discussed. These examples can also be considered at different points in time, showing the evolution of diffusion along these different criteria and capturing the dynamic implicit in norm diffusion. The examples discussed above, for instance, suggest how the paths and actors of the diffusion of benefit-sharing can change over time. No matter how detailed a map can be generated from this approach, however, it does not inform us about two crucial elements concerning how legal norms ultimately change behaviour:[81] the content of the norm being diffused (and how similar that content is across cases) and the degree to which a norm is embedded. We turn then to the potential usefulness of framing, drawing once more on political sociology.

THE IMPORTANCE OF FRAMING IN NORM DIFFUSION

The literature on framing can provide a handle to grasp complex norm diffusion across various sites, through various mechanisms and driven by various actors and laws, by providing a key to understanding if and how norms come to be embedded. The complexity of norm diffusion reflected in the work reviewed thus far, which identifies multiple actors, types of law and paths of norm diffusion, logically leads to the observation that norms are under constant renegotiation or redefinition by different actors and in different arenas. This view of constantly changing meanings is also inherent to the epistemol-

[78] Benefit-sharing was thus included in a package of issues to be addressed under that international process in 2011; Oceans and the Law of the Sea (UNGA Resolution A/RES/66/231, 5 April 2012), Annex, paragraph (b); see also E. Morgera, 'Benefit-sharing in Marine Areas beyond National Jurisdiction: Where Are We At?' (Parts I, II and III) (2015), found at: <http://www.benelexblog.law.ed.ac.uk>.

[79] Development of an International Legally-binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (UNGA Resolution A/RES/69/292, 19 June 2015).

[80] C. Salpin, 'The Law of the Sea: A Before and an After Nagoya?', in: E. Morgera *et al.*, n. 6 above, at 149; M. Wilke, 'A Healthy Look at the Nagoya Protocol – Implications for Global Health Governance', in: E. Morgera *et al.*, n. 6 above, at 123; S. Oberthür and J. Pozarowska, 'The Impact of the Nagoya Protocol on the Evolving Institutional Complex of ABS Governance', in: S. Oberthür and K. Rosendal (eds.), *Global Governance of Genetic Resources: Access and Benefit Sharing After the Nagoya Protocol* (Routledge, 2013), 178; and S. Gagnon *et al.*, n. 49 above, at 13.

[81] A question of utmost relevance in international law. See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law*, n. 28 above.

ogy of constructivism and the view of international law as a process, and is underlined in other work combining international relations and international law.[82] Framing is concerned precisely with understanding how meanings are changed within these processes. Framing may thus complement and strengthen studies of norm diffusion, as it provides tools for unpacking the different interpretations and meanings that may be attributed to a legal norm in different locations.

Supplementing studies of norms and norm diffusion with framing perspectives is widespread, and the legal and constructivist international relations literatures have both explored framing and its role in diffusion in recent years, since 'we cannot understand social ordering today without studying how legal norms settle'.[83] Political sociological studies of social movements are particularly rich in work on framing and diffusion. Drawing on concepts developed in this work may inform our understanding of the processes that forge the meaning of benefit-sharing in different locations.

The concept of frame is attributed to Erving Goffman, and defined as a key used to emphasize certain aspects of a situation: a frame or 'a particular definition *is in charge* of a situation'.[84] Thus, actors (and laws) frame issues in order to attach characteristics and definitions to them. Frames attribute blame, outline alternative paths and means of achieving goals, and thus interpret significance – whether of a person, event, symbol or norm. This implies that framing requires work: 'meanings do not automatically or naturally attach themselves to the objects, events, or experiences we encounter, but often arise, instead, through interactively based interpretive processes'.[85] As much is acknowledged in the legal literature dealing with diffusion briefly discussed earlier.[86] Benford and Snow provide tools key to research on framing work: *articulation*, that is, 'the connection and alignment of events and experiences so that they hang together in a relatively unified and compelling fashion';[87] or *amplification*, stressing the importance of certain issues, events or beliefs in order to increase salience. *Salience*, or *resonance*, is in turn what causes frames to be taken up by other actors. Frame qualities affecting resonance include frame makers (their credibility), frame receivers (their beliefs and values) and the frame itself (cultural compatibility, consistency and relevance).[88] Though the terminology varies, essentially similar reflections on framing are found in the other disciplines of interest here.

Accordingly, benefit-sharing can be studied as a frame for *articulation*, in that it connects ideas of equity and fairness in an arguably persuasive fashion, with a view to highlighting certain aspects of the norm that fit with other norms already well embedded in a context (which could be anything from a village to an international organization) in order to secure the meaningfulness of the new norm. Benefit-sharing can also be seen as a frame for *amplification*, as it stresses the positive implications (rather than burdens and costs) of environmental cooperation in order to make this more salient. In either case, these efforts may fail, leaving room for the re-labelling of an existing local norm (and thus the diversification of meaning attached to the norm) or indeed diffusion in a different direction, for example, from the local to the international level, and subsequent re-definition of the meaning of the norm in another location.

This 'meaning work' (as scholars of frames term it) transfers well to international and transnational scenarios where international norms are implemented, and thereby negotiated and defined in a concrete local context (which may also be affected by power imbalances and strategic but empty uses of international norms). While frames have 'distinct normative and regulatory implications' according to international lawyers, it is fair to note that their role is 'not always recognized',[89] although framing has been emphasized in the scholarship on global law.[90] In constructivist international relations, attention to framing has also grown with particular reference to norm diffusion. Work by Towns focuses on how the framing of norms itself effects diffusion, thus bridging the gap to work on paths. Since norms are inherently constitutive of social hierarchies, States perceived as 'lower down' in a certain hierarchy may introduce new norms in a bid to improve their standing.[91] How a norm is framed is thus relevant to studies that seek to account for paths of diffusion. Also important is Acharya's work on 'how ideas spread', focusing on how norms become embedded through their renegotiation into locally salient forms, labelled as 'localization'.[92] This also chimes with Sarfaty's work

[82] See J.L. Dunoff and M.A. Pollack, n. 27 above.
[83] See T.C. Halliday and G. Shaffer, n. 26 above, at 18.
[84] W.A. Gamson, 'Goffman's Legacy to Political Sociology', 14:5 *Theory and Society* (1985), 605, at 616.
[85] D.A. Snow, 'Framing Processes, Ideology, and Discursive Fields', in: D.A. Snow *et al.*, n. 66 above, at 380.
[86] See D.A. Westbrook, n. 39 above; G.A. Sarfaty, n. 63 above.
[87] R.D. Benford and D.A. Snow, 'Framing Processes and Social Movements: An Overview and Assessment', 26 *Annual Review of Sociology* (2000), 611, at 623.
[88] H. Johnston and J.A. Noakes, *Frames of Protest: Social Movements and the Framing Perspective* (Palgrave Macmillan, 2005), at 12–16.
[89] A. Nollkaemper, 'Framing Elephant Extinction', 3:5 *European Society of International Law Reflection* (2014), found at: <http://www.esil-sedi.eu/node/643>.
[90] N. Walker, *Intimations of Global Law* (Cambridge University Press, 2014).
[91] See A.E. Towns, n. 70 above.
[92] A. Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', 58:2 *International Organization* (2004), 239.

combining legal and anthropological approaches, which emphasizes a similar role for framing:

> While advocating for the recognition of their customary practices, [the Pimicikamak Cree Nation] are negotiating the meaning and application of their local laws. As they *frame and re-frame* their claims for national and international audiences, groups find themselves looking within and engaging in an intra-group dialogue over the meaning of their cultural norms.[93]

Attention to such processes is apt to bring politics and agency squarely into a study of diffusion, by dictating an investigation of the choices made over which locally resonant norms a new norm is 'grafted' to (via the processes described above) that would likely be missed in classical legal studies focusing on transposition from the top down. For example, in many local communities, benefit-sharing may be a norm that has long existed and been adhered to through various forms of commoning. Wynberg and Hauck, for example, refer to local communities where poor returns for the activities of one profession are compensated for by other community members, since they can expect the same should the situation be reversed.[94] In such communities benefit-sharing could well be understood as a new name for a long-established traditional practice.

It should be noted that an incremental change to norm diffusion is not a guaranteed scenario, however. Efforts to localize norms may fail, or an existing norm may become re-labelled, leading to great diversity in understandings of a norm in different settings. Temporary as such situations may be, in a dynamic study of a norm as it diffuses such situations must be accounted for. This opens the study up to approach contentious framings that may otherwise be dismissed as irrelevant to a study of the law, for example, if the term benefit-sharing were applied to a locally relevant definition that clashed with understandings codified at the international level. Once again, the example of community protocols may benefit from a reading using these ideas. As local communities work to draft community protocols, they frame their understandings both of benefit and of sharing in the context of their location, beliefs, etc. As documents intended to inform external actors of their framing of benefit-sharing, community protocols may be imagined to then potentially echo or clash in some way with the benefit-sharing frames of different actors. Through dialogue, local community frames may then come to inform the frames of external actors, vice versa or both. With the recognition of community protocols in international law, a scenario where a local community protocol could eventually contribute to an alteration of the framing of benefit-sharing at the international level could also be envisaged.

To expand on the possibility of such a scenario, Krook and True highlight the tension between 'a relatively static depiction of norm content, juxtaposed against a comparatively dynamic account of norm creation'.[95] A discursive approach, they argue, makes up for this methodological failure to study norms as constantly evolving instead of static 'things'. Rather than weaken the study of norms, the authors argue that attention to this dynamism of meaning provides an explanation for the fact that the most easily adapted norms, quick to diffuse, are inefficient. Ease of diffusion is correlated with the vagueness of a norm (which can be moulded to fit the most disparate of local norms, and thus loses ability to change behaviour in the wooliness of meaning).[96] This observation sits well within Finnemore and Sikkink's work approaching embeddedness or the stages of diffusion. In an initial stage of 'norm emergence', norm entrepreneurs (which may be individuals, NGOs, State actors, etc.) propose a new norm. Given the novelty and thus the challenging nature of the new norm, unconventional methods of promotion or challenge (contentious framing work), such as protest, are more likely at this stage, clearly linking framing with understandings of norm diffusion as active (to passive). Protesters (or other actors engaged in meaning work) may appeal to international norm framings, to local framings or to national framings – thus linking with the comments on paths of diffusion ranging from top down to bottom up, as well as horizontal. If and when a new norm is taken up by enough actors, a *tipping point* is reached and the *norm cascade* stage begins. At this point conforming to the new norm is rewarded and non-compliance punished[97] – in line with the logic of appropriateness or the fashion scenario.[98] Finally, the *internalization* stage is reached when a norm is no longer questioned. This is not necessarily the destiny of all norms, however – norm diffusion is not inevitable and may well be a lengthy process.[99] Accordingly, it could be argued that fair and equitable benefit-sharing is well established in some areas (biodiversity) and could be considered to be at what Finnemore and Sikkink term the 'tipping point'. Yet whether it is 'cascading' into other areas (such as climate change[100] and water[101]) effectively and in the same guise remains to be seen. The performance of the norm of benefit-sharing also hinges on whether the meaning of the norm also reaches some 'tipping point' where its core is accepted as having a single meaning.

[93] See G.A. Sarfaty, n. 63 above, at 454.
[94] See R. Wynberg and M. Hauck, n. 17 above.
[95] M. Krook and J. True, 'Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality', 18:1 *European Journal of International Relations* (2012), 103, at 104.
[96] Ibid.
[97] See M. Finnemore and K. Sikkink, n. 60 above.
[98] See P.J. DiMaggio and W.W. Powell, n. 41 above; D.A. Westbrook, n. 39 above.
[99] See M. Finnemore and K. Sikkink, n. 60 above, at 887.
[100] See A. Savaresi, n. 47 above.
[101] See E. Morgera, n. 1 above.

Ultimately, a mapping of the diffusion of the norm of benefit-sharing as described, coupled with necessary attention to framing and thus embeddedness, could allow us to reflect on the stage at which fair and equitable benefit-sharing finds itself, and thus on its strength as a legal norm capable of changing behaviour. The approach suggested here, we believe, can contribute to reduce uncertainty around using the concept of framing within a legal study, and provides handles to understand the role of meaning in norm diffusion.

Fair and equitable benefit-sharing, to expand on the potential of the framing concept, appears in effect both 'framed' in different ways in different lawmaking contexts, and as a way of 'framing' the search for equitable responses to environmental challenges, namely, by emphasizing the need to focus on benefits as opposed to burdens.[102] It has been noted that benefit-sharing provides a 'social justice frame' to address questions of environmental management,[103] seeking to reconcile competing State and community interests by focusing attention on the *advantages* that derive from environmental protection and regulation, thereby facilitating shared understandings of benefits and allowing cooperation.[104] Interestingly, the literature on benefit-sharing already makes explicit reference to framing, but also points to a degree of confusion in the plethora of frames surrounding benefit-sharing and insufficient rigour in linking these frames to different notions of justice.[105]

CONCLUSIONS: THE VALUE-ADDED OF AN INTERDISCIPLINARY APPROACH

As Twining[106] anticipates, in line with others who call for interdisciplinarity in law,[107] the sociological and constructivist international relations literature on norm diffusion brings many advantages to legal research. It can help understand the role of the behaviour, perceptions and interactions of different actors in particular contexts, as well as the paths through which a legal concept and legal practices may spread outside of the law. As pointed out by Engelkamp *et al*., the need to acknowledge the inherently political nature of studying norms as discourses (since discourses are necessarily displaced in these processes)[108] further demonstrated the need to pay attention to actors (and their framing work). Such need is implicit in an acknowledgement of politics and can help avoid neglecting bottom-up perspectives in legal research. Interdisciplinarity may also foster awareness of bias, such as the assumption that all objects of diffusion are desirable, progressive or innovative, or the assumption that all examples of diffusion of law fit neatly into a means-end, problem-solving framework.[109] This is in line with contemporary comparative law scholarship that is more and more concerned with the 'questioning of the dark sides of apparently emancipatory and progressive agendas'.[110]

The potential value of an interdisciplinary approach therefore lies in attention to both politics and law.[111] Both may be inferred to play a crucial role in framing. Actors may follow certain logics and paths of diffusion, and frame norms (determining how embedded a norm is in a context). They may act in more active or passive manners. What much work in social sciences outside law overlooks is the fact that the law can act in a similar way. Though the negotiation of law is often considered in the sociological and international relations literature we discuss, once the law is in place its nuances and interpretations tend to drop out of the account.[112] This is

[102] Ibid.

[103] See S. McCool, 'Distributing the Benefits of Nature's Bounty: A Social Justice Perspective', unpublished paper presented at the International Symposium on Managing Benefit Sharing in Changing Social Ecological Systems, Windhoek, Namibia, 2012.

[104] C.W. Sadoff and D. Grey, 'Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits', 30:4 *Water International* (2005), 420.

[105] See S. McCool, n. 103 above. For a discussion of different understandings of justice and benefit-sharing in the context of the Nagoya Protocol, see E. Morgera, 'Justice, Equity and Benefit-sharing under the Nagoya Protocol to the Convention on Biological Diversity', 24 *Italian Yearbook of International Law* (2015), 113.

[106] See W. Twining, n. 36 above.

[107] See, e.g., J.L. Dunoff and M.A. Pollack, n. 27 above; J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law*, n. 28 above; D. Bodansky, 'Legal Realism and its Discontents', 28:2 *Leiden Journal of International Law* (2015), 267; D.W. Vick, 'Interdisciplinarity and the Discipline of Law', 31:2 *Journal of Law and Society* (2004), 163.

[108] S. Engelkamp, K. Glaab and J. Renner, 'Office Hours: How (Critical) Norm Research Can Regain its Voice', 10:1 *World Political Science Review* (2014), 33.

[109] See W. Twining, n. 36 above.

[110] See U. Mattei, n. 14 above, at 835.

[111] See also T.C. Halliday and G. Shaffer, n. 26 above, at 37–38. Note, however, the cautionary words in M. Mehling, n. 33 above, against the risks to 'dilute' the legal traits of such studies, or to 'introduce . . . subtle value judgments, ideological orientations and ontological assumptions underlying other disciplines'. Ibid. While the first of these cautions may be lessened by working within an interdisciplinary team, and should be given due attention, the second point raises further questions in our view. Why exactly are practitioners of other disciplines prone to project ideology in their work, while comparative lawyers are not? We would argue that all disciplines (including the 'hard' sciences) are susceptible to such flaws, and suggest that methodologies in sociology in particular do at least openly acknowledge such problems and discuss ways of overcoming them (though not claiming they can be eradicated entirely). See the discussion in E. Morgera and L. Parks, 'An Inter-disciplinary Methodology for Researching Benefit-sharing as a Norm Diffusing in Global Environmental Law' (2014), found at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524333>.

[112] Thus, although we share with Wiener the position that individuals imbue norms with meaning through their expression, we also understand the law, including written expressions of understandings (such as community protocols), to have their own specific meanings that affect norm diffusion and may actually interact with actors in that respect. See A. Wiener, 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations', 35:1 *Review of International Studies* (2009), 175.

where the explicit value of interdisciplinary research comes in – the knowledge of legal scholars brings an account of how the law actually works into accounts of diffusion that otherwise halt at the point of a law's adoption and look to the next site to which a norm will diffuse. Instead, we claim that norm diffusion takes on different shapes and that the meaning of norms continues to develop over time, also as a consequence of the adoption of legal instruments and their influence on other lawmaking processes at different levels or in different contexts. Unpacking the developing meaning of international legal norms adds to the value of our interdisciplinary approach for scholars of international law, as it sheds light on why some legal norms may eventually be deemed better implemented than others as a consequence of how well they are embedded in various locations, and the political reasons linked to distributions of power behind this. All of this appears crucial to understanding the evolving meaning of the legal norm of benefit-sharing.

The literature selectively reviewed here has shown that combining the areas of scholarship explored brings our attention to a wider range of actors, paths, logics and interactions, and allows a much more detailed picture of the diffusion of benefit-sharing to be painted than would have been gained otherwise. This is not to say that there are no drawbacks to be acknowledged in our interdisciplinary approach. Significant practical problems are met with in ensuring that the qualities of each discipline are maintained in interdisciplinary work, perhaps more so for the law as it is less equipped with methods and conceptual frameworks to generate knowledge about context.[113] This preoccupation also finds reflection in ongoing methodological discussions in comparative law.[114] On the other hand, the legal method comes with its own strength, namely, the unique way to 'infer formal statements from the law which manifest the collective will embodied therein, as shaped and moderated by the sum of rules, principles and doctrines constituting the legal system'.[115] For example, while non-legal disciplines concerned with norm diffusion draw attention to actors and processes that exist somewhere on a continuum between 'formal' and 'informal', it remains to be established how lawyers can relate to these categories, as the law may attach different qualities to different actors or processes than those that may appear in fact. In addition, the question of whether the law itself can be considered more or less formal as an agent of norm diffusion remains to be linked with long-standing debates on the status and legal weight of different sources of law. Finally, the relation between framing and the rules of legal interpretation is equally to be fully explored. These significant areas of uncertainty undoubtedly present great challenges in carrying forward interdisciplinary work that may be considered rigorous when assessed from the perspective of each respective discipline involved. The areas of convergence uncovered among the three literatures discussed here, however, bring hope that such an endeavour is possible and desirable, albeit risky. For instance, a key area of convergence can be observed in a shared (though not contemporary) move away from assumptions of the superiority or efficiency of norms that diffuse towards a logic where norms spread because they are seen to be appropriate. This is an important consideration given how much is unknown about benefit-sharing – that is, the lack of understanding of the full range of its promises and pitfalls due to limited conceptualization and implementation. Empirical research, in effect, has revealed that benefit-sharing may in practice be a 'disingenuous win–win rhetoric' that may help avoid 'more fundamental negotiations over access which is the real justice requirement'.[116] Without more fully understanding the interaction between law and power in the diffusion of benefit-sharing, which appears to necessitate an integration of legal, sociological and international relations scholarship, an assessment of the full range of its potential to promote or obstruct environmental sustainability in a fair and equitable manner can only be partial.

Finally, it must be conceded that the examples we have presented here tend to reflect benefit-sharing as it is understood in international law, with community protocols offering a glimpse of how international law can be influenced from the bottom up. Nevertheless, the complexity shown by applying the approach to the few examples presented challenges sequential views of norm diffusion moving inexorably towards further embeddedness. In addition, it should be emphasized that adopting a constructivist stance in line with our research interest means we do not consider the range of literature dealing with norm diffusion in a more quantitative manner. We could investigate the diffusion of benefit-sharing, for example, through a wider-ranging comparison of benefit-sharing as expressed in local, national and international law and claim greater generalizability for our findings. While there is no generally agreed content of benefit-sharing, however, we contend that our approach will generate important findings in this under-studied area. These findings could eventually be tested using different and more generalizable approaches. The approach outlined here is intended to allow an exploratory study of benefit-sharing. As such, the approach may be useful to other scholars who wish to generate detailed knowledge of a norm at a similar stage of development, by allowing to answer questions not

[113] See M. Mehling, n. 33 above.
[114] See E. Morgera, n. 8 above.
[115] See M. Mehling, n. 33 above.
[116] See A. Martin *et al.*, n. 18 above, at 84–88.

only about the content and spread of the norm, but also about its meaning and social significance.

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