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### **An Inter-disciplinary Methodology for Researching Benefit-sharing as a Norm Diffusing in Global Environmental Law**

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## **BENELEX Working Paper N. 2**

# ***An Inter-disciplinary Methodology for Researching Benefit-sharing as a Norm Diffusing in Global Environmental Law***

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**Abstract**

This paper proposes a methodology for an interdisciplinary, empirical enquiry into the diffusion of the legal concept of 'benefit-sharing'. The paper draws together accounts of norm diffusion from sociology, international relations and law to devise a theoretical approach for the empirical research of global environmental law. Against this background, the paper explores the usefulness of process-tracing, the relevance of frames and the need for a participatory action research approach for a research project focused on benefit-sharing as a tool to operationalize equity among and within States.

**Keywords**

Benefit-sharing, norm diffusion, international relations, sociology, law, inter-disciplinarity, participatory action research, process-tracing

## **An Inter-disciplinary Methodology for Researching Benefit-sharing as a Norm Diffusing in Global Environmental Law**

This paper proposes a methodology for an interdisciplinary, empirical enquiry into the diffusion of the legal concept of ‘benefit-sharing’ - the fair and equitable allocation among different stakeholders of economic, socio-cultural and environmental advantages arising from the conservation or sustainable use of natural resources or from resource-related regulation.

An introduction will provide a preliminary discussion of the legal concept of benefit-sharing and of the need to better understand it from a global environmental law perspective.<sup>1</sup> The paper will then explore the relevance of the literature on norm diffusion, which spans a number of disciplines, including sociology, international relations and law, for our purposes. Although other disciplines (such as anthropology, economics, cultural geography) would clearly be useful for an interdisciplinary study of benefit-sharing, this study limits its ambition to test the premises of a purely legal study of benefit-sharing and lay the ground for successive, more ambitious interdisciplinary enquiry into the subject. It does not, therefore, expect to shed sufficient light on the effectiveness of benefit-sharing on the ground, but rather provide a useful basis to support critically an analysis taking international law as its starting point and as a fundamental area for investigation, but does not wish to assume that benefit-sharing necessarily originates in international law or that research should stop at the international level. In effect, preliminary research indicates that benefit-sharing has been taken up in various legal and physical sites, and that its meaning has been translated or understood differently in different arenas.<sup>2</sup> In particular, benefit-sharing is increasingly deployed in a variety of international environmental, but also human rights and corporate accountability, instruments.<sup>3</sup> Furthermore, benefit-sharing is also defined and implemented through the interaction of international, transnational, national and indigenous communities’ customary law.

This paper seeks to make an original contribution by drawing together accounts of norm diffusion from sociology, international relations and law to devise a theoretical approach for the empirical research of global environmental law. In doing so, it does not indicate any assumption about either the direction or form of diffusion. As our discussions will reflect, we understand diffusion as potentially both bottom-up and top-down, intentional and unintentional. We do not, that is, plan to enter the field with specific preconceptions about the origin and nature of the phenomenon we aim to uncover. Against the background of our analysis of the literature on norm diffusion, we explore the usefulness of *process-tracing* as a method for our work, and the relevance of *frames* in that context. The paper will then

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<sup>1</sup> See E Morgera, ‘Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law’ (2012) 23 *European Journal of International Law* 743.

<sup>2</sup> See, in addition to the BENELEX conceptual paper, the BENELEX Working Papers 2-3 on benefit-sharing in international food and agriculture law (by E Tsioumani) and on benefit-sharing in international climate change law (by A Savaresi).

<sup>3</sup> See BENELEX Working Paper 1 (conceptual paper) by E Morgera.

conclude with a discussion of the relevance of a *participatory action research approach* for our research project focused on benefit-sharing as a tool to operationalize equity among and within States, and to explain our ethical approach to this research endeavour.

## **1. Benefit-sharing and global environmental law: the need for empirical, inter-disciplinary research**

Benefit-sharing can be understood as a legal tool that seeks to realize equity in addressing environmental challenges with regards to developing countries as well as to indigenous peoples and local communities.<sup>4</sup> In effect, the emergence of benefit-sharing in international law has revealed two dimensions of this concept: benefit-sharing *among* and *within* States. 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 through payment- and information-sharing, financing, technology transfer and capacity building (inter-State benefit-sharing).<sup>5</sup> 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, by rewarding communities through profit-sharing, recognition of traditional tenure and practices, joint ventures and job creation (intra-State benefit-sharing).<sup>6</sup> While the distinction among/within States constitutes a useful and necessary starting point, there are, however, conceptual and practical difficulties in detaching one dimension from the other. There can be identified, in fact, transnational traits in both dimensions: for instance, inter-State benefit-sharing systems established by international treaties may be operationalized through private-law contractual negotiations;<sup>7</sup> or inter-State benefit-sharing may ultimately channel benefits directly to indigenous peoples or local communities through an international mechanism.<sup>8</sup> And this is just to mention a couple of examples.<sup>9</sup>

As such, benefit-sharing becomes evident and evolves in its conceptual and operational nuances at various (and often inter-linked) levels of regulation. For this reason, it seems necessary to study it from the viewpoint of global environmental law – that is, beyond the

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<sup>4</sup> Ibid.

<sup>5</sup> Eg Convention on Biological Diversity Articles 15-20.

<sup>6</sup> Eg Convention on Biological Diversity Article 8(j) and soft-law instruments adopted by consensus on that basis (discussed in E Morgera and E Tsioumani, 'The Evolution of Benefit-sharing: Linking Biodiversity and Community Livelihoods' (2010) 20 *Review of European Community and International Environmental Law* 150.

<sup>7</sup> This is the case of the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity: see E Morgera, E Tsioumani and M Buck, *Unraveling The Nagoya Protocol: A Commentary of the Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Martinus Nijhoff, forthcoming 2014).

<sup>8</sup> International Treaty on Plant Genetic Resources for Food and Agriculture Secretariat, Press Release, 'Board of Plant Treaty Announces New Benefits for Farmers In 11 Developing Nations, as Efforts Heat Up To Protect Valuable Food Crops In Face Of Threatened Shortages, Climate Change' (undated) [ftp://ftp.fao.org/ag/agp/planttreaty/news/news0009\\_en.pdf](ftp://ftp.fao.org/ag/agp/planttreaty/news/news0009_en.pdf). Morgera and Tsioumani (n 6), at 158-159.

<sup>9</sup> More examples can be found in Morgera (n3).

inter-State paradigm that traditionally characterizes the evolution of international (environmental) law.<sup>10</sup> Global environmental law has been defined as a ‘field of law that is international, national and transnational in character all at once’ and comprises ‘the set of legal principles developed by national, international and transnational environmental regulatory systems to protect the environment and manage natural resources.’<sup>11</sup> The emergence of global environmental law is considered a consequence of the ‘emerging recognition of global public goods’ in the environmental sphere<sup>12</sup> and of the increasing public powers exercised by international organizations and other non-State actors in the supply of these goods.<sup>13</sup> Global environmental law thus prompts the study of environmental law at the international, regional, national and sub-national levels as inter-related and mutually influencing systems, it encourages the use of comparative methods in that endeavour,<sup>14</sup> and it calls for an analysis of the practice of non-State actors, particularly international organizations, international networks of experts providing advice on environmental legislation across the globe, international civil society, and the private sector.<sup>15</sup>

Building on Neil Walker's recent reflection on global law, a global environmental law perspective may in effect help understand benefit-sharing across intra- and inter-State dimensions, and across international and national law, as global law embodies a commitment to understanding the ‘pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes.’<sup>16</sup> In addition, a global law perspective specifically draws attention to the global reach (that is, when a legal concept is ‘present across and between a range of [legal] sites and purports to cover all actors and activities relevant to its remit across the globe’) and the global justification of benefit-sharing (‘an endorsement or commitment to a shared purpose or common political morality that may be explicitly invoked or implied’).<sup>17</sup>

Another salient aspect of global law identified by Walker that is relevant for present purposes is the fact that global law finds itself ‘somewhere between settled doctrine and an aspirational

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<sup>10</sup> E Hey, ‘Common Interests and the (Re)constitution of the Public Space’ (2009) 39 *Environmental Policy and Law* 152.

<sup>11</sup> T Yang and P Percival, ‘The Emergence of Global Environmental Law’ (2009) 36 *Ecology Law Quarterly* 615.

<sup>12</sup> *Ibid.*, at 626.

<sup>13</sup> E Hey, *Global Environmental Law* (SSRN 2009). On the role of the private sector in international environmental law see E Morgera, *Corporate Accountability in International Environmental Law* (OUP, 2009).

<sup>14</sup> Albeit further study is needed to define specific methodological challenges in that respect: see J Ellis, ‘General Principles and Comparative Law’ (2011) 22 *European Journal of International Law* 949; J Wiener, ‘Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law’ (2001) 27 *Ecology Law Quarterly* 1295; A Momirov and A Naudé Fourie, ‘Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law’ (2009) 2 *Erasmus Law Review* 291; A Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 *International and Comparative Law Quarterly* 57.

<sup>15</sup> Morgera (n 3).

<sup>16</sup> N Walker, *The Intimations of Global Law* (forthcoming 2014), at 11-12 and 14, who considers global law as a sub-category of (or, a narrower notion than) transnational law as defined by P Jessup, *Transnational Law* (Yale University Press, 1956), at 136 as ‘all law which regulates actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules which do not wholly fit into such standard categories’.

<sup>17</sup> Walker (n 16), at 18.

approach.’<sup>18</sup> Global law is thus seen as a ‘self-conscious development and a reflexive process’ in which specialist (professional and academic<sup>19</sup>) communities are not only ‘sources of expertise and learning in matters of the emergent global law and as instruments of its application’ but also ‘active players in the fashioning and shaping of global law.’<sup>20</sup> They therefore engage not only in an epistemic but also in an advocacy endeavour in identifying ‘patterns of normative development [that] may be anticipated and pursued,’<sup>21</sup> with the aim of addressing the perceived limits of certain areas of international law through ‘a more selective reading of its sources and areas of impact.’<sup>22</sup> This appears particularly fitting in relation to global environmental challenges, as consensus has become increasingly difficult to reach in certain areas of multilateral environmental negotiations and/or ‘more decentralised forms of implementation and more iterative and reflexive styles of policy-making’ are often relied upon in the further development or implementation of international environmental law.<sup>23</sup> In this vein, our proposed study of benefit-sharing from a global law perspective<sup>24</sup> attempts to draw a legal history of benefit-sharing, gauge present (incipient<sup>25</sup>) trends and articulate future projections,<sup>26</sup> in an iterative process of mapping, scanning, schematizing and (re)framing,<sup>27</sup> with a view to understanding the ‘capacity of law, drawing upon deep historical resources, to recast the ways in which it addresses some of the problems of an interconnected world.’<sup>28</sup>

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<sup>18</sup> ‘All species of what we call global law purport, more or less modestly, to frame and contain something of the kaleidoscope variety and interactivity of national and transnational law and so to impose some kind of pattern and order on a legal world of increasingly porous internal boundaries and deepening and more complex diversity’: Walker (n 16), at 18 and 21.

<sup>19</sup> Hence the inclusion in the project's advisory board of both academics and practitioners (within the United Nations, and in NGOs and think-tanks): see [www.benelex.ed.ac.uk/advisory\\_board](http://www.benelex.ed.ac.uk/advisory_board).

<sup>20</sup> Walker (n 16), at 27 and 46.

<sup>21</sup> *Ibid*, at 152.

<sup>22</sup> *Ibid*, at 112-113.

<sup>23</sup> *Ibid*, at 108, making reference to the specific case of climate change and marine protection as areas ‘where there is increasing failure to deliver grand settlements across significant interest divisions and across the broader set of sovereign States who assert a significant stake in these settlements’, and hence a reliance on ‘less unified and settled institutional structures with wider forms of participation and accountability, more decentralised forms of implementation and more iterative and reflexive styles of policy-making, so emphasis on dispersed influence and incremental policy development.’

<sup>24</sup> In this connection, our project studying benefit-sharing may fit into the ‘species’ of global law that Walker (n 16), at 103-104, defines as ‘functionally-specific (new) legal pluralism.’ In other words, a study of ‘the terms of exchange between different legal systems in the absence of any mutually acknowledged hierarchy to stress the uneven, unpredictable and contingent quality of interactions between heterarchical legal orders with a view to internal ordering of different global segments to achieve specific goals within the relevant sector.’

<sup>25</sup> In effect, benefit-sharing often appears as an ‘embryo rather than the mature expression of a new approach’, to use Walker's expression (*ibid*, at 112).

<sup>26</sup> *Ibid*, at 25-26. See also G Laurie et al, ‘Foresighting Futures: Law, New Technologies and the Challenges of Regulation for Uncertainty’ (2012) 4 *Law, Innovation and Technology* 1, who see in the identification and exploration of possible and desirable future legal and quasi-legal developments a resource for reflexive analysis that stimulates social, moral and legal imagination and empowerment; and F Kurasawa, *The Work of Global Justice: Human Rights as Practices* (CUP, 2007), Ch 3 “Cautionary Tales: On Foresight”, particularly at 99, who highlights the importance of precaution as part of foresight in human rights practice from a global justice perspective.

<sup>27</sup> Walker (n 16), at 143. On framing as transformative aspiration (that is, an ‘exercise of re-imagination ... mounted in aid of an agenda of change’), see *ibid*, at 112; and see discussion on framing in an interdisciplinary perspective below (section 2).

<sup>28</sup> Walker (n 16), at 110.

In going beyond a traditional international law analysis, we aim at contributing to the specific debate on global environmental law in two innovative ways. First, as opposed to previous studies on international legal principles that have concentrated on the interaction between international, EU and national law,<sup>29</sup> we will investigate the interactions of the customary laws of indigenous peoples and local communities with international and national<sup>30</sup> law through the development of community protocols in different regions of the world (including within Europe). The study of the role of indigenous peoples' and local communities' customary laws to contribute to sustainability is still in its infancy, although customary laws are considered 'a resource capable of inspiring innovation and legitimizing practical activities in the process of administering living resources and adapting to changing circumstances in a changing world'.<sup>31</sup> Second, while scholars engaging with global environmental law have mostly focused on questions related to the role of international organizations,<sup>32</sup> we will focus instead on the influence of transnational legal advisors (NGOs and bilateral development partners) on the development and implementation of benefit-sharing. It has already been noted that NGOs actively support creative linkages between communities' customary law and international norms on sustainable development, often by-passing the nation-State, but that there is still a need to better understand NGOs' influence on the development of sustainable development norms.<sup>33</sup> In addition, since NGOs working with communities often partner with or are funded by bilateral development partners, our project will also investigate the role of development partners in influencing the shape of environmental regulation at local and international levels, in a transboundary context. Our project could thus shed further light on whether bilateral cooperation can effectively and legitimately address global environmental challenges when multilateral cooperation is unable (temporarily or more permanently) to do so,<sup>34</sup> using benefit-sharing as a case study.

The need to understand the role of law as a result of the increasing role of non-State actors (NGOs and bilateral development partners) in shaping law-making (in addition or in alternative to States) has already been recognized and has led to call for a *pragmatic and contextualized* approach to legal research.<sup>35</sup> In particular, political sociology appears necessary to understand the *contexts* different actors act in, are shaped by and affect, against the background of the relationships between politics, law and society, and underlying *unequal powers* within that relationship.<sup>36</sup> This project is thus (also) an attempt to investigate the

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<sup>29</sup> De Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, 2002).

<sup>30</sup> Note that Walker (n 16) cautions against any global law study that does not build on the understanding that that national law is 'the most important source of law within the global mosaic' (emphasis in the original), at 14.

<sup>31</sup> Ørebech et al, *The Role of Customary Law in Sustainable Development* (CUP, 2006).

<sup>32</sup> E Hey, 'Global Environmental Law and Global Institutions: A System Lacking 'Good Process'', in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (CUP, 2010).

<sup>33</sup> Ørebech et al (n 31). See also the observations based on field work in Peru by E Desmet, *Indigenous Rights Entwined with Nature Conservation* (Intersentia, 2011), at 161 and 631.

<sup>34</sup> This line of enquiry is tentatively outlined in Morgera (n 3).

<sup>35</sup> G Frankenberg, 'Critical Theory' and A Carty, 'Sociological Theories of International Law' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, 2012, online edition)

<sup>36</sup> K Faulks, *Political Sociology: A Critical Introduction* (NYU Press, 2000). Different contexts and situations of unequal power are essential elements for understanding benefit-sharing and the extent of its contribution to realizing equity: see Morgera (n3).



potential of integrating empirical legal and political sociology research,<sup>37</sup> in particular the literature on norm diffusion, to understand global environmental law.

## 2. The relevance of the literature on norm diffusion

That our ontological standpoint is interpretivist is clear from our interest in the different iterations of benefit-sharing, that is in the social construction of a norm in different sites of law-making and implementation. This section will first review some of the considerable body of literature on norm diffusion, assessing whether and to what extent it is relevant for present purposes. The literature on norm diffusion spans a number of disciplines, three of which are of direct relevance here: sociology, international relations and law. Although evolving in distinct disciplines, the broad lines of theory development in the literature on norm diffusion do echo and occasionally reference one another. Views of norm diffusion as efficiency or the spread of modernity are succeeded by a move away from such assumptions and work that takes more note of context and specificity. Most recently, discussions of actual mechanisms come to the fore, looking in more detail at how norms are internalized, how they actually spread, and how they fit or translate in different contexts (thus moving beyond assumptions of the fixed nature of norms in diffusion).

It can be anticipated that concepts related to norm diffusion drawn from sociology (focusing on both organizations and social movements) appear promising in analyzing the diffusion of benefit-sharing within States, whereas international relations may link well with our interest in investigating norm diffusion among States. These theoretical distinctions will also be reflected in our proposed methods, discussed below. The following sections will also preliminarily highlight certain biases or limitations in adopting a norm diffusion approach: a short discussion of the ‘rival’ (but not, we will argue, mutually exclusive) ‘modernization’ argument will explore ways in which we can remain open to different possible explanations in this exploratory research.

### 2.1 Norm diffusion in the legal literature

From a legal perspective, the term ‘diffusion’ can be understood in a very broad way to account for several phenomena that are quite familiar to the comparative lawyer, such as ‘reception, transplants, spread, expansion, transfer, exports and imports, imposition, circulation, transmigration, transposition and transfrontier mobility of law.’<sup>38</sup> Norm diffusion can thus be used as a useful term to capture a variety of occurrences ‘when one legal order influences another in some significant way.’<sup>39</sup> The concept of norm diffusion, therefore, appears particularly apt to study law from a global perspective, that is to better understand the relations and mutual interactions between different levels of legal ordering (which per se are not static or necessarily clearly defined) of human relations at different geographical levels,

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<sup>37</sup> Following the advice of DW Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, at 192-3, our interdisciplinary work is undertaken through interdisciplinary cooperation.

<sup>38</sup> W Twining, ‘Diffusion of Law: A Global Perspective’ (2004) 49 *Journal of Legal Pluralism* 1, at 5.

<sup>39</sup> *Ibid.*, at 14.

including soft law, transnational law and the customary law of indigenous peoples and local communities.<sup>40</sup> Such a global perspective is needed to unravel diffuse and/or complex processes of interaction between different legal orders, deriving from multiple sources and arriving at multiple destinations, resulting from cross-level transfers and reciprocal influences, emerging in formal, informal, semi-formal or mixed configurations over a continuous and often lengthy process as the result of interactions between a variety of State and non-State actors (including the private sector, NGOs, individuals and communities, activists and lobbyists, as well as teachers and researchers).<sup>41</sup> In particular, cross-level diffusion - diffusion that takes place between many kinds of legal orders at and across different geographical levels - deserves more attention.<sup>42</sup>

Research on diffusion in the legal literature, however, has been undertaken to a limited extent, and particularly *empirical* studies of the diffusion of law are few. Reviews of legal scholarship on diffusion thus seek to build bridges with the much more comprehensive body of literature in the social sciences in order to sketch a new paradigm for empirical legal research. In this view, Twining asserts that despite common origins with the social science literature, no ‘systematic theory’ of the diffusion of law exists, and indeed that most legal studies of diffusion, located in the field of comparative law, are over-reliant on a ‘naïve’ or ‘country and western’ model focusing on the transplantation of law from developed to developing countries.<sup>43</sup> Despite a move from studies of ‘reception’ to ‘transplantation’ - reflecting increased ‘sensitivity to social and political context’<sup>44</sup> - diffusion in the legal literature is ‘generally fragmented, unempirical, and unduly influenced by a simplistic model of processes of diffusion’.<sup>45</sup>

In more recent years, however, work has been undertaken by legal scholars in this field. In a conceptual shift to the global level, Westbrook seeks to explore ‘what happens if we understand instances of what we term the “diffusion of law” as instances of the modernization of authority’.<sup>46</sup> Focusing on *mechanisms* of diffusion, he imagines four scenarios. The first is *imperium*, that is authority imposed by a sovereign. This is exactly the imperial model where new legal norms are simply imposed by a ruler, transferred directly from one polity to another. The second, *fashion*, denotes a legal system that changes according to what is perceived to be modern. Perception is the important word here. As explored below in relation to the literature on sociology, what is perceived as modern is not necessarily the most efficient rule or norm. Rather, the costs of assuming a different method are higher than those attached to an already popular norm. In addition, the wish to be seen as a ‘modern’ polity may drive this scenario. Third, Westbrook describes *system*, where globalization is posited as an entirely new system that is slowly generating and creating a

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<sup>40</sup> Ibid, at 11-12.

<sup>41</sup> Ibid, particularly table at page 17.

<sup>42</sup> Ibid, at 13

<sup>43</sup> W Twining, ‘Social science and diffusion of law’ (2005) 32 *Journal of Law & Society* 203, at 203-5.

<sup>44</sup> Ibid, at 211.

<sup>45</sup> Ibid, at 217.

<sup>46</sup> DA Westbrook, ‘Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless’ (2006) 47 *Harvard International Law Journal* 489, at 493.

novel body of norms. Finally, *tribe* describes a situation where law travels from people to State, and in this sense is decoupled from any physical space. The analogy here could be the diaspora of those following a certain religion or from a certain area with specific norms. These norms travel with the people who practice them, rather than being attached to any one State or other polity. These ‘imaginings’ provide useful tools for conceptualizing different paths of legal diffusion. As Westbrook sums up, ‘if the liberal narrative of history is the unfolding of contract (the fashionable imagination), if perhaps constrained (the systemic imagination), then the tribal and imperial imaginations present counternarratives, which turn on the reinvention of status.’<sup>47</sup> Benefit-sharing may be diffused along any of these kinds of paths or scenarios – imposed by law, spread through fashion or globalisation and indeed adopted and spread by people in local communities. This latter scenario of reinvention of law *from* the people within a global context provides a good theoretical link between the intra- and inter-State dimensions of benefit-sharing, as well as any transnational dimension.

Sarfaty’s work<sup>48</sup> on how norms are translated at local level in the Pimicikamak Cree Nation in Canada is particularly illustrative in this vein of linking inter- and intra-State with transnational dimensions, and comes close to the kind of rich narrative retelling we aim for in our project.<sup>49</sup> Sarfaty uses an ethnographic approach to explore how the Pimicikamak Cree Nation translated international law into newly developed indigenous law, arguing that other branches of the social sciences are guilty of a preoccupation with the role of States in the development of law - to the detriment of other individuals and collectivities. The work relies on 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’.<sup>50</sup>

Both Westbrook and Sarfaty therefore point to the need to study the diffusion of norms by taking into account a variety of factors and mutual interactions between various actors and processes at different levels of regulation and implementation.

Turning to the *content* of norms that are diffusing, Sarfaty’s work also emphasizes the role of ‘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.<sup>51</sup>

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<sup>47</sup> Ibid, at 503.

<sup>48</sup> GA Sarfaty, ‘International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation’ (2007) 48 *Harvard International Law Journal* 443.

<sup>49</sup> Albeit in a more theoretically guided manner in line with process-tracing, as discussed below.

<sup>50</sup> Sarfaty (n 48), at 444.

<sup>51</sup> Ibid, at 456 (emphasis added).

It is exactly this sort of framing that theorists in sociology call ‘meaning work’ (see below), that is the re-negotiation and re-definition of an international norm in a concrete local context (which may also be affected by power imbalances and strategic but empty uses of international norms), which interests us in our project.

Benefit-sharing appears in effect both ‘framed’ in different ways in different law-making contexts, and in itself essentially a way of ‘framing’ the search for equitable responses to environmental challenges by emphasizing the need to focus on benefits as opposed to burdens.<sup>52</sup> In the latter sense, it has been observed from a discursive angle that benefit-sharing provides a ‘social justice frame’ to address ever-challenging questions involving environmental management.<sup>53</sup> To that end, benefit-sharing seeks to reconcile competing State and community interests, by focusing attention on the *advantages* that derive from environmental protection and environmental regulation with a view to ‘getting the parties to think in a new way about the value of resources, or indeed about what constitutes a resource’<sup>54</sup> and thereby facilitating ‘convergence upon a *shared cooperative agenda*...[depending on] each party’s perception of the benefits it can secure from cooperation.’<sup>55</sup> That being said, it has been observed that there is confusion in the plethora of frames surrounding benefit-sharing and insufficient rigour in linking these frames to different notions of justice.<sup>56</sup> This confusion inhibits progress in understanding and applying benefit-sharing, and justifies not only our focus, but also reinforces the importance of attention to framing in multiple sites rather than just law.

Returning to Twining, the solution he suggests for overcoming the shortcomings in the legal literature on norm diffusion is to be found in paying heed to the social scientific literature, particularly the literature on innovations and social movements, which ‘can provide us with some basic tools for analysing particular examples of diffusion processes and a vast treasure house of concepts, hypotheses, findings, debates, concrete examples, and suggestive analogies’.<sup>57</sup> In a recent reflection on interdisciplinarity for international legal scholarship, Hafner-Burton et al arrive at a similar conclusion, that collaboration between political scientists and international lawyers on norm diffusion would likely be very fruitful.<sup>58</sup> We will thus now turn to discuss the wider literature on norm diffusion in sociology, following Twining’s recommendations:

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<sup>52</sup> Morgera (n3).

<sup>53</sup> S McCool, ‘Distributing the Benefits of Nature’s Bounty: A Social Justice Perspective’ paper presented at the *International Symposium on Managing Benefit Sharing in Changing Social Ecological Systems, Windhoek, Namibia* (2012).

<sup>54</sup> T Franck, *Fairness in International Law and Institutions* (OUP, 1995), at 432.

<sup>55</sup> CW Sadoff and D Grey, ‘Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits’ (2005) 30 *Water International* 420, at 420 (emphasis added).

<sup>56</sup> McCool (n 53). Note also Walker’s (n 16) caution about the ‘gulf between global law and global justice and profound difficulties involved in closing the gap’, at 166.

<sup>57</sup> Twining (n 43), at 205.

<sup>58</sup> E Hafner-Burton, DG Victor and Yonatan Lupu, ‘Political Science Research on International Law (2012) 106 *American Journal of International Law* 56.

*Perhaps the most important general lesson to be learned from this foray into social science literature is that understanding the processes of diffusion is mainly a sociological enterprise, requiring detailed empirical research about the behaviour, ideas, attitudes, and the interactions of human actors in particular contexts. Perhaps the best hope for advancing understanding diffusion of law is to persuade our colleagues in social science that this is a subject that deserves their attention.<sup>59</sup>*

## **2.2 Sociological studies of diffusion**

Much of the sociological literature on diffusion concerns organizations, focusing on the spread of business models, practices, and institutions. Djelic reviews the field, clarifying that essentially diffusion studies are concerned with explaining ‘the question of social similarity’ (that is why certain features of societies have come to resemble one another across national boundaries, for example rules for accounting or business models).<sup>60</sup> Two general approaches to the question are distinguished: modernization approaches do not consider diffusion as such, describing rather the adoption of similar solutions or the occurrence of similar reactions as the result of common problems faced by actors in world. This approach is discussed further below.

The majority of the sociological literature takes what Djelic terms the ‘embedded’ approach, focusing on diffusion (the spread of norms) as the result of the interdependency of societies today.<sup>61</sup> Diffusion occurs through dense institutional channels within different spheres (for example through ‘systems’ such as the international legal system). These channels may be formally institutional or norm entrepreneurs insofar as they fulfil institutional roles. Our research design, as we discuss further below, accounts for both possibilities. This section aims to explore to what extent the sociological literature on diffusion can help illuminate mechanisms that allow or prevent benefit-sharing from entering into an international instrument, as well as its translation in specific local contexts. In that regard, it should be preliminarily noted that the work on diffusion in sociology described below has tended to focus on individuals as important norm entrepreneurs, although discussions on diffusion in the specific literature on social movements focuses attention on collective actors, which may be more relevant from the viewpoint of global law.<sup>62</sup>

Towards the end of the last century sociological research moved away from assumptions of efficiency and rationality as the main drivers of diffusion, thereby dispelling assumptions of the superiority of norms that had characterized earlier work. The classical example of this shift is DiMaggio and Powell’s work on institutional isomorphism.<sup>63</sup> Their revisiting of

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<sup>59</sup> Twining (n 43), at 231.

<sup>60</sup> ML Djelic, ‘Sociological Studies of Diffusion: Is History Relevant?’ (2008) 6 *Socio-Economic Review* 538.

<sup>61</sup> *Ibid.*

<sup>62</sup> As noted by Twining (n 38).

<sup>63</sup> PJ DiMaggio and WW Powell, ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields’ (1983) 48 *American Sociological Review* 147.

Weber's iron cage<sup>64</sup> shows that organizational similarity is not necessarily guided by questions of efficiency – instead, organizational change has moved from a 'logic of consequences' (efficiency concerns) to a 'logic of appropriateness' (normative concerns). The creation of an institutional field constrains organizational actors' possibilities for choice as continually reproduced values become internalized. It is the normative sanctioning of these values over time that leads to their reproduction rather than any efficiency quality. This is what the authors call *institutional isomorphism*, which may follow three paths: '1) *coercive* isomorphism that stems from political influence and the problem of legitimacy; 2) *mimetic* isomorphism resulting from standard responses to uncertainty; and 3) *normative* isomorphism, associated with professionalization'.<sup>65</sup>

Strang and Meyer's work on *mechanisms* of diffusion is another much-cited text that moves beyond early ideas of diffusion as efficiency. Of particular import to our purposes here is their discussion of theorization: 'the self-conscious development and specification of abstract categories and the formulations of patterned relationships'.<sup>66</sup> The presence of theory drives diffusion by linking disparate actors and providing motivation for adoption, all of which is seen as dependent on how compelling the theorization is. While these works do much to dispel assumptions of the superiority of norms that diffuse, they do not tell us a great deal about *how* diffusion really takes place, nor do they broach questions of how norms may change during diffusion, assuming instead that norms remain fixed.

Strang and Soule focus on mechanisms, looking at the different rates and pathways of diffusion in organizations and social movements, and urging us to turn our attention to both structural and cultural bases of diffusion.<sup>67</sup> Djelic's work on strong and weak ties pays attention to the detail of how diffusion may occur. Focusing on social networks as the links between micro and macro levels, Djelic distinguishes between in-group and bridging networks. The first is dense and closely knit and potentially exclusive, while the second is less intense and contains more overlapping, peripheral members of different networks.<sup>68</sup> Peripheral members are understood as more likely to have contact with other societal groups than those caught in the centre, while bridging networks perform a similar role. Through these contacts, they communicate norms arising in one group to another. Peripheral in-group members and members of bridging networks thus facilitate diffusion. Guiraudon shows similar processes to be at work in the transnational diffusion of norms concerning foreigners' rights.<sup>69</sup> These works, therefore, help illuminate how norms may be diffused and subsequently adopted where social network members are able to help a norm take root in different national contexts through overlapping memberships. These approaches to

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<sup>64</sup> Whereby efficient bureaucracies expand and are exported by virtue of their very efficacy. Thus norms that diffuse in this view were viewed as superior by definition, *ibid*.

<sup>65</sup> *Ibid*, at 150.

<sup>66</sup> D Strang and JW Meyer, 'Institutional conditions for diffusion' (1993) 22 *Theory and Society* 487, at 492.

<sup>67</sup> D Strang and SA Soule, 'Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills' (1998) 24 *Annual Review of Sociology* 265.

<sup>68</sup> ML Djelic, 'Social Networks and Country-to-country Transfer: Dense and Weak Ties in the Diffusion of Knowledge' (2004) 2 *Socio-Economic Review* 341, at 344.

<sup>69</sup> V Guiraudon, 'European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion' (2000) 34 *International Migration Review* 1088.

understanding interactive processes of diffusion also allow us to bring in considerations of the *content* of norms and how they are framed or translated in different micro contexts.<sup>70</sup>

The social movements literature, in turn, focuses on collective actors' role in norm diffusion and calls attention to the diffusion of frames. The latter concept (as already discussed above in relation to Sarfaty's work<sup>71</sup>) is particularly useful for present purposes given its emphasis on translation and the 'fit' of frames in different contexts.<sup>72</sup> The concept of framing was first developed by Erving Goffman, who saw frames as keys used to bring into focus different aspects of situations: a frame or 'a particular definition *is in charge* of a situation'.<sup>73</sup> Thus, actors frame issues in order to attach characteristics and definitions to people and issues in space and time. They attribute blame, outline alternative paths and means of achieving goals. Thus, frames perform the role of interpreting the significance of a person, event or symbol. Theorists posit that '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'.<sup>74</sup>

Framing thus requires work, as already implicitly acknowledged in the legal literature in Westbrook's ideas about the 'reinvention of status'<sup>75</sup> and Sarfaty's references to 'legal mediation' in the Pimicikamak Cree nation's efforts to give international law meaning in local context.<sup>76</sup> Benford and Snow provide detail about the different techniques that social movements may employ in framing: frames are used for *articulation*, that is, 'the connection and alignment of events and experiences so that they hang together in a relatively unified and compelling fashion'.<sup>77</sup> Frames are also used for *amplification*, stressing the importance of certain issues, events, or beliefs in order to make them more salient. Their *salience*, or *resonance*, is 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).<sup>78</sup> In the literature on benefit-sharing McCool makes explicit reference to the salience of frames, citing work by Entman that sums up well the connections between salience and diffusion:

Framing essentially involves selection and salience. To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a

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<sup>70</sup> With a view to better understanding the content of benefit-sharing, we will consider first the usefulness of political ecology, and at a later stage the legal and political sciences literature on global justice.

<sup>71</sup> Sarfaty (n 48).

<sup>72</sup> Much of the work on diffusion in the literature on social movements discusses the diffusion of contentious tactics, that is new or innovative protest strategies. The discussion on how diffusion takes place is not the less relevant for our purposes here, however.

<sup>73</sup> WA Gamson, 'Goffman's Legacy to Political Sociology' (1985) 14 *Theory and Society* 605, at 616.

<sup>74</sup> DA Snow, 'Framing Processes, Ideology, and Discursive Fields' in DA Snow, SA Soule and H Kriesi (eds) *The Blackwell Companion to Social Movements* (Blackwell, 2004) 308, at 384.

<sup>75</sup> Westbrook (n 46), at 503.

<sup>76</sup> Sarfaty (n 48).

<sup>77</sup> RD Benford and DA Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 *Annual Review of Sociology* 611, at 623.

<sup>78</sup> H Johnston and JA Noakes, *Frames of Protest: Social Movements and the Framing Perspective* (Palgrave Macmillan, 2005), at 12-16.

way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation<sup>79</sup>

Diffusion, implicit in the discussions of the qualities of frames above, is also explicitly analyzed with reference to how frames move across national borders, albeit with less sensitivity to mechanisms than in Djelic's work.<sup>80</sup> Frame diffusion may occur actively through the deliberate efforts of movement actors, or more passively – or even undesirably – through external channels such as the media.<sup>81</sup> It is described as taking place (deliberately) when a frame is useful to both parties involved, when both share some basic cultural or structural characteristics and are in some way linked,<sup>82</sup> following either a hierarchical (trickle-down) form or a proximal (mimicry) form.<sup>83</sup> Snow and Benford see the important factor in the process of diffusion not in the actual mechanical act of diffusion but in the manipulation and interpretation of a frame in order to fit a new societal context (echoing the work on salience mentioned above). They develop a typology of diffusion accordingly. *Reciprocation* occurs when both the transmitter and the adopter actively take an interest in the process. Where only the adopter takes an active interest, *adaptation* takes place, whilst *accommodation* describes the opposite situation. On the other hand, *contagion* describes diffusion between two passive actors,<sup>84</sup> although there is little empirical evidence of this process in the literature on social movements.<sup>85</sup> We may imagine a situation where a norm used by one actor, for example an NGO, is reported in the press, and subsequently taken up by another NGO without the two ever coming into contact. Similarly, we may refer back to the idea of theorization as a possible path for the contagion. Nevertheless, it is difficult to imagine a scenario where no adaptation on the part of the frame adopter takes place at all.<sup>86</sup>

*Passive* diffusion as a description of how a norm may travel through channels such as the media and theorization (to refer back to Strang and Meyer's work<sup>87</sup>) is, however, a useful one for those instances where there may be no obvious traces of *deliberate* diffusion of the norm of benefit-sharing. As discussed below, it may also be that in some cases benefit-sharing has

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<sup>79</sup> McCool (n 53), at 5.

<sup>80</sup> Djelic (n 66).

<sup>81</sup> D della Porta, H Kriesi and D Rucht (eds), *Social Movements in a Globalizing World* (Palgrave Macmillan, 2009), at 3-22.

<sup>82</sup> DA Snow and RD Benford, 'Alternative Types of Cross-National Diffusion in the Social Movement Arena' in D della Porta, H Kriesi and D Rucht (eds), *Social Movements in a Globalizing World* (Palgrave Macmillan, 2009), at 24.

<sup>83</sup> SA Soule, 'Diffusion Processes within and across Movements' in DA Snow, SA Soule and H Kriesi (eds), *The Blackwell Companion to Social Movements* (Blackwell, 2004) 294.

<sup>84</sup> Twining (n 38), at fn 6 mentions similar distinctions in a systematic review by Greenhalgh and colleagues, who distinguish between diffusion as informal spread and dissemination as planned spread or managerial change. Twining (n 43), at fn 60 also discusses optional, collective and authority innovation decisions. These models reflect the typologies of diffusion discussed here, and are also reflected in our own typology introduced below.

<sup>85</sup> Snow and Benford (n 82).

<sup>86</sup> This is also underscored by Twining (n 38), at 24, who remarks: 'no serious student of diffusion can assume that what is borrowed, imposed or imported remains the same...not just a matter of the interpretation and application of received law, but also of its use or neglect, and local, political, economic and social significance ...in social science accounts of diffusion the term 'reinvention' is used to emphasise that local people often employ creative problem-solving in which borrowing or imitation is only one aspect.'

<sup>87</sup> Strang and Meyer (n 66).



emerged as a distinct and independent response to a commonly-faced problem in these instances. Acknowledging the range of mechanisms that may provide explanations for these examples will ensure our research is not predisposed to finding answers to fit any predetermined hypothesis (in line with our exploratory, grounded approach). Reflecting on the mechanisms and channels of norm diffusion will also necessarily lead to some consideration of other themes central to the study of social movements: collective action problems, trust, cooperation and the nature of the social networks we study for example. As we are interested in uncovering paths to diffusion, our work will also focus on the composition of communities, on how different voices in the community are aggregated or ignored, and on how the community's voice in turn is regarded in the wider societal context. Nevertheless, the work will stop short of any formal social network analysis given the focus on the use and translation of benefit-sharing and its diffusion. Rather, these elements will be considered as part of the analysis of the occurrence of benefit-sharing in the various case studies.

In sum, sociological views of diffusion bring several useful considerations for our study of benefit-sharing, particularly (but not only) in its intra-State dimension. First, this body of literature moves norm diffusion away from assumptions of superiority or efficiency of norms that diffuse, as exemplified by DiMaggio and Powell's work on shifts from a 'logic of consequences' to a 'logic of appropriateness'.<sup>88</sup> This is an important consideration given the unknown quantity of benefit-sharing - that is, the lack of understanding of the full range of its promises and pitfalls.<sup>89</sup> Second, work in the field of social movements concerning framing and how notions fit into different societal contexts following processes of redefinition to build their salience point to a useful way of studying the translation of benefit-sharing in different settings (such as in different international regimes, but also at different levels of regulation), potentially with different meanings. Although we do not claim to be studying social movements, this branch of the literature provides us with useful theoretical guidance on collective actors in diffusion and on framing. Third, Strang and Meyer's work highlights the importance of theorization in diffusion, underpinning our view that benefit-sharing is not sufficiently implemented because of a lack of conceptual work about what it really entails<sup>90</sup> (and, interestingly, suggesting that our project in itself may also promote diffusion, as we discuss further below<sup>91</sup>). Finally, work on *how* diffusion takes place through overlapping networks drawing on organizational sociology is useful when it comes to building bridges between studies of diffusion of benefit-sharing in its inter- and intra-State dimensions. Little has yet been said, however, of mechanisms of diffusion at the international level. Here, we must turn to the literature on international relations.

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<sup>88</sup> DiMaggio and Powell (n 63).

<sup>89</sup> See Morgera (n3)..

<sup>90</sup> Strang and Meyer (n 66). See also Morgera (n 3). Note also that in the area of medical law skepticism about the usefulness of the legal concept of benefit-sharing is mainly based on its being under-theorized: K Simm, 'Benefit-sharing: An Inquiry regarding the Meaning and Limits of the Concept of Human Genetic Research' (2005) 1 *Genomics, Society and Policy* 29, at 38.

<sup>91</sup> And in line with Walker's (n 16) understanding of global law as a 'self-conscious development and a reflexive process': see section 1 above.

### **2.3 International relations and norm diffusion**

Gilardi provides a succinct review of the literature on norm diffusion in international relations, which guides the following overview.<sup>92</sup> Interdependence, he notes, is at the core of this discipline, which focuses on interaction between States, making the study of diffusion implicit in much work in the field. Explicit analyses, on the other hand, are a recent development. The bulk of work here is quantitative, and has generated four main categories of mechanisms of diffusion: i) coercion;<sup>93</sup> ii) competition (change in order to attract economic resources); iii) learning (looking elsewhere to understand the consequences of change); and iv) emulation.<sup>94</sup>

Emulation in particular has led scholars of international relations to theorize how and when norms will be taken up by States for reasons unconnected to a more realist view of international society (where States will act only in their own more or less narrowly defined interests). Checkel speaks of socialization with reference to the shift from a logic of consequences to one of appropriateness to explain why norms are adopted by different actors. States' strategic calculations rooted in a logic of consequences may over time become internalized, and the norm's reproduction will thus be rooted instead in a logic of appropriateness. In a second scenario, when States or their agents may adopt a role *seen* to be appropriate in order to simplify their tasks whether or not any internalization has taken place. This is still, however, seen as the beginning of a switch of logics away from consequences and towards appropriateness. Finally, in a scenario of normative suasion drawing on Habermasian communicative action,<sup>95</sup> State agents will 'actively and reflectively internalize new understandings of appropriateness'.<sup>96</sup> They are, in other words, *convinced* that the new norm is simply right.

Checkel's work on why norms are adopted is complemented by Finnemore and Sikkink's model of 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. Norm entrepreneurs may also be understood as *moral entrepreneurs* after Becker, where the norm they promote is the result of beliefs, or *norm enactors* where international organizations seek to export norms (for varying reasons). Given the novelty and thus the challenging nature of the new norm, unconventional methods of promotion such as protest are more likely at this early stage. 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. Finally, the *internalization* stage is reached when a norm is no

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<sup>92</sup> F Gilardi, 'Transnational Diffusion: Norms, Ideas, and Policies' in W Carlsnaes, BA Simmons and T Risse-Kappen (eds), *Handbook of International Relations* (Sage, 2012), 453.

<sup>93</sup> Similar to DiMaggio and Powell (n 63).

<sup>94</sup> Which brings in normative aspects, fitting with DiMaggio and Powell's (ibid) idea of a logic of appropriateness in institutional isomorphism, to continue the analogy.

<sup>95</sup> In the smallest of nutshells, Habermas' work on communicative action discusses the possibility of creating inclusive public spheres where deliberation will eventually lead to consensus on the matter under discussion through the power of rational argument. See J Habermas *The Theory of Communicative Action, Vol. 1. Reason and the Rationalization of Society; Vol. 2. Lifeworld and System* (Beacon Press, 1984 and 1987)

<sup>96</sup> JT Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) 59 *International Organization* 801, at 812.

longer questioned (the authors use the examples of slavery and universal suffrage). This is not necessarily the destiny of all norms, however – norm diffusion is not inevitable and may well be a lengthy process.<sup>97</sup> Gilardi usefully reformulates this view of the lifecycle of norm diffusion as a shift in the burden of proof – at first it is norm entrepreneurs who must demonstrate the appropriateness of a new norm, but over time this shifts to non-adopters.<sup>98</sup> Gilardi also contends that norm entrepreneurs are not indispensable for norm diffusion, in line with ideas of passive diffusion mentioned earlier. Norms are not thus necessarily exogenous.<sup>99</sup>

Continuing in the vein of bridging sociology and international relations (and thus pertinent to our effort at inter-disciplinarity), Towns turns our attention to the *content* of norms.<sup>100</sup> She begins with a puzzle, the diffusion of norms originating from States in Latin America traditionally (and rather imperialistically) seen as receivers of norms rather than entrepreneurs. She argues that norms are inherently constitutive of social hierarchies and that, following Dahrendorf, inequality is thus an inescapable fact of societies built on norms. Thus, States perceived as ‘lower down’ in a perceived hierarchy may introduce new norms in a bid to improve their standing.<sup>101</sup> Bringing our considerations back, once again, to framing, how a norm is framed or understood is thus described as a crucial component of studies of norm diffusion that seek to take account of social hierarchies and trajectories of diffusion.

Studies of norm diffusion in international relations, concerned as it is with the macro level, are thus informative for our study of the diffusion of benefit-sharing in its inter-State dimension. Checkel’s<sup>102</sup> work may help in explaining *why* benefit-sharing has been and may be taken up, bringing our attention to how norms diffuse without the help of entrepreneurs. Finnemore and Sikkink’s work, in turn, can guide conclusions as to the *stage* of diffusion that benefit-sharing has reached, as well as allow us to consider the role of any norm entrepreneurs.<sup>103</sup> Towns’ work, bridging sociology and international relations, underpins our interest in the evolution of the content of benefit-sharing.<sup>104</sup>

Given the points of contact between the sociology and international relations literature on norm diffusion (in terms of shifting from a logic of effectiveness to a logic of appropriateness in diffusion, and also in terms of framing), there appears to be potential for bringing these two approaches together to develop a holistic picture of the diffusion of benefit-sharing both in its inter- and intra-State dimensions.

## **2.4 Diffusion, modernization or both?**

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<sup>97</sup> M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 4 *International Organization* 887.

<sup>98</sup> Gilardi (n 92).

<sup>99</sup> *Ibid.*

<sup>100</sup> AE Towns, ‘Norms and Social Hierarchies: Understanding International Policy Diffusion “From Below”’ (2012) 2 *International Organization* 179.

<sup>101</sup> *Ibid.*, at 183.

<sup>102</sup> Checkel (n 96).

<sup>103</sup> Finnemore and Sikkink (n 97).

<sup>104</sup> Towns (n 100).

In conclusion, the sociology and international relations literature on diffusion may bring many advantages to our legal research on benefit-sharing: it can help understand the role of the behaviour, perceptions and interactions of different actors (individuals, organizations, social movements and States) in particular contexts, as well as the channels of spread and communication of a legal concept and also of legal practices.<sup>105</sup> This may be particularly useful to support empiricism in legal research, which, because of its usual ‘library-bound’ approach, risks neglecting bottom-up perspectives.<sup>106</sup> And it 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.<sup>107</sup>

With regards to the latter point, it can be argued that a common feature of the work on norm diffusion is the implicit assumption that a consciously driven process is at work. As noted above, however, there are exceptions, such as the studies of passive diffusion, recognized as taking place through media channels (in studies of social movements) and through theorization.<sup>108</sup> Yet, there too the actor adopting the norm is seen as active to some degree in taking up a norm. Given the grounded, exploratory nature of our work, we must therefore recognize the possibility that in some circumstances the appearance of benefit-sharing may not be the result of diffusion at all, but perhaps an independent, common response to pressures experienced simultaneously in various contexts.

In effect, in her review of work approaching the ‘question of social similarity’, Djelic (as mentioned earlier) outlines an alternative explanation to diffusion, namely modernization.<sup>109</sup> According to this concept, ‘increasing similarity across borders reveals parallel but discrete processes of fit and adaptation’, since modernization takes a view of history as exerting common and powerful pressures on societies and sees similarity to be logical in their reactions.<sup>110</sup> In other words, a widely shared norm does not necessarily come about through diffusion: it may be a norm arrived at independently by different actors in their attempts to answer the same problem. Common pressures that could lead to such a scenario in the case of benefit-sharing could include decolonization, attempts to increase the social acceptability of the exploitation of natural resources, or an international agenda focusing on the economics of environmental protection (the green economy).<sup>111</sup> Modernization, however, may arguably fail to appreciate the importance of networks and interdependency in the modern world.<sup>112</sup>

Our aim in acknowledging the possibility that diffusion may not explain some occurrences of benefit-sharing is to keep our research endeavour as open as possible in line with its exploratory character. Diffusion accounts, as already mentioned, tend to implicitly assume a

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<sup>105</sup> Twining (n 43), at 236 and 229-230. See also generally Vick (n 37).

<sup>106</sup> Twining (n 43), at 230 and 237.

<sup>107</sup> Ibid, at 232.

<sup>108</sup> Strang and Meyer (n 66).

<sup>109</sup> Djelic (n 60).

<sup>110</sup> Ibid, at 543.

<sup>111</sup> The BENELEX project will in effect use the green economy as a testing ground for the understanding of benefit-sharing: see BENELEX conceptual paper on this question.

<sup>112</sup> Djelic (n 60), at 543.

conscious process. While accounts of passive diffusion go some way to acknowledging this may not (always) be the case, the modernization account removes the idea of spread and trajectory from the equation. Bearing in mind these various possibilities for explaining benefit-sharing will increase our chances of giving the most truthful account possible, as well as providing the scope necessary to explain the presence of diverging meanings of and a fragmented and complex map of the recourse to benefit-sharing, which may be linked to different processes of translation and adaptation. We thus do not see these different explanations as mutually exclusive. The occurrence of benefit-sharing in diverse legal instruments, with diverse meanings attached to it, may result from a mixture of diffusion processes and independent choices.<sup>113</sup> Benefit-sharing may well be the result of independent decisions in some cases, and the result of diffusion in others. In addition, when diffusion is passive rather than motivated or deliberate, it may resemble decisions independent of diffusion at first blush.

### 3. Proposed methodology

With this theoretical framework in mind, we now turn to discuss the accompanying methodology, which will integrate legal and social scientific qualitative methodology within the method of process-tracing. Process-tracing (discussed below) will be theoretically guided by ideas drawn from the international relations literature on norm diffusion for the inter-State dimension of benefit-sharing and from the political sociology literature for the intra-State dimension of benefit-sharing. In both cases, attention will be paid to frames, although we do not envisage carrying out a formal quantitative frame analysis, but rather to be guided by the literature on framing within process-tracing. Linking the findings concerning the inter-State and intra-State dimensions is expected to allow us to recombine a rich narrative of benefit-sharing in norm diffusion in global environmental law. As tends to be the way in social science, however, this neat analytical distinction is fuzzier in reality. As work such as that by Sarfaty<sup>114</sup> explored earlier tells us, the local and the international sphere are not independent of one another. Local contexts exist within a global legal order, and international legal orders are informed and affected by local contexts. Though we will discuss our methodological framework in line with our analytical distinction between inter- and intra-State dimensions of benefit-sharing, therefore, we acknowledge and remain aware that the distinction is artificial, and that we cannot simply *recombine* two distinct strands of study to explain benefit-sharing in the context of global environmental law. We must instead be vigilant and attentive to all aspects of our methodology at all times. Ultimately, our project will be an opportunity to test whether process-tracing informed by legal, sociological and international relations theory on norm diffusion can (and if so, to what extent) help us better understand global environmental law.

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<sup>113</sup> The importance of understanding the diffusion of law as part of some more general process is also discussed in Twining (n 43), at 218 and 235.

<sup>114</sup> Sarfaty (n 48).

In addition, the overall orientation of participatory action research (PAR) will inform all aspects of our enquiry (though our empirical fieldwork more concretely). We discuss this approach in a second section, including a frank admission of our concerns. The legal and qualitative methodologies expressed within process-tracing can thus be seen as combined or contained within the overall PAR orientation and go some way to correcting some of the potential problems we envisage as connected to a PAR orientation.

### ***3.1 Process-tracing***

In broad approximation, process-tracing can be understood as ‘a procedure for identifying steps in a causal process leading to the outcome of a given dependent variable of a particular case in a particular historical context’, that is, rather than simply *narrating* the accumulation of events, the researcher must ensure that narratives are guided and geared towards identifying processes and *causal chains* and mechanisms in their case studies.<sup>115</sup>

George and Bennett distinguish different varieties of process-tracing: detailed narratives; narratives using both hypotheses and aiming for generalizations; analytic explanation and more general explanation. These can be understood as narratives concerned with different levels of abstraction. Detailed narratives are equated with historical narratives, ‘a chronicle that purports to throw light on how an event came about’.<sup>116</sup> These accounts focus on detail without explicitly drawing on theory to explain how one event is causally linked to another. Other, more analytical process-tracing narratives draw explicitly on hypotheses ‘without, however, employing theoretical variables’ while stronger forms seek to generalize the causal processes uncovered to other cases, that is extrapolating an explanation from one case to explain all similar cases. Analytical explanations draw on the historical narrative technique, but ‘couched in explicit theoretical forms ...focusing on what are thought to be particularly important parts of an adequate or parsimonious explanation’.<sup>117</sup> Finally, at a higher level of abstraction, more general explanations do not specify the degree of detail the other forms of process-tracing display. This is usually associated with a large-scale research design involving more cases than may be described in detail, and where the narrative thus concerns one of a great many cases to be discussed.

Our research is exploratory and not therefore concerned with formal theory-testing or the stringencies of systematic process tracing associated with the method when coupled with more formal and quantitative theories (such as game theory). Nor, however, do we aim for the unbounded detail associated with the first version of historical process-tracing described above. Given our interest in processes of diffusion and framing and our goal of uncovering the causal chains linked to these processes, the theoretically bounded version of the method fits most closely with our research. While we are guided by theory, we do not at this stage in the study aim at generalization, since our theoretical approach underlines the importance of context-specific paths. This choice of what George and Bennett term analytical explanation

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<sup>115</sup> AL George and A Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press, 2005), at 176.

<sup>116</sup> *Ibid.*, at 210.

<sup>117</sup> *Ibid.*, at 211.

allows the researcher to focus deliberately on what are considered to be the most important elements of the case in light of the theoretical framework employed, in this case linked to framing, and particularly aspects identified as pertinent to the salience of frames such as cultural resonance, as mechanisms of norm diffusion.<sup>118</sup> In different terms, the thick narratives required by this method will also allow close attention to be paid to cultural contexts and how understandings (framings) of benefit-sharing fit into these. The bounded nature of process-tracing, where researchers concentrate on particular aspects of a narrative, will eventually allow for the identification of any patterns in the diffusion of benefit-sharing. Similar arguments for narratives bound by theory are advanced in Bates et al's work on analytical narratives, where these 'trace behaviour of particular actors, clarify sequences, describe structures, and explore patterns of interaction.'<sup>119</sup>

Overall, our hope is that process-tracing can enable us to determine whether and to what extent there is a causal chain in the emergence and diffusion of benefit-sharing at the intersection of international, transnational, national and indigenous communities' customary law, through theory-based story-telling (focusing on context and events told through theory). Nevertheless, we should note that identifying all the causal links between actors and events in our cases on the basis of evidence may not always be possible, or for that matter predictable. Though we build the usual measures for robustness into our design (in terms of triangulating our data collection methods and sources), which also serve to cover lacunae in the evidence, and the legal research will systematically identify any evidence of cross-fertilisation between different legal regimes that may also contribute to delineating causation, it is impossible to guarantee such comprehensiveness at this stage in our project. This is also due to the essentially subjective nature of the data that will be gathered during our fieldwork. While we will strive to prove causation insofar as this is possible, not all cases may be completely proved. Within-case comparison through the corroboration and confirmation of accounts through multiple data sources will aid here. We will also scrupulously identify, and reflect upon the implications for our method of, instances in which there appear to be no causal link in relation to benefit-sharing in a certain area or at a certain level of regulation.

Process-tracing in our study of benefit-sharing in its *intra-State* dimension will take the form of a classic qualitative case-study design. In line with the constructivist epistemology that underpins ideas of norm diffusion and framing, we will seek thick and detailed data during fieldwork in a small number of cases in order to build the picture of how the norm of benefit-sharing has diffused into or out of (we hold no assumptions) specific local contexts and as a result of interaction among international, transnational, national and indigenous communities' customary law. In line with this, information on paths of diffusion will consider a wide variety of possible sources.

### 3.1.1 *A focus on community protocols for the intra-State dimension of benefit-sharing*

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<sup>118</sup> Ibid.

<sup>119</sup> RH Bates et al, *Analytic Narratives* (Princeton University Press, 1998), at 10.

The use of process-tracing in our fieldwork will be triggered by the consideration, development and/or implementation of *community protocols*.<sup>120</sup> That a community has at least considered the possibility of a protocol is thus one among several of our selection criteria for the case studies, even though the protocol may later be rejected as a threat or another route followed. Community protocols 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,<sup>121</sup> thereby expressing their understanding of the most culturally and biologically appropriate form of benefit-sharing in a specific context. They provide a fascinating documentation of mutual interactions between different levels of environmental regulation.<sup>122</sup> With regards to their relation with national law, community protocols may thus serve as a tool to promote or facilitate the recognition or integration in statutory law of communities' customary laws and procedures concerning their natural resources and their traditional knowledge through a bottom-up process aimed at articulating such laws and procedures in a way that can be more easily understood by national authorities. With regards to international law, the practice of community protocols was heightened during international negotiations on benefit-sharing under the Convention on Biological Diversity and eventually affected these negotiations, including by achieving formal recognition of community protocols themselves in an international, legally binding instrument.<sup>123</sup>

At the same time, community protocols offer an articulation of the holistic approach of communities to the regulation and management of natural resources and the environment, which may challenge the sectoral approach to environmental regulation in statutory law.<sup>124</sup> Compliance with the provisions of community protocols may be secured through national legislation. Community protocols may also facilitate negotiations between communities and potential private-sector users of communities' natural resources and knowledge, and possibly pave the way for the enforcement of communities' customary laws through private-law contracts. The drawbacks of these protocols have yet to be fully explored (for instance, they may require local communities to frame their concerns in terms that resonate with an extraneous or received framework). At the time of writing, literature assessing community protocols is still scant: existing studies are written by practitioners directly involved in the

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<sup>120</sup> Eg, United Nations Environment Programme (UNEP), *Community Protocols for ABS* (undated) [www.unep.org/communityprotocols/index.asp](http://www.unep.org/communityprotocols/index.asp); H Jonas, K Bavikatte and H Shrumm, 'Community Protocols and Access and Benefit Sharing' (2010) 12 *Asian Biotechnology and Development Review* 49; and a series of publications by Natural Justice, available at <http://naturaljustice.org/library/our-publications>.

<sup>121</sup> Morgera and Tsioumani (n 6), at 157-158; and Morgera, Tsioumani and Buck (n 7), on Article 12, section 2.1.

<sup>122</sup> The relevance of community protocols from a global environmental law perspective has been highlighted in Morgera (n 3).

<sup>123</sup> Nagoya Protocol, Arts 12 and 21.

<sup>124</sup> H Jonas, K Bavikatte and H Shrumm (n 125), at 104, refers to 'laws compartmentaliz[ing] the otherwise interdependent aspects of biocultural diversity by drawing legislative borders around them and addressing them as distinct segments.'



promotion of community protocols in the field and their recognition at the international level.<sup>125</sup>

A thorough academic investigation of community protocols in the context of global environmental law – whether they move beyond the discussion stage or not - is therefore called for to elucidate the interactions among the customary laws of indigenous peoples and local communities, and international and national law on the environment and on human rights. In a more practical perspective, a study of community protocols can ultimately help better understand whether and to what extent benefit-sharing, as encapsulated in community protocols, operates as a platform for effective partnership-building between communities, governments and the private sector on the ground.<sup>126</sup>

Since our aim and design is not a classical social scientific attempt to either build or test theory, but rather to understand a process of norm diffusion without necessarily making claims of generalization, this is not selection on the dependent variable *sensu stricto*. The basis of the research at the intra-State level is then the case study, with the unit of analysis being the projects investigated at each of the research sites. In the framework of these projects the communities have developed (and begun to implement) or considered community protocols. These documents and the processes of their elaboration and application provide insights into how the norm of benefit-sharing has been translated at ground level, and also how bottom-up diffusion towards the international level has occurred.<sup>127</sup>

These protocols will thus be the trigger of our data collection. They will facilitate the identification of case studies where discussions of benefit-sharing have already occurred as part of a broader debate on the need or opportunity to develop, implement or revise a community protocol - that is, situations in which indigenous or local communities are deciding whether and how to frame their interactions with third parties (be they governments, private companies or NGOs) in relation to the conservation, sustainable use or regulation of natural resources. That being said, we reiterate that equal attention will be paid to cases where communities may eventually decide against the adoption of a community protocol, preferring not to engage with third parties and remaining uninterested in benefit-sharing. It may also be useful to clarify that while we are interested in the role, as well as advantages and limitations of using community protocols to define and implement benefit-sharing in a specific context, our main research objective is understanding the interactions between different bodies of law in framing benefit-sharing that underpin the development of a community protocol or the decision not to develop one. Our research will thus probe

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<sup>125</sup> Eg, K Swiderska et al., *Biodiversity and Culture: Exploring Community Protocols, Rights and Consent*, Participatory Learning and Action Series no. 65 (International Institute for Environment and Development, 2012, <http://pubs.iied.org/14618IIED.html>, 28; H Jonas, H Shrumm and K Bavikatte, *Biocultural Community Protocols and Conservation Pluralism* (Natural Justice, 2010), [http://naturaljustice.org/wp-content/uploads/pdf/BCPs\\_and\\_conservation\\_pluralism\\_jonas\\_et\\_al2010.pdf](http://naturaljustice.org/wp-content/uploads/pdf/BCPs_and_conservation_pluralism_jonas_et_al2010.pdf).

<sup>126</sup> The link between benefit-sharing and partnership is also emphasized by the UN Special Rapporteur on Indigenous Peoples' rights, who argued that benefit-sharing can 'not only address measures to mitigate or compensate for adverse impacts of projects, but also explore and arrive at means of equitable benefit-sharing in a spirit of *true partnership*' (UN Doc A/HRC/15/37, para. 53, emphasis added).

<sup>127</sup> Community protocols themselves have influenced and received formal recognition in international law (Nagoya Protocol, arts. 12 and 21).

understandings and definitions of benefit-sharing both within and outside these documents, and include so-called ‘negative’ cases where no protocol was concluded. Protocols, in other words, are interesting for us insofar as they express the position on benefit-sharing arrived at by a community and allow for a more focused investigation of the underlying customary, national and international norms relied upon. Where protocols do not exist, their absence may either indicate that a community is not willing to engage in a discussion on benefit-sharing, which may be perceived as a threat or imposition, or may prefer to rely directly on its customary norms: both scenarios are equally interesting and crucial to the research.

Data collected using methods developed alongside research participants in line with the PAR orientation (see below) will provide the basis for process-tracing, guided by embedded sociological approaches to norm diffusion and more specifically work on framing and salience in explanations of how norms fit into different local settings. Our case selection has been dictated by practical concerns to a significant extent: we need to involve partner NGOs that are already involved in discussions with communities on benefit-sharing, notably through the development and/or implementation of community protocols as the primary source for data on the diffusion of benefit-sharing: we are therefore restricted to projects these partner NGOs run. From a principled perspective, however, the case-study selection has been driven by the need to ensure regional representativeness to understand how benefit-sharing is understood, framed and implemented in the context of diverse legal approaches to environmental regulation adopted in different regions, and against the variety of indigenous peoples or local communities and in the context of the different legal recognition they enjoy in different regions. We have also attempted to select case-studies where community protocols aim at realizing benefit-sharing in relation to a variety of different environmental management scenarios (community-based natural resource management, development projects and extractive industries on communities' lands, communities' traditional use of medicinal plants, communities' traditional livestock-keeping, etc).<sup>128</sup>

At this early stage and in line with the advisable practice of triangulation (to avoid reliance on any one source of data and thereby increase validity) and the PAR approach, we will consider focus groups, participant observation, and semi- or unstructured interviews, as well as documents produced by the projects we investigate, including community protocols, as potential sources of data. Paying attention to the framing of benefit-sharing implies attention to contexts: to understand salience, fit, or the rationale behind the translation of a norm means we must study the framings of other actors and relevant societal contexts. For the purposes of our study the actors whose (potentially conflicting) framings are interesting are likely to include not only the communities and varying levels of government, but also business enterprises involved in the sharing of benefits, and transnational legal advisors. Gathering data on these different framings of benefit-sharing will inform our judgment of the *fit* and *rationale* of the community protocols and frames expounded within the projects we study. To this end, we will draw on available documents (such as laws, policy documents, industry press releases or other documentation) and where possible supplement these with interviews

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<sup>128</sup> Our selected countries are: Greece (island of Ikaria), India, Malaysia, South Africa and Argentina.

to corroborate the information available in written form.<sup>129</sup> Historical and current political contexts will also inform this judgment and will instead be investigated through relevant scholarly literature.

### *3.1.2 Our approach to the inter-State dimension of benefit-sharing*

Process-tracing will also characterize our study of benefit-sharing in its inter-State dimension, continuing the interdisciplinary nature of our work. The thick narratives of this study will thus once again pay attention to context, though this time international legal and political contexts rather than local cultures.<sup>130</sup> To recount the presence of benefit-sharing in international law and processes, this part of our research is underpinned by a combination of black-letter-law analysis of relevant international instruments on benefit-sharing placed in the context of the political science literature on the development of these instruments. The political analyses of legal negotiations will be supplemented with semi-structured interviews with those identified as norm entrepreneurs (either in the literature or as a result of the black-letter law analysis) and participant observation on the sidelines of multilateral environmental negotiations sessions. These methods will be used to gather data on both diffusion (or in the modernization view, independent but similar responses) and framing by giving data on contexts (political, legal) for similar reasons to those already outlined. Our inter-disciplinary efforts in this regard aim to avoid certain blindspots in pure legal research: legal developments do not appear out of nowhere, and a complete study of benefit-sharing must include the negotiating history and rationale behind references to benefit-sharing in the legal instruments if we are to understand the true logic behind this norm's introduction within a specific international law-making context. Put simply and in line with our theoretical interest in norm entrepreneurs, we must pay attention to the role of people and politics at the international level. This will also allow us to problematize benefit-sharing as a possibly *abused* and/or *abusive* concept with a view to better understanding ground-level perceptions of benefit-sharing and initial evidence of whether and how it works (or fails to work) in selected cases.

### **3.2 Participatory Action Research**

Action research, according to Reason and Bradbury, is 'not so much a *methodology* as an *orientation to inquiry* that seeks to create participative communities of inquiry'.<sup>131</sup> Rather than traditional scientific approaches to knowledge where researchers study subjects to eventually define general theories (or test theories through the study of subjects), in action

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<sup>129</sup> It should be noted that there may be some difficulty securing such interviews, or that where they participate representatives may simply repeat publicly agreed lines. The trust built up in the research relationship with the community projects also needs to be considered – interviewing others may put that trust at risk.

<sup>130</sup> As mentioned earlier in this working paper, PAR informs our empirical fieldwork more explicitly than this part of the study. Nevertheless, in recombining the strands of the research to reflect on benefit-sharing in the framework of global environmental law, PAR returns to the fore in our commitment to bring the ground-level understandings of benefit-sharing to our research outputs, eventually contributing to a diffusion of benefit-sharing that takes account of these understandings through a mechanism of theorization (see Strang and Meyer (n 66)).

<sup>131</sup> P Reason and H Bradbury, 'Introduction' in Peter Reason and Hilary Bradbury (eds), *The Sage Handbook of Action Research* (Sage, 2008) 1, at 1.

research the aim is to consider research subjects as research *participants*.<sup>132</sup> Knowledge is co-created with, rather than extracted from, participants. The epistemology behind PAR is thus constructivist, but ideology also plays a part in PAR.<sup>133</sup> The reasoning behind the co-creation of knowledge is that research should be oriented to human flourishing. By co-creating knowledge, issues of concern to both researchers and participants can be tackled. The definition by Reason and Bradbury is likely the most eloquent here:

*[A]ction research is a participatory process concerned with developing practical knowing in the pursuit of worthwhile human purposes. It seeks to bring together action and reflection, theory and practice, in participation with others, in the pursuit of practical solutions to issues of pressing concern to people, and more generally the flourishing of individual persons and their communities.*<sup>134</sup>

A central component of PAR is then its orientation to social change, with Marx's famous quote often used to illustrate the approach and the attitudes involved: 'The philosophers have hitherto only *interpreted* the world, in various ways; the point, however, is to *change* it.'<sup>135</sup> The potential tensions and problems associated with an orientation to social change are discussed further below. First we set out the reasons why we believe that PAR fits both with the notion of benefit-sharing that is the subject-matter of our project and with the aims of our project itself.

In the most general sense the attraction of a PAR approach for present purposes is dictated by the concept of benefit-sharing itself. A project on benefit-sharing can only gain credibility by sharing its benefits, which includes sharing knowledge, building capacity and creating partnerships for advancing knowledge. PAR builds this in throughout the research process, and its 'wider purpose to contribute (...) to a more equitable and sustainable relationship with the wider ecology of the planet'<sup>136</sup> also closely reflects the wider aim of the research as a contribution to equitable efforts towards environmental sustainability. In that vein, a PAR approach also appears as an orientation that acknowledges our global environmental law perspective as a 'self-conscious development and a reflexive process.'<sup>137</sup>

Our reasons for adopting PAR do run deeper however. There is no one philosophy or indeed discipline behind PAR as an approach. It has been applied in a wide range of fields both academic and non-academic and its looseness in the sense of accommodating varied disciplines is well suited to our endeavour to develop an interdisciplinary approach. Another aspect of PAR that suggests its suitability for our project is its explicit discussions of power. *Power*, the acknowledgment of its existence within research relationships, and attempts to

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<sup>132</sup> This is also what benefit-sharing itself seeks to achieve: see Morgera (n3); and also G Laurie et al, 'Tackling Community Concerns about Commercialisation and Genetic Research: A Modest Interdisciplinary Proposal' 64 *Social Science and Medicine* 272, at 292-3 for an appraisal in the context of medical law.

<sup>133</sup> JW Moses and TL Knutsen, *Ways of Knowing: Competing Methodologies in Social and Political Research* (Palgrave Macmillan, 2007), at 297.

<sup>134</sup> Reason and Bradbury (n 136), at 4.

<sup>135</sup> Marx 1978 [1845] cited in Moses and Knutsen (n 138), at 296.

<sup>136</sup> Reason and Bradbury (n 136), at 4.

<sup>137</sup> Walker (n 16): see section 1 above.

minimize imbalances in its distribution are central in PAR. PAR practitioners often refer to thinkers such as Marx (as already mentioned), Foucault, Habermas and Freire as inspiring their own research, all of whom highlight the exercise of power in social relationships.

Though power imbalances are present in all research relationships, they risk to be particularly pronounced in parts of our project. Specifically, we plan to research the translation of benefit-sharing at the intra-State level: our fieldwork involves a dynamic of researchers from developed countries carrying out research in less developed countries, with vulnerable communities.<sup>138</sup> The experience of researchers coming from outside in these contexts may well include experiences of harmful research.<sup>139</sup> Adopting a PAR approach seeks to re-negotiate this power imbalance in its involvement of research participants. The involvement of NGOs working on benefit-sharing and with well-established relations with relevant communities, as partners in the BENELEX project is a first step in this process. Their input into the development of methods for co-creating knowledge during field trips, as well as their active participation in such co-creation of knowledge, is a crucial element in addressing power and valuing the ‘researched’ community as a vital part of the research project and its members as ‘experts of their own experiences’.<sup>140</sup> On the other hand, NGOs themselves may be part of the power relationship with the researched community and the dividing line between research objectives and those linked to the activism of NGOs may also need to be acknowledged and openly discussed throughout the research. With this and the cyclical nature of PAR approaches, which should adapt and emerge over time, in mind, the project envisages two sets of fieldwork for each of the case study to allow time for research methods to be developed and honed as well as for the roles of the research participants to become clear.

Power is also inherent in accounts of norm diffusion. As explored above, the earlier literature on norm diffusion in all of the disciplines we have reviewed implicitly saw those norms being diffused as better or more modern. The tendency was also to investigate the diffusion of norms from the more to the less developed arena (between States in international relations, from norm entrepreneurs to others in organizational sociology, transmitters to adopters in social movements, the transplantation of law often from colonizer to colonized in law...). The explicit acknowledgement and attempts to re-negotiate power within PAR are thus also welcome in view of our theoretical framework.

Finally, the practical steps envisaged in PAR approaches also match our research goals and the proposed approach to partnership with NGOs. PAR has been described as a ‘cyclical

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<sup>138</sup> This dynamic could be said to be less present for the research in Greece. However, apart from the inherent power imbalance in research (where power is clearly skewed in favour of the researcher, the research subject usually having only the power to refuse participation), European-funded research could well be construed as repeating the sorts of imbalances discussed in view of the conditions attached to recent EU bailouts in Greece.

<sup>139</sup> J Grant, G Nelson and T Mitchell, ‘Negotiating the Challenges of Participatory Action Research: Relationships, Power, Participation, Change and Credibility’ in P Reason and H Bradbury (eds), *The Sage Handbook of Action Research* (Sage, 2008) 589.

<sup>140</sup> Ibid, see also M Battiste, ‘Research Ethics for Protecting Indigenous Knowledge and Heritage’ in NK Denzin, YS Lincoln and L Tuhiwai Smith, *Handbook of Critical and Indigenous Methodologies* (Sage, 2008), 497.

process of research, learning, and action'.<sup>141</sup> Our detailed research methods will be developed alongside the NGOs *Ikarian Documentation, Research and Action Center* in Greece and *Natural Justice – Lawyers for Communities and the Environment*, whose staff work on projects in the other countries where fieldwork is planned. Our methods will also benefit from peer-review from academics in law, political sciences and geosciences, and from practitioners working in different UN bodies and international NGOs/think tanks. Furthermore, PAR allows the flexibility for these methods to evolve during fieldwork. This is reflected in our project design by providing for two trips to each destination. Co-development of methods will be informed by learning and an appreciation of context in the first field visit, with action to refine and re-negotiate methods for the second round of fieldwork. The ends of PAR, that is 'the outcome of capacity-building within the community involved in the research'<sup>142</sup> is also explicit in this project as one of our outcomes is precisely the co-development and delivery with the partner NGO *Natural Justice* of a capacity-building training module that will be available not only in the locations of fieldwork but for broader and future use by indigenous peoples and local communities that understand English, French or Spanish. This appears in line with work on critical and indigenous methodologies.<sup>143</sup>

### 3.2.1 Concerns and possible approaches to address them

While PAR appears as a suitable, encompassing approach for our research, no approach comes problem-free. Two main concerns or tensions need, we believe, to be tackled if a PAR approach is to bring any worth. The first concern is again power. PAR may not suffice to overcome power inequalities, and may still be perceived as somewhat paternalistic,<sup>144</sup> betraying the same kind of neo-colonialist attitudes it purports to overcome,<sup>145</sup> or not fully preventing the risk of exploiting the knowledge of research participants if nothing more than lip service is paid to the value of their knowledge and aims. There is no easy solution to these risks. However, we propose that PAR may serve as a methodological orientation that can allow us to systematically factor power into our research and bring it constantly to the forefront, thus obliging researchers to be honest about its presence and to explicitly discuss how to tackle such imbalances with partner NGOs and communities, even if there is no guarantee that this will always be successful in redressing imbalances.

These challenges have been discussed by Grant et al, who also suggest some precautions for addressing these tensions. First, they note, researchers must be aware that we have a duty to 'explore our subjectivity and be clear and reflexive about values and power'.<sup>146</sup> As 'powerful outsiders' it is important to consider that this may form a barrier to the trust required for a mutual construction of knowledge. There is no formula for building trust, but this general

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<sup>141</sup> Ibid, at 590.

<sup>142</sup> Ibid, at 590.

<sup>143</sup> Battiste (n 145), at 503.

<sup>144</sup> Particularly perhaps in work inspired by Freire (who wrote about emancipation through education conceived of as experiential learning rather than the transfer of knowledge). P Freire, *Pedagogy of the Oppressed* (Penguin, 1972).

<sup>145</sup> My thanks to Simon Obendorf for raising this point.

<sup>146</sup> Grant et al (n 144), at 590.

honesty, and allowing that not all disagreements can be overcome, should be of assistance. Open and honest communication must be a general rule, including conversations about what each research participant expects or is required to take away. Here it must be admitted that research immediately and concretely benefits researchers more than those who participate, and that ‘power inequities within the research relationship are not erased, only reduced through processes of PAR’.<sup>147</sup> Reflecting on how the research could be of more immediate benefit to participants will thus be an explicit part of the preparation for fieldwork. Practically speaking, our partner NGOs are crucial here given the short lengths of our fieldtrips. We will work closely with these partners in the development of field methods and rely on their assistance to build the goodwill necessary for fieldwork. Attention must also be paid to the specificity of each research site and its power relationships – this is important for making participation as accessible as possible to avoid reproducing *local* power imbalances. Other possible measures include a joint elaboration of the roles and responsibilities of researchers and participants, sharing research capacity with participants where requested – including moments where research could be left in the hands of participants. Generally, this kind of reflexivity is described as a first step towards addressing power imbalances.<sup>148</sup>

The genuine valuing of participants’ knowledge should also be carried through into research outputs with credible accounts that do not brush aside disagreements and the like.<sup>149</sup> From a legal perspective, these efforts will imply seeking the prior informed consent (PIC) of all those participating in our project and exploring different ways to share the benefits of our research with them, such as contributing to the development of local expertise in international law, upon participants’ request to the researchers, or the identification of concrete ways in which our research findings may be considered in a specific context. PIC is a well-known tool in the human rights field,<sup>150</sup> where it has been interpreted as entailing that consent should be given freely, without coercion, intimidation or manipulation. In addition, it should be sought at all stages, from the inception to the final authorization and implementation of proposed activities (‘prior’). It should be based on an understanding of the full range of issues and implications entailed by the activity or decision in question (‘informed’), and given by the legitimate representatives of the indigenous peoples concerned.<sup>151</sup> Several challenges, however, arise in seeking PIC. While international human rights bodies have confirmed that PIC ‘does not necessarily require unanimity and may be achieved even when individuals or

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<sup>147</sup> Ibid, at 593.

<sup>148</sup> Ibid, at 594.

<sup>149</sup> Ibid, at 598. Though all of this may be hampered if research participants do not commit for the duration of the project. The only way of maximizing the likelihood of continuous participation lies precisely in developing the research with rather than about the participants.

<sup>150</sup> CBD Working Group on Article 8(j), ‘How Tasks 7, 10 and 12 could best contribute to work under the Convention and to the Nagoya Protocol. Revised note by the Executive Secretary’ (23 September 2013) UN Doc UNEP/CBD/WG8J/8/4/Rev.2, paragraph 43. On the international judicial recognition of the right to PIC, see Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Case no 12,338 (28 November 2007), 134 and global sources analyzed by A Fodella, ‘Indigenous Peoples, the Environment and International Jurisprudence,’ in Nerina Boschiero et al (eds), *International Courts and the Development of International Law - Essays in Honour of Tullio Treves* (Asser Press, 2013), 349, at 350-352 and footnotes 6, 13, 17 and 20.

<sup>151</sup> UN Permanent Forum on Indigenous Issues. ‘Report on the tenth session,’ (16-27 May 2011) UN Doc E/2011/43-E/C.19/2011/14, paragraphs 34-38, particularly paragraph 34.

groups within the community explicitly disagree,<sup>152</sup> the genuine involvement of legitimate representatives of indigenous peoples and the true nature of consent in the context of indigenous customary institutions are to be ensured, including applicable customary decision-making processes and taking into account that consent may be withdrawn at a later stage.<sup>153</sup>

A second concern in adopting a PAR orientation in our research is the academic rigour of the data. This is essentially a result of the (sometimes conflicting) duties owed to different stakeholders in the research (funders, us as academics, NGO partners and research participants). However, we do not see a PAR approach as incompatible with the rigorous application of legal and qualitative methodologies. Ospina et al discuss lessons learned from this sort of hybrid design which, while not problem-free, is certainly possible.<sup>154</sup> Essentially, combining the qualitative and legal methodologies involves respecting the conventional standards of each, which remains the responsibility of the project team, while still co-creating knowledge with sensitivity to power as described in PAR.<sup>155</sup> In addition, we argue that the standards of these conventional research approaches may even be strengthened by a PAR approach. In terms of the interpretivist ontology and constructionist epistemology that often underpins qualitative social science research and the norm diffusion and framing literatures respectively, PAR brings the social construction view to the very data to be gathered in our research. If *all* knowledge is socially constructed, then the mindful construction of knowledge through action for the purposes of the research is preferable to the arbitrary collection of data from research subjects. From a legal perspective, these efforts will imply that any traditional knowledge disclosed in the course of the project will remain the intellectual property of the communities and will not be subject to any intellectual property protection by the project team. It should be clarified that the project team will not enquire about the *content* of traditional knowledge during fieldwork, but rather about the *practices*, as well as *perceived* opportunities and shortfalls, in *its protection* through legal and other means. This cannot exclude that project participants may wish to share the content of their traditional knowledge on a voluntary basis. The original findings of the research will nevertheless remain under the control of the project team, in light of obligations vis-a-vis the funder to ensure high-impact publication. These findings will specifically relate to the *team's understanding* of opportunities and shortfalls in *protecting* traditional knowledge through legal and other means. That being said, the team will liaise with project participants to ensure that any contextual references to traditional knowledge in the project publications will not negatively affect the holders of such knowledge. The project team will provide free access to academic outputs to all participants and make every possible effort to make these outputs open access. In addition, the project team will develop tools for sharing academic findings in an accessible practical way, through the creation of a training module specifically targeted to indigenous and local communities; and the online publication of policy briefs containing

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<sup>152</sup> UN General Assembly, 'Human rights and transnational corporations and other business enterprises: note by the Secretary General' (6 August 2013) UN Doc A/68/279 (advanced version), paragraph 11.

<sup>153</sup> Ibid.

<sup>154</sup> S Ospina et al, 'Taking the Action Turn: Lessons from Bringing Participation to Qualitative Research' in P Reason and H Bradbury (eds), *The Sage Handbook of Action Research* (Sage, 2008) 420.

<sup>155</sup> Ibid.



recommendations on whether and how benefit-sharing can (and crucially when it cannot) contribute to equitable solutions to environmental challenges, that will be specifically targeted at: a) international negotiators; b) the private sector; c) NGOs advising communities and d) bilateral development partners.

Another concern that may be addressed through a PAR approach is linked to the potentially problematic fact that studies of norm diffusion necessarily look to past processes. We have yet to find literature tackling *ongoing* processes of norm diffusion as they happen, which appears to be the case with benefit-sharing and with a global environmental law perspective.<sup>156</sup> PAR approaches, in this connection, necessarily look to the past, present and future. Learning from and with others brings in the past and a constantly emerging present, while the future is implied in the social change ambitions of the approach. The ideas of first-, second- and third-person enquiry also link to our theoretical framework anchored in the literature on norm diffusion. First-person action research denotes acting with mindfulness of the impact of our behaviour, second-person research denotes inquiry alongside others, and third-person research denotes the enlargement of that action to a community.<sup>157</sup> Strang and Meyer's work<sup>158</sup> on theorization may be characterized in this third-person stage of action research, for instance.

#### 4. Very preliminary conclusions

As highlighted by the literature on norm diffusion, on global law and on PAR, our research in itself may contribute to the diffusion of benefit-sharing. Should that be the case, our reporting of that norm as it is understood in specific contexts with data co-created with research participants should bring their voices to wider circles in the emancipatory vein envisaged by PAR. This may seem rather lofty, but it should be noted that we do not presuppose any intrinsic worth of benefit-sharing. Exploring benefit-sharing with communities rather than approaching them as static sources of knowledge should prevent us from pinning any of our own preconceptions about benefit-sharing to our data, increasing its validity in the traditional scientific sense.<sup>159</sup> The picture built in this mutual construction may tell us whether and to what extent benefit-sharing theoretically and practically contributes to achieving equity in addressing environmental challenges (or whether and to what extent it does not contribute to this end). A PAR approach would in the latter case also sow the seeds for alternatives.

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<sup>156</sup> It may be useful to recall our remarks on legal foresight and global law in section 1 above.

<sup>157</sup> Reason and Bradbury (n 136), at 6.

<sup>158</sup> Strang and Meyer (n 66).

<sup>159</sup> Reason and Bradbury (n 136), at 5.