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Enforcement of Benefit-Sharing Duties in User Countries

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Introduction

ABS is the third goal of the Convention on Biological Diversity (CBD, Article 1). The relationship of *access* on the one hand and *benefit sharing* on the other hand can be described as a *quid pro quo* (Article 15 CBD): The precondition for access should be the agreement about the sharing of benefits; and vice versa, benefits have to be shared only when access has been granted.

To date, the legal discussion has focused on the legislation of ABS in provider countries. The common perception prevailed that the implementation of ABS is primarily a task of the provider states. The reason is partly technical. Applicable legislation is to be adopted in the provider states. In this regard, the international community supported with capacity building and consultations on the national and international level. On the other hand, pushing for benefit-sharing rules has been perceived as being (only) in the interest of provider states. It would (only) be a matter of justice to share profits being generated in industrialized countries (so-called user states) on the basis of GRs or TK accessed in other countries (commonly called 'provider states') (Gerstetter, in this book). However, there is more to it. Connecting both goals provides for a central functional mechanism of the CBD as a whole. The convention was inspired by the regulatory economic thinking of the 1980s. It gave way to the rationale that sharing benefits from the use of GRs and TK would set an incentive for their conservation. From this perspective, the third goal of the convention provides for the instrument to achieve the first goal, namely conservation of biological diversity. This is the very reason why benefit sharing is not only in the interest of the provider states, but also in the interest of the user states.

Therefore, it is incompatible with the CBD to relinquish the ABS implementation to countries of origin. It has become evident that effective enforcement of both statutory and contractual benefit sharing will depend

on supplementing enforcement by and inside user countries. Those can be purely self-regulatory and non-binding, such as internal corporate guidelines supporting employed bioprospectors in complying with local ABS regulations or public research-funding organizations, which support researchers in obeying the law of host countries. This chapter, however, will deal with coercive judicial enforcement. Its focus is on tort liability for non-consented access in respect of the use of GRs and TK.

Bioprospecting – A transnational activity

Typically, bioprospecting is a transnational endeavour. Field research and collection occur inside the provider states, whereas screening and commercialization is conducted in the user countries. This inherent transnational constellation demands the application of transnational legal instruments.¹ Up to now, the focus has been on intergovernmental cooperation (consultations for implementing provider states' legislation and capacity building²). However, effective enforcement of statutory and contractual duties depends on a transnational coordination of legal regimes. Four instruments have been discussed recently with regard to such coordination: mandatory disclosure rule in patent procedures,³ certificates of origin,⁴ border measures (Stoll, 2004, p83) and regulations of research foundations.⁵ In contrast to such prior research, this contribution looks beyond regulating access and raises the question of how benefit-sharing claims can be enforced in user countries. Can a lawsuit of a provider community or a provider state be brought in front of a court in an industrialized state? Can a case be successfully argued that a company that is incorporated in an industrialized country, for example Germany, is liable in torts for violating ABS legislation in the course of its bioprospecting activities in a provider country? Can a share in benefits be claimed in damages?

In order to answer these questions, we need to know which country's law applies. The applicable law is not self-evident in transnational constellations. In contrast to public law, a civil law court does not necessarily apply domestic law. Private law is not in the same way bound to the territoriality principle, which stems from the principle of sovereignty. Private law relies on the principle that the law which suits the case best and which is in the interest of both parties is to be applied.⁶ In fact, each single question can be governed by a different country's law.⁷ Which law should apply is decided by the (domestic) body of conflicts of law.

Therefore, three different questions are to be distinguished: (1) Which court is internationally competent ('has jurisdiction')? (2) Which country's law applies for which question of a given case ('conflict of laws')? (3) What

does the applicable law say (*lex causae*)? These questions will be answered consecutively in this chapter. Its conceptual focus is on how to conceive the right to GRs. Is the right in GRs 'material' or 'immaterial', comparable to 'material' or 'immaterial' property? The answer determines the applicable law and the determination of damages.⁸ In the following, the relevant legal questions will be analysed departing from 'the standard' situation: Bioprospecting was conducted in violation of domestic ABS rules (no contractual benefit-sharing agreement was concluded). The commercial activity is executed inside an industrialized country; the subsequent product is primarily marketed on Western markets.⁹

For the sake of the analysis of the legal question involved, remaining factual problems such as the application for a necessary visa (purpose: conducting a law suit) and costs (travel, hotel accommodation and lawyer's fees) will not be discussed.¹⁰

International and local jurisdiction

The judicial competence (jurisdiction) of courts in international conflicts was harmonized in the European Union in 2002 by the so-called Brussels I Regulation (Regulation 44/2001).¹¹ Article 2 Regulation 44/2001 promulgates as a general rule that the court of the defendant's place of permanent residence enjoys jurisdiction. This rule corresponds to most continental rules;¹² for example, §13 German Civil Procedure Act (Zivilprozessordnung, ZPO), including interim injunctions, Article 2 Regulation 44/2001, §934 ZPO. It is applicable to all contractual claims and damage claims resulting from torts. Additional competences are available for tort claims under Article 5 Section 3 Regulation 44/2001, §13, 32 ZPO (the country's courts where the effects of the tortious act occur). Exclusive jurisdiction is stipulated for claims of invalidity of a registered immaterial right, Article 22 Abs. 4 Regulation 44/2001 ('patents, trade marks, designs and other similar rights'). For those claims, only the country's courts in which the right is valid enjoy jurisdiction. This rule does not only govern the primary law suit which challenges the validity of the right, but also the (in)validity argument as a defence.¹³ However, it does not govern damage claims stemming from the violation of patent.¹⁴ As this chapter will not focus on patents as such, but on benefit sharing (thus claims for financial or other means of remuneration), the rule of Article 22 Abs. 4 Regulation 44/2001 will be neglected in the further course of the chapter.

Following the example of a manufacturer registered and residing for example in the city of Karlsruhe in Germany as a defendant, the civil court in Karlsruhe enjoys international and local competence to decide a claim

against the company for the violation of contractual duties and for damages raised by any person or entity based in a provider state. With regard to this question, there is no legal uncertainty.

Standing

A first legal uncertainty may arise when the plaintiff is a collective entity, such as an indigenous community. Some years ago, the literature argued that these entities would lack standing as Western legal systems do not acknowledge rights vested in groups, unless the group is incorporated.¹⁵ However, under the influence of the modern human rights discourse, the opinion has recently been voiced that communities enjoy standing if their legal status is acknowledged by the home country (Fikentscher, 2005, p14; Godt, 2007, p279ff; van Hahn, 2004, p320). Therefore, it is of central importance that the provider state adopts rules that identify its traditional communities and formulate a procedure which allows identifying any rights to GRs and TK in a given case.

The next question that arises is whether a governmental entity, for instance a ministry of a provider state, enjoys standing according to civil procedure rules. As far as property, contractual and tortious civil law claims are concerned, governmental institutions are not exempt from standing. In principle, the public hand is allowed to pursue its civil law claims as any other person does. However, any financial claim of a foreign government, which is vested in its sovereign rights, would be exempt, such as taxes and duties. Therefore, it is a relevant question whether a certain monetary amount is rooted in a 'civil' or a 'public' norm. This ambiguity arises in two situations. First, the situation is ambiguous in countries that acknowledge the special category of 'public property' (as many African countries do, e.g. Cameroon) (Godt and Nde Fru, 2008, p61). Second, the legal quality of the remuneration claim is unclear when lump sums are regulated by law.¹⁶ Then the conceptual environment will decide about the legal quality (private property or public duty).¹⁷

Finding the applicable law

At the focus of this chapter is the question: Which country's law will govern the suit? The answer to the question is provided by the conflict of law rules of the country where the lawsuit is filed. These rules differentiate according to the nature of the claim raised (contract, torts, quasi-tort, intellectual property, material property). Therefore, the same amount of money can be

raised under different laws if rooted in different legal subsystems. In addition, each question, which forms the basis of each claim, can eventually be judged differently. Consequently, a single claim can be decided on the basis of a mosaic of laws.

Conflict of laws on contracts

Although this chapter will focus on tort claims, it will briefly touch on the conflict rule of contractual claims. Applicable rules in this regard are in the process of harmonization. The so-called Rome I Regulation 593/2008¹⁸ (implementing the Convention of the Law Applicable to Contractual Obligations of 1980¹⁹) was adopted on 17 June 2008 and will be applied to contracts concluded after 17 December 2009. Until then, German law will apply. The basic rule is the same in both regulations. Parties can choose the law, which shall apply to the contract (Article 3 Regulation 593/2008; Article 27 German Conflict of Law Code, EGBGB²⁰). In the absence of choice, the methodologies of the regulations differ. Under Article 4 Regulation 593/2008, rules are stipulated for a set of standard contracts. For example, a sales contract shall be governed by the law of the country where the seller has his/her habitual residence (Article 4 Section 1 lit a Regulation 593/2008). Licence contracts are not among this list. For contract types which are not included, Article 4 Sections 2–4 provide for general rules. Primarily, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his/her habitual residence. Only where the law applicable cannot be determined otherwise shall the contract be governed by the law of the country with which it is most closely connected. Under German law, Article 28 phase 1 EGBGB stipulates as a general rule that the applicable law is to be the law of the country with which the contract is most closely connected. The rule of doubt is that this is the country in which the party who is to effect the performance, which is characteristic of the contract, has his/her habitual residence (Article 28 Section 2 EGBGB). For licences, the application of these rules has been contested (Groß, 2007, p229). Generally, the characteristic duty is performed by the licensor (in our example usually resulting in the application of the law of the provider country). However, if the licence is exclusive and the licensee is obliged to perform, then the characteristic duty is performed by the licensee (usually the law of the user country) (Pfaff and Osterrieth, 2004, p25, note 114).

The question is crucial in cases where benefit-sharing contracts stipulate that only non-commercial research is authorized. This agreement gives rise to the duty of the bioprospector to re-negotiate the contract as soon as the

development matures and the research phase enters the development phase. The violation may give rise to contract penalties or damages.

Conflict of laws in torts

The 'statute' of the delict

With regard to the recovery of profits, claims can be based on various norms, which belong to different subsets of the law. Conflict of laws rules distinguish between torts, quasi-torts and property. In general, tort claims are governed by the law of the place where the delict occurred, the so-called *lex loci delicti* rule. In theory, this can be the place where the 'wrong' was performed or where the right was violated. According to traditional German conflict law, it was the victim that selected the law that suited the victim the best (Article 40 EGBGB). The principle was called 'the most favourable rule'. However, the victim lost this privileged position due to the Rome II Regulation (Regulation 864/2007),²¹ coming into force in 2009 and applicable to cases occurring after 11 January 2009. The Regulation is applicable to all claims raised in the EU states; it applies universally (Article 3 Regulation 864/2007). The primary *lex loci delicti* in the EU will be the country's law where the violation of the right occurred (Article 4 Section 1 Rom II Regulation, *lex loci damni*). The place where the actual damage occurs does not matter (Kegel and Schurig, 2004, p730). With regard to a tort claim, it can also have several places where behaviour violates a right. If the alleged right was violated in Germany and in Kenya, a European Court has to apply both laws and attribute separately the damages, which resulted from a violation of the right in each country.

A claim for recovery of profits can also be based on *negotiorum gestio* (necessity of agency). In this regard, Article 11 Regulation 864/2007 stipulates a set of rules to determine the applicable law. In case of a parallel tort claim, the claim arising from *negotiorum gestio* shares the *lex loci delicti*. In case no tort can be identified, the law of the country in which the act was performed applies (Section 3). In cases of illegal bioprospecting, the unauthorized agency would be the use and the commercialization of the protected right. A precondition, at least under German law, means that there is a potential consent with the activity of the 'user', which was not negotiated in the given case. If commercial activities (development and commercialization) occurred inside the industrial country, it can be argued that the user state's law is to be applied.

In addition, different rules apply with regard to infringements of an intellectual property right (IPR). In this regard, Article 8 Regulation 864/2007 codifies the traditional *lex protectionis rule* according to which the law of the country is to be applied for which protection is claimed.

Therefore, it is important to identify what kind of damages occur in (and after) bioprospecting activities. What kinds of rights are violated? Do damages occur in the country of residence of the right holder or in the country where the damage occurred in financial terms? There is a broad legal uncertainty which is due to the unclear legal characteristics of GR and TK. These will be explored in the following.

Material or immaterial property?

Legal uncertainty stems from the fact that it is unclear whether a 'right to genetic resources' is to be qualified as *material* or *immaterial*.²² However, this qualification is central. All questions relating to property are governed by a special 'property statute' – independent of the *lex causae* applicable according to the tort rule. The conflict of law rule is different for material and immaterial property. In the case of a material property right, all questions related to property (identifying the owner and the scope of property) are governed by the so-called *lex rei sitae* (in Germany: Article 43 EGBGB). The rule stipulates that these questions are governed by the law of the country where the object is located and as long as it is there. Is the property right in question immaterial, one has to distinguish IPRs and autonomy rights: IPRs are, in principle, governed by the territoriality principle (*lex protectionis*, recently codified in Article 8 ROM II Regulation).²³ In contrast, claims resulting from the violation of personal autonomy right (in most jurisdictions so-called personality rights) share the destiny of the *lex loci delicti* (Staudinger-von Hoffmann, 2001, Article 40, note 54).

What is the character of GRs? Are they *material* or *immaterial*? More important, is the violated right a *material* or an *immaterial* property right? For GRs, the immaterial or material quality has ever been discussed. The first discussions came up when the CBD was negotiated (Stoll, 2004). During the 1990s, the discourse shifted to patent law.²⁴ More recent discussions refer to data protection in tissue banks (Schulte in den Bäumen, 2008). The question is most probably not easily answerable, but only with due account of the circumstances. Therefore, we need to look for the prerequisites and into the consequences of each qualification.

Material property

What qualifies a damage claim for a violation of a material property right? When are GRs corporal (and not incorporeal) information? I argue that the answer depends on the facts of each individual case. The material qualities prevail when, for example, fruits, wood and roots *as such* are concerned. 'As such' they are, for example, objects of a sales contract. In contrast, immaterial values prevail when their 'genetic make-up' is concerned. The

specific plant, then, appears only to be the carrier. However, neither are the categories of distinction clear yet, nor are the consequences.

If the title to GR was to be aligned with material property, three issues have to be considered.

First, the conflict of law rule is the *lex rei sitae* rule. Following the example of Kenya and Germany, as long as the plant (as material) is situated in Kenya, property questions are to be determined according to Kenyan property law. After transport to Germany, for example, the property statute shifts to German law. Unless no statutory loss of title occurs due to good faith or adverse possession, a traditional community claiming 'biopiracy' could argue that their material property right was stolen if they bring evidence that the (identical) 'material' is owned by them and the bioprospector took it without permission.

Usually, however, traditional communities refer to something other than 'property' in the (Western) sense; for example, §903 German Civil Code. They claim a right to decide about what is done with 'their' biological resources. Their claim is not directed to the economic value of the single plant (damages), nor do they claim vindication of the material. In essence, this alleged right is rooted in the right to self-determination (a human right), as recognized by Article 8(j) CBD. As far as Western property is concerned, the right to self-determination is in principle embodied in property as the most comprehensive exclusion right. However, material property is limited to a specific object. Only if the community claims the mere vindication of or remuneration for a specific object would the property be protected.

The second consideration relates to the transfer of a plant to a third country under violation of an export prohibition. The question might arise if good faith or prescription could be prevented by arguing that the plant was illegally exported. Similar rationales have been applied to cultural heritage. Some countries stipulate that illegal (not permitted) export of cultural heritage goods will result in a loss of the acquired title.²⁵ National regulation stipulates to whom the property title will be attributed. In that case, the traditional community being the plaintiff can argue that it remained the owner (irrespective of potential acquisition in good faith). However, the regulatory recovery of title will not necessarily be acknowledged by European courts. The recognition depends on the domestic conflict of law rules with regard to the recognition of foreign regulation (so-called mandatory rules).²⁶

Third, the scope of property protection is limited. In (material) property law, protection of prior informed consent (PIC) is granted by the prevention of statutory loss of title. This measure secures the owners' claim for vindication and injunction. Tort claims with regard to (material) property violations are, in principle, restricted to the economic damages (referring to

the monetary value of the very good in question and lost profits for German law: §§249, 252 German Civil Code). With regard to some plant leaves, the economic value is often small, not to say marginal. The immaterial value of material property is acknowledged in only a few cases (for the German law: pets in §251 Section 2 German Civil Code; proprietary environmental goods in §16 Section 1 Civil Environmental Liability Act). A claim for recovery of profits generated by the violator of the right is, in principle, not acknowledged as an 'economic loss' and can only be claimed under *negotiorum gestio* (unauthorized agency of necessity).²⁷

In consequence, the determination of damages is the biggest obstacle for benefit-sharing claims resulting from a violation of a material property right. The economic loss is minimal. Recovery of profits is in principle not possible; the actual use value has no market price.

Immaterial property

Two kinds of immaterial property. GRs and TK are often referred to as 'immaterial property'. However, immaterial property encompasses intellectual property and the autonomy right (in civil-law countries referred to as 'personality' right). The former protects various forms of human creativity. The latter protects the prior consent of a person and relates to corporal material and to information alike. IPRs are, in principle, governed by the *lex protectionis* rule; the right to personal autonomy shares the *lex loci delicti*.

With regard to GRs and TK, both sorts of rights have been discussed. Nothing is settled or cleared. No agreement about the qualities of a sui generic right has been achieved yet, neither in the framework of the CBD nor in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at the World Intellectual Property Organization (IGC-WIPO). The difficulties in defining a sui generic right are not only due to a lack of political will, but also to the complexities of the topic. Precise qualifications of any right attributed to GRs and TK depend on the factual circumstances.

Those who stress the ingenuity, for example, of traditional healers or creators of designs and melodies draw the parallel to intellectual property (Coombe, 1998; van Hahn, 2004; van Overwalle, 2007, p355).²⁸ It gives credit to individual and collective creativity – concealed or shared with the community. A parallel to intellectual property is also drawn to useful natural substances for three reasons. First, traditional communities know about their effects and how to employ them. This knowledge would have an equivalent value of the costly search for a new 'leading target substance' (Balick, 2007, p280; Godt, 2007, p369).²⁹ Second, a comparison is drawn to the isolation theorem in patent law which justifies the grant of a patent

with regard to the novelty requirement. Third, the informational value of the genetic make-up creates an economic value.

In contrast, others stress the right of communities to decide about who may access their resources and their knowledge, for which purposes, under which conditions (Fikentscher, 2005; Ramsauer, 2005; Rosenthal, 2008, p373). At the very centre is the recognition of autonomy and self-determination (Xanthaki, 2007, p131).³⁰ The model is an autonomy right which is acknowledged in the form of a 'personality right' in Germany by the High Court,³¹ or as rights entrusted to the person in common law countries.³² In acknowledging a *sui generis* right to GR and TK by analogy to the autonomy right, the court of the user country could transfer the (international law) recognition of traditional communities in Article 8(j) CBD into an actionable legal property title of (binding) national law.

Intellectual property

Assuming the community claims an IPR, the conflict rule to apply is the territoriality rule (*lex protectionis*). Whereas for registered rights the choice of law is explicitly aligned with jurisdiction (Article 22 Regulation 44/2001), Article 8 Regulation 864/2007 stipulates that the law applicable to non-contractual obligations arising from infringement of an IPR shall be the law of the country for which protection is claimed. The norm does not distinguish between registered and non-registered rights. Reading both rules together, two rationales can be identified. First, the territoriality principle as such does not require the alignment of jurisdiction. Therefore, the validity of non-registered rights and their violation can be argued in any court which is internationally competent/has jurisdiction. Both are to be determined in applying each respective territorial law.³³ This means that, for damages with regard to intellectual property, the *lex protectionis* replaces the general *lex loci delicti* rule. The consequence is that the territorial law decides not only about the violation of the right, but also about the infringing behaviour which results in a violation. Therefore, both the behaviour and the violation must occur in one and the same state.

Transposing these principles to a transnational GR and TK dispute, a European court would adjudicate both the violation of an IPR in the provider state *and* the IPR of the user state, each according to the applicable domestic laws. With regard to the applicability of a provider state's law, one would require that the IPR is recognized by the state and that the disputed body of knowledge is attributed to the community. I argue that the application of provider country's protection of communal right does not amount to a violation of the European or the German *ordre public*, which could block the application of the foreign law (Article 34 EGBGB).

With regard to the violation of an IPR applying, for example, German law as *lex loci protectionis*, one would find that *de lege lata*, statutory German law, does not recognize a sui generis (intellectual) property right in GRs or in TK of traditional communities as such.

However, it can be argued that the recognition of such a 'property' right (sui generis) is required by the CBD.³⁴ Two constructions of the claim are possible. Either one argues for an autonomous interpretation of what 'property' means (in Germany) or one argues for the recognition of such a right as an equivalent of 'absolute rights' protected by tort law (in German terms: 'ein sonstiges Recht' in the sense of §823 German Civil Code). The reason why such a right is to be acknowledged by parties to the CBD can be argued in two different ways. First, one can argue in a straightforward way that the CBD requires recognition directly (arguing for a direct obligation under the CBD). The autonomy right is a universal right, which exists independently from the political will of the sovereign where a traditional community is hosted. Second, one can argue that recognition stems from comity. The duty to recognize is derivative from the recognition of another party to the convention. Therefore, the duty arises under the condition that the provider state acknowledges and identifies such a right. This way of argumentation would give credit to the sovereignty and internal decision making of the provider state. The latter seems to better fit with contemporary concepts of a generalized conflict of law approach influenced by systems theory (Teubner and Fischer-Lescano, 2008, p17). The former is sensible to existing conflicts inside provider states.

Autonomy

As noted above, often it is the claim for self-determination which is formulated in terms of a property language. At the very heart is the PIC requirement. It does not commodify any good, but it attributes an exclusivity right – a precondition for the PIC mechanism to function. A parallel *de lege lata* is the autonomy right (personality right), which also refers to parts of the person which are *res extra commercium* (blood, organs). In common law, interests with regard to the person that are not primarily related to economic property are equally framed as a property right. The applicable conflict of law is the general rule *lex loci delicti*.

Let us assume the GR right in question is an autonomy right: the plant was bioprospected in a provider state and brought to an industrialized country, where research and development was performed and profits generated: Where does the violation of the right occur? Immaterial autonomy rights in general are not bound to a state (even less than copyright). Being rooted in human rights, their quest for recognition is universal. Therefore, various additional 'connecting factors' are discussed (Staudinger-von

Hoffmann, 2001, Article 40, note 60): the territoriality rule (creating a mosaic of applicable laws), the *lex fori* and the place of residence of the plaintiff.³⁵ The facts of each case are decisive.

Applied to the example, we can argue as follows: If the nexus is close to the provider state, the *lex causae* of the provider state has to be applied. A German court will acknowledge a collective right, especially when domestic regulation in the provider state is in place recognizing the traditional community as a legal entity, and when their right to the specific GR and TK is unquestionable. I argue that the recognition of such a right does not give rise to doubts with regard to the German Ordre Public (Article 6 EGBGB). If the case is closer connected with the user state (e.g. when TK was used for advertising the product on the Western market, catering for the argument that the violation of the right occurred in the user state), then the user state law applies. With regard to the management of such a suit, the application of the user state law will have pros and cons. The advantage of applying user state law is the autonomous characterization of a right which opens up the possibility to interpret the law with due regard to the CBD³⁶ and other instruments with regard to the recognition of Traditional Communities.³⁷ The decision depends on the individual constellation of the case.

Damages

In contrast to damages for the violation of a material property, the determination of damages caused by a violation of an immaterial right follows a different rationale. Whereas the damage to a material property right is the lessened monetary value of the item itself, damages for infringements of immaterial property rights are primarily determined by their use value. It is not the protected piece or the information as such which is taxed. Nor is it limited to the actual use value. In intellectual property, the use value is traditionally valorized by three different doctrines: the lost profit on the part of the right holder; reasonable royalties; and unjust enrichment on the part of the infringer. This methodology was first developed for intellectual property law.³⁸ Later, it was transferred to competition law violations (Micklitz and Stadler, 2003, p258f; Stoll, 2000, p101f), and then, when the right to autonomy evolved, it was employed in cases of a violation of an autonomy right by analogy (Stuhlmann, 2001, p309f; Wachs, 2007, p342f). The recovery of profits, however, was especially regulated by *lege speciales*,³⁹ as an exception to the general rules limiting damage claims.⁴⁰ However, Article 13 EC-Enforcement Directive 2004/48/EC now requires the universal account for profits generated by the infringer. Only in cases where the infringer did not knowingly engage in the infringing activity are member states allowed to alternatively attribute either recovery of profits *or* damages.⁴¹

With regard to the violation of an immaterial right, which relates to GR and TK, it is sensible to employ the same doctrines. A benefit-sharing claim that is based on biopiracy is to be calculated with regard to lost profits, reasonable royalties and/or profits generated by the infringer. In the case of intention, the new directive demands that national norms are interpreted in such a way that damages encompass the recovery of profits.

Interim conclusion

With regard to tort claims, the applicable law can be the provider *or* the user country's law. The applicable *lex causae* depends very much on the construction of the case. With regard to illegal bioprospecting, both the applicability of the provider country's law and the user country's law can be argued. In essence, the law cannot be determined in the abstract in advance. The analysis reveals, however, that a meaningful law suit for damages has to be based on a violation of an immaterial property right, be it an IPR or an autonomy right.

General tort requirements

Fault

The national law of the *lex loci delicti* determines the general tort requirements. A claim for damages is usually fault based, thus requiring the violation of a duty. In the case, for example, where Kenyan tort law is to apply, one may ask how the duty of care is to be determined. Do the domestic ABS rules of the provider state constitute the relevant duty of care with regard to the right holder (in contrast to the general public)? Again, things will depend on how the law is formulated and on the facts of the case. I argue that the domestic laws are not to be disregarded just for the reason of being public law which only requires respect inside the relevant country. However, a precondition is that the law's goal is the protection of the respective right in question. If the domestic law transposes the CBD and the user state (e.g. Germany) shares the values expressed by them, it is to be argued that these national norms concretize the duty vis-à-vis the right holder (as installing rights to GR is the functional core of the CBD).⁴² In contrast, if German law is to apply, one might refer to the Bonn Guidelines in order to identify the duty vis-à-vis the right holder. They formulate duties of bioprospectors, scientific and commercial users – especially for cases of transnational cooperation (Godt, 2004, p205f). Ignoring one of these duties amounts to a violation of the duty of care, which one owes to the right holder.

Causality

In order to successfully argue a case it is important to establish a clear link between the tortuous bioprospecting activity and the defendant, namely the company registered in the court's state. The careful establishment of this link is significant in cases where the bioprospecting activity was outsourced or executed by a contractor. It has to be shown that the company acted under the defendant's knowledge, its control and, ideally, that the company had issued internal bioprospecting guidelines but deliberately did not enforce them. It might also be possible that the company knew about violations of the provider country's rules, but did not do anything about them. It is important to establish a causal breach of a respective duty *by the defendant*.

Conclusion

A claim for benefit sharing can be raised on the basis of contracts and torts alike. The analysis shows that it is possible to litigate a (meaningful) benefit-sharing claim for biopiracy in a user country's court. Prospects for success are better with regard to immaterial property than to material property. Against common wisdom, it is not the applicable law that forms an obstacle. Applying foreign law might be inconvenient, but it can ease the burden of argumentation. There is a high degree of flexibility with regard to the argumentation about which country's law is applicable with regard to tort and property-related questions. This is due to the hybrid character of GR – being both material and immaterial. The most important result of the analysis is the following: it reveals that different rationales apply to how damages are determined for violations of material and immaterial property. With regard to material property, it is the economic value of the good as such which is taxed. In contrast, it is the rule to recover a share in profits or the equivalent to the licence fee for the violation of an immaterial right. This rationale is better suited for cases of illegal bioprospecting and is applicable to IPRs and autonomy rights alike. After previous lawsuits against biopiracy have focused on patents, a civil lawsuit for damages based on immaterial rights *sui generis* is another promising route worth exploring.

Notes

- 1 Coined as 'user measures', see Barber et al (2003).
- 2 With regard to the CBD Draft International Regime for Access and Benefit Sharing, see only Kongolo (2008, p73f).

- 3 The mandatory disclosure requirement intends to create a nexus between the provider country's ABS regulations and the very first point in time when commercialization is about to start, enacted, for example, in India in §10(a)(4)(d)(ii)(D) Indian Patent Act (see Godt, 2007, p330f; de Carvalho, 2007, p241).
- 4 Certificates aim at raising and conserving information about the resource (country, source) (Glowka, 2001).
- 5 For example, regulations of the German Research Foundation, 2008.
- 6 Conceptualized as the 'theory of the "seat" of a legal relation' (see Kegel and Schurig, 2004, p183). In common law, justice and comity are put in the forefront (North and Fawcett, 1999, p4). For an account of how conflicts of laws and modern tort law have changed under the conditions of globalization, see Halfmeier (2009).
- 7 Referred to as 'connecting factors' in common law (Hayward, 2006, p3); 'Statuten' or 'Anknüpfungsnormen' in continental theory (Kegel and Schurig, 2004, p300ff).
- 8 Keeping in mind that benefits can emerge at any 'incremental step' of research (Tvedt and Young, 2007, p70).
- 9 A typical scenario is 'Umckaloabo', broadly discussed prior and in the course of the last CBD Conference of Parties (COP 9) in Bonn, May 2008. The active component of this medicament (strengthening the immune system) is taken from the root of *Pelargonium sidoides* (from South Africa). Its physiological function was first alleged by an English traveller (Charles Stevens, born 1880), who was sent in 1897 to South Africa for a cure of tuberculosis and where he met a local healer. As 'Stevens' Cure', the treatment with this root became a widely administered therapy for tuberculosis at the beginning of the 20th century (<http://de.wikipedia.org/wiki/Umckaloabo>). Today, it is used as a stimulus for the immune system in general. The pharmaceutical product in territoriality, licensed for Germany to Schwabe and sub-licensed to ISO (registered in Karlsruhe, Germany). About 4.1 million packets are sold each year, with a value of €55 million (http://www.arznei-telegramm.de/zeit/0303_a.php3).
- 10 Should be adopted as an intergovernmental issue. National focal points should cooperate in this regard. Financial means for access to justice should be provided upon request by the Global Environmental Facility (GEF).
- 11 EC Regulation No 44/2001 of 22 December 2000, OJ L 12 of 16.1.2001, 1–23, in force since 1 March 2002. The Regulation applies to all international law suits, not only to those which involve EU member states. It replaces the Brussels Convention 1968 for all EU Member States except Denmark (for which the provisions of the old Brussels Convention will continue to apply).
- 12 In contrast, the UK used to determine jurisdiction in close relation to the applicable law. For the common law, the regulation brought great change (see Briggs, 2008, p53f; North and Fawcett, 1999, p179f; for a comprehensive comparative account from the copyright perspective, Peinze, 2002, p375f).
- 13 Forcing the courts to set the law suit aside, see ECJ in C 4-03, *GAT/LuK* (2006) ECR I-6509 (as in the USA, see *Voda v. Cordis*, 476 F.3d 887 (Fed. Cir. 2007)). This rule has been criticized by Hess et al (2007, p405).
- 14 Explicitly LG Düsseldorf in its decision *Schuffadengreifer*, GRUR Int. 1999, 455 (at 456). The underlying rationale is that the legal effects of the court ruling are limited to the territory of Germany.
- 15 This argument was merged with the one that property can only be held by individuals. For an elaboration of this argument, see Gerstetter in this book (note 3). The

- discussion about sui generis rights for communities with regard to GRs and TK was especially intricate due to the initial rejection of any further commodification of natural resources by critics of the CBD (see C. Godt, 2004, p206).
- 16 The mere fact that lump sums are regulated does not necessarily qualify them as 'public'; compare, for example, tables of lump sums with regard to immaterial damages in cases of lost body parts in German civil law procedures.
 - 17 From the perspective of conflicts of law, it is an open question whether the conceptual framework of the *lex fori* or of the *lex causae* would govern the determination of the legal quality.
 - 18 OJ L 177/6 of 4 July 2008. The original rule proposed by the European Commission (Article 4 lit. f of COM (2005) 650 (final)) was fiercely debated (Procedure Code COD/2005/0261), resulting in a compromise formula, published by the Council and the EP, now Article 4 Section 2–4 Regulation 593/2008.
 - 19 <http://www.jus.uio.no/lm/ec.applicable.law.contracts.1980/doc.html>
 - 20 Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB).
 - 21 Regulation 864/2007, OJ L 199/40 of 31.7.2007.
 - 22 For TK, the answer seems to be clear: The property right is related to immaterial knowledge. However, what kind of immaterial rights are suitable is a much discussed question.
 - 23 There is a remarkably high degree of legal uncertainty; for an overview, see Kegel and Schurig (2004), p729; this is especially true for non-registered rights such as copyright (see Peinze, 2002).
 - 24 Attempting to downplay the distinctiveness of the informational quality, see Straus (1998, p314).
 - 25 For example, Indian cultural heritage protection laws; see the facts of the Swiss High Court, Decision of 8 April 2005 (No BGE 131 III 418).
 - 26 Germany has been very restrictive in acknowledging them: Article 34 EGBGB (there is only one case, BGHZ 59, 82 – *Nigerian Masks*); more open is the Swiss law in Switzerland, both in the jurisdiction (see Swiss High Court Rationale in the decision of 8 April 2005, *ibid.*) and the written law: Article 19 Section 1 Swiss Conflicts of Law Code provides that instead of applying the law which should govern the case according to a specific provision of this law, a rule of a foreign state can be applied under three conditions: the foreign law wants to be applied; prevailing interests of the parties demand so; and the facts of the case are closely connected to the law of the given state.
 - 27 In broader terms, there are three sets of norms which allow for the claim for profits under the German Civil Code (BGB) (in German: 'Verletzergewinn'): (1) delict requiring fault and economic loss, §§823, 249, 252 BGB; (2) unjust enrichment, being either limited to what was 'objectively' received, therefore *not* profits: §§812, 818 II BGB, or to positive knowledge: §§819, 687 II, 681, 667 BGB. Therefore, the courts extended the rules of (3) agency of necessity, §§687 II, 681, 678, 667 BGB. However, jurisdiction remained strict.
 - 28 Inter alia, contributions in Graber and Burri-Nenova (2008) and von Lewinski (2008).
 - 29 Ethnobotanical knowledge substantially accelerates the finding of a lead substance.
 - 30 Notwithstanding that self-determination 'is a thorny topic'.
 - 31 A concise introduction to this jurisdiction is provided by Brüggemeier, G. (2009).

- 32 For a comprehensive and comparative account, see Resta (2005).
- 33 In reality, for copyright the principle of reciprocal recognition of Article 5 Bern Convention had left no room for applying this rule (Peinze, 2002, p115). Notwithstanding that inside Europe, other principles may prevail: it was proposed that the EU principle of origin prevails if the state where the violation occurred is not identical with the country where a service/a product was first placed (Baetzgen, 2007; Wild, 2007).
- 34 This is close to what Fikentscher (2005) and Godt (2007, p279) propose.
- 35 Fikentscher, who departs from the territoriality rule (as he aligns the autonomy right with intellectual property), comes to similar results. He autonomously qualifies the *lex causae* and applies provider state law.
- 36 Especially in those cases, where the political situation of the provider country is characterized by tensions between the state and the communities (which renders, in the end, legal recognition and the assignment of rights by domestic laws improbable).
- 37 International law material calling for recognition is collected inter alia by Gibson (2005), Rosskopf (2004) and Xanthaki (2007).
- 38 Already in the 18th century (Münchener Kommentar-Seiler (2009), §687, note 27; Staudinger-Schiemann, 2005, §249, note 199). The first German decision was the Aniston case of the Reichsgericht in 1895 (Wachs, 2007, p342). The rationale, however, is different with regard to each right. In patent law doctrine, the rationale is rooted in the process of innovation stretched over time. Initially, the new invention has no market value. In order to capture the economic value being generated over time (and to render the patent system functioning), it is the *future* value which needs to be attributed to the inventions along the time line. This is also the very base of the concept of dependency in patent law, which allows the pioneer (holding the so-called dominant patent) to participate in the profits being generated by those later ones who refine the technology (holding so-called dependent patents) and bring a product to a wider market. In copyright, the doctrine mainly responds to the difficulties in determining the damage value.
- 39 For example, §§15, 128 German Trademark Law and §97 I 2 Copyright Act.
- 40 For the general rules which also apply to immaterial property, see supra note 36. In addition, the amount is usually strongly debated – and court rulings differ. Which costs can be subtracted? GRUR 2001, 329: not general costs as wages and rents, and according to BGH GRUR 2004, 532: not damages to be paid to business partners in the distribution chain; concurring however: OLG Düss GRUR 2004, 53 (see Klüber, 2007, p267; Tilmann, 2003).
- 41 Transposed into German intellectual property laws (however, only *lege speciales*) in July 2008, Bundesgesetzblatt I No 28, 1191–1211 (after the deadline of transposition elapsed on 29 April 2006). With regard to the recovery of profits, courts will need to turn to the doctrine of directive conform interpretation when applying the general tort rules.
- 42 Applied to the CBD; see an earlier approach by Godt (2003).

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