

RECOGNITION OF INDIGENOUS PEOPLES IN ACCESS AND BENEFIT SHARING (ABS) LEGISLATION AND POLICIES OF THE PARTIES TO THE NAGOYA PROTOCOL

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The Nagoya Protocol on Access and Benefit Sharing (ABS) provides for the rights of indigenous peoples and local communities (ILCs) in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). States Parties are obliged to take legislative, administrative and technical measures to recognize, respect and support/ensure the prior informed consent of indigenous communities and their effective involvement in preparing mutually agreed terms before accessing genetic resources and associated traditional knowledge or utilizing them. Within the ambit of contemporary debates encompassing indigenous peoples' right to self-determination, this paper examines the effectiveness of the percolation of the legal intent of international law into existing or evolving domestic laws, policies or administrative measures of the Parties on access and benefit sharing. Through an opinion survey of indigenous organizations and the competent national authorities of the Parties to the Convention on Biological Diversity (CBD), the findings indicate that the space, recognition and respect created in existing or evolving domestic ABS measures for the rights of indigenous communities are too inadequate to effectively implement the statutory provisions related to prior informed consent, mutually agreed terms and indigenous peoples' free access to biological resources as envisaged in the Nagoya Protocol. As these bio-cultural rights of indigenous peoples are key to the conservation and sustainable use of biodiversity, the domestic ABS laws need reorientation to be sufficiently effective in translating the spirit of international ABS law and policies.

Keywords: indigenous peoples; Nagoya Protocol; genetic resources; indigenous traditional knowledge; bioresources; right to self-determination.

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Introduction

Indigenous peoples are known to be the most sustainable societies on the planet. In 2011, the Joint Submission of Grand Council of the Crees (*Eeyou Istchee*), Canada, et al. articulated that indigenous peoples and local communities (ILCs) have a distinct, essential role¹ in safeguarding biodiversity that benefits humankind.² However, indigenous peoples are among the most disadvantaged peoples in the world.³ The actions by the mainstream non-indigenous societies, with their history of exploitation, have resulted in threats to the survival of indigenous peoples and

¹ See, e.g., Updated Global Strategy for Plant Conservation 2011–2020 in Conference of the Parties to the Convention on Biological Diversity, Consolidated Update of the Global Strategy for Plant Conservation 2011–2020, Decision X/17, U.N. Doc. UNEP/CBD/COP/DEC/X/17, 29 October 2010, Annex, para. 9: “[P]lant diversity is of special concern to indigenous and local communities, and these communities have a vital role to play in addressing the loss of plant diversity.” See also, e.g., European Council, Indigenous Peoples Within the Framework of the Development Cooperation of the Community and the Member States, Resolution, 30 November 1998, para. 4: “[M]any indigenous peoples inhabit areas crucial for the conservation of biodiversity, and maintain social and cultural practices by way of which indigenous peoples have a special role in maintaining and enhancing biological diversity and in providing unique sustainable development models.”

² Office of the High Commissioner for Human Rights, It’s Not Enough to Support the Declaration on the Rights of Indigenous Peoples, Says UN Expert, statement issued by U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, on the occasion of the International Day of the World’s Indigenous Peoples, Geneva, 9 August 2010: “[Indigenous peoples] have preserved, generation after generation, an extraordinary wealth of knowledge, culture, and spirituality in the common benefit of humankind, contributing significantly to the world’s diversity and environmental sustainability” (Sep. 20, 2018), available at <http://unsr.jamesanaya.org/statements/its-not-enough-to-support-the-declaration-on-the-rights-of-indigenous-peoples-says-un-expert>.

³ Office of the High Commissioner for Human Rights, Combating Discrimination Against Indigenous Peoples: “Indigenous peoples face many challenges and their human rights are frequently violated: they are denied control over their own development based on their own values, needs and priorities; they are politically under-represented and lack access to social and other services. They are often marginalized when it comes to projects affecting their lands and have been the victims of forced displacement as a result of ventures such as the exploitation of natural resources” (Sep. 20, 2018), available at http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx

the bases of their sustenance, especially natural resources. As a consequence, even the basic human rights of native communities have been jeopardized in countries around the world. At the international level, several instruments⁴ are in place that strive for safeguarding indigenous peoples and their life-sustaining natural resources, particularly land, forests, waters and islands.

Addressing the biological diversity and associated (indigenous) traditional knowledge (ITK) of indigenous peoples and local communities (ILCs), the Convention on Biological Diversity and the Nagoya Protocol⁵ (promulgated under Article 15 of the Convention) provide for the protection of the resources and rights of ILCs in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). According to rights advocates, at the core of the human rights issue relating to ILCs is their demand for self-determination.⁶ “Self-determination” is defined by Anaya⁷ as comprising certain core values, including non-discrimination, protection of cultural integrity, rights over lands and natural resources, and social welfare for economic well-being and self-government. The right to self-determination of indigenous peoples is expressed in the form of ILCs’ local self-governance of natural resources and traditional knowledge, which is first ensured by Articles 8(j) and 10(c) of the Convention.⁸ Therefore, conforming to the needs of recognizing and respecting the rights of ILCs, the Nagoya Protocol consists of provisions concerning ILCs’ involvement in issuing prior informed consent (PIC) and mutually agreed terms (MAT), free access to biological resources and unrestricted exchange of genetic resources.

Articles 5.2, 5.5, 6.3, 8, 15.1, 16.1 of the Nagoya Protocol particularly bind the States Parties to formulate, enact and implement the domestic legislation, policies, administrative measures and governance systems to realize the intent and spirit of the legal provisions in international law. Simultaneously, specifically in Articles 6.2, 7, 8, 12.3(b), 18.2 the Nagoya Protocol refers to the domestic or national access and benefit sharing (ABS) laws of the Parties in relation to core variables (e.g. prior informed consent, approval and involvement, mutually agreed terms) wherein participation

⁴ For example, U.N. Permanent Forum on Indigenous Issues (UNPFII), International Convention on the Elimination of All Forms of Racial Discrimination, International Labour Organization Convention 169, U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), Expert Mechanism on the Rights of Indigenous Peoples, etc.

⁵ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization was adopted by the Conference of the Parties to the Convention on Biological Diversity at its 10th meeting on 29 October 2010 in Nagoya, Japan. In accordance with its Article 32, the Protocol was opened for signature from 2 February 2011 to 1 February 2012 at the United Nations Headquarters in New York by Parties to the Convention. The Protocol entered into force on 12 October 2014.

⁶ Harry Jonas et al., *Community Protocols and Access and Benefit Sharing*, 12(3) *Asian Biotechnology and Development Review* 49 (2010).

⁷ James Anaya, *Indigenous Peoples in International Law* (2nd ed., Oxford; New York: Oxford University Press, 2004).

⁸ *Id.*

of or recognition to indigenous peoples is mandatory. Hence, in all circumstances the Parties need to make serious efforts at implementing the provisions of the Protocol. By August 2017, 47 countries and the European Union had prepared their respective domestic ABS legislation, policy or administrative system.⁹ Simultaneously, in the context of indigenous peoples' rights over biological/genetic resources and associated traditional knowledge, the Parties are obliged to desirably recognize, respect, honour and protect indigenous peoples and local communities. However, the Parties' compliance with the relevant provisions of the Convention on Biological Diversity (CBD), the Nagoya Protocol and UNDRIP need to be evaluated/validated and measured both quantitatively and qualitatively. After the Nagoya Protocol came into force in October 2014, all 97 Parties to the Protocol were requested to submit an Interim National Report of Implementation by November 2017.¹⁰ Until the competent national authorities (CNAs) of the Parties file their interim or final compliance reports, nothing substantial can be concluded about the field-level implementation of the Protocol's provisions. So, how to assess and measure the potential field implications of the Protocol in the particular context of recognition and realization of rights, participation, involvement, importance and space of indigenous peoples? By carrying out an opinion survey of indigenous peoples' organizations and the CNAs of 12 countries, an assessment was made through this article to gauge the field implications of the implementation of the Nagoya Protocol in the context of ILCs' participation in PIC, MAT, access to bioresources and the free exchange of genetic resources within them. The variables chosen have direct relevance to the historically violated rights of indigenous communities. The importance of these variables is reiterated by the U.N. Permanent Forum on Indigenous Issues (UNPFII) while emphasizing the role of the Convention on Biological Diversity in respecting and protecting indigenous peoples' rights consistent with UNDRIP:¹¹

[C]onsistent with international human rights law, *States have an obligation to recognize and protect the rights of indigenous peoples to control access to the genetic resources that originate in their lands and waters and any associated indigenous traditional knowledge. Such recognition must be a key element of the [proposed] international regime on access and benefit-sharing, consistent with the United Nations Declaration on the Rights of Indigenous Peoples.*¹²

⁹ Cf. CBD (Sep. 20, 2018), available at <https://absch.cbd.int/search/nationalRecords?schema=measure>.

¹⁰ As of 5 August 2017, no country had filed a report on the ABS Clearing-House website: <https://absch.cbd.int/>.

¹¹ General Assembly Resolution 61/295 (Annex), U.N. GAOR, 61st Sess., Supp. No. 49, Vol. III, U.N. Doc. A/61/49 (2008) 15.

¹² Permanent Forum on Indigenous Issues, Report on the Ninth Session (UNPFII9) (16–30 April 2010), Economic and Social Council, Official Records, Supplement No. 23, U.N. Headquarters, New York, E/2010/43-E/C.19/2010/15, para. 113 (emphasis added).

In this article, an analysis of the survey data illustrates and extrapolates the trend of various nations as to how they take policy/legal measures and how they treat their indigenous peoples legally and administratively with regard to the issues of indigenous rights, autonomy and integrity. The results of the data analysis are discussed by linking them with the contemporary debate on the space and recognition given to indigenous peoples in the Nagoya Protocol, and on the human rights ensured in accordance with UNDRIP.

1. Methodology

As part of a project on ABS studies at the Academy of International Studies of Jamia Millia Islamia,¹³ the field data was gathered between 2012 and 2015. *Nonreactive*¹⁴ (analysis of existing documents and secondary information) as well as *reactive* (structured interviews, participant observation) research methods were employed in the study and development of this article.

1.1. Sampling for Structured Interviews

Stratified random sampling was employed for purposes of conducting the structured interviews, with a list of potential respondents being prepared beforehand. Organizations and individuals working on or advocating ILC issues and causes were first selected from civil society groups worldwide, and then contacted. The list was subsequently narrowed down using various criteria imposed by different constraints. The survey participants who were able to respond to questions in English via email were contacted. A total of 5,876 organizations, groups and individuals were contacted through email and face-to-face meetings. Furthermore, steps were taken to ensure that the sample included female participants, that it was geographically representative and that it would be easy to access for follow-up purposes, if needed. The data were sourced from 15 interviewees representing diverse organizations from various parts of the world. Their responses are conveyed in Table 1, and they have been expressed in percentage format. Likewise, the expert sampling technique was used to obtain the responses of various national focal points of governments. The CBD's Competent National Authorities (CNAs) of 50 countries from South Asia, South-East Asia, West Asia, Central Asia and North Asia were contacted face-to-face and through email. Of them, the CNAs of 12 countries responded with substantial

¹³ A central university by Act of the Indian Parliament: <http://jmi.ac.in>.

¹⁴ In nonreactive research the people studied are unaware that they form part of a study. They thus leave evidence of their social behaviour or actions "naturally." Creating nonreactive measures follows the logic of quantitative measurement, although qualitative researchers also make use of nonreactive observation. The operational definition of the variable includes how the researcher systematically notes and records observations. Because nonreactive measures indicate a construct indirectly, the researcher needs to rule out reasons for the observation other than the construct of interest.

information in the questionnaire. Countries such as Bahrain, Singapore, Qatar and South Korea replied that they had not started any preparations for ABS legislation or policy in their respective countries; hence they did not attempt to respond to the structured interview questionnaire. The responses of 12 countries, namely India, Bangladesh, Nepal, Thailand, Vietnam, Lao PDR, Timor Leste, Brunei Darussalam, the Philippines, Mongolia, China and Russia, are presented in Table 2.

Table 1:
Survey of Indigenous Organizations & Individuals

Questions of Opinion Survey	* Respondents (n=15)	
	In parentheses, the no. of Respondents	Response Percentage
Recognition of ILCs in issuing PIC and MAT		
1. Will your country involve ILCs in developing the prior informed consent (PIC) and mutually agreed terms (MAT) before allowing the user countries to access & utilize genetic resources or associated ITK held by ILCs?	1. Yes, our country would involve ILCs effectively in developing PIC and MAT. (1) 2. Yes, our country would involve ILCs in developing PIC and MAT, but for namesake only. (2) 3. No, our country would not involve ILCs at all in developing PIC and MAT. (1) 4. No ABS instrument is evolved or evolving in my country. (1) 5. I cannot say. (10)	1. 06.66% 2. 13.34% 3. 06.66% 4. 06.66% 5. 66.68%
2. Does your country's ABS legislation/policy make PIC mandatory before access/utilization of genetic resources or associated ITK?	1. Yes, PIC is mandatory in our existing/evolving ABS legislation/policy. (3) 2. Yes, PIC is mentioned in our existing/evolving ABS legislation/policy, but it is <i>not</i> mandatory. (2) 3. No, there is no mention of PIC in our existing/evolving ABS legislation/policy. (1) 4. No ABS instrument is evolved or evolving in my country. 5. I don't know. (9)	1. 20.00% 2. 13.34% 3. 06.66% 4. 0% 5. 60.00%
3. Do you think that your country will ensure <i>effective</i> participation of your ILCs in establishing the mechanisms to inform the potential users about their obligations before accessing any genetic resources and associated ITK?	1. Yes, our country will ensure <i>effective</i> participation of our ILCs. (2) 2. Yes, our country will ensure participation of our ILCs, but that would <i>not be effective</i> . (6) 3. No ABS instrument is evolved or evolving in my country. (3) 4. I am not aware. (4)	1. 13.34% 2. 40.00% 3. 20.00% 4. 26.66%

Questions of Opinion Survey	* Respondents (n=15)	
	In parentheses, the no. of Respondents	Response Percentage
Recognition of ILCs' Access to Bioresources in Their Territories		
4. Does your country restrict ILCs' access to bioresources in forests and protected areas?	1. Yes, our country fully restricts our ILCs' access to bioresources in forests and protected areas. (2) 2. Yes, our country selectively restricts our ILCs' access to bioresources in forests and protected areas. (8) 3. No, our country does not restrict our ILCs' access to bioresources in forests and protected areas. (2) 4. I cannot say. (3)	1. 13.34% 2. 53.32% 3. 13.34% 4. 20.00%
5. Does your country ensure the rights of ILCs to exchange genetic resources and ITK within and amongst themselves?	1. Yes, our country fully ensures the rights of ILCs to exchange genetic resources and ITK within and amongst themselves. (1) 2. Yes, our country partially ensures the rights of ILCs to exchange genetic resources and ITK within and amongst themselves. (2) 3. No, our country restricts our ILCs exchanging genetic resources and ITK within and amongst themselves. (2) 4. I cannot say. (10)	1. 06.66% 2. 13.34% 3. 13.34% 4. 66.66%

* List of respondents: 1. Unrepresented Nations and Peoples Organization (UNPO), Belgium (represented by Emma Chippendale); 2. Mbororo Social and Cultural Development Organization (MBOSCUDA) North West Region, Cameroon (represented by Sali Django); 3. Grand Council of the Crees (Eeyou Istchee), Canada (represented by Paul Joffe); 4. Kanuri Development Association (KDA), Nigeria (represented by Babagana Abubakar); 5. World Institute for a Sustainable Humanity, Sierra Leone (represented by Alpha Beretay); 6. Direct Sponsor (Tribal Networks), Ireland (represented by Andy Savage); 7. Legal Assistance Centre, Namibia (represented by Peter Watson); 8. Foret pour le Development Integral (FODI), Democratic Republic of the Congo (DRC) (represented by Nsase Soki Maurice); 9. Alex Nyamujirwa George, Tanzania; 10. Imad Abdel Moniem (individual), Sudan; 11. Mizoram Chakma Development Forum, New Delhi/India (represented by Hemant Larma); 12. NESAM Trust, Tamil Nadu/India (represented by P. Murugan); 13. Citizens Foundation, Himachal Pradesh/India (represented by Amit Kumar); 14. Centre for Policy Solution, Jaipur/India (represented by Sanjay Garg); and 15. M. Sudhakar (Individual), Karnataka/India.

Table 2: Opinions of CBD/NP States Parties [position of countries represents that of 2014]

Q. No.	Questions of Opinion Survey	Response Options	% age of Countries' Response	Responses of Countries											
				South Asia			South-East Asia			North Asia					
				I	N	Ba	Th	L	V	P	Br	Ti	M	R	C
Recognition of ILCs in Issuing PIC and MAT															
1.	Shall the national ABS policy/law respect ILCs' right to grant FPIC and right to sign MATs, and in what way?	1. Yes, to large extent. 2. Yes, to some extent. 3. No, not at all. 4. I do not know.	1. 44.44% 2. 44.44% 3. 11.11% 4. 00.00% NAT = 3	2*	NAT	1	1	1	2	1	2	1	2	1	2
2.	In accordance with Article 6.1 and Article 6.2 of the Nagoya Protocol, does your country's ABS legislation/policy make PIC mandatory before access/utilization of genetic resources or associated ITK?	1. Yes, PIC is mandatory in our existing/evolving ABS legislation/policy. 2. Yes, PIC is mentioned in our existing/evolving ABS legislation/policy, but it is <i>not</i> mandatory. 3. No, there is no mention of PIC in our existing/evolving ABS legislation/policy.	1. 55.56% 2. 22.22% 3. 22.22% NAT = 2 NAP = 1	1	NAP	2	1	1	1	1	1	1	1	1	2
3.	Does your country's ABS legislation/policy provide to ensure participation and involvement of ILCs in creating procedures/format of PIC?	1. Yes, our existing/evolving ABS legislation/policy has such a provision. 2. No, there is no such provision in our existing/evolving ABS legislation/policy. 3. I am not aware.	1. 33.33% 2. 44.44% 3. 22.22% NAT = 2 NAP = 1	1	NAP	2	3	3	3	1	1	1	1	2	2

Q. No.	Questions of Opinion Survey	Response Options	% age of Countries' Response	Responses of Countries												
				South Asia			South-East Asia						North Asia			
				I	N	Ba	Th	L	V	P	Br	Ti	M	R	C	
4.	Is your country committed to consult, involve or engage ILCs in issuing PIC to user Parties before accessing/utilizing any genetic resources and associated ITK?	1. Yes, our country is fully committed. 2. Yes, our country is somewhat committed. 3. No, our country has no such mandate. 4. I cannot say.	1. 81.81% 2. 09.09% 3. 09.09% 4. 00.00% NAt = 1	1	1	1	1	1	1	1	1	1	1	1	1	2
5.	As envisaged in Article 5.1 of the Nagoya Protocol, does your country's ABS legislation/policy include provisions of drafting the mutually agreed terms (MAT) on equity principles, opposing the dominant positions of user countries (usually developed nations)?	1. Yes, our country has legal provision in ABS legislation/policy to draft MAT on equity principles. 2. Yes, our country has legal provision in ABS legislation/policy to draft MAT, but not on equity principles. 3. No, our country has no legal provision in ABS legislation/policy to draft MAT. 4. I cannot say.	1. 70.00% 2. 00.00% 3. 20.00% 4. 10.00% NAt = 1 NAp = 1	1	NAp	1	1	1	1	1	1	3	NAt	3	1	4

Q. No.	Questions of Opinion Survey	Response Options	% age of Countries' Response	Responses of Countries												
				South Asia			South-East Asia					North Asia				
				I	N	Ba	Th	L	V	P	Br	Ti	M	R	C	
6.	In accordance with Article 12.3(b) of the Nagoya Protocol, does your country's ABS legislation/policy provide for engaging your ILCs in developing MAT?	1. Yes, our country's ABS legislation/policy provides for engaging our ILCs in developing MAT. 2. No, our country has no such provision in ABS legislation/policy. 3. I cannot say.	1. 50.00% 2. 40.00% 3. 10.00% NAT = 1 NAP = 1	1	NAP	3	1	2	1	1	1	2	2	1	2	
ILCs' Access to Bioresources in Their Territories																
7.	Does your country restrict ILCs' access to bioresources in forests and protected areas?	1. Yes, our country fully restricts our ILCs' access to bioresources in forests and protected areas 2. Yes, our country selectively restricts our ILCs' access to bioresources in forests and protected areas 3. No, our country does not restrict our ILCs' access to bioresources in forests and protected areas. 4. I cannot say.	1. 00.00% 2. 50.00% 3. 50.00% 4. 00.00% NAT = 2	3	3	2	3	2	2	2	3*	NAT	NAT	3	2	2

Q. No.	Questions of Opinion Survey	Response Options	% age of Countries' Response	Responses of Countries													
				South Asia			South-East Asia						North Asia				
				I	N	Ba	Th	L	V	P	Br	Ti	M	R	C		
8.	Does your country ensure the rights of ILCs to exchange genetic resources and ITK within and amongst themselves?	<p>1. Yes, our country fully ensures the rights of ILCs to exchange genetic resources and ITK within and amongst themselves.</p> <p>2. Yes, our country partially ensures the rights of ILCs to exchange genetic resources and ITK within and amongst themselves.</p> <p>3. No, our country restricts our ILCs in exchanging genetic resources and ITK within and amongst themselves.</p> <p>4. I cannot say.</p>	1. 40.00% 2. 40.00% 3. 00.00% 4. 20.00% NAt = 2	1	4	2	2	1	2	1	1	1	NAt	NAt	2	2	4

NAt = Not Attempted; NAP = Not Applicable.

I = India; N = Nepal; Ba = Bangladesh; Th = Thailand; L = Lao PDR;
V = Vietnam; P = the Philippines; Br = Brunei; M = Mongolia;
R = Russia; C = China

1.2. Structured Interviews

Prior to contacting the potential respondents face-to-face and through email and conducting the structured interviews, a set of questions were developed (see Tables 1 and 2). The questions were grouped as follows:

1. Recognition of ILCs in Issuing PIC and MAT;
2. Recognition of ILCs' Access to Bioresources in their Territories.

Respectively, 5 (Table 1) and 8 (Table 2) questions were included in the structured interview questionnaires created for indigenous organizations/individuals and CBD's CNAs. The nature and number of questions were maintained to be pertinent and low, respectively, keeping in view the survey needs, the respondents' profiles and the ambience of the international forums where respondents were contacted in face-to-face meetings.

1.3. Participant Observation

One of the research tools adopted was participant observation of negotiation processes in the CBD's global forums. Participant observation is a research technique used for qualitative research purposes.¹⁵ De Munck and Sobo¹⁶ describe participant observation as the primary method used by anthropologists doing fieldwork, and which involves "active looking, improving memory, informal interviewing, writing detailed field notes, and... patience" (quoted in DeWalt and DeWalt¹⁷). The authors directly observed the following two international meetings on the ABS regime:

- The Second Meeting of the Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on ABS (ICNP-2) (9–13 April 2012, New Delhi, India);
- The Eleventh Meeting of the Conference of the Parties (COP11) to the Convention on Biological Diversity (8–19 October 2012, Hyderabad, India).

The authors specifically interacted with and observed the delegates of selected countries. They took part in the negotiation meetings of COP, side events and meetings of ILCs, NGOs and international organizations, and open shows organized by ILCs. Particular attention was paid to how ILC members were engaged and involved in scheduled sessions of the ICNP-2 and COP11, as well as in side events. Debates concerning PIC, MAT and indigenous rights were addressed and observed, in particular.

¹⁵ Barbara B. Kawulich, *Participant Observation as a Data Collection Method*, 6(2) Forum: Qualitative Social Research (2005), Art. 43.

¹⁶ *Using Methods in the Field: A Practical Introduction and Casebook* (V.C. de Munck & E.J. Sobo (eds.), Walnut Creek, CA: AltaMira Press, 1998).

¹⁷ Kathleen M. DeWalt & Billie R. DeWalt, *Participant Observation: A Guide for Fieldworkers* (Walnut Creek, CA: AltaMira Press, 2002).

2. Results and Discussion

The present article is fundamentally based on the framework of the percolation of “equity and justice” principles enshrined in the Nagoya Protocol into the legal realm of the national ABS regimes. Analysts hint at a pertinent statement: “Good policy is just a starting point – good practice is more difficult to achieve.”¹⁸ Such a quote can perfectly be correlated in the context of international or national instruments meant for indigenous rights and entitlements. For instance, concurring with the Nagoya Protocol, only half of the 97 States Parties have so far promulgated relevant domestic ABS legislation or policies; the percolation of such domestic laws or policies into reality is yet to be seen. This becomes even harder when it comes to realizing the laws in respect of the interests of indigenous peoples. Cotula and Mayers¹⁹ highlight, additionally, the gap between what is “on paper” and what happens “in practice” in the context of land tenure in the territories where indigenous peoples and marginalized communities reside. They underscore the fact that despite a growing international recognition of indigenous communities’ rights to the self-determination of their futures and the management of their natural resources,²⁰ international rights are far from a solution against local disempowerment or the denial of procedural and substantive justice.²¹ Activists, along similar lines, are skeptical of the Nagoya Protocol too, as to whether it will help communities at the local level.²² Such doubts about the ABS regime prove valid when the field implications of newly emerged international law (i.e. the Nagoya Protocol) are closely scrutinized. For example, the highly publicized Hoodia case of benefit sharing in South Africa represents a moral victory for the San community for recognition of their rights relating to traditional knowledge; however, it is reported as having further undermined traditional values and knowledge and the resource governance systems of the San community, according to Jonas, Bavikatte and Shrumm.²³ These researchers further argued that the governance reforms weakened the San’s traditional forms of authority,

¹⁸ Linda Siegele et al., *Conservation and Human Rights, Who Says What?* in *Rights-based Approaches: Exploring Issues and Opportunities for Conservation* 69, 47–76 (J. Campese et al. (eds.), Bogor, Indonesia: CIFOR and IUCN, 2009).

¹⁹ Lorenzo Cotula & James Mayers, *Tenure in REDD – Start-point or Afterthought?* (London: IIED, 2009).

²⁰ See, e.g., Cynthia Morel, *Communication 276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 7(1) Housing and ESC Rights Law Quarterly (2010) (Sep. 20, 2018), available at <http://globalinitiative-escr.org/wp-content/uploads/2017/08/ESC-Right-Quarterly-V7-N1-01.pdf>.

²¹ Cotula & Mayers 2009, at 23.

²² Chee Yoke Ling, *Mixed Reactions on New Access and Benefit Sharing Treaty*, Third World Network, 9 November 2010 (Sep. 20, 2018), available at <https://www.twn.my/title2/climate/info.service/2010/climate20101102.htm>.

²³ Jonas et al. 2010.

increased the community's reliance on external expert opinion, exacerbated power and information asymmetries in and across San communities, and fostered mistrust between the San and Nama communities.²⁴ This example demonstrates that justice for indigenous peoples does not prevail. Therefore, the Honorable Rosalie Abella, Justice of the Supreme Court of Canada, demanded, "We need more than the rhetoric of justice. We need justice,"²⁵ while expressing the plight of indigenous peoples.

With the basic tenet of studying the States Parties' acceptance and compliance with international law advocating indigenous rights, it is hypothesized that Parties have a poor record of recognizing, respecting, honouring and realizing the rights of their own indigenous peoples. Consequently, the implementation of the relevant provisions of the Nagoya Protocol may also be treated not as seriously by the Parties as is required. At first, these statements can be substantiated by the reported facts in the Joint Submission of Grand Council of the Crees et al..²⁶

States have adopted measures to the detriment of indigenous and local communities. In some States, the existence of specific indigenous peoples is not recognized²⁷ – and even if they are, States often refuse to affirm indigenous peoples' resource rights in national legislation.²⁸

²⁴ This has been addressed by the recent San-Nama Benefit Sharing Agreement.

²⁵ Rosalie S. Abella, *International Law and Human Rights: The Power and the Pity*, 55 McGill Law Journal 871 (2010).

²⁶ Open-ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights, First Meeting, Montreal, 6–10 June 2011 (Sep. 20, 2018), available at <https://www.cbd.int/abs/doc/protocol/icnp-1/joint-submission-grand-council-and-others-en.pdf>.

²⁷ General Assembly, Midterm Assessment of the Progress Made in the Achievement of the Goal and Objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General, U.N. Doc. A/55/166, 23 July 2010, para. 20: "The Asian and Pacific region is home to about 70 per cent of the world's indigenous people, yet only a handful of States in that region have officially recognized the existence of indigenous peoples in their countries." For instance, India does not recognize its indigenous peoples, instead it denotes them as "tribes." See also, e.g., Chittagong Hill Tracts: Human Chain Demands Indigenous Recognition, Unrepresented Nations and People Organization, 21 March 2011: "The leaders of the country's indigenous communities called upon the government to seriously consider the issue of constitutional recognition as indigenous instead of small ethnic group; otherwise, the process of amendment of constitution will remain incomplete" (Sep. 20, 2018), available at <http://unpo.org/article/12417>.

²⁸ United Nations (Department of Economic and Social Affairs), Presentation by Grand Chief Edward John, International Expert Group Meeting on Indigenous Peoples and Forests, PFII/2011/EGM, New York, 12–14 January 2011, para. 10: "In the courts [of Canada], government lawyers routinely deny the very existence of Indigenous Peoples and their rights, stating in their pleadings and legal arguments that, unless proven by Indigenous Peoples in the courts, neither Indigenous Peoples nor their rights exist. This means Indigenous Peoples must bring their elders, histories, cultures, ways of life and stories into a legal system foreign to them."

The same is witnessed by the U.N. Department of Economic and Social Affairs (UNDESA) when, in 2011, it determined:

[I]ndigenous peoples continue to lobby governments for the full legal recognition of their traditional land rights.

Likewise, Faizi and Nair²⁹ established that India has the world's largest population of *adivasis*,³⁰ yet, unfortunately, they are refused acceptance as "indigenous people" by post-colonial Indian governments; rather, they are said to be "Scheduled Tribes" in the Constitution, under an alleged conspiracy by dominant settler *Aryans* in order to evade claims by aboriginal people in respect of their lands and resources. Therefore, considering such dispossessing acts of States Parties, the analysis on the stated variables, subsequently, leads to an understanding of the field implications of domestic ABS legislation or policies, whether it exists in the countries implementing the Nagoya Protocol.

2.1. Recognition of ILCs in Issuing PIC and MAT

Rattanakrajangsri and Degawan³¹ describe prior and informed consent (PIC) as the practice of giving or withholding permission. It is the right to choose or to make decisions. It emanates³² from the recognition of the full property rights of a group

²⁹ S. Faizi & Priya K. Nair, *Adivasis: The World's Largest Population of Indigenous People*, 59(3/4) Development 350 (2017).

³⁰ *Adivasi* is a member of any of the aboriginal tribal peoples living in India before the arrival of the Aryans in the 2nd millennium BC (Sep. 20, 2018), available at <https://en.oxforddictionaries.com/definition/adivasi>. The same *adivasis* were termed "Scheduled Tribes" in the Constitution of India, Art. 366(25).

³¹ K. Rattanakrajangsri & M. Degawan, *Handbook on Free, Prior and Informed Consent*, International Alliance of Indigenous and Tribal People of the Tropical Forests (IAITPTF) and the Indigenous Peoples' Foundation for Education and Environment (IPF) (2011) (Sep. 20, 2018), available at <http://www.thai-ips.org/Documents/fpichandbook-THA-for%20Web.pdf>.

³² Some important international legal instruments or mechanisms in which the right to PIC of indigenous peoples is clearly recognized: (1) United Nations Declaration on the Rights of Indigenous Peoples, 2007 (see Arts. 10, 11, 19, 28, 29, 32) (Sep. 20, 2018), available at <http://www.un.org/esa/socdev/unpfi/en/declaration.html>; (2) Convention 169 of the International Labour Organization, 1989 (see Arts. 6.2, 7, 16.2) (Sep. 20, 2018), available at <http://www.ilo.org/ilolex/cgi/lex/convde.pl?C169>; (3) U.N. Committee on the Elimination of Racial Discrimination (CERD), various observations and recommendations on State obligations (Sep. 20, 2018), available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/73984290dfea022b802565160056fe1c?Opendocument>; (4) U.N. Commission on Economic, Social and Cultural Rights, various observations on State obligations (Sep. 20, 2018), available at <http://www2.ohchr.org/english/bodies/cescr/index.htm>; (5) Convention on Biological Diversity (CBD), 1992, and various decisions of the Conference of the Parties to the CBD (see Art. 8(j)) (Sep. 20, 2018), available at <http://www.cbd.int/decisions/cop/?m=cop-05>; (6) Various multilateral institutes, banks, donor agencies and donor countries, and international and regional organizations that make reference to FPIC in their decisions or guidelines, including the European Union, the Association of Southeast Asian Nations, the World Bank, the Asian Development Bank, the Inter-American Development Bank, many U.N. specialized agencies and programmes; (7) Inter-American Commission on Human Rights (Sep. 20, 2018), available at http://en.wikipedia.org/wiki/Inter-American_Commission_on_Human_

over a certain area/resource. It is also, they say, part and parcel of the right to self-determination. Moreover, the prior informed consent obtained from ILCs by the provider/user States Parties is the manifestation of the recognition, involvement and participation of ILCs and their rights over the genetic resources and associated indigenous traditional knowledge (ITK). The Joint Submission of Grand Council of the Crees et al. reaffirms that, in its preamble, the Nagoya Protocol recognizes the “importance of promoting equity and fairness in negotiation of mutually agreed terms (MAT) between providers and users of genetic resources.”³³ Such agreements underline the importance of indigenous “consent” in regard to traditional knowledge and genetic resources. If MAT is carried out fairly and in good faith, it would constitute another step in ensuring prior and informed consent. The Joint Submission of Grand Council of the Crees et al. further emphasizes that Article 6 of the Protocol should have required Parties to ensure the effective protection of the rights of ILCs and respect for their right relating to PIC. Such duties are consistent with UNDRIP and other international human rights law. As indicated by the Committee on Economic, Social and Cultural Rights:

States parties should adopt measures to *ensure the effective protection of the interests of indigenous peoples* relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. (...) In implementing these protection measures, States parties should *respect the principle of free, prior and informed consent*³⁴ of the indigenous authors concerned.³⁵

In addition, the Nagoya Protocol addresses PIC explicitly in Articles 6.2³⁶ and 7,³⁷ which needs to be verified in the context of its field implications. The surveyed

Rights; (8) World Commission on Dams (Sep. 20, 2018), available at http://www.dams.org/docs/kbase/thematic/drafts/tr12_execsumm.pdf.

³³ Open-ended Ad Hoc Intergovernmental Committee, *supra* note 26.

³⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant), U.N. Doc. E/C.12/GC/17, 12 January 2006, para. 32 (emphasis added).

³⁵ Open-ended Ad Hoc Intergovernmental Committee, *supra* note 26.

³⁶ Article 6.2 reads: “In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.”

³⁷ Article 7 reads: “In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources, that is held by indigenous and local communities, is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.”

indigenous organizations/individuals were questioned as to whether their country would involve ILCs in developing the prior informed consent (PIC) and mutually agreed terms (MAT) before allowing the user countries to access and utilize genetic resources or associated indigenous traditional knowledge (ITK) held by ILCs (Table 1: q. 1). Merely one respondent (6.66%) of the surveyed indigenous organizations/individuals said that his/her country would *involve ILCs effectively* in developing PIC and MAT (Table 1: q. 1). Only 2 respondents out of 15 (13.34%) opined “affirmatively,” saying that their countries would involve ILCs in developing PIC and MAT (Table 1: q. 1). One respondent (6.66%) *declined* any such possibility of involving ILCs in developing PIC and MAT. Yet, one respondent (6.66%) also said that “no ABS instrument is evolved or evolving in the country” (Table 1: q. 1). Lastly, the majority of respondents (66.68%) gave no opinion on the question. The analysis of the responses of the indigenous organizations/individuals, thus, indicates that *there is a remote possibility on the part of various countries of involving ILCs in developing PIC and MAT before allowing the user countries to access and utilize genetic resources or associated ITK held by ILCs.*

Out of 15 respondents, 3 (20%) claimed that PIC is made mandatory in their existing/evolving domestic ABS legislation/policy before access/utilization of genetic resources or associated ITK (Table 1: q. 2). On the other hand, 2 respondents (13.34%) highlighted that PIC is mentioned in their existing/evolving domestic ABS legislation/policy, but it is *not mandatory* (Table 1: q. 2). However, one respondent (6.66%) indicated that PIC is not mentioned in his/her country’s existing/evolving ABS legislation/policy (Table 1: q. 2). The majority of respondents (60%) showed a lack of awareness on this issue (Table 1: q. 2). *The analysis of the responses reveals that many countries have the scope of PIC of indigenous peoples in domestic ABS law, but PIC is not made mandatory in such legislation/policy. For example, India’s Biological Diversity Act 2002 lacks any provisions in respect of PIC being mandatory before access/utilization of genetic resources or associated ITK held by ILCs. India’s ABS legislation/policy has been casual on the issue of PIC of indigenous peoples and has not considered PIC to be mandatory before access/utilization of genetic resources or associated ITK.*

“Shall the domestic ABS policy/law respect ILCs’ right to grant PIC and to sign MATs?” was the question responded to by 9 out of 12 countries surveyed (Table 2: q. 1). The competent national authorities of four countries (44.4%) – Bangladesh, Thailand, Vietnam and Russia – opined that ABS policy/law should respect “to a large extent” ILCs’ right to grant PIC and to sign MAT (Table 2: q. 1). The same number of countries (44.4%), including India, Lao PDR, the Philippines and China, opined that national ABS policy/law should respect “to some extent” ILCs’ right to grant PIC and to sign MAT (Table 2: q. 1). Surprisingly, a negative response was recorded from Mongolia (Table 2: q. 1). *This indicates the lack of seriousness of more than half of the surveyed countries including India, Lao PDR, the Philippines, China and Mongolia and their authorities on the issue of respecting ILCs’ right to grant PIC and their right to sign*

MAT. This reaffirms the recorded views of indigenous organizations/individuals in the preceding paragraph. It is also evident from the recorded opinions of the majority of the surveyed countries that their domestic ABS legislation/policy makes PIC mandatory before access/utilization of genetic resources or associated ITK. However, some countries also expressed that such provisions are not made mandatory in their respective legal instruments. Thus, PIC is neither conceived nor incorporated in national ABS legislation/policy of such countries in the same spirit as is envisaged in Article 6.1 and Article 6.2 of the Nagoya Protocol.

Informal discussions during participant observation reveal that the participation of ILCs is solicited in “prior informed consent” and “mutually agreed terms” and the benefit sharing processes as proposed in the evolving legislation of Russia. The Philippines confirmed the involvement of ILCs in preparing MAT. However, the ABS legislation of the Philippines requires that developed MATs signed by ILCs must be ratified by the appropriate national government agency. According to the CNA of the Philippines, such a provision had to be taken into consideration in the revision of the country’s existing ABS policy. The authorities of India’s National Biodiversity Authority highlighted the relevant legal provisions. According to them, Section 41 of the Biological Diversity Act 2002 provides for the constitution of Biodiversity Management Committees (BMCs) within its area for the purpose of promoting conservation, sustainable use and documentation of biological diversity including the preservation of habitats, conservation of landraces, folk varieties and cultivars, domesticated stocks and breeds of animals and microorganisms, and the chronicling of knowledge relating to biological diversity. Then, Section 41(2) provides that the National Biodiversity Authority and the state biodiversity boards shall consult the BMCs while taking any decisions relating to the use of biological resources and knowledge associated with such resources occurring within the territorial jurisdiction of the BMCs. Likewise, Section 41(3) provides that BMCs may levy charges by way of fees collection from any person for accessing or collecting any biological resources for commercial purposes from areas falling within their territorial jurisdiction. With such wording, India’s ABS law has given space to only local communities (having no obvious mention of indigenous peoples) to form BMCs as their local institution. Observations reveal that these BMCs are no longer organic institutions, and they lack the perspectives of indigenous rights in light of UNDRIP.

Yet, in accordance with Article 6.1³⁸ and Article 6.2 of the Nagoya Protocol, the competent national authorities of 12 countries were surveyed on whether their countries’ ABS legislation/policy make PIC mandatory before access/utilization of

³⁸ Article 6.1 reads: “In the exercise of sovereign rights over natural resources, and subject to domestic access and benefit-sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.”

genetic resources or associated ITK. From among them, 9 countries addressed this particular question (Table 2: q. 2). The majority of responding competent national authorities of the surveyed countries (55.5%) – India, Thailand, Lao PDR, Vietnam and the Philippines – indicated that “PIC is mandatory in their existing/evolving ABS legislation/policy” (Table 2: q. 2). The competent national authorities of two countries (22.2%) – Bangladesh and China – conveyed that “PIC is mentioned in existing/evolving ABS legislation/policy, but it is *not mandatory*,” and Mongolian and Russian authorities said that “there is no mention of PIC in their existing/evolving ABS legislation/policy” (Table 2: q. 2). Thus, *it is evident from the recorded opinions of a majority of the surveyed countries that their countries’ ABS legislation/policy make PIC mandatory before access/utilization of genetic resources or associated ITK. However, some countries also disclosed that such provisions are not made mandatory in their respective legal instruments. Conclusively, PIC is neither conceived nor incorporated in national ABS legislation/policy of such countries in the same spirit as is envisaged in Article 6.1 and Article 6.2 of the Nagoya Protocol.*

PIC requires several steps as a process, so it comprises the creation of elaborate procedures and relevant formats to fill in. Nevertheless, the participation and involvement of ILCs in laying down the procedures of PIC-filing have to be critical since the PIC process needs the control of ILCs, not that of the state *per se*. In this regard, the CNAs of 12 responding countries were surveyed, and 3 of them (>33%) – India, Vietnam and the Philippines – responded that their existing/evolving ABS legislation/policy have provisions that the country’s ABS legislation/policy provide to ensure the participation and involvement of ILCs in creating procedures/format of PIC (Table 2: q. 3). Bangladesh, Mongolia, Russia and China (>44% of the surveyed countries), on the other hand, responded that there is no such provision in existing/evolving ABS legislation/policy ensuring participation and involvement of ILCs in creating procedures/format of PIC (Table 2: q. 3). So, *only one-third of the countries are of the opinion that their existing/evolving ABS legislation/policy provides space to ensure the participation and involvement of ILCs in creating procedures/format of PIC.*

With reference to the above, only 13.34% of the surveyed indigenous organizations/individuals expressed that their countries would ensure *effective* participation of their ILCs in establishing the mechanisms to inform potential users about their obligations before accessing any genetic resources and associated ITK (Table 1: q. 3). The majority (40%) of the surveyed indigenous organizations/individuals expressed their views that their countries will ensure participation of ILCs in establishing the mechanisms to inform potential users about their obligations before accessing any genetic resources and associated ITK, but that participation would *not be effective* (Table 1: q. 3). A sizeable ratio of international respondents (20%) said that “no ABS instrument is evolved or evolving in their respective country” (Table 1: q. 3). Therefore, *a majority of the countries are of the opinion favouring the participation of ILCs in establishing the mechanisms to inform potential users about their obligations*

before accessing any genetic resources and associated ITK, but that participation would not be effective. However, despite the current situation of the involvement of ILCs in ABS legislation/policy processes in the 12 countries surveyed, all of the countries except Timor Leste expressed their opinion on the willingness to make a commitment (Table 2: q. 4). A majority of the surveyed countries (82%) – India, Nepal, Bangladesh, Thailand, Lao PDR, Vietnam, the Philippines, Brunei and Russia – have shown their commitment to consult, involve or engage ILCs in issuing PIC to user States Parties before accessing/utilizing any genetic resources and associated ITK (Table 2: q. 4). Only China showed no such commitment, and Mongolia was recorded as being unsure.

The dismal situation of the states in treating PIC before accessing or providing the genetic resources or associated ITK held by ILCs should not be viewed in isolation from the overall perceptions of national laws. Different countries have perceived the meaning of PIC differently, and thus this has affected their responses while making domestic ABS laws or policies and, as a result, in implementing the measures.³⁹ Sometimes the national law only refers to “consultation” but not to consent, because the lawmakers recognize the “right to consultation” but not the “right to give consent” (permission). Other laws talk about the “participation” of indigenous peoples in decision-making processes, or about the right “to be heard.” Moreover, there are, of course, those that do not say anything about the right of indigenous peoples in respect of consent or consultation. In some cases the national laws recognize the right to consultation or participation in general, but not specifically for indigenous peoples; for example, in a law on “good governance” or citizen participation or decentralization.⁴⁰ Some States Parties, such as Canada, claim another interpretation. They articulate that there are two different standards that could apply. One standard is “prior and informed consent”; the other is “approval and involvement.” This could suggest that there would only be “involvement” in relation to situations of “approval” and not “PIC.” Such an interpretation would not be coherent and would be inconsistent with international and domestic law.⁴¹⁺⁴²

³⁹ Hasrat Arjjumend et al., *Comparative Analysis of Access and Benefit Sharing Regimes in India and Russia in the Context of Indigenous Peoples and Local Communities*, 1(9) Journal of Siberian Federal University. Humanities & Social Sciences 265 (2016).

⁴⁰ Open-ended Ad Hoc Intergovernmental Committee, *supra* note 26.

⁴¹ Permanent Forum on Indigenous Issues, Report on the Tenth Session (16–27 May 2011), Economic and Social Council, Official Records, Supplement No. 23, U.N. Headquarters, New York, E/2011/43, E/C.19/2011/14, para. 36, where in regard to FPIC, “[T]he Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of ‘consultation.’” See also *Black’s Law Dictionary* 346 (9th ed., St. Paul, MN: Thomson Reuters, 2009): “Consent, *n.* ... Agreement, approval, or permission as to some act or purpose, esp. voluntarily by a competent person; legally effective assent... *informed consent*... A person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives” (emphasis in the original).

⁴² Open-ended Ad Hoc Intergovernmental Committee, *supra* note 26.

Articles 7 and 5.1⁴³ of the Nagoya Protocol emphasize the necessity of mutually agreed terms (MAT) between the provider party and the user party with the critical involvement of ILCs. Considering the existing inequities and imbalance of power between provider countries (usually the developing world) and user countries (usually the developed world), the Nagoya Protocol has reiterated the need for conditioning the MAT document to minimize the asymmetrical deal. When questioned, the CNAs of a majority of the surveyed nations (70%) – India, Bangladesh, Thailand, Lao PDR, Vietnam, the Philippines and Russia – confirm that their respective country's ABS legislation/policy includes provisions on drafting the mutually agreed terms (MAT) on equity principles, opposing the dominant positions of the user countries (usually developed nations), as envisaged in Article 5.1 of the Nagoya Protocol (Table 2: q. 5). Brunei and Mongolia reported that their respective country's ABS legislation/policy does not include such provisions on drafting the mutually agreed terms (MAT) on equity principles (Table 2: q. 5). China, however, did not disclose its position. *Therefore, the majority of the competent national authorities have clarity in their respective ABS legislation/policy about how to draft the mutually agreed terms (MAT) on equity principles, opposing the dominant positions of the user countries (usually developed nations), as envisaged in Article 15.1⁴⁴ of the Nagoya Protocol.*

Particular stress is laid down in the Nagoya Protocol on social equity and justice in the form of the ensured effective participation of ILCs in processes of MAT preparation and signing. In this regard, 50% of the surveyed countries (India, Thailand, Vietnam, the Philippines and Russia) have confirmed that their ABS legislation/policy provide for engaging ILCs in developing MAT, in accordance with Article 12.3(b)⁴⁵ of the Nagoya Protocol (Table 2: q. 6); while 40% of the surveyed countries (Lao PDR, Brunei, Mongolia and China) declined that any such provision exists in their respective ABS legislation/policy (Table 2: q. 6). Bangladesh was unaware of such a provision; and 2 countries did not respond/address the question. *So, it is reflected in the opinions of the competent national authorities that the position of a majority of the countries is quite strong in relation to executing MAT principles and involvement of ILCs therein.* The respondent CNA of

⁴³ Article 5.1 reads: "In accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. *Such sharing shall be upon mutually agreed terms.*"

⁴⁴ Article 15.1 reads: "Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party."

⁴⁵ Article 12.3(b) reads: "Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of (b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources."

Vietnam added that the benefits are to be shared, under Biodiversity Law 2008, among the stakeholders including ILCs that own the genetic resources or ITK based on the MAT agreement that has been agreed upon at an early stage. The Philippine authorities elaborated the “real meaning” of participation and justice in the following ways: (1) The concerned ILCs shall have a share in any royalties to be paid for patented products and technology developed from the use of biological resources from the country; (2) There is a provision of in-kind benefits (scholarships, livelihood opportunities, capacity-building programmes) from the funds generated from upfront payments made by resource users; (3) Acknowledgment has to be given to ILCs in research reports, with a provision to supply copies of such research reports to them.

In addition to the above interpretation, Lucy Mullenkei of the Indigenous Information Network⁴⁶ summed up the situation by noting that most governments are not involving ILCs fully in the process. Most ILCs have no knowledge yet of their national ABS regulations.⁴⁷ Mullenkei articulated that there will be no fair and equitable sharing of benefits if ILCs are not fully involved in negotiating MAT. Just providing PIC is not sufficient. Lassen argues that a human rights-based approach should be used to ensure recognition and respect for the rights of ILCs.⁴⁸ Again, according to Lassen,⁴⁹ MAT preparation needs contemporary world perspectives and the necessary negotiation skills. She discloses that ILCs are in general not familiar with negotiating commercial international contracts. Therefore, ILCs should seek competent legal advice and enter into cooperation with appropriate capacity-development programmes. As a result, if it becomes known that utilization with their genetic resources and associated ITK is ongoing without the necessary PIC and MAT, then ILCs may seek the support of their national CNA and contact the CNA in the country of the user of the genetic resources.⁵⁰ Lassen advocates that CNAs of provider countries should support ILCs in such cases with legal advice and through additional communication with user country CNAs.

2.2. Recognition of ILCs' Access to Bioresources in Their Territories

ILCs' access to bioresources within their territories equates to the “customary use” of biological resources as enshrined in Article 10(c) of the Convention on Biological Diversity, which states:

⁴⁶ Available at <http://indigenous-info-kenya.net/>.

⁴⁷ Barbara Lassen, *The Two Worlds of Nagoya: ABS Legislation in the EU and Provider Countries: Discrepancies and How to Deal with Them*, Report, Public Eye & Natural Justice (December 2016) (Sep. 10, 2018), available at https://www.publiceye.ch/fileadmin/files/documents/Biodiversitaet/The_two_worlds_of_Nagoya_11-16.pdf.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

The Contracting Parties shall *as far as possible* and as appropriate: (c) *Protect and encourage* customary use of biological resources *in accordance with traditional cultural practices* that are compatible with conservation or sustainable development.⁵¹

“Customary use” is a well-established basis for recognition of indigenous peoples’ land and resource rights in international and domestic legal systems.⁵² In addition, the Joint Submission of Grand Council of the Crees et al. further elucidated that “customary use of biological resources *in accordance with traditional cultural practices*”⁵³ signifies that States Parties have a positive obligation to safeguard and promote these practices. The Human Rights Council pointed out, in 2010,

[I]t is the traditional purposes for such taking which should remain paramount in considering customary uses⁵⁴ of biological resources and traditional cultural practices.

On the one hand, the entire world is talking about the access of users of one country to the biological resources existing in another country; while, on the other hand, a majority of countries restrict their own ILCs from access to the same bioresources.⁵⁵ So, the question “Does your country restrict ILCs’ access to bioresources in forests and protected areas?” was presented to the surveyed indigenous organizations/individuals (Table 1: q. 4). In response, 13.34% of the surveyed indigenous organizations/individuals confirmed the full restriction of ILCs’ access to bioresources in forests and protected areas in their respective countries. In addition, 53.32% of respondents confirmed the selective restriction of ILCs’ access to bioresources in forests and protected areas (Table 1: q. 4). From among the respondents, 13.34% of the surveyed indigenous organizations/individuals said that their respective country does not restrict ILCs’ access to bioresources in forests and protected areas (Table 1: q. 4).

⁵¹ Emphasis added. For the purposes of the Convention on Biological Diversity, “biological resources” includes, *inter alia*, genetic resources (Article 2).

⁵² As noted by the Human Rights Council, in 2010, “At the international and national levels, indigenous peoples’ rights are most often determined on the basis of traditional occupation or other use of their traditional lands, territories and resources.”

⁵³ Open-ended Ad Hoc Intergovernmental Committee, *supra* note 26.

⁵⁴ *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Ser. C No. 79, Judgment, 31 August 2001, para. 151: “As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.”

⁵⁵ Hasrat Arjumend, *Analysis of India’s ABS Regime in Context of Indigenous People and Local Communities*, 4(1) International Journal of Applied Research & Studies (2015) (Sep. 20, 2018), available at https://www.researchgate.net/publication/316102124_Analysis_of_India’s_ABS_Regime_in_Context_of_Indigenous_People_and_Local_Communities.

Therefore, *it is revealed from the analysis that a majority of the countries put restrictions on their own ILCs' access to bioresources in forests and protected areas.*

Half of the surveyed countries (50%) showed an opposite trend by saying that they do not restrict ILCs' access to bioresources in forests and protected areas (Table 2: q. 7). Those countries were India, Nepal, Thailand, the Philippines and Mongolia. Yet, the ground observations and Indian laws such as the Indian Forest Act 1927 and the Wildlife (Protection) Act 1972 confirm full/partial restrictions on ILCs' access to bioresources in forests and protected areas. It is well evident that half of the countries (as 50% of the countries responded) put at least partial restrictions on their own ILCs' access to bioresources in forests and protected areas. Those countries included Bangladesh, Lao PDR, Vietnam, Russia and China. Brunei and Timor Leste did not address the question at all. Therefore, *it is inferred that half of the countries in the world put at least partial restrictions on their own ILCs' access to bioresources in forests and protected areas.*

The international legal instrument (i.e. the Nagoya Protocol) would, however, take years to trickle down to the lands of various countries of the world.⁵⁶ Dispossession is a historical fact with millions of ILCs displaced and continuing to be displaced from the forests, wetlands and river ecosystems which have been their ancestral homes, and their livelihoods taken away along with their lifestyles, forced into subjugation and humiliation. Furthermore, the laws made for the betterment of indigenous peoples are kept in cold storage.⁵⁷ One such prominent example is India's Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, which was to ensure rights, but is not only half-heartedly implemented but also so amended as to it leave ineffective. The major reason for this wide gap between policymaking/existence and implementation is the lack of commitment by the government. There is a need for the emergence of a strong civil society movement in which ILCs, NGOs, academicians and activists actively participate and claim their rights from the state.

The traditional communities often have informal networks within neighbourhoods or concurring geographical territories, through which they share, barter, exchange, borrow and donate essential resources including bioresources and genetic resources. Seed exchange is one such popular example which may be sighted in every traditional community relying on natural resources. Seeds may be of crop plants, forest trees, medicinal plants, ornamental plants or cultural-value plants. On the question of whether the country ensures the rights of ILCs to exchange genetic resources and

⁵⁶ Konstantia Koutouki & Katharina Rogalla von Bieberstein, *The Nagoya Protocol: Sustainable Access and Benefit-Sharing for Indigenous and Local Communities*, 13(1) Vermont Journal of Environmental Law 513 (2012).

⁵⁷ Hasrat Arjjumend, *International Governance of Biodiversity: A Study of ABS Regim*, PhD Thesis (February 2016) (Sep. 20, 2018), available at https://www.researchgate.net/publication/325663561_International_Governance_of_Biodiversity_A_Study_of_ABS_Regime.

ITK within and amongst themselves or not, the majority (66.7%) of indigenous organizations/individuals were not aware of the issue (Table 1: q. 5). Only 33% of the surveyed respondents responded to the question. An insignificant number of respondents (6.66%) opined that their countries *fully ensure* the rights of ILCs to exchange genetic resources and ITK within and amongst themselves (Table 1: q. 5). Only 13.34% of the respondents said that their respective countries *partially ensure* the rights of ILCs to exchange genetic resources and ITK within and amongst themselves (Table 1: q. 5). Likewise, 13.34% of the respondents from the surveyed indigenous organizations/individuals expressed that their respective country *restricts* ILCs from exchanging genetic resources and ITK within and amongst themselves (Table 1: q. 5). So, *one may properly draw the conclusion that various countries do not really support ILCs' exchanging genetic resources and ITK within and amongst themselves.*

However, the competent national authorities of 40% of the responding countries (India, Thailand, Vietnam and the Philippines) responded differently, saying that they *fully ensure* the rights of ILCs to exchange genetic resources and ITK within and amongst themselves (Table 2: q. 8). However, the national competent authorities from another 40% of the responding countries (Bangladesh, Lao PDR, Mongolia and Russia) confirmed that they *partially ensure* the rights of ILCs to exchange genetic resources and ITK within and amongst themselves (Table 2: q. 8). Nepal did not say anything on the question, and Brunei and Timor Leste just did not address the question. So, *the views of the competent national authorities of the surveyed countries were divided on the issue of the rights of ILCs to exchange genetic resources and ITK within and amongst themselves. Half of them fully ensure the rights of ILCs, whereas half of them partially ensure the rights of ILCs to exchange genetic resources and ITK within and amongst themselves.* This is still only a little satisfactory.

Restrictions on ILCs' access to and customary use of biological/genetic resources amount to the violation of the rights of indigenous communities. According to the Joint Submission of Grand Council of the Crees et al., any dispossession⁵⁸ or diminution of the rights of indigenous peoples and local communities would be inconsistent with the central objective of "fair and equitable" benefit sharing of genetic resources. Moreover, the Nagoya Protocol confirms in its preamble:

Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities...

⁵⁸ In the context of access and benefit sharing, dispossession of the rights of indigenous peoples and local communities is precisely what the Convention and the Nagoya Protocol are supposed to address. See, e.g., Forest Peoples Programme, Environmental Governance (Sep. 20, 2018), available at <http://www.forestpeoples.org/en/work-themes/environmental-governance>: "[F]orest peoples do not have secure tenure over these areas [of high biodiversity] and are denied access and use of their territories because of inadequate government policies, extractive industries' activities, or conservation initiatives, such as protected areas. At the same time, many indigenous territories are increasingly threatened by unsustainable activities such as logging, mining, and plantations while the communities are not, or are only minimally, involved in official decision-making and management of these areas."

In international law, state sovereignty is not absolute and is especially limited by the obligations accepted by states in the Charter of the United Nations and specific treaties. As required by the Charter, the U.N. and its Member States have a duty to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.”⁵⁹ Such duty includes universal respect for the human rights of indigenous peoples affirmed in UNDRIP.⁶⁰ But, on the contrary, state laws compartmentalize the otherwise interdependent aspects of the bioresources interactions of ILCs by drawing legislative borders around them and addressing them as distinct segments. Eventually, while the communities manage integrated landscapes,⁶¹ the state tends to view each resource and associated traditional knowledge through a narrow lens, implementing corresponding laws through agencies that separately address, for example, biodiversity, forests, agriculture and indigenous knowledge systems.⁶² The result is that communities’ lives are disaggregated in law and policy, which effectively fragments and reduces their claims to self-determination.⁶³

Conclusion

Various countries had/have the opportunity to demonstrate that they recognize and enforce the rights of ILCs over the biological resources within their territories through making PIC of ILCs and MAT mandatory in their respective domestic ABS legislation/policy or administrative measures. Contrarily, in practice, the MAT agreements are mostly written in such a way that the states dominate all avenues of access and benefit sharing. Largely, the countries seem not to be adhering to the conditions of PIC being mandatory for users before accessing/utilizing any genetic resources and associated ITK. Nonetheless, PIC needs to be the major point of future

⁵⁹ Charter of the United Nations, Arts. 55(c) and 56. These Articles reinforce the purposes of the U.N. Charter, which include in Article 1(3): “To achieve international cooperation... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” See also Permanent Forum on Indigenous Issues, Report on the Tenth Session, *supra* note 41, para. 39: “Given the importance of the full range of the human rights of indigenous peoples, including traditional knowledge... the Permanent Forum calls on all United Nations agencies and intergovernmental agencies to implement policies, procedures and mechanisms that ensure the right of indigenous peoples to free, prior and informed consent consistent with their right to self-determination as reflected in common Article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which makes reference to permanent sovereignty over natural resources” (emphasis added).

⁶⁰ Open-ended Ad Hoc Intergovernmental Committee, *supra* note 26.

⁶¹ Alan Watson et al., *The Relationship Between Traditional Ecological Knowledge, Evolving Cultures, and Wilderness Protection in the Circumpolar North*, 8(1) Conservation Ecology 2 (2003).

⁶² In South Africa, e.g., the Department of Environmental Affairs has a mandate to manage the country’s biodiversity, but it shares responsibility to protect the communities’ associated (indigenous) traditional knowledge with the Department of Science and Technology.

⁶³ Jonas et al. 2010.

debates in the biodiversity governance forums, wherein the consultation, involvement or engagement of ILCs in issuing PIC to user States Parties before accessing/utilizing any genetic resources and associated ITK must take central space. Prior informed consent (PIC) is to follow the agreements based on mutually agreed terms (MAT) before accessing the genetic resources and associated indigenous traditional knowledge (ITK). It bears repeating, however, that in practice, MAT agreements are mostly written in such a way that the states dominate all avenues of access and benefit sharing. The space for ILCs remains either completely absent or marginal in the text of MAT. Even where MAT does exist, the definition leaves the understanding of ITK open to speculation and hence interpretation that could go against the interests of ILCs providing access to it.⁶⁴ There is an increase in the possibility of violation of rights of the most vulnerable communities through some crafty drafting of MAT. Therefore, the engagement and involvement of ILCs in drafting and executing MAT need to be ensured by both the provider party and the user party.

As observed, the custodians of the natural resources are usually denied access to the resources in a bid to colonize, enclose and control the natural treasures by the state (which is also known as stratification of resources). ILCs are the first casualties in such a process of a state's expansion. This happens conventionally in a majority of countries. In the same way, in some states ILCs are denied their rights to exchange the genetic resources held by them. Observations draw another disturbing trend in respect of the state laws being compartmentalized and disaggregated. The implementation of those disaggregated state laws further compounds the challenges by requiring communities to engage with disparate stakeholders.⁶⁵ Communities thus face a stark choice to either reject these inherently limited frameworks (something which is a virtual impossibility, considering the ubiquitous nature of state law) or engage with them at the potential expense of becoming complicit in the disaggregation of their otherwise holistic ways of life and governance systems.⁶⁶ In both the conditions, the communities end up losing.

Furthermore, since most biopiracy involves the powerful countries, they will always find ways to circumvent international or domestic laws; and ILCs being the weakest sections in the world may not be able to assert their rights over genetic resources. In such a situation, the national ABS laws/policy need to give desirable space and recognition to the respective ILCs in order to protect and conserve the biodiversity within their territories. However, it is dissatisfying when the provider countries (especially developing nations) silently accept the neoliberalization and commodification of genetic resources imposed by user countries and entities.

⁶⁴ Lassen, *supra* note 47.

⁶⁵ Examples include government agencies, conservation and development NGOs, private sector companies and researchers.

⁶⁶ Jonas et al. 2010.

Notably, the promotion of community-controlled governance grossly depends on the space given in the domestic laws of the countries. Surprisingly, a number of countries' existing policies/laws recognize ILCs; but ILCs are not in a position to claim their rights even by using enabling laws. The majority of countries have a dismal record in respect of adhering to the Nagoya Protocol and even what reporting is done under the Convention/Protocol is being done with negligence.

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