

# THE SPACE FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

## PARTICIPATION IN POLICYMAKING AND BENEFIT- SHARING NEGOTIATIONS

*The Nagoya Protocol on Access and Benefit-Sharing is a landmark international legislation governing genetic resource access and benefit-sharing founded on genetic resource and traditional knowledge use. Its objective of fair and equitable benefit-sharing, encompasses granting appropriate genetic resource access and relevant technology transfer with due consideration of all rights over such resources and technologies, but a reorientation is needed. Despite the protocol's progressive nature, unaddressed issues remain, including inadequate participation and involvement by indigenous peoples and local communities' during the crafting of both the Nagoya Protocol and its corresponding domestic laws—all of which cumulatively impact benefit-sharing processes.*

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### INTRODUCTION

**N**egotiated in 2010 during the Tenth Meeting of the Conference of the Parties (COP10) to the United Nations Convention on Biological Diversity (CBD) held in Japan, the Nagoya Protocol is a legally binding international instrument, which endeavours to advance national access and

benefit-sharing (ABS) legislation and/or administrative measures and regulate access to genetic resources and benefit-sharing arising out of the commercial utilisation thereof. (Maria Y Teran, "The Nagoya Protocol and Indigenous Peoples", *The International Indigenous Policy Journal*, vol7, no2, 2016, pp1–25) The Nagoya Protocol entered into force on 12 October 2014, ninety days after the date of deposit of the fiftieth instrument of ratification (online at <http://www.cbd.int>) and as of 18 September 2016 had 78 parties with 85 ratifications and 92 signatories. The protocol's objectives have led to worldwide debate concerning matters such as access to genetic resources, access to traditional knowledge, benefit-sharing mechanisms, the role of states and how indigenous peoples and local communities (ILC) are affected or involved in the process. (Roger Chennells, "Traditional Knowledge and Benefit-Sharing after the Nagoya Protocol: Three Cases from South Africa", *Law, Environmental and Development Journal*, vol9, no2, 2013, pp163–84) These debates are particularly important because the parties need to undertake domestic measures in compliance with the Nagoya Protocol and due to increased awareness about the protocol and its requirements among a variety of stakeholders. (Teran, *ibid*)

In general, international jurists are of the perception that the Nagoya Protocol represents progress in protecting the rights of indigenous peoples and their traditional knowledge. However, serious questions have arisen regarding ILCs' involvement, participation and engagement in policy decisions and law-making processes related to the protocol. (Kimberly RM Suiseeya, "Negotiating the Nagoya Protocol: Indigenous Demands for Justice", *Global Environmental Politics*, vol14, no3, 2014, pp102–24) This paper explores the views of ILCs' participant representatives in various international fora concerning the implementation of the Nagoya Protocol. It also analyses the implications of the data collected in the context of the protocol's capacity to address issues concerning ILCs' involvement, participation and engagement in international legal frameworks that currently guide pertinent national domestic laws, policies, administrative measures, procedures and guidelines.

Although the needs of ILCs are generally known not to constitute a priority for international and national legal frameworks, the collected data provide concrete evidence of the isolation and alienation that their representatives experience in

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their quest to serve as a voice for their communities and how such marginalisation impacts the resulting legislation and/or administrative measures, both nationally and internationally. An author from the Kichwa Nation (Ecuador) has pointed out that ABS meetings are mostly inaccessible for Spanish-speaking indigenous members from Latin America, by reason of the fact that they are mostly held in English and “due to (the protocol’s) heavy technical language”. (Teran, *ibid.*, p2)

## METHODOLOGY

This paper is part of a larger study for which the fieldwork was conducted from 2013 to 2015. Evaluative research methods were applied to examine the position of ILCs’ representatives in international fora and the impact of their position on ABS laws. Nonreactive (analysis of existing documents and secondary information) as well as reactive (structured interviews and participant observations) research methods were employed in the study and development of this paper. 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 observations. The operational definition of the variable includes how the researcher systematically notes and records observations. As nonreactive measures indicate a construct indirectly, the researcher needs to rule out reasons for the observations other than the construct of interest.

### *Sampling for Structured Interviews*

Stratified random sampling was employed in conducting the structured interviews with a list of potential respondents being prepared beforehand. Organisations/individuals working on or advocating ILCs’ issues and causes were first selected from civil society groups worldwide and then contacted. The list was subsequently narrowed using various criteria imposed by the financial constraints of the study. Thus, only participants who could respond to questions in English, those with access to email, etc were used. It was ensured that the sample included female participants, was geographically representative and would be

easy to access for follow up purposes, if needed. Pursuant to the selection process and subject to participant availability, ten individuals intensively involved in their communities in addition to being active international fora participants were interviewed.

### *Structured Interviews*

Prior to contacting potential respondents by email and conducting the structured interviews, a set of questions was developed (Table 1: Survey Questions and Responses) and grouped as follows:

- A. Respondents' awareness about ABS
- B. ILCs as primary stakeholders in ABS policy/law-making
- C. ILCs' participation in ABS policy/law-making and negotiation processes
- D. Fair and equitable benefit-sharing

The data was sourced from ten individuals representing diverse organisations from around the world. Their responses are conveyed at the end of the article in Table 1 and expressed in a percentage format. The respondents comprised the following:

1. Unrepresented Nations and Peoples Organisation, Belgium (represented by Emma Chippendale)
2. Mbororo Social and Cultural Development Organisation, 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, 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, Democratic Republic of the Congo, (represented by Nsase Soki Maurice)
9. Alex Nyamujulirwa George, Tanzania

## 10. Imad Abdel Moniem, Sudan

### *Participant Observations*

One of the research tools adopted was participant observations of negotiation processes in the CBD's global fora. This is a research technique used for qualitative research purposes. (Barbara B Kawulich, "Participant Observation as a Data Collection Method", *Forum: Qualitative Sozialforschung/Forum: Qualitative Social Research*, vol6, no2, 2005, online at <http://nbn-resolving.de>) Victor C de Munck and Elisa J Sobo (*Using Methods in the Field: A Practical Introduction and Casebook*, Walnut Creek: Alta Mira Press, 1998) describe participant observation as the primary method used by anthropologists in fieldwork, which involves "active looking, improving memory, informal interviewing, writing detailed field notes and ... patience". (Quoted in Kathleen M DeWalt and Billie R DeWalt, *Participant Observation: A Guide for Fieldworkers*, Walnut Creek: Alta Mira Press, 2002, pvii) The first and third 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 observed the space provided to ILCs' representatives of various countries in the deliberations and negotiations that took place pertaining to ABS mechanisms and regarding outstanding Nagoya Protocol issues. Particular attention was paid to the extent of ILCs' members' representation, participation, engagement and involvement in scheduled sessions of the ICNP-2 and COP11, as well as in side events.

### RESULTS AND DISCUSSION

While it is considered essential to the implementation of the CBD that indigenous peoples fully and effectively participate in international ABS processes, responsible parties have not adequately facilitated this desired participation as needed. (*Potential Threats to Indigenous Peoples' Rights by the Convention on Biological Diversity's*

*Proposed International Regime on Access and Benefit-Sharing*, International Expert Group Meeting on the Convention on Biological Diversity's International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights, 17–19 January 2007, New York, United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, PFII/2007/WS.4/92007 and Teran, *ibid*) During the meetings of the Working Group on ABS ahead of the Seventh Meeting of the Conference of the Parties (COP7) to the CBD, emphasis was placed on the procedural as well as the minimum substantive rights of indigenous peoples that the CBD must protect in any future international ABS regime. Discussions centred on indigenous peoples and benefit-sharing. The importance of indigenous peoples to CBD negotiations is seen from the recommendations that the United Nations made to the Permanent Forum on Indigenous Issues and the Ninth Meeting of the Conference of the Parties (COP9) to the CBD.

Despite the emphasis that the Nagoya Protocol and the international ABS system place on the need to recognise, involve and engage ILCs and provide space and recognition for their customary laws and institutions, they have received inadequate attention or importance in the development of national ABS legislation, policies, administrative measures and institutional frameworks.

(Hasrat Arjjumend, Sabiha Alam, Timo Koivurova and Nikolay G Shishatskiy, "Comparative Analysis of Access and Benefit-Sharing Regimes in India and Russia in Context of Indigenous Peoples and Local Communities", *Journal of Siberian Federal University: Humanities and Social Sciences*, vol9, no1, 2016, pp265–90) The exclusion of indigenous peoples is not restricted only

to the ABS system, but is common in all biodiversity conservation programmes. For instance, the establishment of protected areas excludes local and indigenous peoples from the ecosystems that they call home—the evolution of the ABS and Nagoya Protocol is not the exception. Therefore, the opinions of international indigenous respondents were gathered on exclusion-related questions. The implications of their views on this issue are presented below.

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### ***A. ILCs' Awareness about ABS***

Before exploring the data collected from survey respondents, the extent to which potential respondents were aware of ABS and the related Nagoya Protocol is

discussed. Seventy per cent of surveyed international indigenous organisations/individuals responded that they were aware of the International Regime on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation developed under the CBD (Table 1, Question 1). Similarly, 70 per cent also indicated that the said international ABS regime was linked to the rights of indigenous peoples and local communities (Table 1, Question 2).

Although the concept of ABS has evolved over a period of 17 years and the trajectory comprises a sizeable number of groups, meetings and negotiations that took place in international fora, ABS differs from intellectual property rights systems in that awareness among government officers and representatives, scientists, academics, communities and indigenous peoples remains low. Nonetheless, compared to earlier timeframes, awareness about the international ABS regime has increased since the advent of the Nagoya Protocol in 2010. Awareness among indigenous communities is of special interest, as they are the primary stakeholders of genetic resources and associated traditional knowledge—a central theme of the Nagoya Protocol.

### ***B. ILCs as Primary Stakeholders in ABS Policy/Law-Making***

It is critical that indigenous peoples and local communities (those who embody traditional lifestyles but do not come under the purview of indigenous peoples) be recognised as primary stakeholders by international fora, especially the CBD, when international policies, legislation and institutions on ABS are developed related to access to genetic resources and traditional knowledge associated with genetic resources. (Teran, *ibid*) This was confirmed by 80 per cent of surveyed indigenous organisations/individuals (Table 1, Question 3). Despite ILCs' clear desire to be considered as primary stakeholders, participant observations of the international negotiations of the CBD (as described in methodology) reveal that there is little evidence that they were involved by global organisations of biodiversity governance, such as the CBD, as primary stakeholders in the process of developing pertinent international policies, legislation and institutions. ILCs' rights are more clearly recognised in the Nagoya Protocol than the CBD as demonstrated by its text. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides for the right of indigenous peoples "to maintain, control, protect and develop their ... traditional knowledge ... as well as the manifestations of their sciences, technologies and cultures,

including ... genetic resources, seeds, medicines, knowledge of the properties of fauna and flora. They also have the right to maintain, control, protect and develop their intellectual property over such ... traditional knowledge”. Yet, certain scholars claim that ILCs’ rights are subject to domestic laws. (Kabir Bavikatte and Daniel F Robinson, “Towards a People’s History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit-Sharing”, *Law, Environment and Development Journal (LEAD)*, vol7, no1, 2011, pp35–51) In fact, the Nagoya Protocol’s obligations relating to ILCs and/or traditional knowledge are not qualified in the same manner as Article 8(j) of the CBD—the Nagoya Protocol qualification refers to domestic law (Articles 5(2), 6(2), 6(3)(f), 7(1), 12(1) and 16(1) of the Nagoya Protocol).

### ***C. ILCs’ Participation in ABS Policy/Law-Making and Negotiation Processes***

According to the surveyed indigenous organisations/individuals, the “active participation of indigenous peoples and local communities is essential in the process of developing international policies, legislation and institutions” (Table 1, Question 4). Similarly, 90 per cent of the surveyed respondents (Table 1, Question 5) stated, “indigenous peoples and local communities needed/need to be involved in the negotiation processes during the developmental part of international policies, legislation and institutions”. The data clearly illustrate that ILCs’ stakeholders’ participation and involvement is essential when making international ABS policy and legislation and in negotiation processes through global biodiversity governance fora. Thus, there is a strong need to empower indigenous peoples for them to participate fully and effectively in ABS processes, thus ensuring the full protection of their rights in a legally binding international regime on access and benefit-sharing (that is, the Nagoya Protocol on ABS). An essential prerequisite to this is a more open dialogue between indigenous peoples and the governments of the countries in which they reside. The Nagoya Protocol provides the basis for such state–ILCs interface through Article 12, which requires parties to:

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1. Take into consideration ILCs' customary laws, community laws and procedures with respect to traditional knowledge associated with genetic resources
2. Establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations
3. Support the development by ILCs of
  - a. Community protocols in relation to ABS in traditional knowledge
  - b. Minimum requirements for mutually agreed terms
  - c. Model contractual clauses for benefit-sharing
4. Not to restrict the customary utilisation and exchange of genetic resources and associated traditional knowledge within and amongst ILCs in their implementation of the Nagoya Protocol (Katharina R von Bieberstein and Konstantia Koutouki, *The Nagoya Protocol: Status of Indigenous and Local Communities*, Legal Working Paper Series, Centre for International Sustainable Development Law, Montreal, 2011, online at <http://cisdl.org>)

Subsequent to a range of meetings, fora and gatherings of the Working Group on ABS as well as the Working Group on Article 8(j), it became clear from an analysis of various reports of these events that the number of indigenous participants was limited and wholly inadequate. (also see Teran, *ibid*) In the ICNP-2 and the COP11, government delegations of the parties to the CBD were also observed not to have any representation from respective ILCs. However, ILCs' representative members took part as independent civil society groups or indigenous fora. (Teran, *ibid*) Although nations are the parties to the CBD, that is, they are the ones with the power to negotiate and make decisions, indigenous peoples nonetheless endeavour to influence negotiations by lobbying them to take up indigenous causes and by actively asserting their rights on the floor. To achieve this however, indigenous peoples must be accorded full and effective participation in CBD fora.

Hasrat Arjjumend (*International Governance of Biodiversity: A Study of ABS Regime*, PhD Thesis, MMAJ Academy of International Studies, Jamia Millia Islamia Central University, New Delhi, 2016) articulates that indigenous peoples feel that undue emphasis on state sovereignty could undermine the gains achieved in the recognition and protection of their rights in international and regional human rights fora. In fact, the CBD has been cited in some human rights meetings as the basis for denying indigenous peoples their rights over resources found within their lands and territories. Indigenous

peoples maintain that sovereignty is not absolute. (*ibid*) Article 3 of the CBD acknowledges that sovereignty is limited by the United Nations Charter and the principles of international law. Article 15.1 of the CBD reads, “Recognising the sovereign rights of states over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”. Article 12.4 of the Nagoya Protocol on ABS also leaves the ILCs’ rights of access to bio-resources to the state’s discretion by employing the phrase “as far as possible”. (Bavikatte and Robinson, *ibid*)

Thus, theoretically, ILCs have rights over bio-resources but considering how governments allocate land rights, it is uncertain which bio-resources will be controlled by the ILCs. National sovereignty often supersedes private/community ownership and entitlement, including those of ILCs. States actually overrule the rights of indigenous peoples throughout the Nagoya Protocol. It is clear that most governments neglect their ILCs and their respective rights. (Arjjumend, *ibid*) The vast majority of state parties to the CBD have ratified international human rights treaties that recognise indigenous peoples’ rights to self-determination and to their lands, territories and resources, most of which are codified in UNDRIP.

Some scholars argue that given the tense relationship between states and indigenous peoples, it is unlikely that states would give indigenous peoples access to international arenas. (von Bieberstein and Koutouki, *ibid*) This argument is reinforced by Arjjumend, (*ibid*) who has analysed the need for ILCs to participate or be involved in the ABS law-making and negotiation processes. He points out that dialogue between indigenous peoples and governments is increasingly essential to engage ILCs in various legal and policy processes. Thus, the CBD must respect the rights of indigenous peoples, as must the vast majority of its parties when giving effect to the convention at the domestic level.

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#### ***D. Fair and Equitable Benefit-Sharing***

The objective of the Nagoya Protocol (Article 1) is the fair and equitable sharing of benefits arising from the utilisation of genetic resources, including appropriate access to such resources and transfer of relevant technologies. Furthermore, the protocol calls for taking into account such resource and technology rights and issues of appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable utilisation of its components. (Michael Frein and Hartmut Meyer, *Nagoya Protocol on Access and Benefit-Sharing under the Convention on Biological Diversity*, Background Paper D, Bonn, EED and WWF-Germany, 2011, online at <http://www.wwf.de>) Hence, the question arises whether the commitment of the parties to undertake measures so that benefits are shared in a fair and equitable way with ILCs only arises if the party concerned has domestic legislation to such effect. It may be argued that the reference in the provision to ILCs “holding such knowledge” (that is, traditional knowledge) entails an implicit reference to domestic law. Furthermore, the Preamble states that in the protocol nothing “shall be construed” as diminishing or extinguishing the existing rights of ILCs and it also contains a number of other considerations pertaining to these rights. (Athanasios Yupsanis, “ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview”, *Nordic Journal of International Law*, vol79, no3, 2010, p433)

With the above background, the Nagoya Protocol’s rhetoric was tested by surveying various respondents belonging to indigenous communities. Only 20 per cent confirmed that the Nagoya Protocol would ensure fair and equitable sharing of the benefits arising from the utilisation of genetic resources and indigenous traditional knowledge associated with genetic resources, while 50 per cent had no opinion on the matter and 30 per cent did not feel that the protocol would ensure fair and equitable sharing (Table 1, Question 6). Further, only 20 per cent of surveyed respondents felt that countries would share a percentage of benefits received from user countries (usually developed ones) with ILCs who hold the genetic resource or associated indigenous traditional knowledge in question, while 60 per cent expressed doubt in that regard (Table 1, Question 7). It is thus clear that indigenous organisations have little confidence that the governments of various countries would share benefits received with their respective ILCs who hold the pertinent genetic resource or associated indigenous traditional knowledge. Only a minority of international respondents confirmed that the Nagoya Protocol would ensure fair and equitable sharing of the benefits arising from the utilisation of genetic resources and indigenous traditional knowledge associated with genetic resources.

Some of the respondents commented that merely signing or ratifying a protocol would not help. The Nagoya Protocol should ensure international legal provisions and financial support for the “voiceless” indigenous communities of the South who possess valuable knowledge on local biodiversity and its uses, to protect/safeguard it and to ensure that the benefits are equally shared. (Chennells, *ibid*) Considering the power imbalance in place, it is not certain that such fair sharing will happen—the ABS basically appears to be an instrument to earn money for companies (users of genetic resources) at minimum cost. (Teran, *ibid*)

Therefore, while there will be some benefit to the providers of genetic resources or traditional knowledge, it will not be significant. Some countries have developed or are in the process of developing national legislation and/or administrative measures to regulate not only access to genetic resources and traditional knowledge, but also to control the transaction/routing of the benefits from users to providers. (Chennells, *ibid*) Governments usually act as full regulators, negotiators, controllers and filters. No monetary benefit can be routed to the provider ILCs without the approval of the government’s competent national authority or some other mechanism. In most cases, such as in India, monetary benefits first go to the governmental authority and only if the authority permits, the benefits eventually trickle down (usually only partially) to the provider ILCs. In most cases, governments retain the benefits in their entirety—chiefly in situations of blurred ownership claims of any ILCs over the pertinent genetic resource or traditional knowledge.

In the context of equitable benefit-sharing, repeated references to domestic ABS legislation in the Nagoya Protocol are in recognition of national sovereignty—on the other hand, it may empower parties to interpret the ABS regime in their own fashion and treat the respective ILCs at their discretion. The meaning of the phrase “domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources” in Article 5.2 of the Nagoya Protocol was interpreted differently by the various participants in the survey. Based on the views of the respondents, the variety of interpretations is as follows:

**The Nagoya Protocol should ensure international legal provisions and financial support for the “voiceless” indigenous communities of the South who possess valuable knowledge on local biodiversity and its uses—however the ABS basically appears to be an instrument to earn money for companies (users of genetic resources) at minimum cost.**

- Domestic legislation is decisive in this case. It governs the establishment of rights over genetic resources and traditional knowledge by statutory legal arrangement. In practice, the rights of ILCs over genetic resources will be in accordance with the relevant domestic legislation, such as the constitution and the law of regional national autonomy, for example in China. Hence, each party is free to establish domestic law on the rights of ILCs over genetic resources. If such law has been established, then it has to be taken into account in the benefit-sharing mechanisms developed nationally in accordance with the pertinent laws.
- Domestic legislation should recognise/protect the rights of ILCs over genetic resources and benefit-sharing mechanisms have to include human rights/tribal rights in a transparent manner. This is because in most cases, ILCs themselves cannot defend their rights and multinational corporations may take advantage of them.
- ILCs are granted rights to determine the utilisation and hopefully ownership rights as well over their genetic resources. In this regard, Article 5.2 of the Nagoya Protocol fundamentally differs from Article 5.5, which does not address domestic legislation. This may well be because traditional knowledge ownership is a human rights issue (see UNDRIP).

Therefore, there are constraints on benefit-sharing with ILCs, giving rise to equity and justice concerns, partly due to the fact that repeated references to domestic ABS legislation in the Nagoya Protocol illustrate the precedence of national sovereignty, which in turn empowers parties to interpret the ABS regime in their own fashion and treat respective ILCs according to their discretion. Article 5.2 of the Nagoya Protocol recognises and upholds as decisive the rights of ILCs over genetic resources in the context of benefit-sharing. Nevertheless, this benefit-sharing has to be based on domestic legislation.

## CONCLUSION

Of particular concern in the discussion of the Nagoya Protocol on ABS is the right of indigenous peoples to participate in decision-making processes, to access the biological resources on which they depend and receive an equitable share of benefits arising from the utilisation of genetic resources. (Suiseeya, *ibid*) Lack of ILCs'

involvement/participation, engagement and space in the development of the international ABS regime is another core issue for further debate. (*ibid*) Thus, there is a strong need to ensure indigenous peoples' full and effective participation in ABS processes at the international as well as domestic level in order to achieve the full protection of their rights in a legally binding international access and benefit-sharing regime (that is, the Nagoya Protocol on ABS). Despite express references in the UNDRIP, the UN Permanent Forum on Indigenous Issues and other important instruments for increasing ILCs' participation and involvement, progress made with the engagement of indigenous peoples in the policymaking processes of the CBD and the development of the Nagoya Protocol has been minor. Insofar as the development of domestic ABS laws is concerned, the position has deteriorated further.

The next issue to arise will be indigenous peoples' share of decision-making powers for purposes of ascertaining the extent of benefit-sharing. Again, the Nagoya Protocol has largely left it to the parties to promulgate domestic laws and to make desirable provisions in them for equitably sharing in the accrued benefits deriving from genetic resources or associated indigenous traditional knowledge. (Elisa Morgera, Elsa Tsioumani and Mathias Buck, *Unravelling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and*

**In the absence of fair and equitable benefit-sharing with indigenous peoples, the Nagoya Protocol fails as international law, simply because its current provisions are ambiguous and inadequate.**

*Benefit-Sharing to the Convention on Biological Diversity*, Leiden: Brill, 2014) However, where a state does not take it seriously or does not accord respect to indigenous peoples, what recourse do they have? Therefore, in the absence of fair and equitable benefit-sharing with indigenous peoples, the Nagoya Protocol fails as international law, simply because its current provisions are ambiguous and inadequate. (Konstantia Koutouki and Katharina R von Bieberstein, "The Nagoya Protocol: Sustainable Access and Benefit-Sharing for Indigenous and Local Communities", *Vermont Journal of Environmental Law*, vol13, 2012, pp513–35) In fact, the Nagoya Protocol is supposed to furnish international legal provisions and financial support for "voiceless" indigenous communities in order to ensure equitable benefit-sharing with them.


Another serious implication of the exclusion of indigenous peoples derives from the fact that the Nagoya Protocol also repeatedly refers to "domestic laws" and "state sovereignty". This denotes that genetic resources utilisation has to be dealt with under the principle of state sovereignty and the developed/developing

domestic legislation of countries. International law on ABS (the Nagoya Protocol) also does not adequately address the need to give space, recognition and legitimacy to indigenous peoples and their traditional knowledge. Passing the buck to the parties to respect the rights of their respective indigenous peoples and letting such matters depend on the goodwill of the parties simply evince the CBD's attempts to escape its core responsibilities and further deprive indigenous peoples. The Nagoya Protocol's vagueness tends to empower states further, allowing them to violate the rights and dismantle the institutions of indigenous communities.

Reinforcing state sovereignty over the biological resources of the nation-state amounts to a further strengthening of countries to dispossess their respective first nations and traditional communities. Indigenous peoples also believe that the CBD and Nagoya Protocol's undue emphasis on state sovereignty could undermine the gains achieved in the recognition and protection of their rights in international and regional human rights fora. Most of the references in the Nagoya Protocol pertaining to access to genetic resources, the rights of ILCs, prior informed consent, mutually agreed terms, community protocols, monitoring, etc relate to domestic measures of the parties that partially reinforce state sovereignty. This portion of the Nagoya Protocol hence attempts to shift the responsibility to the states. Therefore, if states do not have a well-developed charter of rights for indigenous peoples (and most countries do not) the Nagoya Protocol will lose much of its impact.

Overall, the results of this study point to the fact that the parties to the CBD are the ones with the ultimate power to negotiate and make decisions. Indigenous peoples nonetheless endeavour to influence negotiations by lobbying states to take pro-indigenous positions and by actively asserting their rights on the floor. Thus, at COP10 more than two thirds of the registered participants were non-party delegates—these included *inter alia* ILCs, nongovernmental organisations and education and research organisations. (Suisseeey, *ibid*) Based on observations it is noted that states are not motivated to advocate for the interests and rights of ILCs domestically or in global fora. Moreover, the stratification of resources and the appropriation of biodiversity and traditional knowledge are known characteristics of the establishment and stability of states—yet such states have more often than not destabilised and uprooted indigenous peoples, making them second-class citizens within their native lands. Therefore, expecting national governments to fulfil the interests of ILCs and respect their rights is futile.

### *Recommendations*

The foremost recommendation is that the Nagoya Protocol on ABS should be amended to eliminate contradictions relating to indigenous peoples and local communities. The involvement, participation and consultation of the representative groups of indigenous peoples in this process must be made mandatory. This should also apply to any new policy process or legal discourse relating to the Nagoya Protocol. The CBD, as an international biodiversity governance structure, should ensure not only the participation, involvement and engagement of ILCs in ABS processes, but also confirm their adequate and true representation in committees, fora, bodies, meetings, etc. In addition to participation and involvement there is the overall space and power that needs to be given to indigenous peoples in the legal texts of the Nagoya Protocol so that ILCs have a fair and equitable stake in deciding matters related to user access to bio-resources and benefits that accrue as a result. Indigenous peoples' fate must not be left to the states through the doctrine of "sovereignty". Having such measures taken at the level of international law on ABS, domestic laws of countries would be relatively better off if they gave due rights and justice to the pertinent indigenous communities and as a result, the conservation goal of the CBD could be largely realised .

**Table 1: Survey Questions and Responses of International Indigenous Organisations/ Individuals in the Context of the Nagoya Protocol's Effectiveness**

Opinion Survey Questions	International Respondents	
	Response (Total number of Respondents = 10)	Response Percentage
<b>A. Respondents' awareness about ABS</b>		
1. Are you aware of an international regime that has emerged on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation (ABS), which has been negotiated since 1998 (in COP4) under Article 15 of the UN Convention on Biological Diversity?	1. Yes (7) 2. No (3)	1. 70% 2. 30%
2. Do you think that the Regime on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation (ABS) is connected to indigenous peoples and local communities (ILCs)?	1. Yes (7) 2. No (1) 3. I do not know (2)	1. 70% 2. 10% 3. 20%



Opinion Survey Questions	International Respondents	
	Response (Total number of Respondents = 10)	Response Percentage
<b>B. ILCs as primary stakeholders in ABS policy/lawmaking</b>		
3. Do you think that indigenous peoples and local communities (ILCs) constitute one of the primary stakeholders in the process of developing international policies, legislation or institutions related to:	<p>A. Access to Genetic Resources held by ILCs</p> <p>1. Yes (8)</p> <p>2. No (2)</p> <p>B. Access to Traditional Knowledge associated with Genetic Resources held by ILCs</p> <p>1. Yes (8)</p> <p>2. No (2)</p>	<p>A.</p> <p>1. 80%</p> <p>2. 20%</p> <p>B.</p> <p>1. 80%</p> <p>2. 20%</p>
<b>C. Participation of ILCs in ABS policy/lawmaking and negotiation processes</b>		
4. Do you think that the active participation of indigenous peoples and local communities (ILCs) in the process of developing international policies, legislation or institutions is essential?	<p>1. Yes (10)</p> <p>2. No</p> <p>3. I cannot say</p>	<p>1. 100%</p> <p>2. 0%</p> <p>3. 0%</p>
5. Do you think that indigenous peoples and local communities (ILCs) needed/need to be involved in negotiation processes during the development of international policies, legislation and institutions?	<p>1. Yes (9)</p> <p>2. No (1)</p> <p>3. I do not know / I cannot say</p>	<p>1. 90%</p> <p>2. 10%</p> <p>3. 0%</p>
<b>D. Fair and equitable benefit-sharing</b>		
6. Do you think that the Nagoya Protocol would ensure fair and equitable sharing of the benefits arising from the utilisation of genetic resources and indigenous traditional knowledge associated with genetic resources?	<p>1. Yes (2)</p> <p>2. No (3)</p> <p>3. I cannot say (5)</p>	<p>1. 20%</p> <p>2. 30%</p> <p>3. 50%</p>
7. Will the parties further share the benefits (received from user countries (usually developed countries)) with their ILCs holding the accessed/utilised genetic resource or associated indigenous traditional knowledge?	<p>1. Yes, the parties would share the received benefits with ILCs judiciously</p> <p>2. Yes, the parties would share the received benefits with ILCs, but only a fraction thereof (2)</p> <p>3. It is likely that the parties would share the received benefits with ILCs (6)</p> <p>4. No, the parties would not share the benefits with ILCs</p> <p>5. I do not know (2)</p>	<p>1. 0%</p> <p>2. 20%</p> <p>3. 60%</p> <p>4. 0%</p> <p>5. 20%</p>