



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

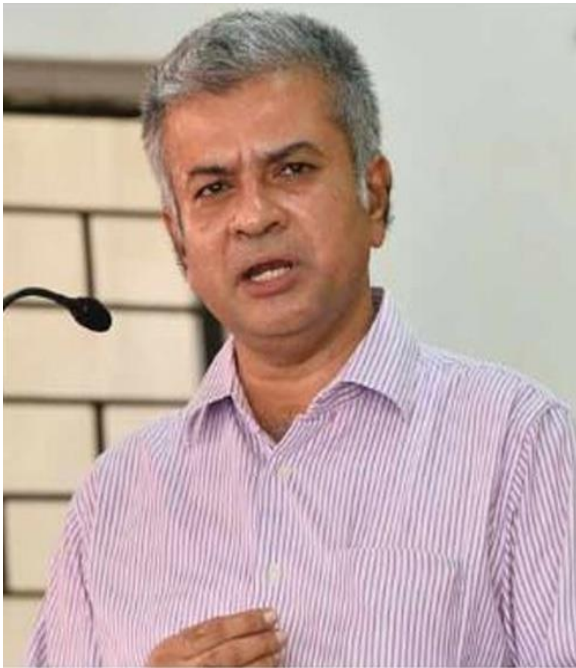
DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal – The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and diploma in Public

a professional Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM-degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi,

Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

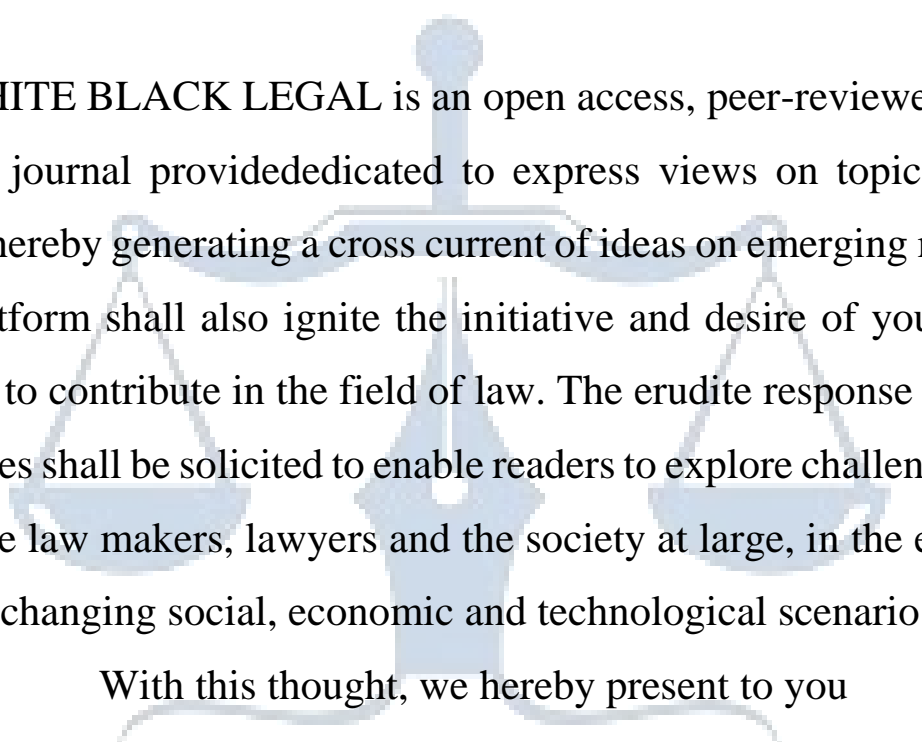


Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

W H I T E B L A C K
L E G A L

BIODIVERSITY BEYOND NATIONAL JURISDICTION (BBNJ) AGREEMENT AND ROLE OF TRADITIONAL KNOWLEDGE

AUTHORED BY - KIRTI MINHAS*

ABSTRACT

Traditional Knowledge (TK) of the ocean and its resources has to be recognised by the International community. The indigenous and local community holders of the traditional knowledge have to be brought into the international community for the development and implementation of conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ) under the United Nations Law of the Sea (UNCLOS).

The paper discusses the working definitions of TK which are part of international instruments to understand what exactly is TK. There is no definitive definition of the term. The second section of the paper will cover international instruments including the Convention on Biodiversity (CBD) and its Nagoya Protocol along with UNCLOS to explain the need for TK in the BBNJ instrument. It will consider the overlap between the two conventions with regard to marine resources and the legal impact on marine scientific research (MSR). Along with the legal landscape of access to and utilization of marine resources. Further, the last part of the paper discusses the latest draft of BBNJ and the importance it has given traditional knowledge. An overview of the draft treaty is provided in order to suggest a way forward for India.

I. INTRODUCTION

Ocean and its resources are one of the most valued resources of the world. More than 90% of the planet is water. Humans depend on the ocean for a lot of activities as well. 17% of the source of food in the world comes from the ocean, then there is transportation and world trade more than 70% of which is through the ocean.¹ 50% of the air we breathe is generated from oceans and it helps in balancing climate change. A pictorial representation of the same is made in Figure 1.

¹ Ocean resources: a gift for life economy and the planet, <https://oceanliteracy.unesco.org/ocean-resources/> (last visited Jul 21, 2022).



Figure 1, Source: National Ocean Service

Sustainable use of the oceans and their resources is a key feature for the protection of biodiversity. Sustainable Development Goal (SDG) 14² on conservation and sustainable uses of ocean and life below water is essential for reaching other goals as well. 14.7 in which focuses on increasing economic benefits to small islands, least developed nations, and developing nations with sustainable use of marine resources.

The legal instrument already in place for the same is the Convention on Biological Diversity (CBD)³ and the Nagoya Protocol on access and benefit sharing⁴. Further, for the achievement of the goal, one of the recent treaties undergoing development in the United Nations is the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ)⁵ under the United Nations Convention on Law of the Sea (UNCLOS).⁶

Indigenous people and local communities (IPLC) play an important role in achieving all these goals. CBD talks about benefit sharing with the local communities through prior informed consent and mutually agreed terms. These communities are holders of a vast amount of traditional knowledge

² THE 17 GOALS | Sustainable Development, <https://sdgs.un.org/goals> (last visited Jul 21, 2022).

³ The Convention on Biological Diversity, 1993 <https://www.cbd.int/convention/> (last visited Jul 21, 2022).

⁴ The Nagoya Protocol on Access and Benefit-sharing, <https://www.cbd.int/abs/> (last visited Jul 21, 2022).

⁵ BBNJ treaty, (2022), www.un.org/bbnj (last visited Jul 20, 2022).

⁶ United Nations Convention on the Law of the Sea of 10 December 1982, https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (last visited Jul 21, 2022).

about oceans and their resources. In the negotiations of BBNJ the Small Island Developing States (SIDS) advocated for incorporating TK in the instrument.

This paper will be focused on bringing out the relevance of traditional knowledge in the BBNJ and along the way will explain how TK has been defined and its interaction with CBD. Secondly, the integration of TK with BBNJ and the coastal waters of the state. Further, a complete overview of the sustainability of biodiversity beyond national jurisdiction will be explained.

I. INTERNATIONAL LAW AND TRADITIONAL KNOWLEDGE (TK)

A. Definition of Traditional Knowledge:

There is no absolute definition of traditional knowledge in international law although many international instruments including BBNJ, Trade-related Aspects of Intellectual Property (TRIPS), CBD, etc. reference the traditional knowledge. The concept of traditional knowledge is explained in certain international instruments but does not explicitly define the term. All of these references, it is associated with a group of people who have the said knowledge like indigenous and local communities. Article 8 (j) of CBD obligates parties to:

*“respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations, and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.”*⁷ And the working group of the Article uses an informal definition i.e. *“knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”*.⁸

The international IP instruments have also given a working definition of TK. The World Intellectual Property Organisation (WIPO) has adopted a definition of TK through its intergovernmental governmental committee (IGC) on IP and Genetic Resources, TK, and Folklore.⁹ It defines TK as *“Traditional knowledge is knowledge, know-how, skills and*

⁷ The Convention on Biological Diversity, § 8 (j) *supra* note 3.

⁸ What the Convention says about Traditional Knowledge, Innovations and Practices, <https://www.cbd.int/traditional/what.shtml> (last visited Jul 21, 2022).

⁹ Intergovernmental Committee (IGC), Wipo.int (2022), <https://www.wipo.int/tk/en/igc/> (last visited Jul 22, 2022).

practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity". This includes knowledge related to ecology, agriculture, medicines, remedies, biodiversity etc.

The practices and traditions of indigenous and local communities have been experienced and developed over centuries and have passed on from generation to generation. It is a collective/community right in the form of stories, folklore, scriptures, language, cultural expressions, rituals, beliefs, agricultural, fishing practices, etc. It is of practical nature and has mainly been discovered in the fields of agriculture, aquaculture, horticulture, environment management, fisheries, plant species, etc.

The connection point among TK and advancements in the domains of pharmaceuticals, drugs, cosmetic care products, farming, synthetic compounds, and ecological protection, comprises the center of the 'biopiracy'. given vital destinations wherein Intellectual Property, explicitly the patent system straightforwardly draws in TK in contestation over the use of Genetic Resources (GRs) across various information structures.

TK, regardless of its pertinence (by and large restricted to an indigenous group or on occasion just inside a family locally), TK across the globe has been viewed as founded on specific moral and moral precepts. This homogenous way of behaving of TK renders an effect that is past national limits. The restriction of the fishing of specific species during their reproducing season is a visible and standard practice among all native fishing networks. The same could be seen in safeguarding coral reefs by native networks by the use of comparative procedures in various areas of the planet.¹⁰

The legislation pertaining to TK in India is depicted in Figure 2. These amendments in the different Intellectual Property (IP) legislation were made in consonance with the TRIPS agreement which in Article 27.3b¹¹ introduced sui generis protection for TK and plant variety. India observed noteworthy activism to protect traditional knowledge from being patented in Europe and America. The basmati, haldi, and neem controversy created pressure and led to some simple yet major sui

¹⁰ Etsoshan Y. Ovung et al., *Indigenous Community Fishing Practices in Nagaland, Eastern Indian Himalayas*, 14 SUSTAINABILITY 7049 (2022); Ch Sebastian Raju et al., *Fishing methods, use of indigenous knowledge and traditional practices in fisheries management of Lake Kolleru*, 4 ARTIC. J. ENTOMOL. ZOOL. STUD. 37–44 (2016), <https://www.researchgate.net/publication/306323384>.

¹¹ WTO | intellectual property (TRIPS) - Reviews, Article 27.3b, traditional knowledge, biodiversity, https://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm (last visited Jul 21, 2022).

generis protection of TK. Government of India (GOI), took the initiative and materialise TK in form of the Traditional Knowledge Digital Library (TKDL) which was established with the objective of incorporating a list of codified TK practices of India.¹²

Figure 2, Source Ragavan (2001)¹³

S. no	Indian legislation	Specific provision protecting TK in India
1	Patents Act 1970 (Amendments of 2002 & 2005)	Sections 3 (b), (c), (d), (f), (h), (i), (j) and (p) (But falls well short of patenting a TK)
2	Copyright Act	Section 31A, 38 and 57 But the term 'folklore' is absent. (Hence TCEs cannot be protected)
3	Geographical Indications Act 1999	Section 11, 24 and 25 (It is at its nascent stage and weak in its implementation) ^a
4	Trademarks Act 1999	Section 29 (It is challenging to get a trademark of all marks used throughout the development of TK)
5	Biodiversity Act 2002	Sec 6(1) (Very poorly implemented so far in India)

B. International Instruments of Marine Resources relevance of TK

i. Convention on Biological Diversity (CBD) and Nagoya Protocol

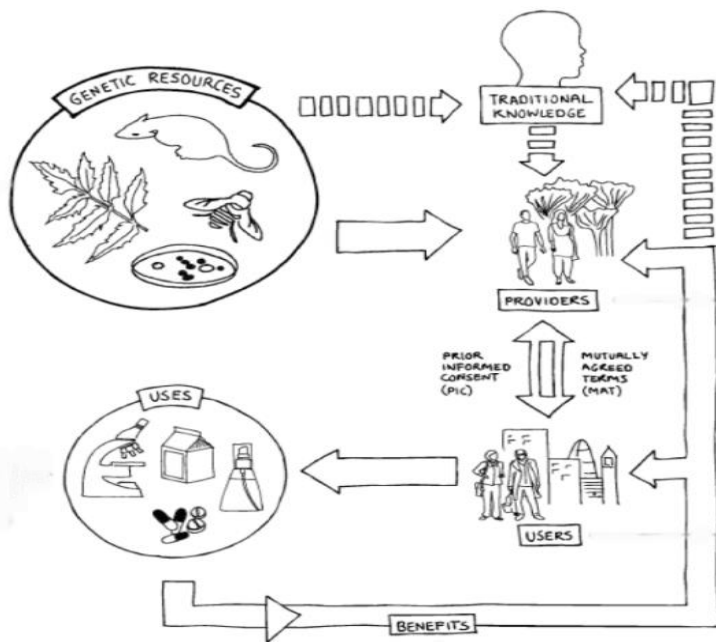
CBD, 1993 is addressing the biodiversity of terrestrial and aquatic origin. Article 3¹⁴ of the convention lays down the three main objectives of CBD: conservation of biological diversity, sustainable use, and sovereignty of the state over all natural resources. The convention came to light also for the introduction of access and benefit sharing (ABS) for the exploitation and utilization of natural resources including marine and marine genetic resources. The Nagoya Protocol, 2010 which came into force on 2014 under the convention elaborates the mechanism for ABS. Figure 3 explains the ABS framework under the protocol which is based on prior informed consent (PIC) and mutually agreed terms (MAT).

¹² Shambhu Prasad Chakrabarty & Ravneet Kaur, *A Primer to Traditional Knowledge Protection in India: The Road Ahead*, 42 LIVERP. LAW REV. 401–427 (123AD), <https://doi.org/10.1007/s10991-021-09281-4> (last visited Jul 21, 2022).

¹³ Srividhya Ragavan, *Srividhya Ragavan, Protection of Traditional Knowledge*, 2 MINN. INTELL, 2 PROP. REV (2001), <https://scholarship.law.umn.edu/mjlst> Available at: <https://scholarship.law.umn.edu/mjlst/vol2/iss2/1> (last visited Jul 21, 2022).

¹⁴ The Convention on Biological Diversity, § 3 *supra* note 3.

Figure 3, Source: Pharma Sea Toolkit



framework

CBD has done work in the field of ecological or biological significant areas (EBSA) which directly connects traditional knowledge with its holders. The areas are also in the coastal waters and as well as in areas beyond national jurisdiction.¹⁵

ii. United Nations Convention on Law of the Sea (UNCLOS), 1982 and over-lapping

Law of the Sea has evolved through customary laws and traditions over a period of time. It is hence effectively implemented by maritime actors and institutions. The convention came into force in 1994 around the same time as CBD. It is important to understand the two different regimes in which marine resources are governed. UNCLOS refers to living, natural and biological resources and gives different rights to states for exploitation, exploration, and research of the resources¹⁶ based on the maritime boundaries as explained in figure 4.

There is a potential overlap between UNCLOS and CBD, provisions of CBD and Nagoya protocol apply to the national jurisdiction of coastal states. And the UNCLOS determines the maritime boundaries of the coastal state. As explained in the figure 3 according to UNCLOS the boundaries of state extend to 200nm up to the exclusive economic zone (EEZ) and continental shelf (CS) (Article 56 & 77 UNCLOS).

¹⁵ Ecologically or Biologically Significant Marine Areas (EBSAs), Cbd.int (2022), <https://www.cbd.int/ebsa/> (last visited Jul 22, 2022).

¹⁶ PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, https://www.un.org/depts/los/convention_agreements/texts/unclos/part12.htm (last visited Jul 21, 2022).

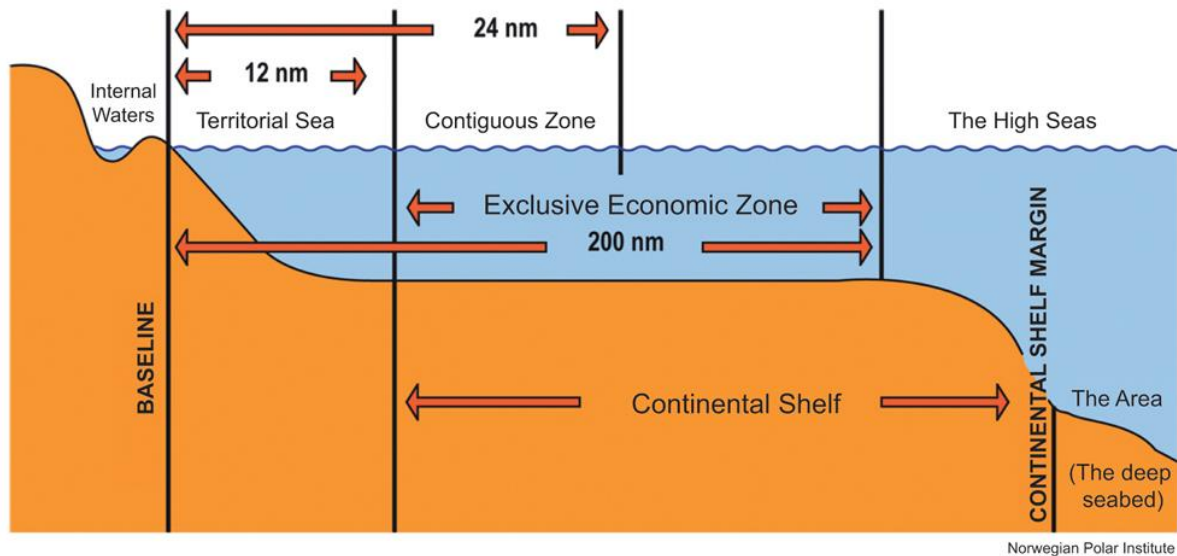


Figure 4

It is safe to conclude that the CBD applies up to a maximum of 350 nm from the baseline as there is a provision for extension of CS. The committee on limits of continental shelf can extend it up to a maximum of 150nm. (Article 77 UNCLOS).

Exclusive rights over the resources have to be differentiated from sovereignty over the maritime boundaries. Only for certain activities, do the sovereign rights apply, and few rights in the maritime zones are for other nations as well.

One of the rights under UNCLOS Article 248 covers Marine Scientific Research (MSR). The rights are granted to coastal states to have information about any MSR project in the coastal waters. Coastal states grant consent for all MSR projects. It should be noted that PIC and MAT from the Nagoya protocol will be applicable up to 200 nm or 350 nm as the case may be for any activity related to marine resources. This can complicate the process as many countries are unclear on the procedure and a joint approach.

Another Agreement to prevent unregulated high seas fisheries in the central Arctic Ocean (CAOFA)¹⁷ has a reference to indigenous and local communities in its preamble and Article 4 (4) & 5 (2) and focuses on the local knowledge in the work undertaken by the agreement. With this, a connection can be envisioned with the BBNJ instrument as well.

¹⁷ Christian Freil, The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean Enters into Force - United States Department of State United States Department of State (2022), <https://www.state.gov/the-agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic>. (last visited Jul 22, 2022).

II. Incorporation of TK into BBNJ

Oceans cover more than 71% of the planet as we have seen in the introduction. Out of that 64% of the surface are areas beyond national jurisdictions (ABNJ). As in the area beyond 200 nm or 350 nm of any nation. Hence the United Nation under UNCLOS is holding negotiations for Biodiversity beyond national jurisdiction agreement. BBNJ revised draft as of 2022¹⁸ recognises the use of traditional knowledge as part of scientific information. Article 10 bis elaborates on the marine genetic resources and associated knowledge with the IPLC. The article adopts the Nagoya protocol principles and instructs states to take legislative or policy measures to include ABS on MAT. The agreement is also proposing consultation and assessment of proposals with IPLC under Article 18 (c). The relevant provisions are mentioned in table 1.

Table 1, Created by author

Article	Name of the Article	Relevant portion from the Article
10 bis	Access to traditional knowledge of indigenous peoples and local communities associated with marine genetic resources of areas beyond national jurisdiction	Parties shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that traditional knowledge associated with marine genetic resources of areas beyond national jurisdiction.
18	Consultations on and assessment of proposals	Indigenous peoples and local communities with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders shall be invited to submit
30	Process for environmental impact assessments	
43	Cooperation in capacity-building and transfer of marine technology	

¹⁸ |Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (General Assembly resolution 72/249), Un.org (2022), <https://www.un.org/bbnj/> (last visited Jul 22, 2022).

IPLC who are creators, protectors, conservators, developers, guardians of the TK have a significant role in conservation and introducing more sustainable practices and use of marine resources and biological diversity. There are several types of TK which are relevant for BBNJ. It can be divided into main three categories

- i. TK based on species and marine processes including that of migratory marine species.
- ii. TK resulting from best practices of environment conservation and management.
- iii. TK related to instrument free navigation

III. Way forward for India

Traditional Knowledge of Indigenous and local communities is an important asset for any nation. India realises that and hence have being the initiative of TKDL. It is high time India support inclusion of traditional knowledge in the BBNJ negotiations as well. Indigenous Peoples in India comprise an estimated population of 104 million or 8.6% of the national population.¹⁹ And along with that, it has to start the capacity building of the local communities related to the ocean in the coastal areas of the country as the coast is more than 7500 km. There is a need for India to pass the long pending legislation on traditional knowledge, The Protection of Traditional Knowledge Bill, 2016. The BBNJ instrument will have to be adopted by nations. India should be a pioneer for the same as it is to achieve goals of conservation and sustainable use by adopting traditional knowledge. TKDL should start working on the inclusion of marine and ocean-related knowledge and know-how.

WHITE BLACK
LEGAL

¹⁹ Indigenous peoples in India, (2022), <https://www.iwgia.org/en/india.html> (last visited Jul 22, 2022).