



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.

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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

ACCESS AND BENEFIT SHARING OF TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES UNDER CBD AND NAGOYA PROTOCOL

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INTRODUCTION

“Access and benefit sharing” of traditional knowledge associated with genetic resources under CBD and Nagoya Protocol and this article looking into what is access and benefit sharing, how does it work, about Traditional knowledge, CBD and its important provisions like Art. 8(j),10(c),17,18 which is relating to access and benefit sharing of traditional knowledge associated with genetic resources. And at last, about Nagoya Protocol, the core obligations of the Nagoya Protocol with respect to genetic resources and its important provisions like Art. 5,7,12 and 16 which is relating to access and benefit sharing of traditional knowledge associated with genetic resources.

Access and benefit sharing is the accessing of genetic resources and traditional knowledge associated with genetic resources and sharing the benefits arising out of those between user country and providing country. The main focus of this article is, we are searching for the provision under the main framework CBD and its supplementary protocol (Nagoya) about provisions relating to access and benefit sharing of traditional knowledge associated with genetic resources.

ACCESS AND BENEFIT SHARING

Access and benefit-sharing means as the term itself stated, it refers to the way in which genetic resources are accessed, and the benefits that result from their use are shared between the people or countries using the resources that is the user country and the people or countries that provide them that is the provider country. Access and benefit sharing is important to both provider country and user country, providers of genetic resources are governments or civil society bodies, which can include private land owners and communities within a country, who are entitled to provide access to genetic resources and share the benefits resulting from their use. The Convention on Biological Diversity contains measures pertaining to access and benefit-sharing that are intended to guarantee both equitable distribution of the benefits derived from the use of genetic resources among their suppliers and easier physical access to genetic resources. “In some cases, this also includes valuable

traditional knowledge associated with genetic resources that comes from ILCs.”¹The benefits to be shared can be monetary, such as sharing royalties when the resources are used to create a commercial product, or non-monetary, such as the development of research skills and knowledge. The monetary and non-monetary benefits are mentioned in the annexure of Nagoya Protocol. It is vital that both users and providers understand and respect institutional frameworks such as those outlined by the CBD and in the Bonn Guidelines. These help governments to establish their own national frameworks which ensure that access and benefit-sharing happens in a fair and equitable way. The access and benefit-sharing are worked on the bases of PIC and MAT. PIC is the Prior informed consent, is the permission given by the competent national authority of a provider country to a user prior to accessing genetic resources, in line with an appropriate national legal and institutional framework. “Mutually agreed terms (MAT), is an agreement reached between the providers of genetic resources and users on the conditions of access and use of the resources, and the benefits to be shared between both parties.”²

TRADITIONAL KNOWLEDGE

“The idea of 'traditional knowledge'(TK) as a terminology has been invented only recently. Currently, though widely recognized, there yet remains no authoritative and internationally agreed-upon definition for TK.” Teshager Dagne suggests that the very "definitional venture of TK poses various theoretical and methodological dilemmas due to the complexity of issues surrounding the term." WIPO, which is currently in the process of negotiating an international definition for TK, has attributed this complexity to the highly diverse and dynamic nature of TK. It identifies this as a central factor which challenges efforts to develop a single and exclusive definition of TK. A combined reading of 'traditional' and 'knowledge', supports a basic understanding of TK as 'a body of tradition-based knowledge which is handed down or transmitted orally from generation to generation'; a product of age-long experience, generationally improved upon"; " a collectively owned heritage as against an individually owned right"; " an adaptive innovative lifestyle generated for survival"; and "a largely unwritten body of instruction and belief". Indigenous peoples view their TK as a holistic concept which is inseparably connected to their indigenous culture, identity, spirituality, livelihood, location, environment and the natural conditions in which they live. This connectionism, from the perspective of indigenous peoples, serves to connect the skills and understandings of indigenous peoples with their medical remedies, plant and animal products, technologies and cultural expressions. TK is thus the totality of all knowledge and practices, whether implicit or explicit, used in the management of socio-economic and ecological facets of life. It

¹ <https://www.cbd.int/abs/infokit/brochure-en.pdf>(accessed on 30/07/23)

² Ibid

constitutes a central component of the biocultural heritage of indigenous groups. “Despite this holistic nature of TK, it is often broken down into various categories to fit within western paradigms. Within WIPO's negotiations, for instance, the broad concept of TK is broken down into three main aspects: TK as such, traditional cultural expressions and genetic resources.”³

TK is a living body of knowledge that is developed, preserved, and transmitted within a society from one generation to the next; it frequently contributes to the cultural or spiritual identity of that community. To put it briefly, TK is recognized as:

- knowledge, know-how, skills, innovations or practices;
- that are passed between generations;
- in a traditional context; and that form part of the traditional lifestyle of indigenous and local communities who act as their guardian or custodian.
- TK example: knowledge about traditional medicines

The turmeric patent United States Patent 5,401,504 was initially granted with a main claim directed at “a method of promoting healing of a wound in a patient, which consists essentially of administering a wound-healing agent consisting of an effective amount of turmeric powder to said patient.” The applicants for the patent acknowledged that turmeric has long been used in traditional medicine to treat a variety of sprains and inflammatory ailments. Based on the information that was then accessible to the examining authority, the patent application was reviewed, and the claimed invention was deemed novel at the time of application. “After more evidence including old Sanskrit texts was made available, the patent was subsequently contested and declared invalid, proving that the claimed invention had really been known for some time TK.”⁴

- Thai traditional healers use the plao-noi plant to treat ulcers
- The San people use the hoodia plant to stave off hunger while out hunting
- Sustainable irrigation is maintained through traditional water systems such as the aflajin Oman and Yemen, and the qanat in Iran

GENETIC RESOURCES

“Under Convention on biological diversity "Genetic resources" means genetic material of actual or potential value, were, "Genetic material" means any material of plant, animal, microbial or other

³ Oluwatobiloba Moody, “ADDRESSING BIOPIRACY THROUGH AN ACCESS AND BENEFIT SHARING REGIME COMPLEX: IN SEARCH OF EFFECTIVE PROTECTION FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES” (2016), pp. 231-278, available at HeinOnline.(accessed on 02/08/23)

⁴Intellectual Property and Genetic Resources, Traditional knowledge and Traditional Cultural Expression, WIPO 2020. (accessed on 03/08/23)

origin containing functional units of heredity.”⁵ Actual or potential value means, for instance sandal oil which is made from sandal or it is a product from sandal. Whatever developed with the help of human efforts it can be termed as genetic resources. Functional units of heredity mean for example, genes.

“GRs are a potential source of income for biodiversity rich communities as well as biotechnology industries which rely on GRs as a major source of input for research into the development of a wide range of health, agricultural and cosmetic products.”⁶

CONVENTION ON BIOLOGICAL DIVERSITY

“The origin of the negotiations for the Convention on Biological diversity lies in the 1987 Governing Council Decision 14/26 of the United Nations Environment Programme, which called upon UNEP to convene an Ad Hoc Working Group of Experts on Biological Diversity for the harmonization of existing conventions related to biological diversity.” The requirement to develop an internationally binding instrument for the preservation and long-term utilization of biological diversity, taking into account the need to share the expenses and advantages between developed and developing countries and the ways and means to support innovation by local people, was the agreement reached by the Group of Experts at their first meeting. “The Ad Hoc Working Group, which in February 1991 became the Intergovernmental Negotiating Committee, held seven working sessions which culminated in the adoption of an agreed text of the Convention on Biological diversity through the Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity.”⁷

In June 1992, during the United Nations Conference on Environment and Development in Rio de Janeiro, the Convention was made accessible for signature. There are currently 193 parties to it as of its 29 December 1993 entry into force.

The principal objectives of the conservation of biological diversity are the conservation and sustainable use of biological diversity, and the fair and equitable sharing of benefits arising from its utilization. The convention recognizes that the key to maintaining the biological diversity depends upon using this diversity in a sustainable manner.

⁵ Supra note 1 at p.4

⁶ Supra note 1 at p.4

⁷ *Handbook of the Convention on Biological Diversity*, Taylor and Francis, Earthscan 2 Park Square, Milgong Park, Abingdon, Oxon OX14 4RN 711 Third Avenue, New York, NY, 10017, USA. (accessed on 03/08/23)

“CBD is a land mark in international law on environment because:

- For the first time it recognized that the conservation of biological diversity is “acommon concern of humankind” and is an integral part of the development process.
- It covers all ecosystems, species, and genetic resources.
- It links traditional conservation efforts to the economic goal of using biological resources sustainably.
- It sets principles for the fair and equitable sharing of the benefits arising from the use of genetic resources, notably those destined for commercial use.
- It also covers the rapidly expanding field of biotechnology, addressing technology development and transfer, benefit-sharing and bio-safety.”⁸

PROVISIONS RELATING TO ACCESS AND BENEFIT SHARING OF TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES UNDER CBD

ARTICLE 8. IN-SITU CONSERVATION

- “Each Contracting Party shall, as far as possible and as appropriate:
(j) Subject to its national legislation, 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;”⁹

Under this Article the 3rd part states about the access and benefit sharing of traditional knowledge associated with genetic resources, it stated to encourage the equitable benefit sharing from the utilization of such knowledge, practice and innovation that is the knowledge, innovation and practices comes within the indigenous and local communities.

ARTICLE 10. SUSTAINABLE USE OF COMPONENTS OF BIOLOGICAL DIVERSITY

“Each Contracting Party 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 use requirements;”¹⁰

⁸ https://asutoshcollege.in/new-web/Study_Material/CBD.pdf(accessed on 04/08/23)

⁹ Art 8(j), Convention on Biological Diversity

¹⁰ Art 10(c), Convention on Biological Diversity

Article 10(c) requires Contracting Parties to protect and encourage customary uses of biological resources derived from traditional cultural practices which are compatible with the requirements of biological diversity conservation or the sustainable use of its components. The traditional knowledge, innovations and practices of indigenous and local communities directly derive from the customary use of biological resources. Therefore, article 10(c) can be read in conjunction with article 8(j) which encourages Parties to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities relevant to conservation and sustainable use, promote their wider application with the holders' approval and encourage the equitable sharing of benefits arising from their utilization.

ARTICLE 17. EXCHANGE OF INFORMATION

1. "The Contracting Parties shall facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.
2. Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information."¹¹

Under this Article, it is mentioned that the contracting party mandatorily exchange information from all publicly available sources, examples TKDL, for the conservation and sustainable use of biological diversity and also, they should take into account the special needs of developing countries too. The second part states about the access and benefit sharing of traditional knowledge associated with genetic resources, where it is mentioned that the exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such. Here exchange of result means benefit sharing, if we accessed any information with regards to traditional knowledge the result coming out of it should be exchanged or shared within the community who shared the knowledge.

ARTICLE 18. TECHNICAL AND SCIENTIFIC COOPERATION

¹¹ Art 17, Convention on Biological Diversity

1. “The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions.
2. Each Contracting Party shall promote technical and scientific cooperation with other Contracting Parties, in particular developing countries, in implementing this Convention, *inter alia*, through the development and implementation of national policies. In promoting such cooperation, special attention should be given to the development and strengthening of national capabilities, by means of human resources development and institution building.
3. The Conference of the Parties, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.
4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.
5. The Contracting Parties shall, subject to mutual agreement, promote the establishment of joint research programmes and joint ventures for the development of technologies relevant to the objectives of this Convention.”¹²

This Article itself stating about the technical and scientific cooperation, it is also a benefit sharing. It talks about TK in paragraph 4. Paragraph 1 stated as the Contracting Parties mandatorily promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity. Paragraph 2 mentioned the contracting party should give special concern to developing country. Paragraph 3 focused to establish a clearing house mechanism. Paragraph 4 talks about TK, that the contracting party as per their national legislation and policy encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies and last paragraph talks about the establishment of joint research programmes and joint ventures.

NAGOYA PROTOCOL

The Nagoya Protocol is a supplement to the Convention on Biological Diversity (CBD) that addresses access to genetic resources and the equitable sharing of benefits arising from their use.

¹² Art 18, Convention on Biological Diversity

The main goal of the Nagoya Protocol is to distribute gains from the use of GRs and TKaGRs in a just and equitable manner.

The legally binding Nagoya Protocol was adopted in 2010 and went into effect in 2014. By acknowledging their entitlement to a portion of the profits made by foreign bioprospectors, it solves the issue facing the countries that are the original providers of genetic resources. The Nagoya Protocol consists of a preamble of 27 paragraphs, 36 main articles, and an annex.

RIGHT OF PARTIES TO NAGOYA PROTOCOL

A source country has right to benefit from any commercial application of its bioresources. Such benefits may include:

- Share in Cash profits
- Sample of what was collected
- Participation or training of national researchers.
- Transfer of biotechnology

The Nagoya Protocol reaffirms that a sovereign country has full rights on its genetic resources and use of its bioresources should be done only by mutual consent. It provides legal certainty and transparency and also covers Traditional Knowledge.

OBLIGATIONS OF PARTIES TO NAGOYA PROTOCOL

“Under the Nagoya Protocol, there are certain requirements or obligations, which each country is required to fulfill:

- Every country should create clear and unambiguous legal framework around access of its genetic sources. This framework should have clear laws, rules, procedures etc.
- Every country should make clear that its consent is taken while accessing its bioresources and terms on which monetary or non-monetary benefits are to be shared. The terms should be mutually agreed and both the contracting parties must have access to justice.”¹³

The Nagoya Protocol sets out core obligations for its contracting Parties to take measures in relation to access to genetic resources, benefit-sharing and compliance.

Access obligations

Domestic-level access measures are to:

- Create legal certainty, clarity and transparency

¹³ https://asutoshcollege.in/new-web/Study_Material/CBD.pdf(accessed on 02/08/23)

- Provide fair and non-arbitrary rules and procedures
- Establish clear rules and procedures for prior informed consent and mutually agreed terms
- Provide for issuance of a permit or equivalent when access is granted
- Create conditions to promote and encourage research contributing to biodiversity conservation and sustainable use.
- Pay due regard to cases of present or imminent emergencies that threaten human, animal or plant health
- Consider the importance of genetic resources for food and agriculture for food security

Benefit-sharing obligations

- Domestic-level benefit-sharing measures are to provide for the fair and equitable sharing of benefits arising from the utilization of genetic resources with the contracting party providing genetic resources.
- Utilization includes research and development on the genetic or biochemical composition of genetic resources, as well as subsequent applications and commercialization. Sharing is subject to mutually agreed terms.
- Benefits may be monetary or non-monetary such as royalties and the sharing of research results.

Compliance obligation

“Specific obligations to support compliance with the domestic legislation or regulatory requirements of the contracting party providing genetic resources, and contractual obligations reflected in mutually agreed terms, are a significant innovation of the Nagoya Protocol. Contracting Parties are to:

- Take measures providing that genetic resources utilized within their jurisdiction have been accessed in accordance with prior informed consent, and that mutually agreed terms have been established, as required by another contracting party.
- Cooperate in cases of alleged violation of another contracting party’s requirements.
- Encourage contractual provisions on dispute resolution in mutually agreed terms.
- Ensure an opportunity is available to seek recourse under their legal systems when disputes arise from mutually agreed terms.
- Take measures regarding access to justice.
- Take measures to monitor the utilization of genetic resources after they leave a country including by designating effective checkpoints at any stage of the value-chain: research,

development, innovation, pre-commercialization or commercialization.”¹⁴

The Protocol also contains significant provisions relating to traditional knowledge associated with genetic resources held by indigenous and local communities, as well as to genetic resources held by indigenous and local communities where the rights of these communities over these resources have been recognized. The Protocol sets out clear obligations to seek the prior informed consent of indigenous and local communities in these situations.

It also provides for the sharing of benefits arising from the use of traditional knowledge associated with genetic resources, as well as benefits arising from the use of genetic resources in accordance with domestic legislation. Benefit sharing must be based on mutually agreed terms. Parties to the Protocol must ensure that their nationals comply with the domestic legislation and regulatory requirements of provider countries related to access and benefit-sharing of traditional knowledge associated with genetic resources. It refers to the possibility for Parties to develop and implement other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and the Protocol.

The protocol requires countries to take the following measures with respect to indigenous and local communities:

- Legislative, administrative or policy measures to ensure benefits from the use of TK associated with genetic resources are shared fairly and equitably with the communities concerned, based on mutually agreed terms. The same applies to genetic resources that are held by indigenous and local communities, in accordance with domestic legislation.
- Measures to ensure that TK associated with genetic resources is accessed with the prior and informed consent or approval and involvement of indigenous and local communities. The same applies to genetic resources, where communities have the established right to grant access.
- Countries should take the customary laws, community protocols and procedures of indigenous and local communities into consideration when implementing the provisions on TK; and endeavour to support the development of community protocols for access and benefit-sharing relating to traditional knowledge.

¹⁴ Dr. Rakesh Shah, IFS , “Access and Benefit Sharing of Biological Resources” <https://www.ignfa.gov.in/document/biodiversity-cell-ntfp-related-issues1.pdf>(accessed on 18/07/2023)

PROVISIONS RELATING TO ACCESS AND BENEFIT SHARING OF TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES UNDER NAGOYA PROTOCOL

ARTICLE 5 - FAIR AND EQUITABLE BENEFIT-SHARING

(5) “Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.”¹⁵

This Article stated that it is the responsibility of the nation to take legislative, administrative or policy measures with respect to the benefits arising from the utilization of traditional knowledge associated with genetic resources and that should be shared in a fair and equitable way with indigenous and local communities based on mutually agreed terms. Article 5(5) obliges Parties to take measures when traditional knowledge associated with genetic resources is used, benefits arising out of such use are shared with relevant ILCs. Pursuant to Article 5(5), benefit-sharing with ILCs is thus obligatory.

The language in Article 5(5) is particularly forthright, considering the CBD language on traditional knowledge associated with genetic resources. The CBD, in Article 8(j), had only required Parties, subject to their national legislation, to “encourage” the equitable sharing of the benefits arising from the utilization of traditional knowledge associated with genetic resources. In contrast, Article 5(5) of the Protocol reinforces the imperative towards benefit-sharing with regard to traditional knowledge associated with genetic resources. This reflects the growing international recognition of the rights of ILCs to maintain, control, and develop their traditional knowledge associated with genetic resources, as well as the obligations of States to take effective measures to recognize and protect the exercise of these rights.

ARTICLE 7 - ACCESS TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

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

¹⁵ Art 5(5), Nagoya Protocol on Access and Benefit-sharing

these indigenous and local communities, and that mutually agreed terms have been established.¹⁶

This Article stated that the as per the domestic law each party shall take measures to ensure that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent and mutually agreed terms.

Here both MAT and PIC are necessary wherein Article 7 requires only MAT. Article 7 proclaims that States have an obligation to take measures aiming to ensure that traditional knowledge associated with genetic resources held by ILCs is accessed with their PIC or approval and involvement, based on mutually agreed terms (MAT). Article 7 of the Nagoya Protocol, ILCs are entitled to determine access to traditional knowledge associated with genetic resources held by them. In implementing the provision, Parties have the flexibility to opt for measures aiming to ensure either that access is determined based on PIC or on “approval and involvement.

Article 7 provides that Parties shall, if appropriate, take measures (through domestic law) aiming to ensure that ILCs can consent or approve before traditional knowledge associated with genetic resources held by them is being accessed, according to MAT and PIC.

ARTICLE 12 -TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

1. “In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.
2. Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.
3. Parties shall endeavour to support, as appropriate, the development by indigenous and local communities, including women within these communities, of:
 - (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;

¹⁶ Art 7, Nagoya Protocol on Access and Benefit-sharing

- (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; and
 - (c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.
4. Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.”¹⁷

Article 12(1) of the Nagoya Protocol calls on Parties to consider the customary laws, community and procedures of indigenous and local communities (ILCs). Customary laws are non-codified norms that have evolved in ILC societies over centuries, constantly responding to changes in these societies and to the surrounding environment. The non-codified aspect of customary norms is essential, as it allows customary laws to gradually and instantly adapt in response to amended societal interests. Community protocols can be described as written documents adopted by a community holding traditional knowledge where the community internally codifies the terms in which it will agree for access to its traditional knowledge associated with genetic resources.

Article 12(2) calls on Parties, in co-operation with concerned ILCs, to establish mechanisms to inform potential users of TK associated with genetic resources of their obligations. It also identifies the ABS Clearing-House as potentially having a particular role in this regard. The obligation of each Party to establish such mechanisms in co-operation with any concerned ILC is mandatory. However, it does not go beyond informing potential users of TK associated with genetic resources of their obligations under the Nagoya Protocol. Indeed, if the user, thus informed, still fails to comply with its obligations, such non-compliance must be addressed through Article 16 of the Protocol i.e. compliance with domestic legislation or regulatory requirements on access and benefit sharing for traditional knowledge associated with genetic resources.

Article 12(3) calls on Parties to endeavor to support ILCs in developing various instruments in order to better deal with access procedures with regard to their TK associated with genetic resources, and to ensure that they receive a fair share in benefits when such knowledge is being used. Particular attention shall be given to women within the communities in this regard. Women have the maximum

¹⁷ Art 12, Nagoya Protocol on Access and Benefit-sharing

knowledge, they are very well equipped with the knowledge it is the fact find out by the WIPO. Nagoya Protocol is the only one which gives the special status and concern to women. ILCs have used genetic resources and developed TK for centuries, and they continue to do so. Article 12(4) of the Protocol assumes that this use may at times involve exchange of genetic resources and TK associated with genetic resources within and among ILCs. Based on this assumption, it confirms that the Protocol does not intend to restrict such use and exchange.

ARTICLE 16 - COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT SHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

1. “Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.
2. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.
3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.”¹⁸

Article 16(1) of the Nagoya Protocol proclaims that Parties where traditional knowledge associated with genetic resources is being used shall take measures to provide that PIC was obtained or that the ILCs have given approval and have been involved prior to accessing the knowledge and that MAT have been established if required by the ABS legislation or regulatory requirements of the country where the ILCs are situated.

This provision follows the approach taken under Article 15(1) of the Nagoya Protocol and thus introduces an obligation for all Parties to take measures that will support compliance with the domestic ABS legislation or regulatory requirements addressing traditional knowledge associated with genetic resources. Article 16(1) indicates that the legislation and the regulatory

¹⁸ Art 16, Nagoya Protocol on Access and Benefit-sharing

requirements that need to be complied with have to be specific to ABS. The provision also indicates that the measures that the Party shall take with regard to the requirement of PIC or the approval and involvement of the ILCs as well as the establishment of MAT are contingent on those requirements being reflected in the domestic legislation or regulatory requirements of the Parties in which the ILCs reside.

CONCLUSION

We can draw the conclusion that the local communities, indigenous people and their knowledge are sufficiently recognized by the CBD and Nagoya Protocol. The protocol has provided more specific information about the access and benefit-sharing of TK associated with GR provisions. The protocol and CBD are emphasizing the part that local communities and indigenous people play in the ABS system through PIC and MAT. Even though they are giving certain provisions relating to access and benefit sharing of traditional knowledge associated with genetic resources, still there are lack of clarity within each provisions like all provisions are stated in favor of domestic law thus, it will change accordingly and every provisions mentioned that first access the knowledge and share the result arising out of it but here problem is TK as such has its own value thus it should be given the benefits when accessed and the framework didn't clarify about the sharing like how much etc.

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