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Protection of the Associated Traditional Knowledge on Genetic Resources: Beyond the Nagoya Protocol

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Abstract

One of the objectives of the Convention on Biological Diversity (CBD) is the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. It addresses traditional knowledge of the indigenous or local communities associated with genetic resources with provisions on access, benefit-sharing (ABS) and compliance, as enshrined under Article 8(j) and Article 15 of CBD. The 2010 Nagoya Protocol is a supplementary agreement to CBD by providing a transparent legal framework for the effective implementation of ABS, which is a cornerstone of CBD. To ensure its success, the Nagoya Protocol requires effective implementation of ABS measures at the domestic level to provide for the fair and equitable sharing of benefits arising from the utilization of genetic resources, which is crucial for mega bio diverse countries like Malaysia, with the contracting party providing such genetic resources. This study embarked to examine the obligations set by the Nagoya Protocol on the parties to CBD to implement ABS by taking legislative, administrative and policy (LAP) measures at the domestic level. The findings reveal the core obligations laid down by the Nagoya Protocol for its contracting parties to take appropriate LAP measures to protect traditional knowledge and to sustainably manage and use their biodiversity.

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Keywods: CBD; Associated Traditional Knowledge,; Genetic Resources; Access and Benefit Sharing; Nagoya Protocol

1. Introduction

Convention of Biological Diversity (CBD) was signed at the United Nations Conference on Environment and Development (The "Earth Summit") held in Rio de Janeiro, Brazil in 1992. As one of the three conventions signed during the summit, CBD is aimed towards the conservation of biological diversity, the sustainable use of

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its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. CBD was opened for signature on 5 June 1992 and entered into force on 29 December 1993. CBD is considered as the only international instrument comprehensively addressing biological diversity.

Protection of the associated traditional knowledge of the indigenous or local communities on genetic resources is one of the cornerstone principles of CBD. This was acknowledged by Latif and Zakri (2004), who are of the view that the need to recognize, protect and enforce the rights of indigenous communities to have continued access to biological resources is quite related to the principle of sustainable management and use of biological diversity

2. Protection of Traditional Knowledge on Genetic Resources

There are several significant provisions under the CBD aims towards promoting for the protection of traditional knowledge. The foremost provision is Article 8 (j) that provides for *In-situ* Conservation as follows,

> "*Each Contracting Party shall, as far as possible and as appropriate ...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"*

The other significant provision relevant to the protection of traditional knowledge is Article 10(c) that provides for the sustainable use of components of biodiversity and reads as follows,

> *"Each Contracting Party shall, as far as possible and as appropriate ... protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."*

In discussing the protection of the associated traditional knowledge on genetic resources, an understanding of a broader perspective of the fair and equitable sharing of the benefits arising out of the utilization of genetic resources is also warranted. The text and substance of Article 15 provides a very amicable compromise in that while recognizing the sovereign rights of States to their natural resources, it imposes on these States the obligation to endeavour to create, conditions to facilitate access to genetic resources and not to impose restrictions contrary to the objectives of the Convention (Shaik and Wan Izatul, 2008). It must be noted that the Access and Benefit Sharing (ABS) regime as warranted by Article 15 is even more crucial for countries that are rich in biodiversity like Malaysia, which is considered as one of the 12 mega-diverse countries in the world.

Nevertheless, it must be cautioned that while work on more appropriate regime on ABS was in progress in many member countries including Malaysia, concerns have been raised in many quarters, mainly diversity rich developing nations, that the full realization of the objectives of Article 15 may effectively be undermined by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation. Article 27.3(b) of TRIPS reads:

> *Patentable Subject Matter*
> *3. Members may also exclude from patentability:*
> *(b) plants and animal other than microorganism, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective …. Generis system or by*

any combination thereof. The provisions of this paragraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

It must be carefully noted that there is lack of recognition of the objectives of the CBD by some members of the WTO, who are encouraged and emboldened in this respect by the above provision of Article 27.3(b) of the TRIPS agreement itself. At the beginning of the above text, it appears that members may also exclude from patentability plants and animal, and essentially biological processes for the production of plants or animals. However, further reading towards the end of the text reveals that this provision essentially *gives* precedence to private right over public rights and allows the recognition of patents and other IPRs using genetic resources and traditional knowledge without prior informed consent and benefit sharing and without the due recognition given to owners of such traditional knowledge (Wan Izatul et. al., 2012). This observation is supported by Suman Sahai (2003), who believes that the CBD and TRIPS are in conflict with one another and Sreenivasan & Christie (2002), who abhor TRIPS on the sense that it is antithetical to liberalised trade because of its nature of facilitating monopoly. They believe that the TRIPS agreement, as governed by the World Trade Organisation, is based on IPR standards in industrialised countries and thus has many implications for development and poverty eradication in the South.

It is important to note that to properly protect traditional knowledge and to employ global mechanisms for equitable benefit sharing, as envisioned by the 8th Conference of Parties of the CBD (COP-8) held on 20 - 31 March 2006 in Curitiba, Brazil, it is necessary to reform both the domestic and global intellectual property regimes. This fact has in fact been acknowledged earlier on by WIPO (2002) that the intellectual property system is in direct conflict with traditional practices and lifestyles where the traditional knowledge holders are situated between their own customary regimes and the formal intellectual property system administered by governments and inter-governmental organisations such as WIPO.

Due to the pressings by the international community including WIPO, the DOHA Ministerial Meeting of the WTO reached and made the decision in December 2001 where member countries agreed to examine, inter alia, the relationship between the TRIPS Agreement and the CBD, the protection of traditional knowledge and forklore, and other relevant new developments raised by members pursuant to Article 71.1. It was also agreed that in undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Article 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension (paragraph 19 of the DOHA Declaration).

3. The Nagoya Protocol and Beyond

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) is a supplementary agreement to the CBD by providing a transparent legal framework for the effective implementation of one of the three objectives of the CBD namely the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The Nagoya Protocol on ABS was adopted on 29 October 2010 in Nagoya, Japan and will enter into force 90 days after the 50th instrument of ratification. As at 20th October 2012, only 92 of the 168 signatories to CBD have signed the Protocol and out of the 92 signatories, only 8 have ratified the Protocol (CBD, 2012). Malaysia has apparently been taking her time to deliberate.

The objective of the Nagoya Protocol as stated under Article 1 is the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity. As a supplementary agreement to the CBD, the Protocol naturally applies to genetic resources covered by the CBD and to the benefits arising from their utilisation. Thus, the Nagoya Protocol also covers the

associated traditional knowledge with genetic resources covered by the CBD and the benefits arising from its utilisation.

1.1 Core Obligations under the Nagoya Protocol

The Nagoya Protocol sets out three core obligations for its contracting Parties (CBD, 2012). The Parties to the Protocol are to take measures in relation to the following obligations with regards to access to genetic resources, benefit-sharing and compliance as follows:-

1. **Access obligations**

   From the text of the Nagoya Protocol, parties to the Protocol must take domestic-level access measures in order to fulfill seven goals as follows:-

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

2. **Benefit-sharing obligations**
   It must be noted that domestic-level benefit-sharing measures are to provide for the fair and equitable sharing of benefits arising from the utilisation of genetic resources with the contracting party providing genetic resources (CBD, 2012). What is "utilisation" has been further interpreted to also include 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 to be agreed upon by the parties where the benefits may be monetary or non-monetary such as royalties and the sharing of research results.

3. **Compliance obligations**
   One significant innovation of the Nagoya Protocol is the promulgation of specific obligations to support compliance with the domestic legislation or regulatory requirements of the contracting party providing genetic resources as well as contractual obligations reflected in Mutually Agreed Terms. The obligations of the Contracting Parties under the Protocol are as follows:

   (i) 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
   (ii) Cooperate in cases of alleged violation of another contracting party's requirements
   (iii) Encourage contractual provisions on dispute resolution in mutually agreed terms
   (iv) Ensure an opportunity is available to seek recourse under their legal systems when disputes arise from mutually agreed terms
   (v) Take measures regarding access to justice

(vi) 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

It must be noted that while the Nagoya Protocol speaks broadly on access and benefit sharing as a cornerstone to CBD, it has taken a further step by addressing traditional knowledge associated with genetic resources by establishing obligations on access, benefit-sharing and compliance. Likewise, the Protocol also addresses the genetic resources where indigenous and local communities have the established right to grant access to them. To guarantee the protection of these communities' interests, the Protocol requires the Contracting Parties to take two measures namely Prior Informed Consent and Fair and Equitable Benefit-Sharing. To do so would also require the Contracting Parties to abide the relevant community laws and procedures as well as customary use and exchange.

It is thus important for countries that are rich in biodiversity like Malaysia to take immediate actions according to the above core obligations as laid out by the Nagoya Protocol. It is important to note that Malaysia currently does not have an effective ABS mechanism through a legislative, policy and administrative (LAP) framework to protect its genetic resources as well as the interests of her indigenous communities. Although Malaysia has yet to sign and ratify the Nagoya Protocol, it must also be noted that as a State Party to CBD, Malaysia is still obligated to fulfil her obligations to allow access to her genetic resources as set out under Article 15 of CBD. It is obvious that the full benefits (for both parties) of Article 15 can only be realised within a framework of LAP measures that address the main components of ABS, namely by establishing and identifying the authorities responsible for granting Prior Informed Consent, establishing an appropriate benefit sharing arrangements and procedures; and creating an inventory of existing traditional knowledge and a register of owners of such knowledge from among the indigenous population (Shaik and Wan Izatul, 2008).

Under the Malaysian National Policy on Biological Diversity, which was officially declared on April 16 1998 with its declared vision as to transform Malaysia into a world center of excellence in conservation, research and utilization of tropical biological diversity by the year 2020, there is only one principle (out of 11 principles) that speaks on the protection of traditional knowledge. Principle (VII) speaks as follows,

Principle (VII) : "The role of local communities in the conservation, management and utilization of biological diversity must be recognized and their rightful share of benefits should be ensured."

However, the national concern on protecting traditional knowledge stops there. There is unfortunately no specific mention of "traditional knowledge", either directly or indirectly, among the 15 strategies for effective management of biodiversity in the Policy (Wan Izatul et. al., 2012). To add salt to the wound is the fact that even Strategy 9, that is to undertake "review and update existing legislation" to reflect biodiversity needs is also silent on traditional knowledge. The only mention of traditional knowledge appears in the Action Plan proposed for Strategy 1, which calls for the establishment of an inventory of traditional knowledge on the use of species and genetic diversity. Similarly, the Action Plan for Strategy 9 calls for identification of areas where new legislation or enhancement of present legislations are needed, among others, for "intellectual property and other ownership rights" although there is no specific mention of "traditional knowledge".

4. Conclusion

Protection of the associated traditional knowledge of the indigenous communities on genetic resources is crucial to secure the sustainability of these communities. To provide justice, in this case environmental justice, to these communities, it is the duty of the government to take affirmative action by developing an effective Access

and Benefit Sharing regime/mechanism comprising of a comprehensive framework of Legislative, Administrative and Policy measures.

For Malaysia, the facts that the current National Policy on Biological Diversity does not provide enough attention to the protection of traditional knowledge may have reflected the government's concern on the issue. Nonetheless, protection of traditional knowledge requires more than just a policy declaration. The policy, especially the Action Plans for Strategy 1 and 9, must be followed up. The establishment of an inventory of traditional knowledge on the use of species and genetic diversity is extremely crucial where biopiracy is imminent. Likewise, to provide an effective Access and Benefit Sharing regime, new legislation (or enhancement of present legislations) must be introduced to protect the ownership rights of these indigenous communities accruing from their associated traditional knowledge on genetic resources.

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