

GOING FURTHER THAN THE NAGOYA PROTOCOL TO GUARANTEE INDIGENOUS PEOPLES' RIGHTS BY ACCESS AND BENEFIT SHARING (ABS) MECHANISMS

Indigenous peoples had high expectations on the implementation of the Convention on Biological Diversity (CBD) which was adopted at the Earth Summit in Rio de Janeiro in 1992. One of the three main goals of the CBD is the fair and equitable sharing of benefits arising from the use of genetic resources. Indigenous peoples' way of life and methods of socio-economic organisation, as well as their know-how and knowledge, are often based on ancestral values related to the sustainable use of their resources. The Nagoya Protocol, adopted at the 10th Conference of Parties to the CBD in 2010 aims to implement the goal of ensuring fair access and benefit sharing arising out of the use of genetic resources and associated traditional knowledge. As such, it should be an international convention upon which indigenous peoples may call in order to assert their rights.

Setting up legal mechanisms that protect genetic resources and traditional knowledge is a precondition to the protection of indigenous peoples' rights. Although the Nagoya Protocol is an international treaty that facilitates the setting up of ABS mechanisms, it is nevertheless an imperfect tool which means that States must now reinforce the normative nature of their national legislation if they are to effectively guarantee and protect indigenous peoples' rights.

In his speech to the World Intellectual Property Organisation (WIPO)¹, the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, underlined the link between a number of fundamental rights and ABS mechanisms. The rights to auto-determination, culture, health and equality all fall within the scope of the Nagoya Protocol. Article 24 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)², states that indigenous populations have the right to their traditional medicines and health practices, as well to conserve their vital medicinal plants, animals and minerals. Article 31 also establishes their "right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions".

Indigenous peoples have greatly contributed to developing and preserving unique knowledge on ecosystems, but unfortunately, there is still inadequate regulation of the use of biological resources. Some firms take advantage of lack of legal regulation in order to take indigenous peoples' knowledge in order and thus obtain patents. In doing so, they deny prior traditional knowledge and are able to keep all the profits resulting from the use of genetic resources for themselves. This illegitimate misappropriation of genetic resources and associated traditional knowledge, without prior informed consent³ nor any sharing of resulting benefits, commonly known as biopiracy, is a serious violation of indigenous peoples' rights. As an instrument to combat biopiracy, the Nagoya Protocol should be able to offer legal support to indigenous populations.

The CBD does represent progress in taking the rights of indigenous peoples concerning biodiversity into account, as it recognises for the first time the existence and contribution of traditional indigenous knowledge in its article 8j⁴. The Nagoya Protocol is an international instrument that is of particular interest to for indigenous

¹WIPO, Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore: 26th session, Geneva, February 3rd 2014

² United Nations Declaration on the Rights of Indigenous Peoples, 2007, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

³ Article 11 of United Nations Declaration on the Rights of Indigenous Peoples and article 6 of the Indigenous and Tribal Peoples Convention, 1989.

⁴ Article 8j of the CBD provides that «each contracting Party shall, as far as possible and as appropriate subject to 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

and local communities. As such, it is a step towards the integration of the rights of these communities in international negotiations as their free, prior and informed consent is now called for in the case of use of traditional knowledge⁵.

However, the CBD, as well as the Nagoya Protocol, are still very much centred on States' interest and States remain sole sovereign on their territories genetic resources. Even if indigenous peoples' essential contribution to maintaining biological diversity through traditional indigenous knowledge is recognised, their rights over this knowledge is still very much dependant upon the way that States nationally apply the international texts.

Far from being true to its original goals, the Nagoya Protocol, despite the fact that it is legally binding, is actually normatively a rather weak text. Unfortunately this could well result in some very variable national implementations in the form of ABS mechanisms that are not necessarily advantageous for indigenous peoples. The protocol oblige States to respect a number of principles concerning access to traditional knowledge, but without however binding them to recognise this knowledge, which is a necessary step prior to the protection of indigenous traditional knowledge⁶. So now it is up to States to compensate for the Protocol's shortcomings through designing national legal frameworks for access and benefit sharing that are truly in the interests of indigenous peoples.

So it is extremely important that States set up normative frameworks for ABS which protect indigenous peoples' rights, for example by setting up appropriate forms of indigenous participation and prior consent and also by establishing ways of sanctioning and punishing any ABS violations. It is particularly fundamental that States recognise the rights of indigenous and local peoples⁷, as a prerequisite to any ABS mechanism working well.

In this way ABS mechanisms will support indigenous peoples in their efforts to obtain respect for their collective and individual rights, as embodied in the UNDRIP.

The Protocol's preamble explicitly mentions the UNDRIP and the interdependency between genetic resources and indigenous and local communities' traditional knowledge⁸. As such it shows that fundamental indigenous peoples' rights are directly concerned by an international legal text which aims to protect biological diversity. These rights and principles constitute the main framework for defining the norms that determine the Nagoya Protocol as a legal instrument.

Biopiracy, of which indigenous peoples are victims, is linked to the issue of intellectual property. The Nagoya Protocol does not deal with the question of intellectual property concerning genetic resources and traditional knowledge. WIPO deals with this question and is currently leading negotiations with a view to obtaining an international legal agreement which effectively ensures protection of traditional knowledge on genetic resources. It will be essential that indigenous peoples' rights be the basis for drawing up this agreement.

Our recommendations

In view of the economic and moral injustice that biopiracy implies concerning the most fundamental indigenous peoples' rights, we demand that:

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»

⁵ CBD website <https://www.cbd.int/traditional/Protocol.shtml>

⁶ BURELLI T., *Faut-il se réjouir de l'adoption du Protocole de Nagoya ?* Revue Juridique de l'Environnement, n° 1, 2012

⁷ *Idem*

⁸ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>

- States ratify the Nagoya Protocol as soon as possible and that they set up ABS mechanisms in their national legal framework in order to comply with the requirements of respecting indigenous peoples' rights.
- States endeavour to improve on what the Nagoya Protocol provides for, by setting up national legal instruments that really protect indigenous traditional knowledge, for example providing for legal recourse and efficient ways to ensure indigenous peoples' access to justice.

We call upon :

- The Special Rapporteur on the rights of indigenous peoples
- The Special Rapporteur in the field of cultural rights
- The Independent Expert on human rights and the environment
- The Permanent Missions to the United Nations Office at Geneva

to require States to take all necessary national measures, complying with CBD's and Nagoya Protocol's goals to ensure protection of indigenous peoples rights.