

ABSTRACT

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Findings: Over several decades the unabated biopiracy has generated debates between developed countries and developing countries. Concerned with the biodiversity loss the Global South agreed to conserve biodiversity provided the Global North agrees to share the benefits they derive from the commercial use of genetic resources. Subsequently, the Convention on Biological Diversity (CBD) addressed the issues of unabated biopiracy and enabled the evolution of elaborate access and benefit sharing (ABS) regime in the form of *Nagoya Protocol on fair and equitable sharing of the benefits arising from the use of genetic resources (ABS)*.

In order to undertake this study, innovations were made in devising the research methodology. The present study has employed the methods of content analysis, structured interview, questionnaire survey, and participant observation. Respondent groups of the study include indigenous organizations/individuals, academic institutions, CSOs, concerned individuals and competent national authorities (CNAs) of 12 countries from South Asia (India, Bangladesh, Nepal), South East Asia (Thailand, Vietnam, Lao PDR, Philippines, Brunei Darussalam, Timor-Leste) and Other Asian Countries (China, Mongolia, Russian Federation).

As the focus of this study has been on the indigenous people who are central to ABS and Nagoya Protocol, it is essential to conclude the centrality of the ILCs in international and national ABS processes. International ABS regime fully recognizes the rights of ILCs over genetic resources and associated TK, their customary rights, their right to participation in local ABS agreements, and many other such processes. However, it has been noted that the TK of ILCs has been recognized subjectively as the commodity to be accessed, utilized and transferred for commercial as well as non-commercial productions side by side the genetic resources held by provider Parties and/or ILCs. Another significant phenomenon was the low or lack of participation/involvement of ILCs in the negotiation processes that took place during the evolution of international ABS processes. Except for sporadic attendance of ILCs'

representatives in ABS Working Groups and its meetings before the onset of Bonn Guidelines and one special task force constituted for inclusion of ILCs in the formulation process of Nagoya Protocol, the desired inclusion, involvement and participation of ILCs in international ABS negotiations and processes have been found missing generally. On the other hand, subsequently the Nagoya Protocol and CBD recognize sovereign rights of the States over genetic resources, while undermining rights of indigenous people and local communities. This has far reaching consequences particularly on the space provided to ILCs by States in their respective legislation and related measures. The ILCs have not only been given due recognition, participation and role in development of domestic ABS legislation, regulation or policy, but also not in deciding the PIC and MAT, which are prerequisites of accessing the genetic resources and associated TK by the user countries or the companies. Immense efforts by all stakeholders including the CNAs, ILCs representations and UNCBD, academia, CSOs and other concerned to make conducive environment and enabling ABS legislation so that the ILCs can attain their rights in all ABS processes at all levels – international, regional, national, local.

Bonn Guidelines on ABS were voluntary instruments. Countries like India, Philippines, Brazil, Australia, etc. developed their national ABS legislation in response to the voluntary guidelines. Nagoya Protocol is the binding international law, which essentially guides all signatory countries to (1) make domestic legislation/ mechanism/policy in order to regulate the access to genetic resources and associated TK and share the benefits equitably & fairly from their utilization, (2) provide due space, recognition and inclusion of respective ILCs in domestic legislation/policy, (3) follow strictly the cross-cutting concerns like PIC, MAT, justice and equity before any genetic resource is accessed. There are very elaborate clauses in the Nagoya Protocol dealing with the access to genetic resources, access to associated TK, fair and equitable sharing of monetary and non-monetary benefits, process of PIC and MAT, necessity and process of involving the ILCs especially in PIC and MAT, recognition and inclusion of customary laws of ILCs, undertaking and promoting the process of community protocols, involving the ILCs in clearing-house, participation of ILCs in monitoring mechanisms and checkpoints, and the capacity building of stakeholders. It is noteworthy that the Nagoya Protocol sums up the necessity and criticality of recognizing, involving and including the indigenous people in legal frameworks by referring the UNDRIP right in the Preamble of the Protocol. Now, lastly, the prime challenge confronting the global biodiversity governance institutions and the Parties of Nagoya Protocol is the checking of biopiracy and channelizing the accrued benefits from utilization of genetic resources and associated TK. It particularly gains impetus when another burgeoning challenge is posed by the rapidly growing field of synthetic biology and a gamut of free trade agreements.