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ACCESS TO BIOLOGICAL RESOURCES AND BENEFIT SHARING: BEYOND NAGOYA PROTOCOL

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INTRODUCTION

History of human race is a history of application of imagination, otherwise innovation "as well as creativity, to an existing base of knowledge in order to solve problems or express "thoughts. From early writing in Mesopotamia, the Chinese abacus, the Syrian astrolabe, the""ancient observatories of India, the Gutenberg printing press, the internal combustion engine, "penicillin, plant medicines and cures in Southern Africa, the transistor, semiconductor nanotechnology, recombinant DNA drugs, and countless other discoveries and" innovations, it has been the imagination of the world's creators that has enabled humanity to advance to today's levels of technological progress.[1] Objective of the Nagoya Protocol is towards"set an international, legally binding framework to promote a transparent and effective implementation of the ABS concept at the regional, national and""local level in the future. IUCN considers ABS. the third objective of the Convention, to be a concrete example for valuing biodiversity and its ecosystem services, and for taking proper account of this value as a prerequisite for conservation and sustainable use. consequently, IUCN welcomes adoptionof Protocol following six years of negotiations which marks an important step towards the implementation of the Convention on Biological Diversity.[2]"Nayoga Protocol which came into force on 12th October 2014, with an aim to implement the provision of benefit sharing under the Convention on Biological Diversity (CBD) which aims at establishing the fair and equitable sharing of biodiversity benefits as one of its main objectives. With the foundation assumptions that after implementation of the protocol , the benefit sharing of it has reasserted the need for companies to monitor, understand and comply with access and benefit sharing requirements. Further at same time especially in underdeveloped nations, its implementation is still in question. Because the target groups for whom the protocol have been made are benefited or not, the aboriginals and their traditional knowledge protection with respect to benefit sharing is still under the black shadows

1.BACKGROUND OF NAGOYA PROTOCOL

Nagoya Protocol on access as well as benefit sharing is a landmark in international governance of

[1] WIPO, INTRODUCTION TO INTELLECTUAL PROPERTY,2010 EDITION.

[2]IUCN , "An explanatory guide to the Nagoya Protocol on access and benefit-sharing"IUCN Environmental Law And Policy and Law Paper NO.83.

biodiversity .If we go by the article 1 of protocol , it states "The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components."[3] 'Utilization', 'biotechnology' as well as 'derivative' are three input concepts to understand Nagoya Protocol in relation towards that of CBD regime as well as how it will going to scrutinise BioTrade. The Nagoya Protocol makes it reccomendatory for all countries to establish "appropriate, effective and proportionate"[4] measures to provide that genetic resources as well as traditional knowledge utilized within their jurisdiction have been accessed on basis of prior informed consentin addition to mutually agreed terms, as required by country of origin. So, benefit of such provision is that, itwould also need to ensure that research developmentas well as commercialization conducted within their countries utilizes genetic resources according to requirements established by countries of origin of these resources. So, it tries on an iinternational level to make an uniform base with look upon to utilisation along with benefit sharing of genetic resources. Further, it also mandates for the establishment of *Access as well as Benefit-sharing Clearing-House* (ABS Clearing-House),[5] which woulda platform for exchanging information on accessin addition to benefit-sharing with it has been established under Art.14 of Protocol .

There is a dire need for clear, fair as well as equitable rules on Access with Benefit sharing in order to ensure furthermore stop misappropriation of genetic resourcesalong with associated traditional knowledge (TK), The issue of 'biopiracy' which is one of the biggest challenge for the genetic trade, which has been defined as "access to and use of genetic resources without prior informed consent and/or mutually agreed terms pursuant to the national access legislation of the country providing the genetic resources and applicable international rules on access and benefit sharing."[6] Thegenetic resources could be misusedusing IP system is when,[7] for example, a company sources biological resources from anothernationwith no that country's consent, utilizes that resource

[4]Nagoya Protocol on Access and Benefit Sharing -Technical Brief, Union For Biological Ethical Trade.(Available at:http://ethicalbiotrade.org/dl/benefit-sharing/UEBT-ABS-Nagoya-Protocol.pdf, last accessed on 21.12.2017 at 10:52pm)

[5]Article 14, Nayoga Protocol.

[6] Definition proposed by Switzerland for WG-ABS 9 on 18 February 2010 regarding the need for definitions in the lead up to COP 10 at Nagoya, Japan(Available at:http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf, last accessed on 21.12.2017 at 11:28pm)

[7]*Ibid.*

in Research &Developmetto develop an invention, with then attempts to patent that invention utilizing resourcewith no any benefits to provider, or without mentioning where resource was obtained[8].

Further , it has been identified that largely the economic benefits arising from the exploitation of genetic resources is based on that of biochemical compounds[9] obtained from those resources like plants, microbes, marine organisms, mammalian sources etc, such as chemicals with therapeutic properties for the manufacture of medicines (e.g. enzymes), cosmetics (e.g., flavonoids or food e.g., alkaloids .[10]

If we summarise the aims and objectives of Nayogaprotocol , those are as follows:[11]

1. It gives a definition of objective, use of terms, scope as well as relationship by other international instruments of Nagoya Protocol;[12]
2. It elaborates on the principles and main requirements on the fair and equitable sharing of benefits and access to genetic resources and traditional knowledge;[13]
3. It also provides for possible mechanisms for implementation, including a multilateral benefit sharing mechanism and an access and benefit-sharing clearinghouse;[14]
4. It also includes measures to promote compliance with legal and regulatory requirements, as well as with mutually agreed terms;[15]
5. Further provides to promote tools and awareness raising, capacity building and transfer of technology activities on access and benefit sharing.[16]

[8] The Convention on Biodiversity and the Nagoya Protocol: Intellectual Property Implications.A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property,2014(Available at:http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf, last accessed on 21.12.2017 at 11:42pm)

[9]Implications for BioTrade of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, (Available at:http://www.biotrade.org/ResourcesPublications/UNCTAD_DITC_TED_2011_9.pdf, last accessed on 21.3.2016 at 11:50pm)

[10]Union for Ethical BioTrade (UEBT), Nagoya Protocol on Access and Benefit Sharing Technical Brief, Available at http://ethicalbiotrade.org/news/wpcontent/uploads/UEBT_ABS_Nagoya_Protocol_TB.pdf., last accessed on 22.12.2017 at 12:10am)

[11]*Supra* note. 2.

[12]*Ibid.*

[13]*Supra* note 11.

[14]*Ibid.*

[15]*Ibid.*

[16]*Ibid.*

Table 1. BioTrade under the Nagoya Protocol

Biodiversity-based products and services	Applicability of the
Natural ingredients and products for cosmetics: essential oils, natural dyes, soaps, cream and butters, moisturizers, etc.	Yes, if access is s R&D to eventua commercialize natu products containing t
Natural ingredients and products for pharmaceuticals: extracts and infusions from medicinal plants, natural medicine, capsules, etc.	See above
Natural ingredients and products for food: fruits, cereals, grains, tuberous, nuts, cocoa, , jams, sweets and snacks, jellies, pulps and juices, spices and sauces, teas and infusions, food supplements, crocodile meat, etc.	See above
Leather and garments: skin from Caiman yacare and Nile crocodile, etc.	No, since no researc or other utilization o biochemical compou price is paid for the materials
Wildlife for pets: butterflies, chameleons, snakes, tortoise, etc.	See above
Flowers and foliage: heliconias and other tropical flowers.	See above
Fish products: paiche (Arapaima gigas).	No, unless fish is breeding
Handicrafts: furniture, decoration objects, jewelry and garments.	Not applicable

[17]

2.STATUS OF IMPLEMENTATION NAGOYA PROTOCOL IN INDIA AND ACCESS TO BIODVERSITY SHARING AND ITS BENEFIT

If we take a look in India's commitments towards biological diversity protection , can be summarised as follows :[18]

1. India has signed the Convention on Biological Diversity on 5 June 1992 and ratified it on 18 February 1994

2. India has also Signed Cartagena Protocol on 23 Jan 2001 and ratified the same on 11 September 2003

3. Further has also Signed the Nagoya Protocol on 11 May 2011 and ratified the same on 9 October 2012

4. In national level, it has enacted the Biological Diversity Act (BDA) in 2003 and the enforced the law from 2004 .

If we consider the Nayogaprotocol,it lays down for provisions to deal with "benefits" arising from any kind of use of biological material and associated traditional knowledge that are need to be shared.[19] For, a country like India , are have been under more pressure to design legally binding mechanisms in line with the international regime to facilitate access to biological resources and knowledge.[20]Now, lets have a look over various legal framework that india have in national level to ensure access and benefit sharing of biological resources

"The Geographical Indications of Goods (Registration and Protection) Act 1999:"

The Act was promulgated with the objective of excluding unauthorized persons from misusing GIs, of protecting consumers from deception, of adding to

[17] Implications for BioTrade of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, (Available at:http://www.biotrade.org/ResourcesPublications/UNCTAD_DITC_TED_2011_9.pdf, last accessed on 21.12.2017at 11:50pm)

[18] HemaPande " Implementation of ABS Mechanism in India", Available at:https://www.cbd.int/doc/meetings/fin/ds-fb-02/other/ds-fb-02-presentation-22-en.pdf, last accessed on 21.12.2017 at 12:31 pm)

[19] *Ibid.*

[20] KanchiKohli, ShaliniBhutani, Access to India's Biodiversity and Sharing Its Benefits (Available at:http://kalpavriksh.org/images/CCCBD/ABS_BDAct_EPW_August2015.pdf, last accessed on 22.12.2017 at 5:30pm)

the economic prosperity of the producer of such goods and of promoting goods bearing Indian GI's[21] in the export market. Needless to say, geographical indication products are the natural brands because of their unique quality. It is the best way to protect TK – Basmati Rice, HyderabadiBiriyani and Pochampalli sari being classic examples .[22]

*ii.*Biological Diversity Act of 2002:

It aims to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge. The Act foresees the protection of "knowledge of local people relating to biological diversity" (Art.36(5))."Biological diversity" is defined as "the variability among living organisms from all sources and the ecological complexes of which they are a part, and includes diversity within species or between species and of eco-systems," (Art2(b)).[23]

The Act is a classic example of defensive protection to TK. For instance, Section 6 of this Act provides that "no person shall apply for the IPR, by whatever name called, in or outside India, for any invention based on any research or information on biological resources obtained from India without obtaining the previous approval of the National Biodiversity Authority (NBA) before making such application".[24] NBA may determine benefit sharing fee or royalty for benefits accruing from commercial utilization of such rights [25].

Further Ministry of Tribal Affairs has also prepared a draft of the National Tribal Policy. The policy provides for regulatory protection, socio-economic and political empowerment, development of infrastructure, increased livelihood opportunities, improved governance and administration, preservation of cultural and traditional rights and traditional knowledge,[26] protection of traditional knowledge in the intellectual property rights regime and access to privileges and includes measures to support and preserve the rich tribal culture, tradition heritage, arts and crafts, dance and music through documentation and dissemination, market linkages, cultural festivals and melas and encouragement and support of tribal artists,[27] and folk art performers. Efforts will be made to preserve, document and promote traditional wisdom .[28]

[21]Supra note 18.

[22] Available at :http://www.iipa.org.in/New%20Folder/Dr.%20Raju%20Narayana%20Swamy.pdf, last accessed on 22.12.2017 at 12:21am)

[23] 'The Biological Diversity Act, 2002, Biological Diversity Rules, 2004, Andhra Pradesh Biological Diversity Rules' (2009), Andhra Pradesh Bio Diversity Board, Hyderabad

[24]*Ibid.*

[25]Venkataraman, K. &Swarna, Latha, S., 'Intellectual Property Rights, Traditional Knowledge and Biodiversity of India', Journal of Intellectual Property Rights, 13 (July), 2008.

[26]*Ibid.*

[27]*Ibid.*

[28] Available at:http://www.nipo.in/governmentpro10.htm, last accessed on 23.12.2017 at 1:12pm

iii.Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulation, 2014;

Recently ,The Ministry of Environment, Forests And Climate Change, through National Biodiversity Authority has notified in exercise of powers conferred by section 64 of Biological Diversity Act 2002,[29] and introduced regulations known as "Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014. The guidelines basically contains 17 Sections covering monetary benefits through regulation 3, 4, 7, 9 and12. Now, lets have look on the major guidelines with relation to ABS :[30]

1. If we refer to, Regulation 3 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations (GABRAKBSR, 2014)[31]it expresses mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial utilization.Further, Article 3 seems to have been written off in haste and seems misleading as it lowers percentage of monetary benefit sharing obligations on the trader without approval, in the range of 1.0 to 3.0% and on the manufacturer in the range of 3.0 to 5.0% of the purchase price of the biological resources.[32] On Prior benefit sharing negotiation, the benefit sharing obligations increase and shall be not less than 3.0% in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer. This article may promote traders and manufacturers not to indulge in prior benefit sharing negotiations for monetary gain and low benefit sharing. For high economic value biological resource, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB. [33]

2. Regulation 4 of the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations (GABRAKBSR, 2014) provides option of benefit sharing and categorises graded percentages of monetary benefit sharing at the rate of annual gross exfactory sale of the product that was accessed for commercial utilisation. Till Rs One crore, the benefit sharing component is 0.1%, i.e. Rs 10,000. Annual gross ex-factory sale above Rs One crore up to three crore, fetches 0.2% or Rs 60,000, Above 3 crores, 0.5% i.e. Rs 1,50,000 would be paid as benefit sharing component.[34] The guidelines have introduced a Nagoya plus provision by determining financial structure. How far the financial

[29]Section 64, Biological Diversity Act.

[30]PoonamJayant Singh and Atul Kumar Tiwari, "Analysis of Status of Access and Benefit Sharing of Biological Resources and Associated Knowledge in India: The Path from Common Heritage of Mankind to Sovereign Right of a Nation".Uttar Pradesh State Biodiversity Board Publication.

[31]*Ibid.*

[32]*Ibid.*

[33]*Supra* note 17.

[34]*Supra* note 33.

mechanism will reward the benefactors and stake holders is yet to be seen .[35]

3. Regulation 7 provides for monetary and non monetary mode of benefit sharing for transfer of results of research. In monetary benefit case the applicant has to pay to the NBA 3.0 to 5.0% of the monetary benefit received by the applicant.[36]

4. Regulation 9 provides for the mode of benefit sharing in IPR. If the applicant himself commercialises the process/ product/ innovation, the monetary sharing shall be in the range of 0.2 to 1.0% .If the applicant assigns /licenses the process / product / innovation to a third party for commercialisation, the applicant shall pay to NBA 3.0 to 5.0% of the fee received (in any form including the license / assignee fee) and 2.0 to 5.0% of the royalty amount received annually from the assignee/ licensee 172 .[37]

5. Regulation 12 provides for mode of benefit sharing for transfer of accessed biological resource and/ or associated knowledge to third party for research/ commercial utilization. The applicant transfer or shall pay to the NBA NBA 2.0% to 5.0 % of any amount and/ or royalty received from the transferee, as benefit sharing, throughout the term of the agreement. In case the biological resource has high economic value, the applicant shall also pay to the NBA an upfront payment, as mutually agreed between the applicant and the NBA.

Regulation 15 provides for sharing of benefits for approval granted for biological resource or associated knowledge by NBA for research or for commercial utilization or for transfer of results of research or for Intellectual Property Rights or for third party transfer. 5.0% of the accrued benefits shall go to the NBA, out of which half of the amount shall be retained by the NBA and the other half may be passed on to the concerned SBB for administrative charges. 95% of the accrued benefits shall go to concerned BMC(s) and/ or benefit claimers."[38]

3.Role Of Nagoya Protocol In Ensuring ABS

Under article 10 of the protocol ,Multilateral Benefit-Sharing Mechanism and Transboundary Cooperation (Global Multilateral Benefit-Sharing Mechanism), has been provided under which "Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and [TK] associated with genetic resources that occur in transboundary situations or of which it is not possible to grant or obtain [PIC]. The benefits… through this mechanism shall be used to support the conservation of biological diversity and the sustainable

[35] *Ibid.*
[36] *Ibid.*
[37] PoonamJayant Singh and Atul Kumar Tiwari, "Analysis of Status of Access and Benefit Sharing of Biological Resources and Associated Knowledge in India: The Path from Common Heritage of Mankind to Sovereign Right of a Nation".Uttar Pradesh State Biodiversity Board Publication.
[38] *Ibid.*

use of its components globally."[39] The establishment of a multilateral benefit-sharing fund has already been proposed by the Africa Group.[40] The wording "not possible to grant or obtain [PIC]" is broad and could thus cover genetic resources or associated TK which origin is not clear or that were obtained prior to the entering into force of the NP and the CBD, for instance for ex situ collections. The fund thus provides a potential means of addressing developing country concerns over the temporal scope .[41]

Further ,Article 5 of the Nayoga Protocol (Fair and Equitable Benefit-Sharing) also clearly distinguishes between benefits arising from the utilization of genetic resources, benefits that are arising from genetic resources that are held by ILC and benefits arising from the utilization of TK associated with genetic resources.[42]Also , in order to facilitate monitoring the Protocol introduces internationally recognized certificates of compliance which "shall serve as evidence that the genetic resource which it covers has been accessed in accordance with [PIC] and that [MAT] have been established".[43]

Thereby the already mentioned permit issued in accordance with Article 6.3(e) NP shall constitute such a certificate.[44] But to conclude we can say the biggest flaw of Nayoga protocol as a whole is "there is no specified obligation of user states to ensure benefit sharing. As before, the enforcement of benefit-sharing duties is left to contractual means, with all the difficulties of forum, litigation costs, and prosecution of titles. The fact that the Protocol does not go further in that direction constitutes a major disappointment for the provider side."[45][46]

4.Traditional Knowledge(TK) Protection Under Nagoya Protocol

The Nagoya Protocol also address the treatment of TK associated with genetic resources and genetic resources held by ILCs. Article 7 of the Nagoya Protocol requires countries to ensure that access to associated TK is based on PIC and that benefit sharing will take place. Such

[39] Article 10 , Nagoya Protocol (Available at:https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf, last accessed on 20.12.2017at 2:47pm)

[40] Dr KonstantiaKoutouki,THE NAGOYA PROTOCOL: STATUS OF INDIGENOUS AND LOCAL COMMUNITIES,LEGAL ASPECTS OF SUSTAINABLE NATURAL RESOURCES LEGAL WORKING PAPER SERIES (Available at:http://cisdl.org/public/docs/legal/The%20Nagoya%20Protocol%20-%20Status%20of%20Indiginous%20and%20Local%20Communities.pdf, last accessed on 21.12.2017 at 12:10pm)

[41] Kamau, Fedder& Winter, "The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and what are the Implications for Provider and User Countries and the Scientific Community?";KrystynaSwiderska, supra note 6; Union for Ethical BioTrade.

[42]Supra note 23.

[43]Article 17(3) , Nayoga Protocol

[44].*Ibid.*

[45] Kamau, Fedder& Winter, "The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and what are the Implications for Provider and User Countries and the Scientific Community?

[46]*Supra* note 23.

benefits are required to cover benefits from R&D, but not commercialization.But,the Protocol governs only TK associated with genetic resources, and not all TK. "The protocol on 'Access to Genetic Resources and Benefit Sharing' is significant to Indigenous Peoples because it is the first treaty relevant to Indigenous Peoples to have been negotiated since the adoption of the UN Declaration on the Rights of Indigenous Peoples, and relates to access to the natural environment, including where Indigenous Peoples' territories exist,"[47] The link between genetic resources and traditional knowledge in the context of ABS is based on the second and third obligations under Article 8(j) of the CBD. Accordingly, the CBD acknowledges the value of traditional knowledge to modern society and recognizes that holders of such knowledge, innovations, and practices are to be involved and provide their approval, subject to national law, when it gets to the wider application of those knowledge, innovations, and practices. Furthermore, States are encouraged to equitably share the benefits arising out of the utilization of ILCs' knowledge, innovations, and practices. [48]

Today , the indeginious people face threats to their traditional knowledge (TK) and resource rights. Although States commiserate about the debilitating poverty suffered by such peoples, some States appear unwilling to safeguard Indigenous rights to resources.[49] A key problem that exacerbates the impoverishment of Indigenous peoples and local communities is "biopiracy".[50]This issue is not specifically referred to in the Nagoya Protocol. Biopiracy has been described as "the unauthorised commercial use of genetic resources and TK without sharing the benefits with the country or community of origin, and the patenting of spurious 'inventions' based on such knowledge and resources".[51]Now lets have a look on some of the draw backs of Nagoya protocol in relation to the Traditional Knowledge protection :[52]

1. Indigenous peoples' human rights concerns were largely disregarded, contrary to the Parties' obligations in

[47] Nagoya Protocol on Access to Genetic Resources Recognizes Indigenous Rights , Cultural Survival, (Avaiable at:https://www.culturalsurvival.org/news/japan/nagoya-protocol-access-genetic-resources-recognizes-indigenous-rights, last accessed on 23.12.2017 at 3:40 pm)

[48] *Ibid.*

[49] Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights.Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva 11-15 July 2011(Available at:http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf, last accessed on 23.12.2017 at 3:09pm)

[50] Valeria A. Gheorghiu, "Sailing The Seas of Treaties: Biopiracy in the Wake of the International Treaty on Plant Genetic Resources for Food and Agriculture", (2006) 7 Fourth World Journal 1

[51] KrystynaSwiderska, Banishing The Biopirates: A New Approach To Protecting Traditional Knowledge, Gatekeeper Series 129, International Institute for Environment and Development (London: IIED, 2006)

[52] *Ibid.*

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the Charter of the United Nations, Convention and other international law;[53]

2. progressive international standards, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) were not fully respected – despite the obligation in the Protocol that it be implemented "in a mutually supportive manner with other international instruments"; [54]
3. repeated use of ambiguous and questionable phrases, such as "subject to national legislation" and "in accordance with national legislation" is not consistent with the requirement that national legislation be supportive of the "fair and equitable" objective of benefit sharing;[55]
4. excessive reliance on national legislation is likely to lead to serious abuses, in light of the history of violations and the Protocol's lack of a balanced framework;
5. the phrase "indigenous and local communities" is used throughout the Protocol, even though "indigenous peoples" is the term now used for such peoples in the international human rights system. ii Such denial of status often leads to a denial of self-determination and other rights, which would be discriminatory;
6. in regard to access and benefit sharing of genetic resources, only "established" rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination;[56]
7. "established" rights might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling. This would be a gross distortion of the original intent. Massive dispossessions could result globally from such an arbitrary approach inconsistent with the Convention;[57]
8. "prior and informed consent" of Indigenous peoples was included in the Protocol, along with questionable and ambiguous terms that some States are likely to use to circumvent the obligation of consent;[58]
9. lack of Parties' commitment to ethical conduct is exemplified by the Tkarihwaié:ri Ethical Code of Conduct,

[53]Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights. Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva 11-15 July 2011(Available at: http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf, last accessed on 23.12.2017 at 3:09pm)

[54]*Supra* Note 37.

[55]*Ibid.*

[56] Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights. Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva 11-15 July 2011(Available at http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_annex_comments_on_observer_participation.pdf, last accessed on 23.12.2017at 3:09pm)

[57]*Ibid*

[58]*Ibid*

adopted by the Conference of the Parties – which Code stipulates that it "should not be construed as altering or interpreting the obligations of Parties to the Convention ... or any other international instrument" or altering domestic laws and agreement.[59]

Above are some of the major drawbacks , that need to be considered in order to make the Nayoga protocol much more efficient and protecting for the Indeginious people also. Around the world, in spite of worldwide distinguishment of the right of indigenous people groups to safeguard and secure their customary practices, learning and lifestyles, the social legacy of numerous indigenous people groups is under risk, and numerous indigenous people groups are kept from getting a charge out of their human rights and essential opportunities .[60]

5. CASE STUDIES WITH RELATION TO ABS

I.Vedanta –Niyamgiri Controversy

In 2004, three different environmental activists filed petitions at the Cuttack High Court in Orissa and India's Supreme Court challenging the proposed mining project on grounds that it violated India's Constitutional provisions under Schedule V, the Supreme Court's order on the Samata case[61] and the country's environmental and forest conservation laws. In 2004, three different environmental activists filed petitions at the Cuttack High Court in Orissa and India's Supreme Court challenging the proposed mining project on grounds that it violated India's Constitutional provisions under Schedule V, the Supreme Court's order on the Samata case and the country's environmental and forest conservation laws.[62]Niyamgiri hills is the natural habitat for many endangered, threatened and conservation dependent flora and fauna species because of its diversified topography with high mountain peaks, plain plateaus at hill tops, innumerable deep valleys and gorges, abundant springs, diverse vegetation resources and its distance from so called mainstream development process.[63] Being abundant in such rich flora which also includes many medicinal plant species and are protected under the traditional knowledge. Allowing , a MNC like Vedanta to mine would not only have violated the land rights but also the intellectual property rights of those tribals.

The honorable apex court finally held in the case of Orissa Mining Corporation Ltd. Vs. Ministry of Environment & Forest & Others[64], the blatant disregard

[59]*Supra* note 37.

[60] Bruntland, G., Our Common Future: The World Commission on Environment and Development, Oxford, Oxford University Press, 1987.

[61]*Samatha v. Andhra Pradesh* (1997) 8 SCC 191

[62] Seeland K., Schmithusen F., 2002, Man and Forest Series 2, Forest Tribes of Orissa, Vol-1: The DongariaKondha

[63]*Ibid.*

[64]Orissa Mining Corporation Ltd. Vs. Ministry of Environment & Forest & Others(2013) 6 SCC 476

displayed by the project proponents with regard to rights of the tribal and primitive tribal groups dependent on the area for their livelihood, as they have not proceeded to seek clearance is shocking. So , it should be led to the village panchayats to decide whether to allow the MNC or not. Its, really an appreciable descission given by the honoble court , which not only protected the land rights but also the intellectual rights of the tribal of that region .

II.NestleRooibos Products Issue

Nestlé, the world's largest food company was charged with the allegations of biopiracy after it applied for patents involving two plants found in South Africa without having negotiated permission to use them with the South African government. The problem was that, they have dubbed the "rooibos robbery," the Berne Declaration, a Swiss advocacy organisation, and Natural Justice, a South African environmental group, accused Nestlé of having violated South African law and the Convention of Biological Diversity (CBD).[65]Issue that arose was , there were two plants found in South Africa, rooibos and honeybush, both of which are commonly used to make herbal teas. Nestec, a Nestlé subsidiary, filed four international patent applications for using the plants or extracts from them to treat hair and skin conditions such as acne, wrinkles, and hair loss. A fifth application sought patent protection for using rooibos as an anti-inflammatory. It is seeking patent protection in a large number of countries around the world, including South Africa .[66]

Under South African law, the commercial phase of bioprospecting begins once a patent application has been filed.,phase a permit which would include a benefit sharing agreement and a material transfer agreement has to have been submitted regardless of where the research takes place,butthe companies that supplied the rooibos and honeybush to Nestlé had also not secured permits. So, Nestlé case highlights the urgent need of a new protocol that prevents the misappropriation of genetic resources and associated traditional knowledge".

6.BEYOND NAYOGA PROTOCOL: OTHER TREATIES RELATED TO ABS

I.The TRIPS Agreement

"As one of the agreements to which all Members of the World Trade Organization has a major impact on the scope of intellectual property protection around the world. The TRIPS Agreement establishes minimum standards of IP protection, which must be incorporated

[65]Supra note 21.

[66] The Convention on Biodiversity and the Nagoya Protocol: Intellectual Property Implications. A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property,2014(Available at: http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf, last accessed on 22.12.2017 at 11:42pm)

[67]Bridges Trade Biores, Vol. 10, No. 10, 31 May 2010.

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through national legislation by WTO Members unless specifically exempted by the WTO as in the case of the Least Developed Countries.[68] Such standards are established for a variety of IP instruments including patents, copyrights, trademarks, geographical indications (hereafter GIs), industrial designs, plant variety protection, integrated circuit designs and undisclosed information. The treaty body for the TRIPS Agreement is the TRIPS Council, which is an intergovernmental body serviced by the WTO Secretariat in Geneva, Switzerland. The TRIPS Agreement establishes minimum standards of protection for WTO Members over a variety of IP instruments including patents, copyrights, trademarks, geographical indications, industrial designs, plant variety protection, integrated circuit designs and undisclosed information .[69]

II .Bonn Guildlines

ABS, the Conference of the Party to the CBD (COP) 5 (2000) established the Ad Hoc Open-ended Working Group on ABS with the mandate to develop guidelines.23 The result is the Bonn Guidelines, adopted unanimously by some 180 countries.[70] The Bonn Guidelines are of voluntary nature and according to I.A.1 .

"may serve as inputs when developing and drafting legislative, administrative or policy measures under Articles 8(j), 10(c), 15, 16 and 19 CBD; and contracts and other arrangements under MAT for ABS".[71]

The Guidelines identify the steps in the ABS process, with an emphasis on the obligation for users to seek PIC of providers. They also identify the basic requirements for MAT and define the main roles and responsibilities of users and providers.[72] With regard to PIC, the Bonn Guidelines distinguish between ILC associated with the genetic resources being accessed and TK associated with the genetic resources being accessed. In both cases PIC of ILC and in the latter also the approval and involvement of the holders of TK should be obtained in respect of established legal rights[73]. Furthermore the Guidelines introduce a proposed list of elements that could be considered as guiding parameters in contractual agreements as well as basic requirements for MAT particularly with regard to ILC and TK [74]

(a) Regulating the use of resources in order to take into account ethical concerns of the particular Parties and stakeholders, in particular ILC concerned;[75]

[68]*Supra* note 51.
[69]*Ibid.*
[70]Bram de Jonge and NielsLouwaars in: Kamau, Fedder& Winter, supra note 6 at XXV, 37; Dross & Wolff, at 12; Nijar, The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries at 7; Garforth et al; Country reports, in: Kamau, Fedder& Winter,
[71]Boon Guildlines.
[72]*Ibid*
[73]Para 31, Bonn Guildlines.
[74]Para 43,Bonn Guidelines.
[75]*Ibid*

(b) Making provision to ensure the continued customary use of genetic resources and related knowledge;[76]
(c) Provision for the use of intellectual property rights include joint research, obligation to implement rights on inventions obtained and to provide licences by common consent;[77]
(d) The possibility of joint ownership of intellectual property rights according to the degree of contribution.[78]

CONCLUSION

The Nagoya Protocol is nevertheless a reaffirmation of the importance of access and benefit sharing and a renewed call for all stakeholders to take relevant principles into consideration in all their activities.[79] Even as the Nagoya Protocol is further defined and put into effect, early adopters of access and benefit sharing practices in the food and personal care sectors will gain a competitive advantage. In addition, early adoption of access and benefit sharing practices will reduce the growing reputation and regulatory risks of non-compliance. For companies working with biodiversity-based ingredients for food and personal care products, therefore, addressing access and benefit sharing including through membership in organizations such as the Union for Ethical BioTrade, which incorporate access and benefit sharing in its standard, tools and technical support - should be seen an opportunity to advance their engagement and commitment to ethical sourcing of biodiversity.[80] As the tribal groups have a nearby reliance on organic assets identified with plants and creatures/winged animals. Their employment and way of life regularly relies on and is formed by these assets. In this manner, their survival and sustenance is complicatedly connected to preservation and use of these assets. Corporate protectionism as far as licenses and intellectual property rights (IPR)[81] emerging out of different worldwide bargains/instruments on exchange and basic property assets, for example, TRIPS under WTO speaks to a genuine danger to monetary work of these groups and in addition a wellspring of potential misuse of their asset base as bio-differing qualities communicated in life structures and knowledge is tried to be changed over into private property and treated as an open access framework free of charge abuse by the individuals who need to privatize and patent it.[82] Henceforth there is a dire need to give more suitable and solid legislations and institutional plans for perceiving and recognizing the rights of tribal groups to such assets and knowledge. Hence, the protocol should be allowed to increase its ambit with sufficient changes in order to accommodate almost the needs of every one and to ensure equitable access to "ABS" .

[76] *Supra* note 75.
[77] *Ibid.*
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid*

[81] Amnesty International ,Report 2010, "Don't Mine Us Out Of Existence Bauxite Mine And Refinery Devastate
Lives In India
[82] *Supra* note 43.

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