

**REGULATIONS AND POLICIES ON BIOLOGICAL DIVERSITY AS
PROTECTION TOWARD INDIGENOUS COMMUNITIES IN INDONESIA
(POST NAGOYA PROTOCOL)**

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A. INTRODUCTION

The usage of biodiversity, most of all, comes from developing countries. It is undeniable that Indonesia as part of the world specifically in biodiversity has a lot natural resources that can be used for the development of the world. Indonesia itself has diversity within in local people, indigenous community, biodiversity and natural resources. Based on the fact of Indonesia's richness, especially indigenous community and biodiversity, it can be expended as part of international trade which origins from Indonesia.

Referring to the development of international trade, there are three major pillars that are related to biodiversity. They are, first, conservation; second, the sustainable use of resources for future generations; and third, the alleviation of poverty through the fair and equitable sharing of resources. The last pillar that was mentioned is the important part of the protection for indigenous community specifically in Indonesia.

The limit of ability and facility owned by indigenous community in accessing the fair and equitable benefit of their knowledge including in biodiversity reveals the problem regarding indigenous prosperity.

To support the acceleration of the third objective and to effectively implement international regime on access to genetic resources and benefit sharing¹, so the Nagoya Protocol was made on October 29th, 2010, Nagoya, Japan. This Protocol was formed in order to guide and give the technical parts that should be fulfilled by all the parties who included and ratified The Convention on

¹ Article 15 on The Convention of Biodiversity.

Biodiversity. This protocol had signed by more than ninety countries, but to be effectively entry into force it must be ratified at least by 50 charter and 90 days after the fifty charters has been ratified.

B. RESEARCH PROBLEMS

The main problems of the protection of Biodiversity Convention concerning to indigenous community in Indonesia are implementing the Nagoya Protocol through the regulations and policies. Besides that, the stressing point of this research is to minimize the raise of poverty and increase the number of welfare among indigenous community in Indonesia through specific ways or procedures which usually happen in these society whose have the ancient, important, and remarkable knowledge.

C. DISCUSSION

The complexity and diversity in biodiversity and indigenous community have become the vast range of issues involved- from trade to conservation, intellectual property rights, biotechnology and traditional knowledge and its related to the policy concerns with globalization, corporate behavior, and the disparities among developed countries, developing countries, and least-developed countries (rich and poor countries).

First, we have to know the definition form each term. Indigenous people or indigenous community can be interpreted as: *“locales that document interactions between those human and non-human persons who have come before present generation and as importantly who continue to interact in contemporary times”*². The story of this community it just likes a multimedia production involving the communal creation (it can be anything such as story, medicine, etc). Indigenous community is also related to indigenous knowledge. The Director

² Anne Rosse, et. al. Indigenous and Scientific Knowledge. p.31.

General of United Nations Educational, Scientific and Cultural Organization (Mayor, 1994) defines traditional knowledge:

“The indigenous people of the world possess an immense knowledge of their environments, based on centuries of living close to nature. Living in and from the richness and variety of complex ecosystems, they have an understanding of the properties of plants and animals, the functioning of ecosystems and the techniques for using and managing them that is particular and often detailed. In rural communities in developing countries, locally occurring species are relied on for many - sometimes all - foods, medicines, fuel, building materials and other products. Equally, people’s knowledge and perceptions of the environment, and their relationships with it, are often important elements of cultural identity”

From above, we could see that indigenous community cannot be separated with indigenous knowledge. These things are also related to the protection of biodiversity. The meaning of biodiversity is the variety of life and reflects connectivity variation at all levels of biological organization. In definite terms, it means that “biodiversity means the variability among living organisms from all sources including, inter alia³, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems”⁴. Biodiversity encompasses all forms, levels, and combinations of natural variations and served as a broad unifying concept. Three other important aspects to be understood about biodiversity⁵:

- **Center of origin:** is a geographical are where a taxon originates or is developed for the first time. Taxon is a unit of taxonomy, the science that classifies all living organisms in the world.

³ Means among other things.

⁴ Vide Article 2 the Convention of Biodiversity.

⁵ Indonesian National Document of Biodiversity. BAPPENAS. 2004

- **Center of diversity:** a geographical area with high species or genetic diversity. A center of origin is not necessarily a center of diversity. Indonesia, for instance, is considered as the center of origin of banana and sugar cane, but is also a center of diversity for plants, which did not originate here, such as rice, mango and the ginger family.
- **Center of endemism:** a geographical area with a high number of endemic species at the local level.

The connectivity and the important of those things above are getting more important especially after the signed of the Nagoya Protocol regarding access to genetic resources and equitable and fair benefit sharing and this protocol is the next step post Convention on Biodiversity in 1992.

The protocol is a derivation regulation from the Convention so it can be applied in world indigenous community (more specified in technical procedures) and the objective of this protocol is equitable and fair benefit sharing from utilization of genetic resources in order to give contribution toward conservation and sustainable consumption from biodiversity and also as instrument in achieving the third purposes of biodiversity convention.

In Article 5 Number 1 on Nagoya Protocol, it is explicitly said that utilization of genetic resources (including in here the use of indigenous knowledge from indigenous community⁶) shall be shared in equitable and benefit sharing⁷. The calculation of equitable and benefit sharing must be determined in specific and definite assessment. These principles⁸ recently also adopted by United Nations Declaration on The Rights of Indigenous Peoples, that stating :

⁶ Indonesia has about 336 cultural groups with their diverse cultures. Diverse local cultures are also associated with knowledge systems on biodiversity utilization and conservation, often known as **traditional wisdom**.

⁷ Previously has been regulated on the Convention on Biodiversity 1992 and also Bonn Guidelines 2002.

⁸ Equitable and Fair Benefit Sharing Principles.

“Indigenous people have the right to maintain, control, protect, and develop their traditional knowledge... and the manifestations of their sciences, technologies, and cultures including genetic resources, seeds, medicines and.... (knowledge) of properties of fauna and flora....They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”⁹.

The regulation of equitable and benefit sharing in Nagoya Protocol is divided into two types of utility, monetary and non-monetary. Transfer of technology is one kind of non-monetary activity, and when the product are published into market and commercialized, it becomes monetary activity.

At present, the process of adoption of Nagoya Protocol in Indonesia is in the middle of ratification process. This protocol is submitted before the parliament together with the Rotterdam Convention. From Nagoya Protocol, there is guarantee that fair and equitable benefit sharing in consuming genetic resources are must be based on Mutual Agreed Terms (MTA). Mutual Agreed terms are formed as legal basis in regulating of fair and equitable benefit sharing of genetic resources either financially or non-financially. This legal basis has is also connected to strengthen the state sovereignty and jurisdiction, as stated in Article 33 and Article 18 The 1945 Indonesian Constitution (UUD Tahun 1945).

Before the ratification of Nagoya Protocol in Indonesia as national regulation, The Ministerial of Population and Environment has already provided for protecting the biodiversity. One of the agendas provided by The Ministerial is establishment of biodiversity and the prevention of biopiracy¹⁰ Park (*Program*

⁹ Article 31.1 United Nations 2007.

¹⁰ The definitions are : (1) appropriate or reproduce (the work or idea etc. of another) without permissions for one’s own benefit and (2) plunder. In essence, it is conducted by individuals and companies accused of one or both of the following acts : (1) the misappropriation of genetic resources or traditional knowledge through the patent system, (2) the unauthorized collection for commercial ends or genetic resources or

Taman Keanekaragaman Hayati-KEHATI dan Pencegahan Pencurian Hayati-Biopiracy)¹¹. This project is a program to support the implementation of Nagoya Protocol in Indonesia who developed every region's. This action is actually to increase the protection and the preservation of biodiversity and its already regulated based on Population and Environment Ministerial Regulation Number 29 of 2009 regarding Guideline of Biodiversity for Districts. The program heads for sustain the back up of the genetic resources in order to save any kind of local plants where in high threats level. The development of the agenda is conducted by observing the benefit and the function of ecosystems.

The high-priority of ratification of Nagoya Protocol as Indonesia's national regulation (act) because of the reasons of conflicts between the "biodiversity-rich" developing country providers and "technology-rich" developed country users of biodiversity.

In Indonesia itself, right now, there are more than fifteen regulations in national scope starts from acts, government regulations, President's commands, until technical regulations that released by ministerial. Apart from that, from all existing regulations which linked to biodiversity, there is no one regulation that controlled and maintained the protection over the indigenous community specifically. It is quite miserable when we remember that Indonesia has a lot of genetic resources and diverse society (local people and indigenous community) but in reality lack of legal protection before the law. The government of Indonesia shall consider the certainty of the common heritage of humankind and the state sovereignty¹². Over and above, the concept of justice is also needed in regulate the benefit sharing especially the economic aspect for indigenous community and

traditional knowledge. Biopiracy is not only about the law but also related to morality and fairness.

¹¹ Long time before this project, the Ministerial already built The National Park as efforts of conservation.

¹² The resources exploitation must be carried out as the benefit of humankind as a whole. It is also stated in the Non-Binding Statement on Benefit Sharing by the Human Genome Project's Ethics Committee.

whole national society. We (the government) should think that the justice concept must be “a justice in exchange” which means mainly establishes the fairness of transactions specifically in the usage of biodiversity (genetic resources)¹³.

Indonesia’s government should make sure about the indicators of well-being, poverty and sustainability of indigenous community and its refers to the international indicators because it strongly support human rights based-approach to indicators development¹⁴. It is not only establishing the indicators of well-being, poverty and sustainability, but also the government should bring the key policy issues that access and benefit sharing regulation (right now in the middle of the legislation process) must cover all the complex elements such as technologies, conservations, trade, and legal aspects that fit into whole regulatory.

The Nagoya Protocol as well regulates the intellectual property rights. So, at least there are two proposals that should be submitted regarding to this part. First, it is that intellectual property laws be modified, possibly through Article 29 TRIPS to include strong disclosure mechanism, which would require all the applicants for intellectual property rights to disclose the country of origin of genetic resources, the sources of relevant traditional knowledge and positive proof of benefit sharing and prior informed consent. The second, it could occur concurrently with the disclosure mechanism, would require the international certificate demonstrating origin, the source or legal provenance of genetic resources and possibly also proof of prior informed consent and benefit sharing¹⁵.

¹³ Doris Schroeder. “Justice and Benefit Sharing” in *Indigenous People, Consent and Benefit Sharing*. Springer. New York. 2009. p.19.

¹⁴ Tebtebba Foundation. *Indigenous People’s Indicators of Well-being, poverty and sustainability in Indicators Relevant for Indigenous Peoples : A Resource Book*. Tebtebba Foundation. Philippines. 2008. p. 59.

¹⁵ Rachel Wynberg and Sarah Laird. *Bioprospecting, Access and Benefit Sharing : Revisiting the Grand Bargain in Indigenous Peoples, Consent and Benefit Sharing*. Springer. New York. 2009. p. 79.

But these proposals are not as easy as what we think to be implemented in the real situations especially in Indonesia as developing countries¹⁶.

It happens because of the strict oppositions by some users and industries on one hand, on the other hand the mega-biodiversity developing countries such as Brazil and India argue¹⁷ that the protection of traditional knowledge and genetic resources will be more effective if international mechanisms are established within the framework of the TRIPS agreement to require patents applicants to disclose the origin of genetic material and traditional knowledge. This would increase transparency and assist in the enforcement of access and benefit sharing agreements. At the same time, in Indonesia's condition, it is quiet difficult because of the society condition neither the common society nor the indigenous community are still in the low levels of the urgency of the classification and the registration of their intellectual property rights including in patents. This condition are getting worst because the government itself also in the stagnancy situation. Even though there is adjustment, it just in little movement that not quiet significance.

The other aspect that must be considered by Indonesia's government when they want to ratified the Nagoya Protocol into national regulations are also made concepts of clear guidelines, code of conduct and standard technical regulation of the ratified Nagoya Protocol eventually. Most of these benefits are expected to be generated in the industrialized urban centers. The truth is, the biological diversity and traditional knowledge associated with it are found in rural areas, where production of such resources is in the hands of local community and they bear very little state power and authority to resource governance and are devoid of any advanced technological development and communication.

¹⁶ The way of life of indigenous people remains vulnerable to domination by more assertive and dominant cultures, which partly explains the rapid loss of culture and traditional knowledge common to these peoples worldwide.

¹⁷ Ibid. p. 80.

These technical regulation as guidelines to implement the Nagoya Protocol are needed to obtain the right to grant access by the indigenous and local communities after the traditional knowledge that related to genetic resources have been established through some provisions¹⁸.

The emerging biodiversity laws shall set up new institutional mechanism responsible for bioprospecting. For example, the Biodiversity management committee on the local levels¹⁹. Therefore, the incentive to the traditional and marginalized communities to protect their system and culture, and get benefits from their knowledge and resources is in threat. Another ways, to optimize the accomplishment of Nagoya Protocol objectives, some tools already started in Indonesia and the other not yet. For example the establishment of National Focal Point already operate by Ministerial of Population and Environment, the maintainability of ex situ conservation and in situ conservation including the National Park. By having the ratified Nagoya Protocol into national regulation, it will accelerate and strengthen the ability of indigenous community (from the use of their knowledge, innovations, and practices).

D. CONCLUSION

From all the explanation above, it can be concluded that the concept of equitable and fair benefit sharing that is proposed in the Convention on

¹⁸ The Secretariat of The Convention on Biological Diversity. Benefit Sharing. UNEP. p.4.

¹⁹ Krishna Prasad Oli. Access and Benefit Sharing from Biological Resources and Associated Traditional Knowledge in the HKH Region-protecting community interests. International Journal of Biodiversity and Conservation. Volume 1 (5). 2009 p.113.

Biodiversity and then more specified regulated in Nagoya Protocol shows that it is new idea that needs to be improved explore in more details regulation. This idea is trying to guarantee that the conservation and the sustainability of genetic resources in biodiversity still sustain in the good way especially for the indigenous community (by ensuring that its custodians are rewarded and hence encouraged to promote conservation).

Furthermore, the protection of Intellectual Property Rights (IPR) in traditional knowledge that also related to genetic resources whose owned by indigenous community must be regulated by national acts or regulations in order to maintain the utilization of origins indigenous knowledge which use by corporations and its commercialized still in a proper mechanism by following the rules (national regulations).

More and more, however, Indonesia shall require more partnership (among companies, research institutions, government itself and indigenous community and others) in having joint collaborations in order to implement the objectives of Nagoya Protocol and to acquire togetherness prosperity among states (specifically in here is Indonesia), indigenous communities, and users.