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Olivia Bronson graduated from UC Berkeley (13') where she designed her own major in the Interdisciplinary Studies Field Department. In this interdisciplinary framework, she focused on the nexus between poverty, public health, and gender in the context of sub-Saharan Africa. Since her first experience in Kenya in high school, she has returned to the continent and traveled extensively throughout Kenya, Zambia, and South Africa. Currently, Olivia is working for Venture Strategies for Health and Development, a nonprofit committed to improving women's reproductive health in the developing world through mobile health initiatives. She hopes to return to Africa in the future and continue to explore the social factors that shape health care experiences through a gendered lens.

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EXPLORING THE NUANCES, ETHICALITY AND FUNCTIONALITY OF 'CONSENT'

Prior Informed Consent as a Legal Mechanism to Protect Malaysia's Indigenous Communities' Rights to Genetic Resources and Associated Traditional Knowledge

By Kaya Allan Sugerman

Indigenous communities worldwide face a new type of misappropriation by the outside world—not only are indigenous lands and livelihoods illegitimately seized, as has been the case throughout history, but today indigenous innovations and knowledge systems are commonly commoditized and ascribed commercial value within biotechnological and pharmaceutical marketplaces. Researchers, corporations, and governments who seek access to and ownership over native plant resources and associated traditional knowledge often do so unjustly, unlawfully, and violently, rarely engaging in a thorough and meaningful consent process for the utilization of such knowledge. When they do, the process often has many shortcomings. In addition, governments often sideline and marginalize indigenous individuals from the political process governing these resources. This paper focuses on the legal concept of 'Free, Prior, and Informed Consent' as it can serve as a protective mechanism for traditional knowledge and its innovators. I analyze its historical foundations, ethical boundaries, nuances, and the potential functionality of a mandatory FPIC policy governing indigenous biodiversity matters within Malaysian national law. In posing a comparative analysis of the international, national, and grass roots frameworks governing consent, I argue that an integration of indigenous customary law or practice into state-specific FPIC protocols proves the most equitable and workable model for national FPIC legislation. By detailing visits to and interviews with four indigenous communities in the East Malaysian state of Sarawak and in Perak, Peninsular Malaysia, I share locals' concerns, hopes, and methods for knowledge protection. The paper concludes with recommendations for indispensable legislative action to be taken by both the state and federal governments of Malaysia and other biodiversity-rich countries. This research was developed through my work as a Research Assistant at the Center for Excellence in Biodiversity Law (CEBLAW) in Kuala Lumpur, Malaysia, with guidance from director Gurdial Singh Nijar. This Center serves as advisor to the Government on matters of biodiversity law. The director, a fellow researcher, and I performed field research, throughout which time I produced this report.

I. Introduction

The threats to and preservation of 'biological diversity' (or biodiversity) have become a major topic of discussion as world powers join together in international forums to confront the present, nearly catastrophic effects of human-caused climate change on the world's populations and environment. Ironically, the people who are disproportionately affected by these environmental ills are often merely subjects of the debate. They are rarely treated as official parties with significant political representation or a voice in the solution. Malaysia's Indigenous and Local Communities (ILCs) are one such affected group, and they are the core focus and intended collaborators in this research initiative.

The roles of ILCs in the preservation of earth's biological resources, the discovery and use of medicinal plants, and progress in sustainable biodiversity management methods and agricultural practices have also become significant topics of global discussion. Since its inception in 1993, the United Nations (UN) Convention on Biological Diversity (CBD) has acknowledged "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably the benefits arising from the use of traditional knowledge."[1] In order to promote these concepts, and particularly the "fair and equitable sharing of benefits," the Conference of the Parties to the CBD developed the Nagoya Protocol on Access and Benefit Sharing (ABS) in October 2010.[2] Today, 25 countries have ratified this international protocol, which further outlines the appropriate measures that should be taken to ensure equitable interaction with ILCs and biodiversity caretakers.[3] However, distinct challenges still exist for the protection of ILCs' rights to ownership over their lands, genetic resources (GR), and associated traditional knowledge (ATK). For instance, national governments' sovereignty over resources is fully safeguarded within this protocol, while that of ILCs is not. In order to combat such inequities between states and indigenous communities, we must take a holistic look at the international, national, and local systems for governing access to these indigenous innovations and information.

This study specifically analyzes the context of Free, Prior, and Informed Consent (FPIC) to explore how this legal mechanism has been modeled into formal and informal agreements and policies at different levels and where it has been effective in its implementation, use, and outcomes. We will further consider how we can realize a constructive Malaysian national FPIC policy based upon customary practices of FPIC and molded to sustain redistributive justice and deep democracy.

II. Nature of the Problem

International frameworks such as the CBD, the Nagoya Protocol, the Bonn Guidelines, and the UN Declaration on the Rights of Indigenous Peoples have repeatedly affirmed that ILCs are the primary caretakers of biodiversity, holding unique cooperative and interdependent

1 United Nations Secretariat of the Convention on Biological Diversity. *UN Convention on Biological Diversity Including its Cartagena Protocol on Biosafety*, (1992), 2.; The CBD has 168 signatory countries, one of which is Malaysia.

2 "The Nagoya Protocol on Access and Benefit Sharing" Convention on Biological Diversity. http://www.cbd.int/abs/default.shtml

3 Of the 25 countries that have ratified the Nagoya Protocol, four are considered "mega diverse": India, México, South Africa, and Indonesia. In order to be entered into force, the Protocol must have a total of 50 ratifications.

relationships with the lands and territories they inhabit. However, these communities' established rights to "maintain and strengthen" those relationships, as well as "develop and control the lands, territories, and resources that they possess by reason of traditional ownership" are by no means adequately protected.[4] Indigenous peoples across the globe face dire threats to their cultures, lives, and livelihoods. Many are affected by oppression, political marginalization, and sidelining as most governments pay little heed to their wants and needs. Some suffer from direct violence, while others undergo displacement from their customary lands to clear the way for 'development' spurred by the government or multinational corporations. Although traditional claims to land exist, indigenous interests are often regarded secondary to the state's interest. Any development of customary lands and resources, regardless of its effects on ILCs, can be justified as for the "common good" of the state. Though not as easily quantified or clearly recognized as the appropriation of land, another large threat to ILCs is the unfettered commoditization, and exploitation of their indigenous and traditional knowledge and innovations.

Traditional Knowledge (TK) includes ILCs' beliefs; knowledge; customary laws and traditions; spiritual sites, sacred sites, and the material things that go with them; rights to flora, fauna, and biodiversity surrounding ILCs; and the artistic works and creations that have usually been passed down orally from generation to generation.[5] What is of particular concern in this research is the rampant appropriation of biological resources and their associated TK (ATK), a phenomenon commonly termed 'biopiracy.' Gurdial Singh Nijar, Director of Malaysia's Center of Excellence for Biodiversity Law (CEBLAW) and biodiversity advisor to the Malaysian government, asserts that the creativity of ILCs in developing TK associated with their ecological environments "has healed, fed, and clothed the world."[6] An estimated three quarters of plants providing active ingredients for prescription drugs came to researchers' attention through their use in *traditional* medicine.[7]

Scientists, medical researchers, pharmaceutical companies, and other bio-prospectors stand to gain huge sums of money and power when they access TK by engaging in conversations or surveys with indigenous communities, collecting samples of plants which have time-tested uses, and commoditizing indigenous peoples' immense knowledge of plants, animals, and their environment. This knowledge includes therapeutic and medicinal properties of plant genetic resources, nutritional value of some food sources, and various indigenous agricultural and land conservation practices.[8] In turn, ILCs often receive few to no benefits or profits from these business transactions. In fact, these transactions often end up resembling theft.[9]

Yet, also unconstructive is looking at illicit bio-prospecting through a "lens of biopiracy." Such a lens leads one to think that the unauthorized use of TK for commercial gain is somehow similar to pirating music or movies. By focusing solely on the inadequate compensation to the

4 United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, (2007): Art. 25, 26.2.

5 Michael Bengwayan, "Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia." *London: Minority Rights Group International* (2003): 3.

6 Gurdial Singh Nijar and Azmi Sharom (Eds.). *Indigenous Peoples' Knowledge Systems and Protecting Biodiversity* (Kuala Lumpur: Advanced Professional Courses, 2004).

7 Gurdial Singh Nijar, "Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects." *European Journal of International Law* (2010): 458; 74% of the 120 active compounds currently isolated from higher plants and used widely in medicine today were used traditionally by ILCs, and subsequently by bio-prospectors.

8 Bengwayan, 4.

9 Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities." *Michigan Journal of International Law* (1996): 944

owner of intellectual property, one ignores the fact that these appropriated innovations were not even meant for commercial gain in the first place.[10] We posit that the initial, unconsented, appropriation of TK and the subsequent lack of compensation for it are unjust. It is invaluable to recognize that communities do not develop TK to be bought or sold, but rather develop it as a part of their cultural fabric. TK is held in high regard, as it is formed through the intricate and intimate spiritual connection and respect ILCs hold for the earth. By trying to fit such indigenous or traditional medicinal plant knowledge to conventional Western ideas and models of economic value without ILC consent, we cast aside the spiritual, cultural, and social importance of TK for knowledge holders.

To be clear, we do not hold the utilization of genetic resources as inherently immoral. Rather, we find the means that the majority of bio-prospectors have used to acquire indigenous innovations or TK unethical. Bio-prospectors often benefit extensively by securing patents or copyrights over TK. In some instances, corporations can use their formal intellectual property over TK to exclude ILCs from owning and making use of their own discoveries. In particular, a corporation can bring fines and litigation to bear against an ILC that attempts to use the TK the corporation took from it.[11] Usually lacking are both reparations and a holistic process of recognition, permission, informed consent, or ILC involvement in decision-making. Because the problem at hand is ILCs' lack of legal protections from bio-prospectors' predatory actions and disenfranchisement from the relevant decision-making processes, we explore the possibilities of a legal tool that incorporates the concepts of community-ownership, democracy, and equity into its culturally-sensitive decision-making framework.

In particular, this paper explores how local control over resources can be sought through an FPIC process. We have singled this process out as a mechanism that should operate independently of any Intellectual Property Rights regime. FPIC serves to ensure

> "Consent to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures the activity would entail, the potential risks involved, and the full implications that can realistically be foreseen. Free, Prior, and Informed Consent implies the right to stop the activity from proceeding, and for it to be halted if it is already underway."[12]

In this working definition, FPIC strives to be a measure for the inclusion of ILCs in an equitable, just, and democratic decision-making process regarding the access to and use of BR and ATK that is rightfully theirs. The concept of FPIC is key to conversations on participation and inclusion of ILCs. This legal mechanism is highlighted as the central concern for this research, both on

10 Graham Dutfield, "Protecting the Rights of Indigenous Peoples: Can Prior Informed Consent Help?" In R. Wynberg, D. Schroeder, & R. Chennells (Eds.), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (2009): 54.

11 Roht-Arriaza, 944-945; Indigenous and traditional knowledge are often referred to by the Western world as the "common heritage of mankind," meaning that it is heritage to be utilized, its benefits opened up to the world. This most often denotes free collection and holding, such as is the case of seed banks. Seeds and their original uses are one type of traditional knowledge, as are potatoes, as we will later see with the Potato Park in Peru. Many Northern-run, biodiversity-poor seed companies depend on genetic seed resources from bio-diverse countries to sustain genetically engineered varieties. Though such biotechnology companies claim to "protect and develop plant genetic resources for all of humanity," the 'common heritage' products engineered in their laboratories are protected with patents and must be bought. This is usually the reality even for farmers from the areas where the seed was originally collected.

12 Darrel A. Posey and Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (Ottawa: International Development Research Centre, 1996), 47.

a global scale, and within Malaysia more specifically. We will focus on what FPIC means and requires, when it is obtained, and how.

In order to understand better why FPIC is the most appropriate approach to ILCs and their TK, it is important to step back and examine more closely the deficiencies of the alternatives. A common argument, for instance, is that ILCs would benefit from applying a Western-style 'intellectual property' approach to their circumstances. By using this approach, the thinking goes, ILCs will be able to maintain legal sway over access to their resources and TK. This Intellectual and Cultural Property Rights (ICPR) regime, however, is inadequate as an Access and Benefit Sharing (ABS) policy. Unlike an FPIC process independent of ICPR structures, such a framework offers very little by way of community-wide ownership and fails to recognize the unique context and political power structure in which TK exists.

Posey, Dutfield and Wynberg et al. put forth the ways in which an Intellectual and Cultural Property Rights (ICPR) approach proves unfitting and artificial when applied to the unique ILC setting. Many Western powers push the ICPR approach to knowledge protection as a way to guarantee legal individuals' rights to their intellectual property. The approach includes using patents, copyrights, plant breeders' rights, or plant variety protection, certification, and labeling.[13] Wynberg et al. describe these tools as "monopolistic" and "individualistic" since they fail to account for the community-based ownership of biological resources and TK and rather focus on one or a few specified individuals as the sole owners of such 'property.'[14] In fact, in many cases, more than one community develop the relevant TK and groups often straddle official frontiers. In this case, offering payments (e.g. royalties) to one community would likely amount to inter-community conflict.[15]

Posey and Dutfield come to similar conclusions, as ICPR protections are purely economic and do not take into consideration the much wider cultural, spiritual, and social nature and value that biological resources and ATK hold for ILCs. As with a "lens of biopiracy," the ICPR regime holds that the problem lies in sufficient monetary returns, failing to address the issue that ILCs would not have put their TK on the market in the first place and have been unjustly pillaged. The ICPR regime inadequately addresses TK in a vacuum, disregarding larger systemic issues like these communities' lack of power, rights, and resources . The misappropriation of TK is a symptom of these root issues and identifying an effective protective legal measure for ILCs means addressing both issues, instead of just the basic economic return. Furthermore, Posey and Dutfield point out that the existing power imbalance between ILCs and corporations makes it extremely difficult for ILCs to defend their ICPRs even if they legally maintain them. High litigation costs are a persistent problem; high application costs make patents difficult to obtain. Already faced with life-threatening issues, ILCs have little time and energy to engage in much policy and advocacy work, making participation in the ICPR regime—with its litigation and other legal processes—difficult.[16]

We now turn to the alternative paradigms of Community Intellectual Rights (CIR) and Traditional Resource Rights (TRR).[17] These acknowledge that TK is collectively owned and shared and they regard knowledge-holders or ILCs to be "innovators," rather than just owners. A replacement for the term 'ICPR,' TRR and CIR are "integrated rights approaches" that establish

13 Posey and Dutfield, *Beyond Intellectual Property*; Rachel Wynberg and Doris Schroeder, "Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case." *Springer* (2009).

14 Wynberg, 7.

15 Posey & Dutfield, *Beyond Intellectual Property*, 92.

16 Preface to Bengawayan, 2

17 Ibid.

the precedence of human rights and environmental law over property rights law. They uphold the principle of local control over resources, TK, and self-determination.[18]

Relating to this need to uphold the value of environmental law over property rights is Bengwayan's observation that there is an inherent connection between environmental destruction and human rights abuses.[19] He emphasizes that this fact must be taken into account if the causes of human, environmental, and indigenous rights are to advance. Extractive practices inevitably affect those who live in close connection to the land. Those who live in rural areas and engage in subsistence-farming life styles, for instance, are often the most adversely affected.

We have identified ILCs as particularly vulnerable to narrowly deliberated state development and cash-strapped governments' efforts to make a quick profit. Offering ILCs a non-coercive, prior, fully informed choice over ATK access along with the ability to determine its limitations and qualifications is core to the many international, national, state, and local documents, declarations, and protocols that guide practices involving ILCs and their rights.[20] The importance of consent is clear, but the legalities surrounding it, how FPIC is obtained, and the ways utilized to ensure that it occurs, are vastly deliberated. This research will draw from scholarly literature and will work from international organizational legal texts, model national law, and community protocols and customary laws to determine how and if FPIC should be operationalized into Malaysian national law.

III. The Ethical Argument for FPIC Fully Involving and Accounting for ILCs

Now that we have discussed what FPIC consists of and the nature of the problem at hand, we shall consider the core values or ethical principles at stake. The values considered include justice, equity, and democracy. By highlighting some values that are often negatively affected when no legal protections for TK exist or when current international and national regimes lack implementation and enforcement mechanisms for FPIC agreements, we seek to discover the best ways to harness and defend these moral ideals. We will also discuss how FPIC may further advance these values. Later sections venture into a more detailed discussion on how these values can be used as a critical lens for assessing and evaluating existing FPIC legislation. This will help determine the extent to which FPIC is a holistically constructive way to govern and administer access to biological resources (BR) and ATK.

A. Justice and Equity in Consent – the Concept of Exchange

In the case of bio-prospecting and utilization of BR and ATK a number of actors and their ranging interests—whether cultural, social, economic, geo-political, or a combination—greatly affects Access and Benefit-Sharing (ABS) legislation and subsequent FPIC processes. Each party is seeking something from the outcome. Schroeder explores how benefit sharing fits into philosophical debates on justice, and we can similarly apply her conceptual framework to FPIC. By using the CBD as a focal point, she investigates why a negotiated exchange, or the act of the knowledge-holder "giving one thing and receiving an appropriate return" from the access-

18 Posey and Dutfield, 92, 95.

19 Bengawayan, 7.

20 Katsuhiko Masaki, "Recognition or Misrecognition? Pitfalls of Indigenous Peoples' Free, Prior and Informed Consent (FPIC)." In S. Hickey & D. Mitlin (Eds.), *Rights-based approaches to development: exploring the potential and pitfalls*. Sterling: Kumarian Press, (2009): 71.

seeker, is necessary in order to regain and uphold a distributive justice balance.[21] Distributive justice refers to the "division of existing resources among a group of qualifying recipients."[22] This concept of justice is tied to a similar concept of 'equity' here to denote that justice does not necessarily mean *equality*, i.e., dividing existing resources *equally* among groups, but instead refers to the division's level of fairness for the recipients.

Prior to the adoption of CBD, genetic and biological resources belonged to the "common domain" and were seen, especially by the Global North, as free and available resources or as the "common heritage of mankind," which needed no [legal] permission, consultation, or other exchange for access, harvest, or utilization.[23] In many cases, the economically wealthy countries of the North have exploited the resources of poorer, biodiversity-rich countries and these poorer countries have not benefitted equitably.[24] The issue is not solely of repatriation either; it is of participation in initial decision-making, which ILCs have historically not been afforded. According to Schroeder, this is the context in which benefit sharing must be understood, and thus a balancing of the scales must occur through appropriate returns.[25] The argument for 'property rights' similarly justifies returns. Schroeder, however, draws upon a larger historical context and Tobin's previously mentioned human rights and indigenous rights precedents to further reinforce the ethical nature of this return. As noted before, the ICPR regime by itself does not wholly take these other issues into account.

The FPIC process can also be seen as an exchange: it deals with one party's giving preliminary consent to another party in exchange for access to agreed-upon information. The context here is one of foreign misappropriation as well as state-imposed internal misappropriation. The populations to be considered are not only the most vulnerable states, but also the most vulnerable people *within* those states. The focus thus centers on indigenous and local communities (ILCs) and their right to FPIC, seeing that they encompass some of the most politically marginalized groups in the world. This is only compounded by the fact that these groups are also the most closely linked to the resources and traditional knowledge in question, which justifies their full ability and innate right to controlling its allocation, use, and access. It is thus made clear that well-negotiated, thought out, and implemented consent systems—involving the exchange of information, decisions, payment, and eventual genetic resources—become today's fairest and most equitable means for trying to reach a state of distributive justice for ILCs.

B. Degrees of Community Participation and Democracy

Literature from Firestone, Wynberg et al., Durraiappah at al., and Laird & Noejovich call attention to the ways this legal mechanism opens new channels and expands existing ones for ILC participation and deep democracy. That there are many parties in question calls for strict scrutiny of the CBD and national legislation with regard to how they delineate each party's role in FPIC decision-making procedures. As mentioned, the CBD safeguards national governments from the outside bio-prospecting world but does not address local community participation. Each national government has interpreted the CBD differently when it comes to incorporating

21 Doris Schroeder, "Justice and Benefit Sharing." In R. Wynberg, D. Schroeder, & R. Chennells (Eds.), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case*. Springer Netherlands (2009): 19.

22 Ibid, 18.

23 Ibid, 15-16.

24 Ibid.

25 Ibid.

ILCs' rights to political involvement into their individual ABS legislation. Specific elements defining FPIC in international and national law will be addressed further in upcoming sections. Here we will look at how the value of democracy is negatively affected when the appropriate FPIC measures and legal recognition of the rights of ILCs do not exist in law. We will also see how cultural sensitivity and the inclusion of customary consent practices within the FPIC process strengthens democracy.

To foreground this discussion, we must confront the fact that the incorporation of ILCs into FPIC agreements is essential to the democratization of ABS negotiations, just as it is to values of justice and equity. If bio-prospectors or governments fail to include those ILC populations who, as demonstrated, have the biggest stake in the appropriation of their BR and ATK, inequitable and undemocratic decision-making will result. Even with adequate FPIC stipulations in place, there is a spectrum of ways ILCs can be unjustly consulted and handled. These include but are not limited to manipulative or misleading negotiations, lack of truthful information regarding how ILCs' TK will be used, and minimal returns to the community.

So how do we ensure fairness? First, it is important to shed preconceived views of democracy. These may include Western democratic models where citizens' voices are involved indirectly through elected representatives, and which focus on the individual and private property rights.[26] In contrast, we suggest that the level of *participation* is the determining factor of democracy. Duraiappah et al. and Laird et al. denote levels of participation on a scale from one to nine. They begin on the one hand with extractive, manipulative, and passive participatory practices and end on the other with community-controlled, self-mobilized, active, and empowered participation. This side of the spectrum denotes community-propelled consent processes that utilize customary protocols in order to change systems, indicating a more democratic process.[27] According to these authors, values of democracy and participation are most injured when ILC participation in a FPIC process or bio-prospecting project is contrived or manipulated, determined without ILC input, and executed without the application of customary methods and protocols.[28] The guidelines for FPIC put forth by the Working Group on the Convention further set out how these can be avoided. These recommendations include according "equal status" to the holders of traditional knowledge and conceptualizing the FPIC process as a "negotiation," "collaboration," or "partnership."[29] As a legally binding text, this should be a starting point, falling in line with the 'scales of participation.'

Democracy can be reinforced in a consent process when customary laws and procedures are taken into consideration as models for sui generis negotiations regarding BR and ATK. Through the development of culturally sensitive FPIC frameworks, which give ILCs ownership and "responsibility" over BR and ATK, communities are empowered to define their own methods

26 Wynberg et al., 238.

27 Durraiappah's degrees of participation: (1) manipulation, (2) passive participation, (3) participation in information giving, (4) participation by consultation, (5) participation for material incentives, (6) functional participation, (7) interactive participation, (8) partnership and (9) self-mobilized/active participation.

28 Anantha Durraiappah, Pumulo Roddy, and Jo-ellen Parry, "Have Participatory Approaches Increased Capabilities?" *International Institute for Sustainable Development* (2005): 1-31; Sarah A. Laird, Sarah A. & Flavia Noejovich. "Building equitable research relationships with indigenous peoples and local communities: Prior informed consent and research agreements," in S.A. Laird (Ed.) *Biodiversity and Traditional Knowledge*, (London: Earthscan, 2002), 179-238.

29 qtd in Laurel A. Firestone, "You Say Yes, I Say No; Defining Community Prior Informed Consent Under the Convention on Biological Diversity." *Georgetown International Environmental Law Review*, 16, 1(2003): 184; Durraiappah, 6.

for participation. In contrast, alien legal frameworks that determine community participation or define FPIC in a culturally insensitive manner are forms of domination.[30]

IV. FPIC in the International Framework

Origins of FPIC can be traced back to international agreements between countries attempting to move their potentially hazardous chemicals and waste into others[31] and to medical requirements stipulating a particular dialogue between doctor and patient.[32] The foundations of consent were first set out as a method for navigating the relationship between nation-state and indigenous populations by the International Court of Justice in its 1975 advisory opinion to the *Western Sahara* Case. The Court quoted General Assembly resolution 1541 (XV) when deliberating territory whose sovereignty was disputed by Spain and Morocco: "The integration should be the result of the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted."[33] Numerous other influential international forums, including the United Nations and the Working Group on Indigenous Populations, have since embraced ILCs' right to FPIC. Also valuable are the "soft-law" mechanisms including ethical guidelines, declaratory principles, and policy frameworks which reinforce indigenous rights to BR, its ATK, and self-determination.

These international agreements must result in a tangible outcome and application on the ground so that actors are fully protected from misappropriation and exploitation of their resources. In order to strive for 'trickle down' or implementation of such broad guidelines, one must initially consider ILC marginalization both by foreign bio-prospectors and domestic national governments, and analyze the documents dictating the ABS process and the intended role and determinations for FPIC. In doing so we gain an understanding that the governments of nation-states rich in biodiversity, i.e., the developing countries in the Global South, are thoroughly safeguarded from exploitation, as the emphasis and motivation of international law is focused on national sovereignty and chiefly offers national governments the fundamental option of consent. We further recognize that the communities within them, whose ways of life and livelihoods are most intimately tied to biodiversity and its conservation, must be equally respected and protected through the option of consent. While FPIC for concerned ILCs is strongly encouraged by the international community, this is not always the case on the ground.

A. International Human Rights and Indigenous Rights Legal Structures Involving FPIC

Through a diverse international basis for FPIC, this study offers due attention to all soft and hard law structures, since both notably impact its internalization and application. Shahrom, Bengwayan, and Mauro explore the international human rights framework as it relates to

30 Brendan Michael Tobin, "Customary law as the basis for Prior Informed Consent of Local and Indigenous Communities." International Expert Workshop on Access to Genetic Resources and Benefit Sharing, Mexico. (2004): 5.

31 See the *Basel Convention (Transport and Disposal of Hazardous Waste)*

32 Firestone, 181.

33 Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development." *Berkeley Journal of International Law 27*, no. 2 (2009): 570.

indigenous rights to FPIC. Shahrom declares that the concept of "self-determination"—defined and set out by the United Nations International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESC)—avows great importance to FPIC and recognition of ILCs' rights. Asserting that all people have the right to "freely determine their political status and freely pursue their economic, social, and cultural development," she argues that these documents support the idea that indigenous peoples' rights to their lands, resources, and full involvement in decision-making processes are essential to their being in a position to "freely pursue" their economic, social, and cultural development as a people.[34] Full involvement would therefore at least require FPIC and community approval for activities that affect their lives.

The International Labor Organization (ILO) Convention 169 is another human rights instrument that stipulates requirements for FPIC outright, except in the context of proposed relocation of ILCs from their lands. Adopted in Geneva at the Tribal Peoples Convention in 1989, this Convention is the only legally binding instrument pertaining directly to indigenous peoples, praising the "distinctive contributions of indigenous and tribal peoples to the cultural diversity and social ecological harmony of humankind and to international cooperation and understanding."[35] Additionally, Bengwayan notes that rather than simply acknowledging ILC ownership, Articles 13, 14, and 15 of the ILO Convention 169 stipulate that governments officially recognize ILC rights over traditional lands and resources, including biodiversity and wildlife.[36] However, as of 2012 only 20 countries have ratified this Convention.

Making parallel affirmations, the 1965 UN Declaration and International Convention on the Elimination of Any Form of Racial Discrimination (ICERD) initiated a 1983 study on discrimination against indigenous populations with the conclusions that states should indeed respect customary law governing land and resource ownership and integrate it into national law.[37] Following these recommendations, the UN Commission on Human Rights (UNCHR) created a UN Working Group on Indigenous Populations (WGIP) to review the transformation of indigenous rights over time, offer a place for indigenous peoples to express grievances, and promote the protection of those rights.[38] The eventual 2010 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that came out of this body affirmed full ownership rights over lands and territories as well as intellectual and cultural property. Additionally, it affirms "the right to effective measures by States to prevent any interference with, alienation of, and encroachment upon these rights."[39] These State responsibilities are further defined throughout, such as in Article 32, as consultation and cooperation in good faith with the concerned indigenous communities, "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources."[40] It also declares that rights over indigenous knowledge or innovations, TK, or what the document calls "intellectual and cultural heritage" *shall not* be

34 Zuraida binti Rastam Shahrom, "Traditional Knowledge and Access and Benefit Sharing under the Convention on Biological Diversity," (master's thesis, Universiti of Malaya, 2010), 42.

35 qtd in Bengwayan, 15.

36 Ibid.

37 Francesco Mauro and Preston D. Hardison, "Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives." *The Ecological Society of America*, *10* (2010): 1264.

38 Mauro, 1264-5.

39 qtd in Bengwayan, 14.

40 United Nations General Assembly, *UNDRIP,* Article 32.2.

separated from the indigenous territories and resources themselves, reaffirming the idea that GR and their associated TK are inextricably linked; ILCs' FPIC, therefore, should indeed be sought out regarding access to either one.[41]

This declaration is a form of 'soft-law,' meaning it is not legally binding and "lacks teeth" or monitoring and enforcement mechanisms. However, its clarity on the value of FPIC rings loud and clear to the international community, and there is no doubt that this method for safeguarding a fair and equitable access process has been endorsed repeatedly.[42] Thus, a new normative international legal framework governing best practice arises out of these texts, studies and agreements, but comes into effect rather slowly because they have no legal repercussions for states unwilling to make changes. Next we will discuss legal specifications for ILCs' FPIC within the 1993 Convention on Biological Diversity (CBD), a legally binding text ratified by 193 countries.

B. FPIC within the Convention on Biological Diversity

With the creation of a Convention on Biological Diversity (CBD) in 1992, and its entry into force in December 1993, came considerable dialogue around the conservation of biological resources, sustainable development, and access and benefit-sharing (ABS). The third objective I have listed—identified specifically as "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources"—brought about the most apparent controversy.[43] Taking this global treaty in its entirety, along with the Bonn Guidelines and Nagoya Protocol, was a large step in recognizing ILCs as the primary stewards of the world's forests, biodiversity, and related intellectual innovations, as well as their right to FPIC. The CBD's Preamble recognizes the distinct interdependent relationship between ILCs and their surrounding biological resources or natural environment and thus points out the need to ensure the just division of benefits that may come from the use of these GR and ATK.[44]

The CBD text sets forth a standard of respect for and protection over indigenous TK; however, it has been widely critiqued for its weak wording and its not giving ILCs concrete rights over GR and ATK. Bengwayan, Firestone, Shahrom, and Ni offer varying perspectives on the CBD, but agree on some core aspects. All have acknowledged that the Convention emphasizes the importance of indigenous care for and knowledge about biodiversity. They also find that it affords some new rights to ILCs, including the move to support and promote the participation of relevant stakeholders in a FPIC process through their "approval and involvement."[45] Nevertheless, they also believe that bilateral agreements between states and corporations have been encouraged because the CBD strongly asserts state sovereignty. In other words, the legal weight given to the national authority excludes ILCs from access procedures and essentially undermines the text's very intention. By qualifying any consent or ownership rights afforded to ILCs with phrases like, "as appropriate to the circumstances and subject to national law," local stakeholders' consent

41 Bengwayan, 15.

42 Bengwayan, 14.

43 United Nations General Assembly, *UN CBD*, Article 1.

44 Mauro, 1265.

45 qtd. In Kuei-Jung Ni, "Legal Aspects of Prior Informed Consent on Access to Genetic Resources : An Analysis of Global and Local Implications towards an Optimal Normative Construction." (2008): 7.

over a project may carry far less weight than that of the national government, and it seems as if consent may not even be required at all.[46]

As a result of favoring states' privileges, undemocratic, unethical or nonexistent ILC FPIC processes could arise; this possibility will be discussed in the upcoming section. Ni remarks that the CBD merely adds the "spirit of FPIC" into the ABS process.[47] We now turn our attention to other official interpretations, discussions, and a holistic conceptualization and analysis of the CBD and its state sovereignty-oriented phrases. By doing so, we learn that the document's contributions to the FPIC 'spirit' may translate into more legal obligations than originally deduced.

Shahrom draws attention to an official note by the CBD interim secretariat to the intergovernmental committee on the CBD, which states that "the provision of Article 8(j) leaves it up to individual countries to determine *how* [Article 8(j)] will be implemented" (emphasis added). She argues that this does not mean national governments can decide to not implement this article at all or to exclude ILCs' participation. By contrast, she argues, it simply means that governments have the right to decide how these provisions are to be implemented.[48] The COP also published a report in 2009 responding to questions about the extent to which the CBD's measures for ensuring compliance with FPIC in Article 15 also apply to instances where ILCs' TK is more specifically involved. Experts referred to Article 8(j) to interpret the question, concluding that it "provides a basis for a requirement that FPIC be obtained," and that "national laws would therefore prescribe compliance conditions for the granting of access to GR with ATK which *ensure that FPIC is properly and appropriately obtained* from indigenous peoples and local communities" (emphasis added).[49]

Thus, although states have the right to implement these obligations in a manner they choose, the provisions shall not be interpreted in a "manner that undermines the objectives of Article 8(j)" but rather in a holistic fashion, taking into full account all of the document procedures and Working Group clarifications, and with the utmost dedication to its overarching objectives and aims.[50] Shahrom also points out that the CBD's use of the phrase "approval and involvement" instead of "FPIC" nonetheless allows ILCs the right to say 'no.' She further notes that it also lets ILCs maintain some control over access. The words the report uses gravitate in that direction: "approval" connotes a type of consent and "involvement" connotes active participation as opposed to passive acceptance of outsiders' activities.[51]

Still, the original CBD text can be problematic in the way it addresses ILCs and outside parties' responsibilities toward them. In particular, its language can leave too much room for interpretations harmful to ILCs' interests. It only recommends that the Contracting Parties "encourage" benefit sharing, "endeavor to" provide compatible conditions for using biodiversity, and "promote" ILC involvement.[52] In fact, FPIC had not been given a clear definition within this framework. Moreover, since the first text's appearance, there had not been a detailed illustration of how nations should implement an FPIC system. Recognizing some of the document's

46 qtd in Ni, 7; Firestone, 172; Bengwayan, 14; Shahrom, 49.

47 Ni, 12

48 Shahrom, 49.

49 United Nations Environment Programme. *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing*. (2009): 13.

50 Shahrom, 49.

51 Ibid, 49-50.

52 Firestone, 173; United Nations General Assembly, *CBD*.

deficiencies, the Conference of the Parties (COP) convened its fifth meeting, in Kenya. There, it created an Ad-Hoc Working Group on Access and Benefit-Sharing (hereafter Working Group) to help along the implementation of the ABS mandate.[53] At the next meeting, in 2002, the COP adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, providing a voluntary framework to CBD Parties to clarify the benefit-sharing provisions of CBD.

This "roadmap" helps to plot out the steps required to create an ABS agreement and the responsibilities of each party involved. This later document also does not define FPIC, though it does reaffirm the necessary consent of all "relevant stakeholders, such as indigenous and local communities."[54] In this document, the national authority remains the primary consent-giver. Nevertheless, the Guidelines serve as a useful reference, aiding Parties to build their capacities by establishing procedures for FPIC, describing what FPIC requires and means more generally, offering constructive suggestions on which information should be submitted to relevant stakeholders prior to seeking access, and recommending timing and deadlines for submitting such information.[55] Though the Guidelines are not legally binding, they remain important alongside both the original CBD and the Nagoya Protocol—another mechanism under the CBD that addresses FPIC as a means for protecting ILCs' GR and ATK.

C. Does the Nagoya Protocol Serve as an International Regime to Enforce Equitable Access and Benefit-Sharing through FPIC?

At the same 2002 World Summit on Sustainable Development in Johannesburg where the Bonn Guidelines were created, there was a call for an international regime that would elaborate on and serve to enforce the third objective and Articles 8(j) and 15 of the CBD. This would promote and safeguard fair and equitable sharing of technologies and benefits with the (developing) countries from which they came.[56] A mandate was then established in 2004 at the 7th COP meeting in Kuala Lumpur, Malaysia, and the Nagoya Protocol was finally adopted 6 years later in October 2010. As it pertains to state responsibility, this Protocol also contains nuanced language, including the urgent obligation on states to enact specific ABS regulations that govern access to GR. Though the text is progressive in its intentions, it seems to imply that, until such ABS legislation is created, user parties may justifiably gain free access to developing countries' biological resources. Ni stresses the need for clarification since the current wording can allow actions that counteract the very essence of protection the CBD embodies.

In its discussion of FPIC, though the Protocol reiterates that "domestic law" takes precedence, it also establishes more concrete criteria for incorporating ILCs into an FPIC process. This advances ILC rights further than the foundational CBD document does, especially when it comes to both Traditional Knowledge (TK) *and* the Genetic Resources (GR). It seems that mention of both GR and ATK is the first step, but the Protocol's practice of separating them out for right-affirming purposes—i.e., ILCs are stated as having clear rights over their TK, but rights over GR are declared dependent on national legislation—is a "cross-cutting issue" within

53 Ni, 6.
54 Ibid, 7.
55 Ni, 7-8.
56 Ni, 11.

this text.[57] For instance, the text asserts that ILCs only have the ability to grant or withhold access to GR when there is an "established right to grant access."[58] This begs the question: What defines 'established right?' Nijar writes that we cannot assume that these rights are only set up by a state body. In fact, as this Protocol asserts, most customary rights and laws were established prior to even the creation of the state, whether they be rights to traditional lands and territories, or collective and communal rights to intellectual property that have been passed down between indigenous community members for generations. Though the Protocol once again emphasizes state sovereignty over genetic resources and the ABS process, its Preamble does in fact recognize the "inseparable nature of GR and TK," pronouncing inextricable ties between the two from the beginning. This should, in practice, translate into FPIC processes.[59]

Another muddy area to consider is the Protocol's phrasing regarding how permission to access GR and ATK should be obtained through the "FPIC" *or* "approval and involvement" of ILCs. The Parties to the Convention seem to be given two options at every single mention of FPIC. Does this imply that there is a substantive difference between the two? Nijar concludes that while the second option seems to offer a "lesser right," Parties have consistently considered them equivalent: they both, in effect, mean FPIC.[60] This follows Shahrom's discussion about "approval and involvement" and indicates that it should be interpreted as a meaningful and consequential consent process. Article 8(j) of CBD is therefore strengthened, since the regime no longer only requires the "promotion" of ILC approval and involvement in TK access, but instead requires Parties to implement these agreements with the "aim of ensuring" that access occurs with the FPIC or approval and involvement of ILCs.[61]

D. Conclusions to the International Frameworks

Many international forums have embraced the importance of and ILCs' right to Free, Prior, and Informed Consent as a solid mechanism for ensuring the protection of biological resources and the innovations ILCs develop from them. The necessity of FPIC is enshrined in declaratory principles, legally binding international treaties, and "soft law" guidelines. It is found in a growing body of international customary and normative laws and has been affirmed over time as an indispensible element to relations between ILCs, their national governments, and outside actors. We now have the scholars' insight into the workings of the UN's Convention on Biodiversity framework. It is important to keep in mind throughout the rest of the discussion just how important this Convention is. By outlining what rights FPIC affords for ILCs, it continues be of tremendous consequence.

Some critics characterize the CBD as a document produced at the "behest of interests mostly from the North," by which they mean developed countries' governments, corporations and non-governmental organization or NGOs. Nevertheless, there is no doubt that the action it and its documents have inspired has changed the face of TK protection and drawn much attention to its instrumental economic, spiritual, cultural, and especially environmental role in

57 Gurdial Singh Nijar, "The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries." *South Centre*, (2011): 24.

58 Ibid.

59 Ibid.

60 Ibid, 25.

61 Ibid.

sustaining the earth's ecological health and balance.[62] On the other hand, while the CBD has served to protect biodiversity-rich nation-states, i.e., developing countries' central governments, from misappropriation by foreign bio-prospectors, scholars note that the CBD and its national sovereignty principle do not always favor ILCs. In the worst case scenario, ILCs are not involved or consulted at all in matters relating to their lives, lands, innovations, and knowledge. In this instance, they become spectators in what often becomes a bilateral agreement between a government and an access-seeker.

Corporations often seek intellectual property rights or control over innovations or types of traditional knowledge that actually belong to ILCs. When this occurs, benefits do not flow back to a community and an ILC does not have say in how the resource is utilized or commoditized. This is particularly unfortunate when considering the already-high degree of distributive injustice that exists between most indigenous communities and their nation-states. This injustice manifests itself both in terms of tangible resources and the allotment of political power. Bengwayan notes that although all of these documents have been globally referenced, many of them lack solid enforcement mechanisms and do not have nearly enough concrete information to inform situations on the ground.[63] To ensure that everyone is equally protected from exploitation, individual nation-states must therefore implement the Nagoya Protocol, which mandates the monitoring and enforcement of FPIC for ILCs.

V. National Frameworks and Approaches to ABS, ATK and FPIC Legislation

Since the creation of CBD and the Bonn Guidelines and most recently of the Nagoya Protocol, many developing countries rich in biodiversity have crafted national regulations with FPIC and Mutually Agreed Terms (MAT) specifications that aim to fulfill the ABS mandate. Given that the CBD gives considerable weight to national sovereignty and the role of state as sole owner and regulator of its biological resources, states have given varying levels of political voice and accordance to ILCs. Many critique nation-states' enormous role since there is no legally binding international regime which monitors ABS legislation and FPIC implementation to ensure they are being managed in good faith with adequate ILC consultation, consent, and input.[64] We theorize that the extent to which a state recognizes that its ILCs hold political leverage and inherent rights as indigenous peoples to their customary lands and resources is generally proportional to the extent they offer their ILCs the right to FPIC in bio-prospecting projects.

Along these lines, Perrault et al. note four specific "enabling conditions" for ensuring ILCs' FPIC: acknowledgement of community property rights, plans governing natural resource management, existence of community participation in decision-making, and heightened community capacities.[65] Nijar, Sharom, and Shahrom additionally state that there should be a formal incorporation of indigenous fundamental rights into national constitutions prior to the formulation of holistic national ABS legislation. This would include rights to land and perhaps

62 Bengwayan, 13.

63 Ibid, 14.

64 Ni, 33.

65 Anne Perrault, Kirk Herbertson, and Owen J. Lynch. "Partnerships for success in protected areas: the public interest and local community rights to prior informed consent (PIC)." *Geo. Int'l Envtl. L. Rev.*, *19*, (2006): 475-542.

the codification of customary law into national law.[66] These scholars declare that laws should be in place which establish indigenous rights, obligate prospectors to apply for consent from all relevant ILCs, enforce and monitor this mandate, and require detailed relevant information from all those seeking access to BR and ATK.[67] When such laws are not in place, or when any one of these factors enabling FPIC is not present, there is more room for fault or non-implementation.

A. Model Holistic ABS Legislation

Taking into special consideration how current national policies utilize, administer, and regard FPIC, what might fair and equitable ABS legislation look like? We must figure out which stakeholders are actively involved in the access process and which are discounted, and what distinct role the State assumes in regulating access to biological resources and ATK. I will offer examples from specific national biodiversity and ABS legislation—including but not limited to the state-level Provisional Measures in Brazil, the Executive Order No. 247 of the Philippines, and the Biodiversity Law of Costa Rica—in order to highlight this array of concepts. As we look to these examples, we will also repeatedly return to the ethical questions and values initially posed in Section II, i.e., democracy or degrees of participation, justice, and equity, as measures by which we can judge and assess policies. These values are potentially harmed when government interests prevail over those of the local communities most directly affected by access to BR and ATK.

Along the same lines as Nijar et al. (2004) and Shahrom, Firestone asserts that national ABS and particularly FPIC legislation should encourage a "valuation" of BR and ATK, recognize the ways in which ILCs have preserved and conserved BR and developed ATK, and ensure local participation in decision-making regarding BR and ATK measures.[68] Scholars tend to agree that there are two primary models under which ABS legislation exists currently. The first—adopted by India, Costa Rica, and the Philippines—is the formulation of holistic and comprehensive biodiversity legislation, which governs access to genetic or biological resources *and* benefit sharing as well as 'echoing' most elements found in CBD. The second encompasses specific laws covering solely GR access or management, or protection of ATK as a stand-alone policy. Brazil is an example of a country that deals specifically with GR as opposed to having a more general biodiversity law that incorporates both elements of the CBD and legislation on GR at the same time.[69] As our case studies show, the creation of a Competent National Authority has been critical to the functioning of each nation's law.

The CBD affirms a state's inalienable right to national sovereignty, including over its BR and GR. In addition, the CBD Working Group recommends the creation of a national "focal point" or Central National Authority (CNA) for ABS. This "focal point" would serve to inform access-seekers of relevant FPIC procedures, stakeholders to be consulted, and information-disclosure processes.

66 Nijar et al., *Indigneous Peoples' Knowledge*; Shahrom, 28.

67 Shahrom, 28.

68 Firestone, 175.

69 Ni, 23; Crucible II Group, Dag Hammarskjöld Foundation, I. D. R. C. (Canada), & Institute, I. P. G. R. *Seeding Solutions: Options for National Laws Governing Control Over Genetic Resources and Biological Innovations*. (Crucible II Group, Ed.). IDRC, (2002).

B. Possible Roles of a Central Government and Central National Authority in ABS and FPIC Regulations

The CBD Working Group also recommends that the CNA be responsible for advising negotiations, monitoring and evaluating ABS agreements, and developing mechanisms for full ILC participation and involvement in these processes. This may include assisting ILCs to establish internal community advisory boards and committees.[70] While the text of the CBD is not clear in communicating what political power shall be allotted to ILCs, even by way of FPIC, it emphasizes that such these boards' members should be chosen by the ILCs themselves. In the previously mentioned Duraiappah's 'degrees of participation,' this could be seen as a case of 'functional participation,' where ILCs "participate by forming groups to meet predetermined objectives related to the initiative." Functional participation denotes that participation is included, but only at an intermediate part of a project, and not in the initial or final decision-making stages.[71] Since international law allows for national jurisdiction over such a body, governments have the right to act however they see fit when faced by a previously formed community body such as a council of elders, shamans, or chiefs. While encouraging such participatory and involving practices is a good start, there should be a more effective system for overseeing government ABS and FPIC actions and procedures in order to ensure fair and democratic processes. Eventually, international bodies should enforce these procedures.

Firestone and UNEP clarify some roles a national government can and should take on, including capacity-building, offering resources—these include monetary, administrative, and legal aid; mediation or alternative dispute resolution mechanisms; etc.—, and "awareness-building and information-sharing" between communities.[72] Additionally, there is a consensus that the government is expected to support FPIC processes and protect its ILCs by offering tools and mechanisms which enhance and ensure meaningful and non-intrusive communication with outside forces hoping to access GR and ATK. In each of these roles, it is important to note that in order to be sensitive to the needs of ILCs and assist them in the most effective manner, the government should offer its services and be accessible to communities when they solicit it, instead of imposing itself in ways that communities may resent and feel do not suit their desires. I recommend that the government undertake a needs assessment—a process involving interviews with a large portion of those in the community—in order to gauge what the ILC wants help with in ABS arrangements. Again, this is predicated on the government's already having officially recognized the rights of ILCs and their appropriate role as collaborators and joint decision-makers in ABS arrangements.

Firestone writes that in some cases the CNA may also take on the role of "intermediary" between access-holders (here ILCs) and access-seekers (bio-prospector or researcher). This could either be as a "passive supervisor" or as a "negotiating agent," a role that entails a more direct role within ABS and FPIC negotiations.[73] Ni (2008) highlights how both Costa Rica and Australia have taken an 'intermediary' approach. Both countries might be described as filling related roles of "monitor" and "enforcer," akin to a watchdog over or supervisor of the FPIC process.[74]

Costa Rica's comprehensive national legal framework, the 1998 Biodiversity Law of Costa Rica, utilizes a state-run Technical Office in the process of obtaining FPIC from ILCs. The Office facilitates the FPIC process, coordinating with "local interested parties," or parties whose land

70 Firestone, 202-3.
71 Durraiappah et al., 6.
72 Firestone, 203-204; UNEP, 14.
73 Firestone, 203-204.
74 Ibid, 204.

or BR are the subject of research, to finalize their consent or dissent.[75] The Office also works as a monitor by making "field consultations" after an FPIC process has commenced to ensure the agreed-upon terms are suitable and that all requirements upon the access-seeker are met.[76]

Under Australia's federal-level Environment Protection and Biodiversity Conservation Act of 1999, a Genetic Resources (GR) regulatory regime also monitors to ensure that FPIC progresses in a consequential manner. The CNA also reviews any given consent to be sure that the ILCs were engaged in thorough negotiations with adequate time for access-providers to consider the application and that a benefit-sharing agreement was negotiated. The CNA also provides independent legal advice regarding the application and conducts its own Environmental Impact Assessment before reaching a final decision. The above examples are some of the ways a CNA can function in partnership with ILCs to ensure satisfactory, efficient, just, and equitable ABS processes.

C. Single-Consent and Multi-Consent Systems: Who Gets to Consent?

This paper seeks to explore and evaluate why and how FPIC tenets can be based in and upon customary laws, protocols, and decision-making procedures. Given that we are using a framework that takes as indispensable ILCs' rights to FPIC, such application of customary protocols would further ensure a rigorous consent procedure between access-seekers and access-providing parties (ILCs). As we have seen in the section on international ABS frameworks, international treaties, conventions, and declarations have all in some way recognized ILCs as invaluable stakeholders. In some of the documents (see UNDRIP and ILO Convention 169), ILCs are considered rights-holders of BR and ATK. However, some national frameworks opt for a "single-consent" or bilateral approach to ABS, i.e., an approach that only requires FPIC from the CNA and not from the ILCs that are affected. For example, the Indian Biological Diversity Act of 2002 created a National Biodiversity Authority (NBA) to regulate foreign attempts to access BR and ATK, offering no FPIC, consultation, or any other role to local communities who may be adversely affected and even displaced by projects.[77] Brazil by contrast has in place a Provisional Measure that recognizes that local stakeholders must be consulted. Nevertheless, the national authority still remains the ultimate decision-maker, and can override an ILC's choice to withhold consent when a project is said to serve "public interest."[78] Ni comments on this "centralization of GR control by the government" as being "paternalistic" and as challenging the "autonomy and interests of individuals and indigenous communities."[79]

In contrast, a "multi-consent system"—utilized by the Philippines, Costa Rica, Peru and Australia—allows for all concerned parties to become involved and accountable for the decision of access to BR and ATK. There are numerous ways a to go about this process, but two notable ones are the "two-contract approach" and the single agreement approach. Coined by the Crucible II Group, the "two contract approach" refers to an FPIC process that involves an initial contract between the access-seeker and access-holder or "domestic supplier" (ILC) and a second agreement between the supplier and government. Here, the final decision of consent is between the CNA and ILC and the ILCs have an enhanced political role. The single agreement approach,

75 Ni, 20.
76 Ibid.
77 Ni, 16.
78 Ibid, 17.
79 qtd in Ibid, 16.

which was utilized by the Philippines' Executive Order 247, requires that an access-seeking party approach the government for permission, which in turn attempts to gain FPIC from the relevant ILCs. In this case secured FPIC can be included as a document in the contract's annex.[80]

D. Specific Challenges and Spaces for Opportunity in the Realization of the Process of Free, Prior, and Informed Consent of ILCs

As discussed in Section II of this analysis of the scholarly literature, there are moral questions to consider when evaluating international, national, and local approaches to the implementation of FPIC processes within ABS legislation. After offering a brief survey of notable national legislation, we have highlighted instances where best practices have been used and have pinpointed areas that must be afforded special attention in order to curb inequitable and unfair practices. These include the worst-case scenario of ILCs not being afforded any FPIC. Below we enumerate the specific challenges to the values of equity, justice, and democracy and to the comprehensive realization of FPIC that have arisen in various instances at the national level during the implementation of an FPIC process.

i. Power Asymmetries

First, we must address the inherent power asymmetries that exist between the bio-prospector, government representative, and ILC representative or community involved in access agreements, FPIC, and Mutually Agreed Terms (MAT) negotiations. A similar power asymmetry is present in the relationship between a doctor and patient, where one actor has heightened status as a figure of authority, highly educated citizen, and individual who could potentially alter the life of the patient. Firestone notes that these sorts of power imbalances, when present between indigenous groups and outsiders, often intensify ILCs' distrust for outsiders; they do not forget their long histories of oppression.[81] When ILCs come into a minimally supportive, 'gate-keeping' or contractual FPIC process, they often also face intimidation by outside actors who tout Western intellectual property rights and business models. In these situations it is likely that they feel marginalized, pressured, or driven into an agreement. Jonas and Shrumm draw on an example from a workshop set up in Sri Lanka to analyze the effectiveness of 'Bio-Cultural Community Protocols' as TK-protection mechanisms. In the workshop community participants shared their experiences of interacting and negotiating with the Forest Department, a body whose mandate is to ensure the conservation of forests. This body had banned some communities from forests, concerned that their activities on the land were harmful. Community members shared that they felt as if they were "walking into the Forest Department's territory" upon entering discussions. This fostered an immediate feeling of intimidation, generating tension within the discussion from the onset. Though the Department was open and asked questions in a respectful manner, the community also noted that in a real situation (and not a workshop set up by an outside NGO to analyze such negotiations), the government and its officials would likely not be so accommodating, since in the past they had given little lee-way to ILCs when compromising on terms.[82] Firestone recognizes that such disadvantage should be adequately accounted for and

80 Crucible II Group, 19-20.

81 Firestone, 206.

82 Harry Jonas and Holly Shrumm, *Exploring bio-cultural community protocols in the sri lankan context – a report of a training-of-trainers workshop on bio-cultural community protocols.* Avisawella, (2010): 7.

acknowledged, with measures taken to decrease the possibility of intimidation or of anything less than a free process in terms of consent. To that end, all negotiations and written text should be translated or provided in the communities' native language.[83]

ii. Gaps in Information and Expertise

Connected to unequal power relations is the concept of gaps in expertise, information, and education, as highlighted by Firestone. The concept of Free, Prior, and Informed Consent would be incomplete if communities were not offered all the relevant information in a manner such that they could internalize and conceptualize all the plausible challenges, benefits, and consequences involved. Firestone comments on possible policies to ensure such progress, pointing out that the provision of all the relevant project information will invariably help prevent environmental and cultural harm. He notes that in their regulation of TK access, some government agencies have required information to be disclosed by bio-prospectors in a permit application. Updates on ownership status, impacts on environments, communities, and cultures, as well as imaginings for future utilization and/or commodification of a resource are all required within the permit.[84]

Shahrom notes that the necessary information might also include ongoing communication to ILCs with respect to research or bio-prospecting methodologies, objectives, and findings throughout the course of the project.[85] For instance, the requirements for visiting the Kuna Yala forest reserve in Panama feature such an application. First, a researcher is required to put forth a proposal that spells out the scope and timeline of the project and its possible environmental and cultural impacts. He or she must also provide a Scientific Committee overseeing Kuna forest access with written reports of the research in the native language of Spanish, involve Kuna community members in their research, and receive approval from the Committee when seeking to collect species. The collection process must further be done in a specified manner, with specific, distinct procedures for the utilization of the collected materials.[86]

As previously mentioned, the CNA or an organization affiliated with it should also establish capacity-building structures in order for communities to be fully informed and aware. Such structures might include financial, technical, and entrepreneurial advice, such as that offered to a rice-cultivating community, the Bambarabotuwa community, in Sri Lanka. Jonas et al. remark that these were key to the development of a multi-stakeholder forest management committee, bringing government officials and community member representatives together to review such information from GR-users.[87]

iii. Community Diversity

We will explore this topic in greater detail in the subsequent local and community protocol section, but it is important to recognize that the actors involved in FPIC process, governments and ILCs alike, are often hybrid entities lacking a single consensus. Cultures evolve and are not

83 Firestone, 179.
84 Firestone, 187.
85 Shahrom, 18.
86 Ibid.
87 Jonas and Shrumm, 6.

static. Ethnic groups' desires and indigenous communities' wills cannot be aggregated without the possibility that some opinions and viewpoints will be discounted or overlooked. This can be true both between different ILCs as well as within one. In some cases, government stipulations around FPIC may be seen as restrictive and counter to the will of a community that has its own methods for proceeding. On the other hand, some ILCs may feel uncomfortable with the FPIC process, its legal and technical concepts, or the issues presented to them by an access-seeking party. In these cases, ILCs may require the government to provide more capacity-building mechanisms. The Eighth UN Working Group on ABS meeting in Montreal addresses this issue of community diversity by acknowledging that community-level procedures are inherently dynamic. They change to better fit the needs of the group and to respond to evolving international and national frameworks. Though people outside of the ILC may not know the relevant community procedures, there are often well-defined community structures with local authority. The UNEP Ad-Hoc Open-Ended Working Group on Access and Benefit Sharing recommends that national governments directly report to and rely on these, further ensuring that FPIC mechanisms will be sustainable and accepted as legitimate by communities themselves.[88] Their eighth meeting report also notes that "there is no one-size-fits-all approach" to address TK, GR, and FPIC at the community level: these issues must be dealt with case by case, as each poses unique challenges, power struggles, and opportunities.[89]

iv. Cultural Sensitivity

Directly related to the concepts of diversity within a single community and between many communities is the idea that respecting cultural mechanisms and abstaining from imposing unsuitable, unfamiliar, and foreign frameworks is essential to maintaining justice and equity. This may involve avoiding Western business models for contract agreements with access-seekers or intellectual property right systems for protection. In keeping with this attitude, governments may want to avoid asking for legal texts documenting the rights ILCs want to defend. In her work on the cultural heritage of Australia's indigenous populations, Terri Jenki comes to the conclusion that cultural sensitivity does not simply mean recognizing indigenous knowledge as unique, but that it also means respecting it by employing it in tandem with Western knowledge. She claims that the two are "parallel and equal systems of innovation."[90] She further asserts that indigenous systems of customary law and the Australian legal system are parallel, requiring mutual respect in a process of collaboration. Working together with ILCs, governments have the potential to co-create culturally sensitive and meaningful FPIC mechanisms based on trust, confidence, and security. By doing so, Tobin argues that "infringing practices," which fail to thoroughly incorporate ILCs into a participatory legal process, can be phased out. This evolutionary process greatly promotes human rights.[91] He notes that though the codification of customary law is an option to be considered, it must also be examined critically since such acts may affect the flexibility of traditional legal regimes and have negative effects on this form of rights-protection in the long term. Tobin remarks on the gap in the literature covering the underlying principles of customary law. Filling in this gap, as we will cover, is one of the main purposes of this research. By laying

88 UNEP, 11; Shahrom, 22.
89 UNEP, 11.
90 Tobin, 5.
91 Ibid.

out the framework of customary law and indigenous self-governance with respect to FPIC and TK, we will enter into a discussion and comparative analysis of local, national, and international methods. We then seek to discover how these frameworks can be applied to Malaysian national law.

VI. The Free, Prior, and Informed Consent Governance and Traditional Knowledge Protection Systems of Indigenous and Local Communities

Many scholars have suggested that the community or customary laws, protocols, and procedures dealing with consent should form the basis upon which to sculpt domestic TK and GR access legislation. Defined as "orally held rules and procedures…to regulate conduct and interactions within their communities, with outsiders, and with the territories on which they depend," customary law is representative and definitive of an ILC itself. It acts as an embedded set of values that becomes accepted and applied in a community, maintaining social and environmental harmony.[92] A customary law or protocol might spell out how a decision gets made in the community and which members must be involved. It could also assert traditional land rights or be used as a tool for evaluating those seeking access to TK. Each community has its own evolving, collective system for holding and controlling its TK. By using these systems as a basis for national legislation, we would accommodate the reality that ICPR mechanisms do not serve ILCs. We would also enhance the fluidity of FPIC processes, taking into account the collective ownership of TK and the spiritual, cultural, social, and economic values the knowledge-holding community itself places on TK.

A. Methods of Local FPIC Governance

Though we are seeking the overlap between traditional FPIC mechanisms and national law, we must first recognize the independent value of the 'home-grown' community procedures already in place—they often assert a significant degree of self-governance and separateness from the state or outside forces which may consider them useful for their own purposes. In this section I ask, 'in what way have ILCs taken measures for TK protection through community consent into their own hands?' By acknowledging and surveying the ways by which ILCs have sought protection over their GR and ATK through FPIC, one can focus on the concrete steps state actors can take to apply these working examples to operationalize national FPIC legislation.

The alternative frameworks of "Community Intellectual Rights" and "Traditional Resource Rights," which we examined earlier in the paper and which recognize ILCs as "innovators" are embedded in the findings of Jonas et al., Guri Yangmaadome et al., John et al., McGee, and Shahrom. All these scholars highlight the possibilities of using community-based methods in order to protect TK and guarantee that ILCs get the FPIC they rightfully deserve. Of particular interest for these authors are community research protocols and policies (also known as bio-cultural protocols), innovative sui generis legal agreements, and community-controlled and

92 Holly Ashley, Nicole Kenton, and Angela Milligan (Eds), *Participatory Learning and Action 65 - Biodiversity and culture: exploring community protocols, rights and consent*. London: The International Institute for Environment and Development (IIED) (2012): 26.

collaborative research projects.[93] From this survey of approaches we recognize that a large variety of methods are used both within and between communities and that constructing a one-size-fits-all solution is neither possible nor desirable. In this section, we will explore the way these mechanisms emerge, the degree to which they are either alien or familiar to communities, and the effectiveness with which they achieve a diverse range of community needs, priorities, and objectives.

i. Community Research Policies and Protocols

A community protocol, sometimes referred to as "bio-cultural protocol," is generally meant to communicate previously undocumented or unwritten customary rules and rights to those outside of the community. Bannister asserts that community-based FPIC protocols are in some cases "defensive responses to the imposition of research," or in other cases, ways to encourage beneficial research relationships and economic development opportunities.[94] Many protocols are a combination— a reaction to an imperfect, undesirable, or perhaps hurtful research process, and a push toward something better. The hope is that, by declaring these rights and internal laws out loud and in writing, communities will have more confidence and legitimacy when negotiating with powerful actors, which in this case means bio-prospectors or the government. This is because this process enables them to refer to their rights in a form acceptable to most outsiders. This, however, raises a few important problems. A main concern centers on the effectiveness of primarily utilizing mechanisms, such as codification, that may be foreign or new to the ILC. As we shall see, persistent community involvement in the creation and use of such a protocol is essential to maintaining a democratic approach. Otherwise, the process runs the risk of being imposed rigidly, inattentively, and in a top-down fashion.

The NGO *Natural Justice* has developed a body of work regarding the creation and use of the Bio-Cultural Protocol (BCP). It has also offered assistance to groups or ILCs that would like to create a BCP. For example, *Natural Justice* and other NGOs worked with the Tanchara community from the Upper West Region of Ghana to create a BCP when this community was faced with a prospective gold mining project that would destroy its sacred groves, wetlands, and burial grounds. This type of BCP is meant to clearly articulate the ILCs' cultural values, overarching visions for development, customary rights and responsibilities, and finally, institutions and processes required to obtain FPIC.[95] Jonas et al. from *Natural Justice* also discuss the BCP process of the pastoral Sri Lankan Raika community of livestock-keepers, noting that their protocol similarly makes national and local demands. It includes requests for the allocation of development funds, recognition of particular rights, and requirements for social or

93 Community mechanisms for protecting TK that do not pertain directly to FPIC community methods and stipulations are not included in this survey. These might include the creation of biodiversity information networks and databases and registers for TK (see Bannister et al., *Mobilizing Traditional Knowledge*). While these forms of TK protection are no doubt invaluable in this effort by communities, they do not fall under the scope of this paper. It should also be noted that FPIC is not held as a means to an end, but rather one of the many means, or part of a wider set of tactics for ILCs to defend their rights. This paper expressly focuses on how FPIC can be secured to the utmost degree.

94 Kelly Bannister, "Lessons for ABS: Academic Policies, Community Protocols and Community-level PIC." *Research Policy*. International Expert Workshop on Access to Genetic Resources and Benefit Sharing, (2004): 3.

95 Bernard Guri Yangmaadome, Daniel Banuoko Eaabelangne, and others, "Sacred groves versus gold mines: biocultural community protocols in Ghana." In H. Ashley, N. Kenton, & A. Milligan (Eds.), *Participatory Learning and Action 65 - Biodiversity and culture: exploring community protocols, rights and consent.* London: IIED. (2012): 127.

environmental impact assessments prior to development or research projects.[96] These scholars stress that such a document should clearly demonstrate to outside parties the links between an ILC's culture and its TK and its wants and needs when it comes to land and resources. The idea that this document is in some sense meant to prove something to the outside world is something we should inspect further. Through this method, ILCs must explain themselves in legal terms. They must offer outside actors detailed descriptions of local populations' ecological, agricultural, and health practices and convince them that they matter and should be respected. In practice, ILCs do not often find this very compatible or desirable. Indeed, the literature illustrates many cases in which this process did not 'sprout' or develop naturally out of an ILC. Rather, the literature finds that an NGO or similar capacity-building organization was necessary to facilitate the process. As we have noted, *Natural Justice* very prominently fulfills this role.[97] Again, this should lead us to ask whether this 'community-based approach' is in fact community-based. We must consider the relevant context in which ILCs operate, a context in which outside actors displace ILCs from their lands and steal their innovations. I will argue that as long as ILCs desire to use and create a BCP, it can be considered ethical. It must, however, be taken in and forged *by* the community itself along with others; it must endeavor to serve the community and no one else. There is always the possibility that culturally insensitive models arise, but so long as those assisting in the process are working with and for the people, conscious not to super-impose values or perceptions upon the community, the resulting protocol can embody a truly community-based spirit.

The Ulu Papar communities' development of a BCP in Sabah, Malaysia, exemplifies this idea. In this instance, community members and NGOs conducted field interviews. These interviews sought not only to gauge the communities' perceptions of their situations, but also to find out what problems were to be addressed in the BCP and how they were to be resolved.. Workshops where all villages could come together with representative bodies to discuss were also held. The final result was a BCP which documented both the "ILC's aspirations" regarding future relations with bio-prospectors and government representatives and also community-sculpted guidelines for FPIC.[98] By coming to a collective understanding of what such provisions should look like, the community becomes the active agent, ensuring its full involvement when an access-seeker or bio-prospector expresses interest in a project that affects it. The facilitating organization or body can then work beside it, harnessing financial, legal, and administrative capacities to offer support to ILCs in whatever way is requested. Thus, the benefits of a community or bio-cultural protocol flow forth, and negotiations may proceed in a more clear-cut manner when there exist clear guidelines and thought-out FPIC procedures previously negotiated between ILC members. With such organization an outside body is often more inclined to offer the protocol due attention, even if it is not mandated by the state.

ii. Sui Generis Legal Agreements

Beyond conventional legal mechanisms and IPR approaches, indigenous groups and organizations have established some sui generis legal protections.[99] One prominent example is the emergence

96 Jonas et al., 5-6.

97 Ibid 5-8.

98 Theresia John, Patricia John, and others. "Creating the Ulu Papar biocultural community protocol: process and product in the framing of a community agreement." In H. Ashley, N. Kenton, & A. Milligan (Eds.), *Participatory Learning and Action 65 - Biodiversity and culture: exploring community protocols, rights and consent*. London: IIED, (2012): 145.

99 'Sui Generis' here refers to a type of law that is necessary for a unique or special interpretation of an issue.

of the Inter-community Agreement for Equitable Benefit Sharing in Potato Park, Peru. As part of an international investigation on "Common Law and Genetic Resources," the Asociación ANDES developed a legal agreement that reflects principles of "open sharing for mutual benefit," and focuses on the restoration, fair distribution, and collective property rights of native potatoes between six Quechua communities.[100] Governing FPIC by involving the General Assembly of the Association of Communities of the Potato Park, the agreement is based in Quechua customary law and embraces a sort of equalizing effect, maintaining a distributive justice balance between the communities by ensuring that there is an equitable exchange of information and traditional resources at hand to all those who have collective ownership.[101] A separate legal framework the Quechua communities of the Potato Park also utilized is a covenant with the International Center of the Potato (CIP), stipulating repatriation and restitution for potato varieties previously taken from the region without the FPIC of the community. This covenant acknowledges that benefits have come out of the genetic material taken out of the park and that they should be returned.[102]

A "know-how license agreement" is defined by Bannister et al. as an agreement that establishes "conditions for collection and use of…traditional knowledge [and associated genetic resources], treating TK as a form of information technology, and defining know-how to include all relevant TK … whether or not it has fallen into the public domain."[103] This type of license was utilized in a transaction between the Aguaruna community and US pharmaceutical Searle & Co.; through it, the ILC has been able to continue ownership over its TK, come into agreement with outside parties over conditions of its use, compensation, confidentiality, and the eventual termination of access and/or use. This 1996 license also prohibits the use of TK for patenting life forms, and, when taken in its entirety, it is a novel approach initiated as part of the International Cooperative Biodiversity Groups (ICBG-Peru).

An Aboriginal Copyright is another mode for protection. It was used to protect the TK of the Tulalip tribes of Washington during a research project. Such an approach is based on intellectual property laws, used as a supplement to publications regarding TK, so that its uses by outside parties can be limited to those agreed or consented to by the TK-holders. One last mechanism to highlight is a Traditional Use Agreement, such as the one developed between the Great Barrier Reef Marine Park Authority and Traditional Owners in this region of Australia. Such an agreement facilitates engagement between ILCs, Park Authorities, and scientists in order to ensure that hunting and using resources is done sustainably. In this framework, communities are not simply cut out of the 'sustainable use' process, but rather become part of the fabric of marine biodiversity research and marine life health.[104]

iii. Community-Controlled Research Projects

It is important to discuss indigenous community-controlled research projects since this seems to be the best way to incorporate communities in research that involves them, their GR, or their ATK. Through collaboration with ILCs that have sufficient capacity, outside forces can work to develop a project that everyone has consented to. Essentially, if ILCs are going to choose

100 Shahrom, 23-24.

101 Ibid; Kelly Bannister and Preston Hardison, "Mobilizing Traditional Knowledge and Expertise for Decision-Making on Biodiversity." *Environmental Studies*, Vol. 1: 1-31, (2006): 13.

102 Bannister et al., *Mobilizing Traditional Knowledge*, 14.

103 Ibid, 15.

104 Ibid.

to participate in research, they must offer their FPIC to do so. Research might be focused on languages, indigenous cultures or territories, health assessments, or land-based assessments.

Bio-cultural mapping is one project that can either be done in collaboration with outside actors or independently of them. Such a project can assert rights to customary lands by mapping out where indigenous territories stand, what they are used for, and how important they are to ILC livelihoods. Peluso calls this act 'counter-mapping' since communities "appropriate the state's techniques and manner of representation to bolster the legitimacy of "customary" claims to resources." States create official government maps that do not include or account for indigenous land rights and "counter-mapping" attempts to correct this omission in a progressive manner.[105] The FPIC of an ILC is inherent in such a counter-mapping project because it is the ILC itself that is spurring the research. If FPIC were to be the core focus of a research project, such as in the case that an ILC must gauge its internal consent to a proposed project and there is no outside body taking the initiative to help it do this, then the community might take up its own consent research mechanism.

McGee presents this method as bringing matters under the control of the ILCs. A "community referendum" or a free and fair election by direct vote that solves the issue of how to determine FPIC is progressive and participatory. It falls into the "full and direct" category of participatory democracy in Duraiappah's and Laird et al.'s democratic scales. First used in Peru in 2002, this referendum method has now spread throughout Latin America. Nevertheless, whether a state will accept a "no" majority as merely an opinion poll or as a serious dissent remains an unanswered question.[106]

International laws make it difficult for states to pursue their own "national interest," without regard for ILCs. National legislation makes clear the meaning of these international conventions as they apply to the state in question. Local laws can help to measure community opinion as it applies to FPIC processes and can help forge protection methods that are more applicable to regional circumstances. A balance must be struck among these various legal levels. The balance that emerges in practice is reflected in the varying narratives of FPIC, its use, and its importance.

iv. Benefits and Challenges

The process for creating community or bio-cultural protocols, community referendums, and community-controlled research creates a medium through which ILCs can address the diversity of voices within their ranks. This was a topic first discussed in Part IV as a challenge and area of opportunity for creating fair and equitable ABS legislation. Ishwar Poojar, a representative from the Sri Lankan Raika community, shared some experiences from the development of his community's Forest-Dependent Community Protocol. This document affirms customary laws with respect to conservation and the sustainable use of resources. It also details local rules specifying whom the community shares knowledge with and spells out the community's future plans, challenges, and rights and obligations. Poojar notes that for his community, the appropriate way to account for many opinions is through a popular election of a Council of Elders. These Elders acted as the prime creators of the Community Protocol. The Raika community also held regular review meetings where the Council of Elders encouraged public discussion of the

105 Nancy Lee Peluso, "Whose Woods Are These? Counter-Mapping Forest Territories in West Kalimantan, Indonesia." *Antipode.* Vol 27, 4, (1995): 384.

106 McGee, 635.

Protocol, its subject matter, and content. This process also incorporates "community confessions," which allow for anonymous reflection, criticism, and praise for the protocol and its perceived effect on community life.[107] Jonas et al. emphasize that we must place particular value on the *process* of creating a protocol rather than on the final product. They argue that the strength of such a document lies in its ability to encapsulate and reconcile as many opinions as possible. This ability in turn ensures its long-term sustainability when faced with complex access negotiations. The advisor to the aforementioned Sri Lankan workshop maintains that in the creation of such a document, it is most important to "be ready to listen and to entertain all ideas."[108] Outsiders have often overlooked the fact that ILCs are heterogeneous groups, and participants often disagree on courses of action, especially when it comes to something that is collectively handled like TK. During a protocol process, it is clear that utilizing a model that works through these differences during the development process will benefit the negotiations that come later.

Nevertheless, it is important to realize that the nation-state is a constant challenge to these customary, FPIC-dictating protocols. It is never certain whether the government will recognize these modes as valid or respect them and act in accordance with them; the state may ignore a community-based referendum for gauging consent and so override an ILC's decision. This problem is one of CEBLAW's main motivations for trying to combine customary and national law in a harmonious manner.

In our study, community perceptions on the ground are of the utmost importance. In determining how equitable or just particular legal frameworks are, no collective opinion matters more than that of the communities that are most directly affected by these policies. Vermeylen notes that much of the recent literature on TK and its commodification fails to take into account the very views and opinions of the ILCs with which the literature is concerned It is common for scholars to think that indigenous peoples "speak with one coherent, authentic voice." This leads them to view indigenous peoples' defense of TK as a last stand for a traditional, non-Western lifestyle.[109] As we have established, this is not the case. Things are more complicated in the cases where TK that transcends community boundaries is involved. This extra layer of complexity often requires the use of established or alternative regional mediation or dispute resolution mechanisms. By undertaking scenario surveys and recording life stories, Vermeylen's study gauges community perceptions on the commodification of TK. These perceptions often include feelings of mistrust toward access-seekers who are seen as having betrayed the ILCs. At the same time these communities express the desire and need for economic compensation. Vermeylen found that opinions on how to deal with TK are in fact highly polarized. In deciding whether TK should be shared and patented or should be kept private without an official "owner," communities often fail to reach consensus. Sometimes there is a marked gender difference in attitudes toward these questions. The perceptions of ILCs toward the use of their TK are thus varied and wide-ranging, directly dependent on the context under which they are taken and accorded value, and also on the wider context of community conditions and ILCs' lack of political power in society. FPIC policies and protocols should therefore be based upon all of these considerations and done in a way that ensures dialogue and adequately addresses the whole range of community needs.

In order to make certain that thorough and holistic considerations for community opinion are taken, leading scholars and attorneys within biodiversity law and indigenous rights

107 Jonas et al., 11.

108 Jonas et al., 12.

109 Saskia Vermeylen, "Trading Traditional Knowledge : San Perspectives from South Africa, Namibia and Botswana." In R. Wynberg, D. Schroeder, & R. Chennells (Eds.), *Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case* (2009): 194.

law recommend that customary law be utilized as a foundation for any ensuing national law regarding FPIC and TK protection.[110] By working in a mutually-supportive way with and through traditional frameworks, the State can also work to further the values of social equity, justice, and democracy by meaningfully incorporating and using traditional frameworks.

The significant question the literature leaves unanswered is *how* exactly we might go about adopting customary laws and practices regarding consent to create national FPIC legislation. A national application of FPIC must be flexible enough to operate fluidly and fairly on a case-by-case basis. It must also honor the spirit of customary law by ensuring powerful stakeholders seek out FPIC from ILCs and fully respect community responses. Our fieldwork attempts to secure answers to this core problem and aims to fill the gap in the literature. We hope that this will subsequently inform national policy. In particular, this research project attempts to fill in this gap by merging the international legal frameworks that promote FPIC's implementation with community-originated methods for gauging, utilizing, and configuring conditions for consent. Through qualitative interviews with three indigenous communities in Sarawak and one indigenous community in Peninsular Malaysia, we have gained perspective and recommendations from those most affected by international laws regarding TK—the indigenous and local communities themselves.

VII. Field Research and Consultations with Indigenous Communities in Sarawak and Peninsular Malaysia

The points that we have discussed up until now are far easier expressed abstractly than specifically. The first part of this paper has attempted to involve and confront common considerations that arise in bio prospecting and FPIC procedures. In particular, we have scrutinized the specific relations between states, indigenous communities, and outside corporations or researchers and the processes that aim to offer communities political leverage. Nevertheless, the reality is that these issues are very difficult: the results have often been disappointing for the ILCs involved. Some points that appear obvious, such as the justice and democracy embodied by consent, remain elusive in their implementation or simply fail to be implemented at all. Hence, this paper echoes scholars' calls: it pleas with biodiversity-rich governments, asking them to attempt to understand, fully respect, and implement into national law mechanisms that can begin to right some of these wrongs. Such legislation should that ensure further exploitation of ILCs does not occur. Though the field research here focuses on Malaysia's ILCs, the issues at hand are not unique to Malaysia and the solutions proposed do not apply solely to the Malaysian government. Nonetheless, since the research was conducted in Malaysia under the supervision of CEBLAW, an institute affiliated with the Universiti Malaya in Kuala Lumpur, it more specifically calls upon the Malaysian federal and local state governments to provide constructive solutions to these problems.[111]

110 Nijar et al, *Indigenous People's Knowledge Systems*; Posey, 61; Tobin, 6.

111 The Center for Excellence in Biodiversity Law (CEBLAW) is a university research institute housed in the Law Faculty at the Universiti of Malaya, in Kuala Lumpur Malaysia, and operated jointly by the Government of Malaysia. The Center, its director Gurdial Singh Nijar, and Research Assistant Pei Fern serve as advisors to the Government on matters related to biodiversity and biosafety law. It plays a leading role in negotiations of international treaties under the UN CBD and Cartagena Protocol on Biosafety, on behalf of the Government of Malaysia, the Group of G77 and China, Like-Minded Megadiverse Countries and other informal international groupings (text taken directly from CEBLAW website). I worked as a visiting scholar and Research Assistant for CEBLAW July 2012 – October 2012, and wrote this report as well as accompanied on fieldwork prior to and during that time.

A. Malaysia's Legal Structure with Respect to Biodiversity, Prior Informed Consent, and Traditional Knowledge of ILCs

To provide historical and legal context for the fieldwork CEBLAW and I, as a Research Assistant, performed in Malaysia, it is important to have some basic background on Malaysia's legal framework with regard to biodiversity and indigenous communities. Malaysia is a federation of thirteen states and three federal territories, and its indigenous communities are found in three main areas—Sarawak and Sabah, which, together, constitute East Malaysia or Malaysian Borneo and Peninsular Malaysia, which is also called West Malaysia. A number of indigenous groups inhabit each of these regions. Though none of these groups can be adequately categorized simply by their region, they have been for administrative purposes.[112] In our research, CEBLAW visited three *Iban* communities in Sarawak and one *Orang Asli* community in Peninsular Malaysia. Though indigenous communities make up only around 5% of the total population in West Malaysia, in Sarawak and Sabah they make up about 30% of each of the states' populations.[113] Notably, the Borneo states have special legislative powers: while the federal government manages indigenous issues in West Malaysia, the individual state governments of Sabah and Sarawak have jurisprudence over their respective indigenous populations' issues. Additionally, in Peninsular Malaysia, a federal body called the Department of Orang Asli Affairs—established in 1984 by the Aboriginal Peoples Act—holds responsibility for these groups.

Looking again to Malaysia's requirements under the CBD, the government is obligated to protect indigenous TK, innovations, and practices embodied in the lifestyles of Malaysia's ILCs, promote TK with the involvement and consent of these communities, and equitably share the benefits arising from such promotion. However, by starting with an analysis of how the Malaysian states delineate or approach indigenous land rights, which are foundational to the rights to TK and FPIC which arise out of that land, we see that such protections are not currently in place. First considering the Aboriginal Peoples Act which is most relevant for Peninsular Malaysia's ILCs, Sharom stresses that this legislation not only allows for land to be delineated or 'gazetted' as an aboriginal area, reserve, or alternatively as commercial state property, but also allows the State Authority to have the power to "revoke wholly or in part any declaration of an aboriginal area."[114] This would leave any such indigenous right to land subject to the State's whim. Therefore, though the law's existence seems to recognize indigenous rights to particular lands, it also offers the State the ability to negate or override all indigenous claims at any time. This includes Native Customary Rights claims—indigenous groups are offered no legal security when it comes to their lands, livelihoods, and essentially their ability to exist.[115] Though Article 5 of the Constitution details what should entail a right to land by stating that "No person shall be deprived of his life or personal liberty save in accordance with the law," this law also falls victim to narrow interpretations by the justice system, since the state can extinguish land rights

112 The indigenous communities of Peninsular Malaysia have been generically grouped under the umbrella term *Orang Asli* (meaning 'Original Peoples'), and generally include three main ethnic groups – the Negrito, the Senoi, and Proto Malay – followed by many sub-ethnic groups. We visited the E. Semai communities, who are Senoi. Sabah's overarching groups include the Dusunic, the Paitanic, the Murutic, the Bajau, and the Suluk. Sarawak's groups include Iban, Bidayuh, and Melanau. It is in Sarawak that we visited three Iban communities.

113 Azmi Sharom, "Critical Study of Laws Relating to the Indigenous Peoples of Malaysia in the Context of Article 8(j) of the Biodiversity Convention." *International Journal on Minority and Group Rights*. (2006): 56.

114 Ibid, 57.

115 Ibid, 58.

in accordance with written law that gives them the power to do so.[116] Sharom further notes that because of the lack of land protections, "the promotion of indigenous knowledge and practices, with their consent, is only likely to occur in an ad hoc and disjointed manner, if at all."[117] Going into our research, it thus seems highly doubtful that TK is being protected and valued, and further unlikely that current legal mechanisms provide a forum for consensual bio-prospecting and research relationships to take place.

Additionally invaluable is Sharom's discussion on the extent to which Malaysian laws address public participation, which is essentially the foundation for a FPIC process. The Environmental Impact Assessment (EIA) reports that are required especially for larger development projects affecting many communities and ecological processes and the Town and Country Planning Act 1976 (TCPA) seem to be the only two venues the federal government allows for participation from communities. Even then, these planning tools or reports are merely open to commentary and suggestions by the public and the Department on the Environment has no obligation to incorporate these viewpoints into the resulting project. Furthermore, in the Bakun Dam Case, the state government of Sarawak even circumvented what little public participation element exists within the EIA by taking the project out of the control of the federal Department on the Environment and claiming state jurisdiction over the project.[118]

While there is a National Policy Biodiversity Act (1998) and a National Policy on the Environment that mention recognition of local communities in the "conservation, management, and utilization of biodiversity" as well as the right to shared benefits, neither one make mention of consent processes or the involvement of indigenous peoples.[119] Both Sabah and Sarawak have also developed biodiversity legislation, namely the Sabah Biodiversity Enactment 2000 and the Sarawak Biodiversity Center Ordinance 1997. Each established a biodiversity council responsible for managing its respective Biodiversity Centre. Indigenous communities were not involved in the creation of these pieces of legislation, however. Neither of the councils includes indigenous representatives. While these bodies do encourage the sharing of traditional knowledge and the utilization and protection of such knowledge systems, their process for obtaining the TK cannot be called consensual in the sense that we have defined it. The process is not ongoing and merely requires a preliminary signature on a permit. While there is promise that these forums could prove beneficial for the protection of indigenous communities' rights to their innovations in the future, they currently lack many important characteristics that define adequate frameworks. In particular, the status quo does not include ILCs' active and informed participation. It also does not recognize ILCs' rights to their innovations and the lands from which these stem.[120]

B. Methods of Research

Through organized discussion with the Loagan Berni, Sungai Peking, and Sungai Linai longhouses in Sarawak and the E. Semai community in Perak, our researchers were able to fill some gaps in

116 Ibid, 61; Sharom references the *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors case*, concerning the displacement of ILCs due to a hydroelectric project in Sarawak, where the state government extinguished respondent's rights because the Aboriginal Peoples Act allowed them to do so (Sharom, *Critical Study of Laws,* 61). This situation is all too common, and is currently taking place with the proposed Baram Dam project, where 20,000 people are estimated to be legally displaced, given state-sovereignty claims to extinguishing Native Customary Rights.

117 Ibid, 64.

118 Ibid, 62-63.

119 Ibid, 64.

120 Ibid, 67.

our understanding of FPIC, as it exists on the ground in Malaysia. We were also able to confirm some hypotheses derived from the literature and falsify others. CEBLAW traveled with Jok Jau Evong, who serves as the Field Director of the non-governmental organization *Sahabat Alam Malaysia* (SAM), or Friends of the Earth, located in Marudi, Sarawak.

Working with Jok and having him as our host was an enormous privilege and undeniably deepened the resulting research and findings. Jok left his Kayan village—Uma Bawang in middle Baram, Miri Division—in 1985 to lead many communities in groundbreaking protests against a logging company taking native lands for operations. His vast knowledge, perceptions and understanding of the issues are deeply embedded in this section, as he was a primary translator from Iban to English or *Bahasa Melayu* (Malaysian national language), and was able to guide and moderate the discussion and consultations with the Sarawakian longhouse communities.

We introduced ourselves to the communities by attempting to foster a discussion about how the ILCs make decisions regarding their native land, resources, and TK; how their decisions have been respected or disregarded; how consent functions in these processes; and whether and how they think Free, Prior, and Informed Consent could work as a political mechanism that aims to protect community ownership and rights over GR and ATK.

After introducing our individual roles at CEBLAW and detailing some of the ways CEBLAW is involved with biodiversity work, we asked that the members of the community share their opinions on how their BR, ATK, and land may be protected through national law, state policy, community-based initiatives or documents, or other means. The floor was open for discussion, and depending upon the community, members enthusiastically came forward in groups, allotted talking time solely to chiefs or village elders, or coordinated and talked amongst themselves until they felt they had come to a decision on what to propose and say. In each community there was also a large group of people (between 15-40) present at these discussions that did not add their input vocally, but actively listened to the conversation. Within each community, members were interested in having their stories heard. Some stories related directly and others indirectly to the questions at hand, yet every one was an informative piece of the puzzle. Though each narrative was unique, they also shared common threads. Every community voiced its thoughts on why indigenous lands and traditional knowledge need to be protected and what the major challenges to their protection are. This basic framework steered the conversation and the communities generally proceeded through the discussions by identifying issues they see as most salient—issues with FPIC (or a lack of it), with 'development' (and the displacement, conflicts, and environmentally degrading activities usually encompassed by this term), and with "power over" community leaders and their decision-making processes. FPIC was often referenced as 'consent' or 'permission' but was loosely identified from the beginning as being a continuous process where a high level of information is shared with and discussed with a community, and where proceedings are made only if and when *full* community permission *prior* to a project is obtained.

I shall attempt to navigate the research or discussions we had with these communities as organically as possible, touching on themes as they came up. Throughout this discussion, however, we must keep in mind that each community approached the various issues with different fervor. There is thus no painstaking order to the subject matter as I present it—each community brought up matters in different order.

Returning to a concept discussed at length earlier in the paper, it is valuable to recognize that communities are not static, but rather dynamic. No one community has one homogenous, indigenous voice —nor do community members place the same level of concern on the same things. There might be general consensus on some matters, as there were during these community

discussions. For instance, the dangers and negative effects posed by logging operations to community health and forest and river ecology, and the distress and sadness community members feel for their loss of lands are both topics these communities expressed undivided concern about. Nevertheless, these issues may not be unanimously important for all individuals within the longhouse.

C. Research Topics and Discussion

One of the largest internal schisms in communities we visited is that between a village 'headman' (a common post for the village leader) and the rest of the community. Of course conflict between the two is not the norm for every ILC. For instance, in our first community visit to the *Loagan Berni* longhouse, community-appointed headman Vincent shared that their ILC's collective decision-making method—governed by *adat*, the Malay word for local and customary law—is to fully consult all family heads prior to making any decisions. Vincent was the main spokesperson at this meeting and he was joined by many other community members who agreed with him. Vincent was as opposed to land grabs by foreign logging and plantation companies as every other member of this longhouse community present. With SAM's assistance he had collected records of all Native Customary Rights (NCR) over their lands to highlight their claims to territories that had been unjustly and sometimes unknowingly appropriated for 'development.'

In places other than *Loagan Berni* we found that the state government had appointed many of the ILCs' headmen, who, in turn, were often complicit with government operations. The assigned headman is commonly rewarded or bribed with money and inordinate amounts of power and perks from the government to sign off land belonging to the community through contracts with companies or to give blind consent to bio-prospectors. This is the case even though the community is usually in opposition to his policies and decisions, as the majority of each community we visited was. Often in collaboration, both the headman and the government thus override the existent *adat* law and customary land rights. Again, these rights govern everything from dialogue and management processes with respect to resources and ATK, claims to land, and official ownership of TK. This is a serious issue related to the idea of consent and it must be addressed; it is extremely likely that government-appointed headmen will not act in accordance with customary law and the interests of their communities' constituents. Signing contracts and agreements with third party companies or with the government can be *justified* or *framed* as consent, but the reality is that this is a severely weakened, 'gate-keeping' strain of consent involving little to no participation from the people. In other words, it is not likely to be indicative their wants and needs. In these instances an outside actor may have technically obtained permission without regard for those who were being most affected by the project's consequences.

In the case of the *Sungai Peking* community, where the headman was said to have retreated to his farmhouse for the night of our dialogue with the community, the village members we spoke with stressed that the large conflict between their headman and a slight majority of community members would make any conversation around a holistic consent process extremely difficult. One participant remarked that when the headman has meetings regarding the community, they are privately held in his *bilik* ('room' in Iban) with his parties only, involving no one else from the village. This community has done something quite unique by mobilizing to create a "Residents Association" independent of the headman that meets regularly to make clear the community's

claims to land and to document concessions made against their will and sometimes without their knowledge.

Every ILC visited expressed similar problems with the role of the Sarawak state government in the past 50 years, especially since the start of logging operations in Sarawak in the 1970s. Speakers lamented the fact that forests have disappeared, that their family farms had been logged and then clear-cut or burned without their permission or even their foreknowledge, and most have not even seen any compensation for these losses.[121] We traveled to farms belonging to the *Sungai Peking* communities under Native Customary Rights law. Looking across the distant horizon, we saw that some plots were neatly lined with flat palm oil plantations, some were blackened and burnt, and others in the transition between logging and plantation growing. Most of these alterations to the land were not the result of the community's choice to exploit its own properties but rather came about without its consent. Some members of the community have lost their family plots entirely to these external state or corporate projects. Those who have not actively fear that they will.

When we brought up the use of a 'consent' mechanism, specifically a policy of 'Free, Prior, and Informed Consent' where communities are mandatorily consulted in a collective fashion prior to development or access to resources, communities unanimously agreed that such an instrument would be invaluable to their protection. They also avidly identified its existence in their customary or *adat* laws. Within these communities, *adat* operates as a set of cultural norms, customs, values, laws, and dispute resolution systems governing internal and external relationships, whether they are social, political, or economical. Each community explained to what extent *adat* still governed its decision-making and dialogue with outside actors. For a variety of reasons, the use and usefulness of *adat* has varied in recent years. In all three Sarawakian longhouses and in the *Orang Asli* community, *adat* was pronounced weaker than it had been in the past though still existent, often even offering answers to many of our core questions.[122] For instance, *adat* maintains that a chief or headman of a tribe (if one exists) is not supposed to engage politically with issues of the government, but rather serve as spokesperson for the community.[123] *Adat* also specifies how community decisions are to be made communally and

121 Headman Vincent, personal correspondence, Aug. 28, 2012; Headman Vincent told us his community has received no concessions for lands seized by the state government, nor have they received concessions from companies that have inhabited those lands with operations. He disclosed that when his community was physically displaced by operations, the state government contracted foreign companies and outside labor to build them a new longhouse; however, the workmanship and materials were of terrible quality. He remarked that his own community would have done a better job rebuilding their longhouse, and that in certain instances, ILCs do just that to avoid dilapidated carpenter-ship.

122 El Semai Orang Asli community, personal correspondence, August 3, 2012; The *E. Semai* Orang Asli community in Perak noted that the village elders know *adat*, but younger people, many of whom leave home to find work in factories or on palm oil estates, are not as familiar with *adat*. This was a common theme throughout the communities we visited. The *E. Semai* community was in the process of transcribing *adat* with the help of a respected village elder, until he passed away mid-project. Since, the transcribed materials have yet to be been found and the project is at a stand still.

123 Sungai Linai community, personal correspondence, August 3, 2012; The *Sungai Linai* community expressed that their *adat* stipulates that a village chief should not be involved with politics, but rather stay "neutral" in order to objectively channel community perceptions. The community explained that after their previous chief had passed away in an accident, the government appointed a new chief who is "fiercely involved in politics." The preceding chief's son was not allowed to inherit the position, as is custom. Translation by Jok Jau Evong.

pinpoints a body that shall act as representative (e.g. Headman, Chief, Elder committee, etc.) if that community has a formalized hierarchy or leadership structure.[124] However, in most cases there is no coherent written documentation of these common laws as these communities have oral traditions. For that reason, outside forces often consider native law nonexistent or moot. An oral common law is therefore challenged in the face of external, encroaching forces with antagonistic legal structures and goals. Whereas these communities do not require written laws within and amongst themselves, they are now finding that without such documentation, they are at a severe disadvantage. *Loagan Berni*'s Headman Vincent said that he felt it was important to have written *adat* law so that the next generations would follow it.[125]

Beginning with *Loagan Berni* and then traveling to *Sungai Peking*, we quickly discovered that this community too has aspirations to strengthen and revitalize its *adat*. The aim was communicated to us as manifold: to use *adat* to "revive original customary decision-making processes," where headmen have limited power and are bound to majority-community choices, and to clarify and protect customary land rights, including consent requirements that compel outside actors to respect their NCR and seek permission for access. Each family in this longhouse has had NCR to their land since colonial administration,[126] but state government authorities have since repeatedly claimed that traditional *adat* is no longer valid or has "expired," as was also the case in the *Sungai Linai*.[127] As discussed in the brief analysis of the Aboriginal Peoples Act dictating Orang Asli affairs, Perak's *E. Semai* communities felt similarly disheartened since their Native Customary (Land) Rights have repeatedly been revoked, and in their place the government offers "land titles." This community's headman emphasized that there is no comparison in quality and size—for these titles offer meager eight-acre plots, only with compensation for fruit trees lost on previous lands, but with no regard for the right to the land itself.[128] Thus, compensation is not the motivation for ILCs' grievances; rather, their desire to regain their original rights to their land is. This extinguishment of land rights repeatedly arose as a focus of conversation, through formal discussion, spontaneous song during night celebrations, and one-on-one conversation. It is apparent that in order to protect traditional knowledge, innovations, and practices of ILCs (as legally binding international biodiversity law stipulates), these communities must protect their right to land, as lifestyle is directly intertwined with that land from which these communities create, innovate, subsist, and thrive.[129] Given that Malaysian law and the state government of Sarawak repeatedly negate ILCs' rights to their land, their rights with respect to all things related to that land, including TK, are bound to be violated. Again, this paper is in large part a plea and recommendation to the government to implement in state and federal legislation a *obligatory* Free, Prior, and Informed Consent policy mandating consent directly from ILCs (not merely their headmen) to access TK. This FPIC must parallel the implementation of constitutional

124 Just as a community is dynamic and constantly evolving, so are its *adat* or customary laws. For instance, prior to colonization by the Dutch and British in Malaysia, there was likely a very different *adat* than that which exists today. This is true with regards to changes in *adat* post-colonization and with every independent Malaysian government thereafter. While some ILCs' customs have been far more insulated from outside actors than others, most indigenous peoples of Malaysia have come into constant contact with different ways of life (e.g. non-nomadic, non-subsistence traditions), dating back hundreds of years. Their current customs are thus fluid, as they respond to others' (see D. Ngidang's "Deconstruction and Reconstruction of Native Customary Land Tenure in Sarawak").

125 Headman Vincent, personal correspondence, August 28, 2012.

126 See Nancy Lee Peluso's and Peter Vandergeest's "Genealogies of the Political Rights Forest and Customary in Indonesia, Malaysia, and Thailand" for a detailed account of the environmental history of colonial and post-colonial forest and land management in relation to Malaysia's indigenous communities.

127 Sg. Peking, Sg. Linai, personal correspondence, July 28-30, 2012.

128 E. Semai, personal correspondence, August 3, 2012.

129 Sharom, 66-67.

indigenous rights to land because valuable and irreplaceable knowledge systems are innately intertwined with it and could not exist without it.

D. Analysis and Recommendations

Malaysia's current legal framework governing biodiversity makes little effort to support international law since it does not support public participation, include ILC members (outside of the often biased and corrupt politically-appointed headman) into the decision-making process, or require an official, all-inclusive consent from populations most readily affected by access to TK, exploitation and seizure from lands. Given that this is the case, a return by communities to customary law systems as a counter-narrative is desirable. The Sungai Peking community's Residents Association likewise creates an alternative dialectic, attempting to challenge the linear progression of state activities and government appointed headmen in hopes of producing different outcomes. Having gained popular support, the ability for this particular body and this ILC to maneuver and develop a document resembling a bio-cultural protocol, which includes the documentation of oral *adat* customs and regulations, could produce a strong model for other ILCs to follow.

Not all ILCs will choose to mobilize in this way or take this path. This route also does not guarantee the pushback needed to ensure protection of traditional knowledge systems and native lands. As Bannister writes, we must realize at once that "communities will need to be enabled (through provision of time, funds, access to information, building of expertise) to *define for themselves* the concept of community-level FPIC and the internal process to achieve it, before an external process can be codified."[130] At the same time, state resistance is the largest trial facing such internally created protocols governing FPIC. Thus, some ILCs may have protocols and written *adat*, and some may not, but all do have customary law and rights that should be afforded through them, which begins with an effective "interface between national and international legal regimes and customary law and practice."[131] This interface is currently nonexistent in Malaysia, and especially in Sarawak and Peninsular Malaysia, as we have noted with an analysis of current biodiversity legislation. A message that was echoed across all communities—perhaps most clearly in *Sungai Linai*—was an exasperation about government disrespect for *adat* and land rights that have been practiced for generations. This disrespect was exemplified when government authorities told the community that their traditional *adat* was no longer valid and had "expired," and this would be reason enough for appropriating communally owned ILC forest. While there was at least some semblance of hope and possibility in *Sungai Peking* around efforts to strengthen *adat* in the future (namely through the creation of a community protocol), in *Sungai Linai*, the men who spoke seemed more disillusioned and discouraged when they reflected upon their current and past interactions with the Sarawak state government. They maintained that they could do all the strengthening of *adat* they pleased, but at the end of the day if the government decides to extinguish land rights or offer consent to a pharmaceutical corporation for entrance and use of resources and ATK, the community usually cannot take sustainable action to guard against it.[132] These speakers stressed that *adat* is "useless" when such decisions are governed by

130 Bannister, *Lessons for ABS*, 3.

131 Tobin, 6.

132 In past cases where the government has granted logging licenses or plantation lands to companies, communities have responded with a variety of resistance efforts. Beginning in 1967 with one Penan community, villages have set up road blockages, sabotaged operations by disabling machinery, and created public acts of protest. With every act (most of which are nonviolent acts of protest), the ILCs have been met with mass arrest, seizure of passport, and

pulu, or 'Higher Court,' with only the headman acting as representative of the ILC. Though this community agreed that it might be beneficial to have a series of meetings and record their *adat* in order to present specifications to future bio-prospectors, they determined that the problem is so large now that constructive change seems impossible unless it occurs from within the government.[133]

With the focus coming back to the responsibility of the state, the discussions became circular. Though the prospect of strengthening *adat* seemed a promising one with numerous possible positive outcomes, to this community the missing state policy element meant those outcomes would not be concrete or assured; instead, changes were thought to be far-fetched, minute, and gradual at best. Though this paper encompasses an array of topics regarding indigenous rights to their lands and TK through legal and non-legal multilateral frameworks, it set out specifically to explore state FPIC policy possibilities that would enhance justice in current Malaysian biodiversity legislation. Through interactions with indigenous communities and comparative analysis of countries' FPIC methods, it became clear that a shift in Malaysian government policy surrounding ILC participation and rights is desperately needed.

We have discussed how the implementation of a mechanism like Free, Prior, and Informed Consent can pose complex issues to all involved, but it has proven to be of utmost importance in the interface between indigenous and local communities, state and local governments, and bio-prospectors and corporations. Without such a tool to gauge community approval or disapproval, manage and create clear expectations from each actor involved, and specifically address ongoing communication with and benefits flowing back to the communities, the process may not be democratic, equitable, or just. Even with a FPIC process in place, ethical conditions for the least powerful actors are not a given. In order for FPIC to happen on communities' terms, it must be supported through the process of creating local-level stipulations around resource and ATK access. This seems most viable through the drafting of a bio-cultural protocol or similar document, as Sungai Peking seems hopeful to develop, but may happen other times on other terms depending upon how an individual community defines and creates their individual process. To safeguard ILCs against exploitation and protect their TK, lives, and livelihoods enveloped by their land, customary law must gain formal standing in state and federal policy, such that customary rights to land are guaranteed and cannot be overridden by corporate actors, researchers, or state officials when opportunities for profit arise. We thus recommend that ILCs' *rights* to their customary lands be formally concretized in the Malaysian Constitution. The principle of community-level FPIC is essential, and therefore, federal legislation must incorporate a *compulsory* Free, Prior, and Informed Consent mechanism, which recognizes customary law (and community protocols, when they exist) as the *basis* upon which it is sought. In this way, communities will not be forced to conform to alien FPIC frameworks, but rather have ownership over a process governing terms of access and utilization of TK. By specifying in federal biodiversity legislation that customary law is to be the core foundation for such a FPIC arrangement, customary laws are not codified or 'frozen in time' as Posey (1996) cautions against, in a way that ILCs' *adat* for FPIC can continue evolving to make for a more inclusive FPIC process.

Furthermore, we recommend the establishment of a federal and state-level representative body or council composed of democratically elected (non-government appointed) indigenous (*Dayak* and *Orang Asli*) members. This body shall be consulted and its recommendations

similar punishment (see J Peter Brosius' "Prior Transcripts, Divergent Paths: Resistance and Acquiescence to Logging in Sarawak, East Malaysia").

133 Sg. Linai community, personal correspondence, August 30, 2012.

mandatorily included in all matters pertaining to biodiversity and land of, surrounding, or belonging to indigenous communities. Such a body might work as a standing commission within the Biodiversity Centres for each state (Sarawak, Sabah and Peninsular Malaysia), consulting the CAN in bio-prospecting matters. This body shall act as an additional safeguarding mechanism, so that the CAN may not make decisions that are in its interest but not in the interest of ILCs. These councils shall be allotted the co-responsibilities of directing access-seekers to the appropriate communities, confirming that FPIC takes place in a holistic and ongoing fashion, and reviewing bio-prospecting agreements and FPIC processes to assure that they have fully taken account of community consensus and are benefiting the actors involved.

E. Conclusion

Free, Prior, and Informed Consent has been identified by scholars and local indigenous communities alike as a mechanism that could make great shifts in the manner in which traditional knowledge access and state and private interactions with ILCs are navigated. This study has highlighted the ways in which FPIC was used in the past, the theoretical and ethical underpinnings of such a mechanism, and the necessary place it has in governing Malaysian biodiversity law, mainly as a tool for involving previously disempowered indigenous peoples in direct decisions regarding their very lives and livelihoods. Local communities have developed numerous forms of response and resistance to the exploitation of their lands, genetic resources, and innovations, but few of these have seen long-standing outcomes, and these groups have more often than not faced more oppression simply for protecting what they see as rightfully theirs. The current power dynamic with regard to biodiversity in the Global South is unbalanced and unjust, where benefits from purportedly "common heritage" innovation go almost solely to the corrupt political state officials who make illegitimate decisions about the use and ownership of indigenous biological resources and ATK without ILCs' consent. This study has argued that these actions are wholly unlawful under international biodiversity legislation and are not representative of a democratic or equitable biodiversity governance system. Free, Prior, and Informed Consent and its implementation as one tool to aid other local mechanisms—such as the bio-cultural community protocol, or Native Customary Rights to land—thus proves essential if the federal government of Malaysia hopes to both insulate their remaining biodiversity from Global Northern extractive enterprises and protect its most vulnerable citizen groups from the most oppressive internal forces.

List of Acronyms

ABS	Access and Benefit Sharing
ATK	Associated Traditional Knowledge
BCP	Bio-cultural Protocol
BR	Biological Resources
CBD	United Nations Convention on Biological Diversity

CEBLAW	The Centre of Excellence for Biodiversity Law
GR	Genetic Resources
FPIC	Free, Prior and Informed Consent (also referred to as Prior, Informed Consent/PIC)
ICP(R)	Intellectual and Cultural Property (Rights)
ILCs	Indigenous and Local Communities
MAT	Mutually Agreed Terms
TK	Traditional Knowledge
UN	United Nations
UNDRIP	United Nations Declaration on Rights of Indigenous Peoples

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