

The Nagoya Protocol in an Indigenous Peoples' Perspective

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Introduction

The Tenth meeting of the Conference of Parties (COP10) to the Convention on Biological Diversity (CBD) was held in October 2010 in Nagoya. Just before the COP10 began, representatives of indigenous peoples who were to participate in the COP10 held a pre-conference to devise a strategy at Chukyo University. I was involved in hosting this pre-conference. This experience has made me aware of the necessity to analyze how far indigenous peoples' claims were accepted in the Nagoya Protocol and what kind of difficulties are there in realizing their claims. This article mainly

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deals with these issues.

There are already a few researches which focus on the status of indigenous peoples' rights in the Nagoya Protocol. Most of them, however, are conducted by scholars in the fields of environmental law,⁽¹⁾ and very few of them are by human rights scholars.⁽²⁾ Besides, although, in 2014, the CBD COP12 made an important decision regarding indigenous peoples that is likely to have an influence on the implementation of the Nagoya Protocol, it has not drawn much academic attention so far. This article, therefore, firstly overviews the development of indigenous peoples' rights in international human rights law and then analyzes the Nagoya Protocol and the CBD COP12 decision from their point of view. The aim of this article is to clarify limitations and possibilities of the Nagoya Protocol from the perspective of indigenous peoples' rights.

I. Preparatory study on indigenous peoples' rights

1. The concept of indigenous peoples

Before getting to the main point, I would like to refer to the

(1) See, for example, Akiko Toi, "Nagoya Giteisho Ni Okeru Senju minzoku No Kenri No Isou", *Houritsu Jiho*, Vol.1066 (2013), pp. 60-64; Elisa Morgera, "Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law", in Denis Alland et al eds., *Unité et diversité du droit international*, Martinu Nijhoff Publishers, 2014, pp. 983-995.

(2) See, for example, Toshiaki Sonohara and Hideaki Uemura, "Senj uminzoku To Seibutsu Tayousei: Seibutsu Tayousei Jouyaku Dai 10 Kai Teiyakukoku Kaigi No Seika Wo Gaikann Suru [Indigenous

question of who indigenous peoples are. Although Cobo's working definition of indigenous peoples was widely accepted by UN bodies, the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) does not provide any definition of them. The lack of definition in the UN Declaration is derived from the appearance of indigenous peoples who are not necessarily covered by Cobo's working definition.⁽³⁾ The most remarkable example is the recent appearance of indigenous peoples in Africa. According to Cobo's working definition, "indigenous...peoples...are those...having a historical continuity with pre-invasion and pre-colonial societies"⁽⁴⁾. This definition was considered to cover the first occupant of a certain territory and not to be applied to Africa. This was because most of all Africans had settled before being colonized by Europeans and, in most cases, there exists no clear evidence which tribe had first come to a certain territory.

However, since the mid 1980s, some African ethnic groups began to identify themselves as indigenous peoples. This stems from the fact that, in the 1980s, some NGOs in western countries

Peoples and Biodiversity: A overview of the 10th Conference of the Parties on the Convention on Biological Diversity]", *Annual Report of Daito Law Institute*, No.31 (2011), pp.13-22.

- (3) For more detailed examination of the lack of definition in the UN declaration, see Yuko Osakada, "Ahurika Ni Okeru [Senjuminzoku No Kenri Ni Kansuru Kokuren Sengen] No Juyou To Teikou - Senjuminzoku No Teigi · Jiketsuken · Tochiken Wo Megutte [Africa's Struggles over the UN Declaration on the Rights of Indigenous Peoples]", *Chukyo Law Review*, Vol.45 No.1/2 (2010), pp.1-27.
- (4) José Martínez Cobo, *Study of Discrimination against Indigenous Populations: Final Report*, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (1983), para.379.

which were supporting indigenous peoples began to get involved in Africa and help those discriminated ethnic minorities there. Working with western NGOs, some African ethnic minorities came to realize that their historically suppressed experiences were quite similar to those of indigenous peoples: African ethnic minorities and indigenous peoples have been discriminated by national majorities, prohibited from practicing their particular cultures and using their languages, and deprived of their traditional lands. Some African ethnic minorities, as a result, began to claim their rights to culture, language and traditional lands within the discourse of indigenous peoples' rights.⁽⁵⁾

In 1989, the first representative of African tribes appeared in the drafting process of the UN Declaration and insisted that their current living conditions should also be dealt with the UN Declaration.⁽⁶⁾ Although some African and Asian State delegations resisted applying the UN Declaration to their countries, in the late 1990s, there was a general consensus to apply the UN Declaration universally.⁽⁷⁾ Representatives of indigenous peoples considered that it was not only impossible but also unnecessary to define themselves. Instead, they claimed that their right of self-determination should include their right to identify themselves as indigenous

(5) Sachiko Kubota, "Huhensei To Sai Wo Meguru Porityikkusu - Senjumin No Jinruigakuteki Kenkyu", in S. Kubota *et al.* (eds.), *Senjumin Towa Dareka*, Sekaishiso Sha, 2009, p.5.

(6) Moringe Parkipuny, Member of Parliament Ngorongoro, Tanzania, Statement before the U.N. WGIP 6th Session, *The Indigenous Peoples Rights Question in Africa*, Aug. 3, 1989, available at: <http://cwis.org/africa.html> (accessed October 1, 2015).

(7) U.N. Doc. E/CN.4/1999/82 (1999), para.65.

peoples.⁽⁸⁾ While the inclusion of African and Asian ethnic groups made it difficult to clearly distinguish indigenous peoples from ethnic minorities, the African Commission on Human and Peoples' Rights, which emphasizes the importance of recognizing the existence of indigenous peoples in Africa, argues that their self-identification should be respected.⁽⁹⁾

2. The core rights of the UN Declaration

At the CBD COP10, indigenous peoples asserted that their rights, as recognized in the UN Declaration, should be respected in its outcome documents. So let me explain what rights indigenous peoples have in the UN Declaration. The core right of the UN Declaration is the right of self-determination. This was one of the most controversial aspects in its drafting because some State delegations feared it might imply a right to secession. This right was recognized by clearly denying the possibility of secession in Article 46(1). The substance of indigenous peoples' right of self-determination is to make indigenous peoples capable of participating in the democratic process and to reconstruct the State by protecting their particularities.⁽¹⁰⁾ As a consequence of the right of

(8) U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996), paras.35 and 68.

(9) African Commission on Human and Peoples' Rights, Centre for Minority Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, February 4, 2010, para.157.

(10) Yuko Osakada, "「Senjuminzoku No Kenri Ni Kansuru Kokuren Sengen」 No Igi To Kadai - Tochi Ni Taisuru Kenri Wo Chushin Ni [Significance and Problems in the UN Declaration on the Rights of

self-determination, the UN Declaration recognizes the right to free, prior and informed consent (FPIC). This right was also met with strong opposition from some State delegations, saying that it might give indigenous peoples the right of veto.⁽¹¹⁾ As a result of the strong State opposition, the UN Declaration does not necessarily require States to obtain the FPIC of indigenous peoples in all matters that might affect them. Provisions which clearly require States to obtain the FPIC are Article 10 concerning forced settlement and Article 29(2) concerning storage or disposal of hazardous materials in the territories of indigenous peoples. On the other hand, Article 32(2) merely obligates States to consult with indigenous peoples in order to obtain their FPIC before approving any project affecting their lands. However the first draft, which was adopted by the Sub-Commission on the Promotion and Protection of Human Rights in 1994, did provide the right to FPIC in this situation.⁽¹²⁾ After receiving strong criticism from some States,⁽¹³⁾ however, it was turned down. Nevertheless, indigenous peoples interpret this expression as the requirement for their FPIC based on the premise that their consent is an integral part

Indigenous Peoples: Focusing on Land Rights]”, in Kentaro Serita *et al.* (eds.), *Kouza Kokusai Jinkenhou Dai 4 Kan, Kokusai Jinkenhou No Kokusaiteki Jisshi [International Human Rights Law Series IV, International Implementation of International Human Rights Law]*, Shinzan Sha, 2011, pp.500-506.

(11) See, for example, U.N. Doc. A/HRC/2/G/1 (2006), p.2; GA/10612.

(12) UN Draft Declaration on the Rights of Indigenous Peoples as approved by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), Article 30.

(13) See, for example, U.N. Doc. E/CN.4/1996/84 (1996), para.81.

of the right of self-determination.⁽¹⁴⁾ The other rights which might relate to the CBD are the right to land and resources and intellectual property rights.

3. Indigenous peoples' claim at the COP10

Based on discussions at the pre-conference at Chukyo University, the International Indigenous Forum on Biodiversity (IIFB) made the following opening statement at the COP10. "In 2007, the United Nations General Assembly recognized and affirmed that Indigenous Peoples have equal rights and freedoms to all other peoples of the world. We are the owners of our territories and fully responsible for the biodiversity, and biological materials and resources belonging to our territories. We have the right to exercise the same power freely enjoyed by other peoples of the world, i.e. the power of free, prior and informed consent when OUR territories and resources are being accessed. ...We now call upon COP 10 to consider and incorporate the rights, interests and needs of Indigenous Peoples into all decisions of this Conference."⁽¹⁵⁾ Following this principle, at the drafting process of the Nagoya

(14) Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (2011), pp.19 and 23, available at:

http://www.indigenousbar.ca/pdf/undrip_handbook.pdf (accessed October 1, 2015); U.N.Doc.A/HRC/EMRIP/2011/2 (2011), Annex, paras. 22-23.

(15) International Indigenous Forum on Biodiversity, *COP10 Opening Statement*, October 18, 2010. Available at:

<http://iifb.indigenousportal.com/2010/10/18/cop-10-opening-statement-of-iifb/> (accessed October 1, 2015).

Protocol, indigenous peoples insisted that their right of self-determination, intellectual property rights and rights to genetic resources in their territories should be respected, and called for a States' obligation to obtain their FPIC before accessing their traditional knowledge or their genetic resources.

II. An analysis of the Nagoya Protocol from an indigenous peoples' perspective⁽¹⁶⁾

1. Achievements of the Nagoya Protocol

The Nagoya Protocol improved consideration for indigenous peoples on the following points, showing the influence of the growing international recognition of indigenous peoples' rights, including the UN Declaration.⁽¹⁷⁾ First, while the CBD Article 8(j) only 'encourages' the equitable sharing of the benefits arising from the utilization of indigenous and local communities' (ILCs) knowledge, the Nagoya Protocol makes it clear that it applies to

(16) This Chapter is mainly based on a translation of Yuko Osakada, "Senjuminizoku No Jiyu Na Infomudo Konsento Wo Eru Gimu - Kokusai Jinkenhou No Kankyo • Kaihatsu Bunya Heno Eikyo No Genkai To Kanousei [Indigenous Peoples' Rights to Free, Prior and Informed Consent: Its Limitations and Possibilities within the Context of Environmental and Development Law]", *Yearbook of World Law*, Vol.33(2014), pp.103-105.

(17) Thomas Greiber *et al.*, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit -sharing, IUCN Environmental Policy and Law Paper No.83* (2012), p.89; Matthias Buck *et al.*, "The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity", in *RECIEL*, Vol.20, No.1 (2011), p.52.

traditional knowledge (Article 3) and requires States to take legislative, administrative or policy measures for the benefit sharing with ILCs (Article 5(5)). Although Article 5(5) includes a restrictive term, “as appropriate”, such restrictive terms are less frequently used compared with other provisions in the Protocol relating to ILCs, thus it fortifies legal obligations regarding traditional knowledge more than the CBD Article 8(j).⁽¹⁸⁾ Second, while the CBD had been criticized for ignoring indigenous peoples’ rights to resources by only acknowledging States’ sovereign rights over genetic resources,⁽¹⁹⁾ the Nagoya Protocol finally recognized that the ILCs could hold rights to genetic resources (Article 5(2)). Third, while the CBD only regulates that access to genetic resources which are provided by States should be on mutually agreed terms (MAT) and subject to prior informed consent (PIC) of States, the Nagoya Protocol requires MAT and PIC with regard to traditional knowledge and genetic resources held by ILCs, though, as we will see later, these requirements should be stipulated in domestic laws (Article 5(2), 6(2) and 7). Fourth, while the Nagoya Protocol obligates user States to take appropriate measures to comply with provider States’ domestic legislation regarding the ABS to genetic resources (Article 15), a similar provision has been included as concerns access to traditional knowledge (Article 16), though it is accompanied by a restrictive

(18) T. Greiber *et al.*, *supra* note 17, p.89.

(19) Debra Harry *et al.*, “The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples”, in Beth Burrows (ed.), *The Catch: Perspectives on Benefit-sharing* (2005), available at: [http://www.zemargraphics.com/biopolitics_web/The_BS_in_ABS\(final\).pdf](http://www.zemargraphics.com/biopolitics_web/The_BS_in_ABS(final).pdf) (accessed October 1, 2015).

term, “as appropriate”.

2. Limitations of the Nagoya Protocol

However, consideration toward indigenous peoples in the Nagoya Protocol is limited on the following points, because of strong concern of some States against the recognition of indigenous peoples' rights. First, the Nagoya Protocol uses the expression “indigenous and local communities”, following in the footsteps of the CBD, not the expression “indigenous peoples” which implies the right of self-determination and is claimed by indigenous peoples. In this respect, the CBD COP12 made an important decision to use the term “indigenous peoples” in future decisions. I will explain this decision later. Second, the preamble of the Nagoya Protocol just notes the UN Declaration. Based on the strong opposition of Canada, the term “significance” was omitted at a meeting closed to indigenous representatives. Third, several restrictive terms, such as “as appropriate”, “in accordance with domestic legislation” and “with the aim of”, are contained in provisions with regard to ILCs. These are criticized for creating a double standard between ILCs' rights and those of State parties.⁽²⁰⁾

(20) Konstantia Koutouki, “The Nagoya Protocol: Sustainable Access and Benefit-sharing for Indigenous and Local Communities”, *Vt. J. Envtl. L.*, Vol.13 (2012), p.533; Quebec Native Women, *Joint Statement of North American Indigenous Organizations on the Nagoya ABS Protocol of the Convention on Biological Diversity*, December 14, 2010, available at: <http://www.faq-qnw.org/old/documents/pressrelease-14dec.pdf> (accessed October 1, 2015).

According to Bavikatte, the larger group Parties reiterated that the right of ILCs over genetic resources had to be highly restricted to national discretion since there were no CBD obligations to recognize such a right.⁽²¹⁾ It followed that restrictive terms, such as “in accordance with domestic legislation regarding the established rights of these ILCs” (Article 5(2)), and “where they have the established right” (Article 6(2)) are included so as to be interpreted that the recognition of ILCs’ rights over genetic resources is left to national discretion.⁽²²⁾ As regards the provision of access to traditional knowledge (Article 7), the phrase “in accordance with domestic law” was inserted, because some delegations were of the opinion that State parties should have the right to offer PIC.⁽²³⁾ It enabled Article 7 to be interpreted that the PIC of ILCs is required only when domestic legislation provides so.⁽²⁴⁾ Fourth, while the Nagoya Protocol provides for the monitoring of the utilization of genetic resources (Article 17), a similar provision was deleted when it came to the monitoring of the utilization of traditional knowledge because of the lack of consensus.⁽²⁵⁾

(21) Kabir Bavikatte and Daniel F. Robinson., “Towards a People’s History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing”, *LEAD*, Vol.7, No.1(2011), p.46.

(22) Maiko Tanoue, “Idenshigen To Dentouteki Chishiki Ni Kansuru Aratana Wakugumi To Chizai Seido - CBD-COP10 No Seika To Ka dai -”, *Chizaiken Forum*, Vol.84 (2011), p.60; Quebec Native Women, *supra* note 20.

(23) T. Greiber *et al.*, *supra* note 17, p.110.

(24) M. Tanoue, *supra* note 22, p.60; Quebec Native Women, *supra* note 20.

(25) Draft Protocol on Access to Genetic Resources and the Fair and

It follows from what has been observed that, at the drafting of the Nagoya Protocol, while indigenous peoples insisted on their right of self-determination, intellectual property rights and rights to genetic resources in their territories by invoking the UN Declaration, some State delegations were unwilling to recognize indigenous peoples' rights, as this might restrict the right of States over natural resources. The latter led the Nagoya Protocol to include several restrictive terms in provisions concerning ILCs. Indigenous peoples had been criticizing attitudes of State delegations for seeking to insert restrictive terms. They claimed that some States did not realize the States' sovereign right over genetic resources was not unrestricted and that the Protocol must correspond with internationally approved standards on indigenous peoples. Their claims, however, were not accepted. The Nagoya Protocol, thus, could be interpreted that indigenous peoples' PIC with regard to access to traditional knowledge or genetic resources which are held by them is required only when domestic law of provider States stipulates so.

III. The COP12 Decision on the use of the term "indigenous peoples"

Even after the Nagoya Protocol was adopted, indigenous peoples have been urging States to use the terminology "indigenous peoples and local communities" instead of "indigenous and local

Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, Status as of 12 noon, 27 October 2010, Article 13.

communities” (IPLCs) used in the CBD. The reason why indigenous peoples called on States to use the term “IPLCs” is that they would like to make the CBD and the Nagoya Protocol consistent with the UN Declaration. The expression of “indigenous peoples” was adopted in the UN Declaration in spite of some States’ opposition. Those States had been worrying that it might imply the recognition of peoples’ right of self-determination, including the right to secession for indigenous peoples. Some States, such as the United States had been proposing to use the term “indigenous populations”. Although the UN Declaration made clear that it did not confer the right to secession to indigenous peoples, it became the first international instrument that recognized the right of self-determination for indigenous peoples. The right of self-determination for indigenous peoples is considered as a core right from which other rights of indigenous peoples stem, and means that indigenous peoples are eligible to decide their destinies by, and for themselves. Indigenous peoples would like to make clear that they have the right of self-determination even in the context of biological diversity, by urging the adoption of the term “indigenous peoples”. Indigenous peoples consider that to make the Protocol consistent with the UN Declaration means, for example, that all rights based on customary use must be protected, although the reference to “established” rights in Articles 5(2) and 6(2) could be interpreted to refer to situations where ILCs can demonstrate that their right to genetic resources is affirmed by domestic legislation.

In 2010 and 2011, in response to the IIFB’s demands, the United Nations Permanent Forum on Indigenous Issues (PFII) called on

the parties to the CBD and the Nagoya Protocol to use the terminology “IPLCs”⁽²⁶⁾. In the 2011 preceding paragraph, the PFII recommended taking a human rights approach in the context of environmental issues. In the 2011 succeeding paragraph, the PFII emphasized the importance of respecting and protecting indigenous peoples’ rights to genetic resources consistent with the UN Declaration. It also recommended protecting all rights based on customary use, not only “established” rights. A series of the PFII’s recommendations, therefore, urged adoption of a human rights approach in the context of the CBD and the Nagoya Protocol. More precisely, they required States to recognize indigenous peoples as subjects of the right of self-determination affirmed in the UN Declaration by adopting the expression “IPLCs”, and to reinterpret the CBD and the Nagoya Protocol from the perspective of indigenous peoples’ rights.

Having considered the PFII’s recommendations, the COP12 decided “to use the terminology “indigenous peoples and local communities” in future decisions and secondary documents under the Convention, as appropriate”⁽²⁷⁾. This decision, however, accompanies the following restrictive paragraphs; “(a) The use of the terminology “indigenous peoples and local communities” in any decisions and secondary documents shall not affect in any way the legal meaning of Article 8 (j) and related provisions of the Convention; (b) The use of the terminology “indigenous peoples and local communities” may not be interpreted as implying for

(26) U.N. Doc. E/2010/43-E/C.19/2010/15 (2010), paras.102-117; U.N. Doc. E/2011/43-E/C.19/2011/14 (2011), paras.25-27.

(27) UNEP/CBD/COP/DEC/XII/12 (2014), pp.15-16.

any Party a change in rights or obligations under the Convention; (c) The use of the terminology “indigenous peoples and local communities” in future decisions and secondary documents shall not constitute a context for the purpose of interpretation of the Convention on Biological Diversity as provided for in Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties or a subsequent agreement or subsequent practice among Parties to the Convention on Biological Diversity as provided for in Article 31, paragraph 3 (a) and (b) or special meaning as provided for in article 31, paragraph 4, of the Vienna Convention on the Law of Treaties. This is without prejudice to the interpretation or application of the Convention in accordance with Article 31, paragraph 3 (c) of the Vienna Convention on the Law of Treaties.”

While the COP12 decided to adopt the expression IPLCs, it denied the possibility of the reinterpretation of the CBD from the perspective of indigenous peoples’ rights. As mentioned earlier, the purpose of a recommendation by the PFII to use the expression IPLCs was to urge State parties to take a human rights approach in the context of the CBD and the Nagoya Protocol, and to reinterpret them from the perspective of indigenous peoples’ rights. The COP12 decision, however, extracted merely a recommendation of the expression IPLCs and, in effect, rejected the remaining recommendations. This decision mainly stems from the fact that the State parties to the CBD did not want to reopen the argument over indigenous peoples’ rights which had taken place in the drafting process of the Nagoya Protocol.

The COP12 decision shows the limitation of the human rights

approach in the field of environmental law. The human rights approach would likely be limited in so far as it means a restriction on States' rights or profits. In the present case, the recognition of indigenous peoples' right to genetic resources based on customary use might restrict the States' sovereign rights over genetic resources. Thus, a consensus over the expression IPLCs could be reached only by denying the possibility of reinterpretation of the CBD from the perspective of the indigenous peoples' rights. In this respect, some indigenous peoples' organizations criticized the practice of consensus among the Parties, saying that consensus was not a legitimate approach if its intention or effect was to undermine the human rights of indigenous peoples.⁽²⁸⁾

Conclusion

The IIFB has been present in CBD meetings since it was organized at COP3 in 1996. They also played an active role in realizing their rights at the drafting of the Nagoya Protocol. The core right of indigenous peoples is the right of self-determination. The effective participation of indigenous peoples in the drafting process itself partly realizes their right of self-determination, and its outcome document, the Nagoya Protocol, does take their rights into consideration to a certain degree. From the perspective of indigenous peoples' rights, however, the Protocol with many restrictive terms was not sufficient for respecting their rights. In-

(28) UNEP/CBD/COP/12/INF/1/Add.2 (2014), pp.16-18; U.N. Doc. A/HRC/18/42 (2011), Annex (Expert Mechanism advice No.2 (2011)), para.27.

indigenous peoples have been trying to bring their rights into the environmental law field, which is generally unrelated to human rights, and to put the highest value on their rights in the environmental law. Nevertheless, as we have already seen, their challenge was not successful to a great degree. These limitations were mainly derived from the fact that, in spite of the participation of indigenous peoples, they were not permitted to table any proposed amendments without a State party's support,⁽²⁹⁾ and consensus was sought solely among the State parties at the drafting of the Protocol. Although indigenous peoples have been severely criticizing the State-centered character of international law, its basic structure remained unchanged.

There is still, however, a faint gleam of hope left for indigenous peoples. Some authors argue that the reference to "in accordance with domestic legislation" focuses on the facilitative role of the State in implementing rights of ILCs over genetic resources rather than on the determination of these rights.⁽³⁰⁾ The argument in favour of this interpretation could be that during the drafting of the Protocol, the term "in accordance with domestic legislation" was seen as less restrictive than "subject to national legislation", a phrase used in Article 8(j) of the CBD. There exists, therefore, certain room for having an argument over how to interpret this term at the Conference of Parties of the Nagoya Protocol.

(29) U.N. Doc. UNEP/CBD/COP/11/7 (2011), para.20.

(30) K. Bavikatte *et al.*, *supra* note 21, p.45.