



How Indonesia and Thailand Transform International Law: A Study of Access and Benefit Sharing

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Submission : 15 Mei 2024

Revision : 30 Juni 2024

Publication : 15 Juli 2024

Abstract

This paper addresses the transformation of international law, The Convention on Biological Diversity (CBD) and its Nagoya Protocol on Access and Benefit Sharing (NP), into national law. Those convention and protocol have established an Access and Benefit Sharing (ABS) system between utilizers and providers of genetic resources, including for indigenous people. One of the objectives of treaties it to obligate States to make law to ensure the rights of indigenous people for benefit sharing. Indonesia and Thailand are megadiversity countries and also the parties of the treaties. This paper tries to compare Indonesia and Thailand in transforming the ABS law into their national legal system and how the judges in Indonesia and Thailand use international treaty in deciding the cases. CBD is the starting point of the ABS concept for legal rights or interests that can be owned in relation to genetic resources. In this sense ABS is one of the new and innovative legal concepts introduced in international law. However, the CBD has only created a concept of ABS rights policy. Therefore, the concept of ABS rights of indigenous peoples needs to be formulated in national law by enacted the rights of indigenous peoples related to genetic resources.

Keywords: *transformation; international law; national law; access and benefit sharing*



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Abstrak

Makalah ini membahas transformasi hukum internasional, Konvensi Keanekaragaman Hayati (CBD) dan Protokol Nagoya tentang Pembagian Akses dan Manfaat (NP), menjadi hukum nasional. Konvensi dan protokol tersebut telah membentuk sistem Access and Benefit Sharing (ABS) antara pengguna dan penyedia sumber daya genetik, termasuk masyarakat adat. Salah satu tujuan perjanjian ini adalah untuk mewajibkan negara membuat undang-undang yang menjamin hak-hak masyarakat adat atas pembagian keuntungan. Indonesia dan Thailand adalah negara megadiversitas dan juga merupakan pihak dalam perjanjian tersebut. Tulisan ini mencoba membandingkan Indonesia dan Thailand dalam mentransformasikan undang-undang ABS ke dalam sistem hukum nasionalnya dan bagaimana hakim di Indonesia dan Thailand menggunakan perjanjian internasional dalam memutus perkara. CBD merupakan titik tolak konsep ABS mengenai hak atau kepentingan hukum yang dapat dimiliki terkait dengan sumber daya genetik. Dalam pengertian ini ABS merupakan salah satu konsep hukum baru dan inovatif yang diperkenalkan dalam hukum internasional. Namun CBD hanya menciptakan konsep kebijakan hak ABS. Oleh karena itu, konsep hak ABS masyarakat adat perlu dirumuskan dalam undang-undang nasional dengan menetapkan hak-hak masyarakat adat terkait sumber daya genetik.

Kata Kunci: transformasi; hukum internasional; hukum nasional; akses dan pembagian manfaat

A. Introduction

Several studies demonstrate the relationship between international treaties and their implementation in many national legal systems. However, it mostly refers to developed countries and is

limited to certain jurisdictions. There are very few studies on how international obligations are transformed in the legal systems of newly independent, post-World War II countries and how international treaties are translated into national law.¹ The transformation of international law into national law is a problem that occurs in many countries² but should be resolved because the importance of it in realizing the objectives of international treaties. The States practise in applying international law into national law is based on the theory of monism and dualism. Monism theory holds that international law applies directly to national law. Unlike monism, dualism considers international law and national law as two separate systems because international law cannot directly be applied in national law but needs to be transformed first.

When a treaty has been ratified and based on the requirements entry into force as international law, it must be implemented. International treaties are the

¹ Dinah Shelton. *International Law and Domestic Legal System: Incorporation, Transformation and Persuasion (Introduction)*, New York: Oxford University Press, 2011

² Hikmahanto Juwana. 'Catatan atas Masalah Aktual Perjanjian Internasional', *Indonesian Journal of International Law*, Vol. 5, 2008. See also Malcom N. Shaw QC, *International Law*, Cambridge University Press, 2008.

main source of international law and have a central role in regulating relations and issues of public international law that is agreed upon by State.³ International treaty in accordance with the principle of *pacta sunt ser vanda post ratifying* are obliged to apply into national law in good faith.⁴

Indonesia and Thailand are megadiversity countries that are parties of the Convention on Biological Diversity (CBD) and Nagoya Protocol on Access and Benefit Sharing (NP). CBD and Nagoya Protocol recognize 'the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.'

³ Anthony D'Amato. 'Treaty as a Sources of General Rule of International Law', Northwestern University School of Law Working Papers, 1962, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1755264 accessed 11 July 2023.

⁴ I.I. Lukashuk. 'The Principle of *Pacta Sunt Ser vanda* and The Nature of Obligation Law', 2027, 83 *American Journal of International Law: The principle that treaty obligations must be fulfilled in good faith is one aspects of the fundamental rules that requires all subject of international law to exercise in good faith.*

Both countries recognize the role of the indigenous people and tribal people in conservation of the genetic resources, and it depends on the national law to regulate it. Based on the Article 8 (j) CBD:

“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

This provision refers to Article 15 (j) and is followed by Article 5 paragraph 2 Nagoya Protocol

‘Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous people, in accordance with domestic legislation regarding the established rights of these indigenous people over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.’

The consequences of those articles are that State needs to implement the ABS provision in municipal law.

This matter is viewed as the relationship between international law and national law which is the main question of this paper. The relationship between international law and municipal law, both theoretical and practical, is examined in order to contextualise ABS of CBD and Nagoya Protocol including how the judges decide the case by considering treaty.

B. Discussion

1. The Transformation Access and Benefit Sharing of Genetic Resources of Indigenous People into National Legal System

Genetic resources are resources that have the following elements of genetic material. They have real or potential use value and are found in nature, whether living naturally or cultivated in the form of plants, animals or microorganisms and inheriting original traits (heredity) which can be utilized and developed into superior products.⁵ For thousands of years mankind has utilized genetic resources as a form of biodiversity to sow seeds, select plants, make food and

⁵ Convention on Biological Diversity 1992. Article 2.

drink, including harvest medicinal plants. The diversity of genetic resources is the basis for the improvement of agricultural crops and the development of the pharmaceutical industry, food and health care products that sustain life on Earth.⁶

In general, innovations based on genetic diversity always rely on physical access to genetic material. Many states have historically controlled access to natural resources directly through regulations, however, they have not controlled access to biological genetic material. As a result, users who gain access to genetic resources are not yet obliged to share the benefits or benefits derived from their use with their country of origin or people or communities or indigenous peoples who may be the prime providers.⁷

At the Beginning of the Convention on Biological Diversity (CBD), and in the following years since the

⁶ Karry Ten Kate and Sarah A Laird. *The Commercial Use of Biodiversity Access to Genetic and Benefit Sharing*, UK: Eartscand, 2000, 'Genetic resources are biological materials of animal, plant, microbial, or other origin that contain the hereditary information necessary for life and are responsible for their useful properties and ability to replicate'.

⁷ Lyle Glokwa. *A Guide to Designing Legal Framework to Determine Access to Genetic Resource*, United Kingdom: IUCN The World Conservation Union, 1998.

CBD took effect in December 1993, no other subject may be as controversial as the provisions of Article 15 Access to Genetic Resources and benefit sharing (Access and Benefit Sharing/ABS). The controversy stems from the implications of Article 15 for state sovereignty, economic aspects, scientific development, indigenous and local communities, researchers, and industries that are highly dependent on genetic resources.⁸

How should the essence of the concept of Access and Benefit Sharing be interpreted in international law into national law? Given that historically, the use of genetic resources was initially accessed freely because it was considered a common heritage of mankind. Historically, genetic resources were accessed for free based on the world view that these were common heritage of mankind.⁹ According to the Nagoya Protocol, users of genetic resources must share benefits with the countries and indigenous peoples where the genetic resources originate.¹⁰ Benefit sharing consists of two

⁸ *Ibid.*

⁹ Reji K. Joseph. 'International Regime on Access and Benefit Sharing, where are you?', *ASEAN Biotechnology and Development Review*, p. 65, 2010.

¹⁰ Myrna E Watanabe, 'The Nagoya Protocol on Access and Benefit Sharing', *Bioscience Journal*, p. 6. 2015.

complementary concepts, namely utilization and benefit sharing. The CBD does not provide a clear definition of the meaning of ABS so that the meaning of ABS is left to the countries implementing the arrangement within their jurisdiction to define it. Access and Benefit Sharing (ABS) is an exchange between those who provide access to genetic resources and those who provide compensation or rewards for their use,¹¹ taking into account all rights to genetic resources, technology and with appropriate funding.¹²

In Indonesia, the genetic resources of indigenous and tribal peoples have a concept of the form, authenticity and novelty of the ownership period of protection, and a value system that is different, or even contrary to the Intellectual Property Rights regime in the form of fixation of ideas, or materialization, of creative ideas into patent provisions. Meanwhile, genetic resources associated with traditional knowledge are expressions of values and culture in a broader form, not only in the form of fixation of ideas.

¹¹ D. Schroeder. 'Access and Benefit Sharing: It is time for a Definition', *Journal Medical Ethics*, p. 33. 2006.

¹² Pham Phu Phuy *et al.* *Approaches to benefit sharing A preliminary comparative analysis of 13 REDD+ countries*, Cifor Bogor Indonesia: 2013.

The majority of the forms of genetic resources associated with traditional knowledge involve ideas that have been nurtured through oral traditions, which are not written down.¹³

In terms of ownership, the IPR regime is centred on individual ownership, while genetic resources are managed communally. The period of protection of conventional IPR regimes, for public access, is limited to a certain period. In contrast, genetic resources and traditional knowledge are continuous, from generation to generation.¹⁴

When the state acts as a state party that ratifies the international CBD treaty and the Nagoya Protocol, this means that the state is ready with the rights and obligations imposed in accordance with international agreements and is obliged to formulate policies to realize the sharing of benefits from the use of genetic resources of indigenous peoples into their national laws. including for Indonesia and Thailand. In the framework of the World Trade Organization (WTO)

¹³ Miranda Risang Ayu. *Geographical Indications Protection in Indonesia based on Cultural Rights Approach*, PhD Thesis, Aus-AID & Faculty of Law, University of Technology Sydney: 2008.

¹⁴ *Ibid.*

related to genetic resources, Annex 1C is known as the Trade Related Aspect of Intellectual Property Rights Agreement (TRIPS Agreement), Article 27 paragraph (3) letter b TRIPS determines that:

'Members may also exclude from patentability: plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.'

According to these provisions, genetic resources cannot be fully protected through patents because genetic resources are living things and their derivatives are not the result of human creation. Therefore, countries must establish their own protection policies through the sui generis system or a combination of sui generis and patents in order to avoid the practice of further development of indigenous peoples' SDGs by industry in the form of products whose results can be patented.

In Indonesia, the constitutional basis for the management of genetic resources is stated in Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia that "natural resources are controlled by the state and used maximally for the prosperity of the people". Meanwhile, regarding to the rights of customary law communities, Article 18b paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that: "The state recognizes and respects indigenous peoples and their traditional rights as long as they are still alive and in accordance with community development and principles. The Unitary State of the Republic of Indonesia is regulated by Law. Several laws and regulations about genetic resources related to the rights of indigenous peoples have been established. In principle, these regulate the recognition of the rights of indigenous peoples to natural resources, namely:

- a. MPR (People's Consultative Assembly) Decree No. IX/MPR/2001 concerning Agrarian Reform and Management of Natural Resources;
- b. Law No. 5/1960 on Basic Agrarian Provisions (UUPA);
- c. Law Number 5 Year 1990 Concerning Conservation of Living Natural Resources and Their Ecosystems;

- d. Law Number 5 of 1994 concerning Ratification of the United Nations Convention on Biological Diversity;
- e. Law Number 7 of 1994 concerning Ratification of the Approval for the Establishment of the World Trade Organization (World Trade Organization);
- f. Law Number 41 of 1999 concerning Forestry as amended by Law Number 19 of 2004 concerning Amendments to Law Number 41 of 1999 concerning Forestry;
- g. Law Number 29 Year 2000 Concerning Plant Variety Protection (PVP);
- h. Law Number 31 of 2004 concerning Fisheries as amended by Law Number 45 of 2009 concerning Amendments to Law Number 31 of 2004 concerning Fisheries;
- i. Law Number 21 of 2004 concerning Ratification of the Cartagena Protocol on Biological Security of the Convention on Biodiversity Protocol on Biosafety to The Convention on Biological Diversity;
- j. Law Number 32 Year 2009 concerning Environmental Protection and Management;
- k. Law Number 1 of 2014 concerning Amendments to Law Number 27 of 2007 concerning Management of

Coastal Areas and Small Islands and Law Number 13 of 2016 concerning Patents.

Those natural resource laws and regulations do not regulate the benefit sharing of genetic resources except Law Number 5 of 1994 concerning Ratification of the United Nations Convention on Biological Diversity. In another section related to GRs, Law Number 13 concerning Patents, the provisions of Article 26 regulate genetic resources and benefit sharing:

- (1) If the invention relates to and/or originates from genetic resources and/or traditional knowledge, it must be clearly and correctly stated the origin of the genetic resources and/or traditional knowledge in the description.*
- (2) Information on genetic resources and/or traditional knowledge as referred to in paragraph (1) shall be stipulated by an official institution recognized by the government.*
- (3) The distribution of yields and/or access to the use of genetic resources and/or*

traditional knowledge as referred to in paragraph (1) shall be implemented in accordance with statutory regulations and international agreements in the field of genetic resources and traditional knowledge.

The provisions of the article above implicitly acknowledge the origin of genetic resources and traditional knowledge, but do not yet explicitly regulate the sharing of benefits. In accordance with the provisions of Article 26 paragraph (3) the distribution of the utilization of genetic resources shall be carried out in accordance with statutory regulations and international agreements. However, the benefit sharing arrangements in accordance with the laws and regulations and international treaties have not yet been followed up through the transformation of international law into national law.

As a megadiversity country, Indonesia has abundant of genetic resources, most of which are in the areas managed by indigenous peoples. After the Constitutional Court Decision No. 35/PUU-X/2012 on May 16, 2013, which stipulates that customary forests

are not part of state forests, ABS policy becomes important regarding to the legal status of Indigenous People forest areas where genetic resources are located. In national law, the position of Indigenous People as legal subjects who have rights and obligations must be recognized and confirmed in local regulation. Several Local Regulations have been established to recognize the existence of indigenous people namely:

1. Local Regulation of Lebak Regency Number 32 Year 2001 concerning Protection of the Indigenous People of the *Badui*;
2. Local Regulation of Malinau Regency Number 10 of 2012 concerning Recognition and Protection of the Rights of Indigenous Peoples in Malinau District;
3. Local Regulation of *Ciamis* Regency Number 15 of 2016 concerning the Recognition and Protection of the Kuta Village Indigenous People; and
4. Local Regulation Number 8 of 2016 concerning Recognition and Protection of the *Serampas Marga* Customary Law Community.
5. Local Regulation of Lebak Regency Number 8 of 2015, namely 519 *Kasepuhan* consisting of core

Kasepuhan, Kokolot Lembur and Gurumulan Rendangan.

Furthermore, as many as 538 indigenous peoples have been established through regional law products after the issuance of the Constitutional Court Decision No. 35 /PUU-X /2012 on May 16, 2013, which defines customary forest as not part of state forest. This determination is made through 7 District Head Decrees and 6 Regional Regulations at the district level. Recognition of the existence of indigenous people is very meaningful for the protection of the SDGs of Indigenous Peoples in the future even still at the local level.

Like Indonesia that has multi-ethnic people and diverse culture, Thailand also has indigenous peoples known as hill tribes (Hills Tribal). In some studies, there are ten officially recognized groups of indigenous and tribal peoples called the Chao Khao. Chao Khao means hill people/mountain people or upland people. These indigenous peoples live in the northern, and western parts of Thailand.

In connection with the term, indigenous people and tribal people are used as the equivalent of customary law communities. Studies on indigenous peoples in international forums recognize two terms, i.e. indigenous people and tribal people. United Nation Declaration on The Right of Indigenous Peoples 2007 uses the term indigenous peoples. Indonesian Constitution uses the term indigenous peoples. Meanwhile the term tribal people is used at the international level for the context of Africa, Bangladesh and Thailand, and they are included in the indigenous people's movement in the forums of the United Nations (UN). Indigenous peoples and tribal people are essentially the same, namely groups of indigenous peoples. Both refer to equality as indigenous people who have social, cultural and value ties who live in certain area. According to the Department of Social Development and Welfare (Thailand), this group is spread across twenty provinces. They are the Akha, Hmong, Htin, Karen, Khmu, Lahu, Lisu, Lua, Mien, Mlabri and sea nomad ethnic groups of Choa Lay with a population of approximately 925,825,210. Person. Thailand has interest to protect their biodiversity.

2. The Practise Indonesia Law and Thailand Law in Relation to Transformation International Law into National Law Concerning Access and benefit Sharing as The Right of Indigenous Peoples

The validity of international law into national law has a strong theoretical basis. It is from the theory of the will of the state to be bound by the provisions of international law, namely international treaties based on the principle of *pacta sunt ser vanda* and good faith. The study about the binding of the state to international law shows two views of the enactment of international law into national legal system. It is based on monism or dualism doctrine.

From the general legal rule point of view, the relationship between international law¹⁵ and national law can be said that national law has no influence on state obligations at the international level. On the other hand, international law ¹⁶ does not further determine

¹⁵ David H Ott. *Public International Law in the Modern World*, (Pitmen Publishing London 1987).

¹⁶ Michael Akehurst. *A Modern Introduction to International Law*, London: 4th edition, George Allen and Unwin, 1986.

how the relationship between international law and national law.¹⁷

One way in which international law applies in the States is by transforming it. International treaty about the rights of indigenous to the access and benefit sharing (ABS) for the utilization of the genetic resources that has been made and ratified by States is Convention on Biological Diversity CBD. It has three main objectives namely:

1. Conservation of biodiversity (the conservation of biological diversity);
2. Sustainable use of its components; and
3. Sharing the benefits of access and utilization of genetic resources (the fair and equitable sharing of benefits from the arising of the utilization of genetic resources).

Related to the CBD's third objective, it is specifically regulated in the international treaty Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their

¹⁷ *Ibid.*

Utilization to the Convention on Biological Diversity in 2011. The Establishment of the CBD and the Nagoya Protocol is driven by the under-pressure condition of genetic resources and the loss of plants, species and habitats at a significantly increasing rate,¹⁸ which in turn will disrupt human life. States agree to conserve and regulate the benefit sharing from the utilization of genetic resources for those who contribute to the preservation of biodiversity.

Most of the genetic resources existing in the developing countries get worldwide attention with the start of bioprospecting. The activities of examining the potential commercial use of genetic resources are carried out mostly by developed countries. The pharmaceutical and food sectors are dominated by

¹⁸ *Convention on Biological Diversity: Noting also that there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.* See also Makarim Wibisono, "Selamat Datang Protokol Nagoya", that the idea of the Nagoya Protocol is to stop the tendency to destroy about 40,000 species of genetic resources every year so as to conserve the ecosystem and perpetuate various life in nature, . <https://nasional.kompas.com/read/2010/11/22/03211740/functio.n.file-get-contents>, accessed on 6 August 2020.

America and France, while for cosmetics by Japan.¹⁹ One example of a bioprospecting case is the utilization of periwinkle rosy plant compounds derived from Madagascar plantations by American pharmaceutical company Eli Lilly & Co. for the treatment of leukaemia cancer. Eli Lilly & Co.'s sales in 1997 reached more than 180 million US dollars, while the indigenous people of Madagascar did not get any benefit sharing of the sales.²⁰ Genetic resources which mainly exist in developing countries are usually used traditionally by indigenous and tribal peoples who are known to have local values and wisdom in maintaining and preserving genetic resources.²¹

¹⁹ Efridani Lubis. *Perlindungan dan Pemanfaatan Sumber Daya Genetik Berdasarkan Penerapan Konsep Sovereign Right dan Hak kekayaan Intelektual*, Bandung: Alumni, 2009.

²⁰ Ibid

²¹ United Nation: An estimated 370-500 million indigenous peoples in the world are spread across 90 countries. They live in all geographical regions and represent 5000 different cultures see Claudia Sobrevila, *The Role of Indigenous People in Biodiversity Conservation*, The World Bank, Washington D.C., May 2008, p. xii: Most of the world's major biodiversity centers are right on the territory and guarded by indigenous and tribal peoples. These indigenous territories cover up to 22 percent of the world's land surface and they maintain 80 percent of the planet's biodiversity area. Also, the greatest diversity of indigenous groups resides in the largest tropical forest wilderness area in the world in America (including the

The genetic resources of indigenous peoples associated with traditional knowledge are developed into industrial products, cosmetics, food, medicines, and other needs by the pharmaceutical, cosmetic and food industries. However, the economic benefits of its utilization are not shared equitably but only for technology owners. As stated by Grethel Aguilar:

It is estimated that between 25 000 and 75 000 plant species are used for traditional medicine. Only 1% is known by scientists and accepted for commercial purposes. Part of the modern pharmaceutical industry is developed on the basis of plants discovered and use by indigenous peoples and local communities, even though the economic benefits are not equitably shared.²²

Amazon), <https://www.un.org/en/events/indigenousday/>: accessed 23 August 2023.

²² Grethel Aguilar. "Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples", *Journal Environmental Science&Policy*, p.4 2001, see <https://www.ConventiononBiologicalDiversity.int/doc/articles/2002-/A-00390.pdf> It is estimated that between 25,000 and 75,000 plant species are used for traditional medicine. Only 1% is known by scientists and is accepted for commercial purposes. Part of the modern pharmaceutical industry is developed based on plants found and used by indigenous and local communities, but the economic benefits are not shared equitably.

To accommodate and create a more balanced mechanism, the CBD recognizes the role of indigenous and tribal peoples as emphasized in the Considerations as follows:²³

‘Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components’.

In the next section, the CBD obligate states to further regulate the policies of protecting the genetic resources of indigenous peoples and determine the existence of Access and Benefit Sharing as stated by Article 8 paragraph (1) letter J:

‘Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and

²³ Preamble United Nation Convention on Biological Diversity.

sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices’.

Furthermore, these provisions (Article 8 (1) J) are strengthened by Article 15 (7) of CBD

‘Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms’

Meanwhile, the Nagoya Protocol is established to realize the objectives of third pillar of the CBD that is to reaffirm the provision of benefit sharing as in Article 5 paragraph (2):

‘Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and

local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.”

The practice of states in applying international law to national law for Indonesia refers to Law Number 24 of 2000 concerning International Treaties. The Indonesian legal system refers to the Pancasila values system and hierarchically refers to Article 7 paragraph (1) of Law Number 12 Year 2011 concerning the Formation of Legislation. The Thai legal system is a civil law system based on the principles of the national state. Indonesia inherited the Dutch legal system while Thailand was a country that was never colonized. By comparing the practices of Indonesia and Thailand in applying the concept of Access and Benefit Sharing, it is hoped that similarities and differences will be found. These similarities and differences are important ingredients for reforming the law of genetic resources in the future as a manifestation of the state's obligation to transform and implement the concept of benefit sharing.

When a state, acts as a state party, ratifies the CBD and Nagoya Protocol, it means that the state must prepare the rights and obligations imposed in accordance with international treaties and must formulate a policy to realize the distribution of benefits from the utilization of the genetic resources of indigenous and tribal peoples into their national law. However, the mandate of the CBD and the Nagoya Protocol on ABS has not been transformed from international law into national law yet.

‘Indigenous and tribal peoples should not be harmed by the access and use of their genetic resources by beneficiary third parties. *pharmaceutical companies for commercial gain, often without their informed consent and without any benefits flowing back to them.*’

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In relation to participation in an international treaty, The 1945 Constitution of the Republic of Indonesia does not reveal which theories are held

²⁴ Michael A Bengwayan. *Intellectual and Cultural Property Rights of Indigenous Peoples in Asia*, Minority Rights Group International, UK: Kavita Graphics, 2003

whether monism or dualism. Meanwhile, in practice Indonesia shows inconsistency in applying the doctrines. Moreover, at implementation level, Indonesia does not distinguish itself whether to incorporate or to transform. The unclear choices on how international law applies and validates in national legal system will cause fundamental problem because there is no certainty of the validity of international law. As stated by Cassese that international law cannot stand alone without the assistance and facilitation of national law:

‘International law can’t stand on its own feet without its “crutches”, that is international law cannot work without the constant help, cooperation, and support of national legal system. As the German jurist Triepel observed in 1923, the international law is like a field marshal who can only give orders to general. It is solely through the generals that his orders can reach the troops. If the general don’t transmit them to the soldiers in the field, he will lose the battle’.²⁵

To be applied into national law, legal principles, rules of international law specified in international

²⁵ Simon Butt. ‘The Position of International Law Within the Indonesian Legal System’, *Emory International Law Review*, 2014.

treaties need a process by transforming them into the national legal system into national legal rules that bind people and groups of people in their jurisdiction including law enforcement officials. Based on the above explanation, post-ratification of the international agreement of the CBD and the Nagoya Protocol by Indonesia needs to be followed up by implementing the provisions of the CBD and the Nagoya Protocol by drafting a separate legal regulation that is sui generis or integrating the obligation to regulate the rights of indigenous and tribal peoples for benefit sharing through revisions in regulations legislation related to genetic resources related. Therefore, a comparative study was carried out with other countries.

Ratification documents cannot be used as a basis for enforcing international treaties in legal proceedings at the national level. The transformation of international law into national law is necessary because international agreements bind the countries that follow but does not necessarily mean to directly bind its citizens. The transformation of international law into national law is defined as the application of provisions of international law into national law by transforming

or embodying the provisions of international law into national law.

According to the Nagoya Protocol, users of genetic resources must share benefits with countries and indigenous peoples where genetic resources originate. Benefit sharing consists of two complementary concepts, namely utilization and benefit sharing.²⁶ The CBD does not provide a firm understanding of the definition of ABS so that the definition of ABS is left to the countries implementing the regulation in their jurisdiction to define it. Benefit sharing (Access and Benefit Sharing) is defined as benefit sharing which refers to the principles and ways in which genetic resources can be accessed and how the division of savings between those who use resources and providers is carried out in accordance with the regulations.

Benefit sharing (ABS) is an exchange between those who provide access to genetic resources and those who provide compensation or rewards for their use taking into account all rights to genetic resources,

²⁶ D. Schroeder. "Access and Benefit Sharing: It is time for a Definition", *Journal Medical Ethics*, April 2007, 33.

technology, and with appropriate funding.²⁷ The concept of genetic resources according to Article 1 CBD is genetic material that has real or potential value. Genetic material is material from plants, animals, microorganisms or other bodies that contain functional inheritance or functional units (heredity).²⁸ Kerry Ten Kate and Sarah A. Laird suggested genetic resources are biological material of animals, plants, microbes, or other origin that contain heredity information needed for life and are responsible for their useful properties and have the ability to replicate. The philosophical basis for the birth of the concept of benefit sharing (Access and Benefit Sharing) over genetic resources is a concept through property rights. Aristotle said that ownership of private property in a country shows the freedom guaranteed by the state for every citizen.²⁹

Furthermore, Thomas Aquinas said humans as servants of God have a direct relationship with goods

²⁷ Pham Phu Phuy *et al.* *Approaches to benefit sharing A preliminary comparative analysis of 13 REDD+ countries*, Bogor Indonesia: Cifor, 2013.

²⁸ Article 2 *United Nation Convention on Biological Diversity*.

²⁹ J.H. Rapar Th.D. *Filsafat Politik Aristoteles*, Jakarta:Rajawali, 1993, p. 105.

because ownership is the basis for human activity.³⁰ Man needs to have external goods not as his own but as shared property, so he is willing to share it with those who need it. Thomas Aquinas termed inclusive, as compensation for the use of this right, the owner must be given a balanced reward.³¹ Benefit sharing is an agreed concept in return for both the state and indigenous peoples' genetic resources providers for their conservation efforts so far, as well as incentives to do the same in the future. This is in accordance with the basic principle of natural law theory, namely the principle of justice which has universal validity which can be found through human reasoning.

Sacrifices in preserving and preserving genetic resources associated with traditional knowledge of indigenous and tribal peoples for benefit sharing are also related to the concept of unjust enrichment based on the principle of "one shall not be allowed to unjustly enrich himself at the expense of another" (a person is not permitted by law to enrich themselves at the

³⁰ Sonny Keraf. *Hukum Kodrat dan Teori Hak Milik Pribadi*, Yogyakarta: Kanisius, 1997, p. 36.

³¹ Sony Keraf. *Ibid*, p. 58.

sacrifice of others, but he must provide the benefits obtained are fair and reasonable).³²

The principle is in line with the principle of *suum cuique tribune* which teaches to give everyone their right. 'It is fair according to the law of nature that nobody should be enriched by loss and injustice to another'.³³ This principle is the basis for formulating the rules of access regulation by guaranteeing the rights of indigenous peoples to the distribution of benefits as business compensation and the contribution of indigenous and tribal peoples who have preserved and preserved them.

'The ABS regime has a dual foundation. The Fairness and equity of the third CBD Objective in respect of countries sovereign rights over biodiversity and

³² Faizal Kurniawan *et al.* *Unsur Kerugian Unjust Enrichment dalam Mewujudkan Keadilan Korektif*, *Yuridika Journal*, Volume 33 Nomor 1 Januari 2018. p 22. *Unjust Enrichment Doctrine is general principle that one person should not be permitted unjustly to enrich himself at expense of another but should be required to make restitution of or property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly*

³³ *Ibid.*

reinforced by Nagoya Protocol the rights of indigenous people and local communities. Fairness and equity were seen implicitly as serving the other foundation the creation of an incentive for conservation and sustainable use'.³⁴

Although Indonesia has a large number of natural resource laws and regulations related to genetic resources, Indonesia has not done its obligation to transform and regulate ABS in its national law as mandated by the CBD and Nagoya Protocol. Unlike Indonesia, Thailand has *sui generis* laws and regulations that govern the distribution of benefits for access and use of genetic resources. Although Indonesia and Thailand are both megadiversity countries with abundant diversity of genetic resources, Indonesia does not yet have specific regulations governing benefit sharing.³⁵ This condition makes indigenous people as provider of genetic resources would be harmed because

³⁴ Christian Prip and G. Kristin Rosenda. *Access to Genetic Resources and Benefit Sharing from their Use (ABS) State of Implementation and Research Gaps*, Fridtjof Nansens Institutt: 2015.

³⁵ Amik Krismawati. 'Keunggulan dan Pengembangan Sumber daya genetik Durian Kalimantan Tengah', 2012, 18. *Indonesia is rich of genetic resources and biodiversity, but its development no so fastly as in Thailand*.

their contribution to conserve genetic resources a long time did not get benefit sharing.

Some Indonesian scholars have the view that Indonesia adheres to a dualism which is concluded from the first example of the 1982 Law of the Sea Convention (United Nations Convention of the Law on the Sea / UNCLOS). Indonesia ratified this convention with Law Number 17 of 1985, but the ratification did not affect Law Number 4 of 1961 concerning Indonesian Waters which remained in force for more than ten years after the ratification of UNCLOS. When Law Number 6 of 1996 was enacted to implement UNCLOS, Law No. 4 of 1960 was revoked and replaced. This shows that Law Number 17 of 1985 is an instrument of ratification of Unclos whose contents are transformed by forming Law Number 6 of 1996 concerning Indonesian Waters.

The position of international law is not mentioned in the Indonesian legal hierarchy whether this can be interpreted that international law is not officially recognized as a country that adheres to the theory of monism which explicitly places international law in the national legal system. In this context Indonesia can be said to be a part of monism and on the other hand

dualism. The court's practice shows that in cases of implementing the New York Convention judges cannot implement international treaties if they have not been transformed into national law.

In fact, Indonesia has experienced the absence of transformation of legislation that resulted in the inability of the implementation of international treaties. One of them is when the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "New York Convention")³⁶ has been followed by Indonesia through ratification with Presidential Decree Number 34 of 1981.³⁷

Thailand, like Indonesia, which is an ASEAN member country, is located in the tropical zone above the equator, in the middle of Southeast Asia with a region connected between Indo-Burma, Indochina and Malaysia. This position makes Thailand one of the most abundant countries in terms of species and genetic

³⁶http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf accessed 8 June 2023.

³⁷ Keputusan Presiden Nomor 34 Tahun 1981 tentang Pengesahan 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards,' entry into force 7 June 1959.

resources.³⁸ Thailand has 10% of all known species of the world, most of which are endemic to the Malay Peninsula and the Indochina Region, and this does not include many species that are not identified. These genetic resources provide basic needs for human livelihoods, and support study, research, innovation and market production.³⁹

The contribution of biodiversity in the form of genetic resources to Thailand's wealth and well-being has long been recognized. That awareness gave birth to policies that led to the conservation of ecosystems and species of genetic resources. This recognition is also a driving factor for the implementation of the Nagoya Protocol.⁴⁰ Although Thailand does not ratify the

³⁸ Peerapon Jaderojananont. 'The Protection of Biodiversity in Thailand: An Overview of the Implementation of the 1992 Convention on Biological Diversity', Fakultas Hukum Universitas Jambi: Papers on The International Seminar on The Protection of Biodiversity, 2016.

³⁹ Office of Natural Resources and Environmental Policy and Planning. *Access and Benefit Sharing*, Thailand, p. 5.

⁴⁰ Office on Natural Resource Environmental and Planning Ministry of Natural Resource and Planning. *Thailand National Report Implementation of Convention on Biological Diversity*, p. 3. The law consist of: 1) The Constitution of the Kingdom of Thailand 1997; 2) The National Park Act 1961; 3) The National Forest Reserve Act 1964; 4) The Plant Quarantine Act of 1964 and Plant Quarantine Act (second

Nagoya Protocol, it has rules regarding to access and benefit sharing (ABS).⁴¹

Thailand is a party to most international agreements. In general, most treaties cannot be signed and ratified only by the Executive because the procedure requires parliamentary approval or the King's signature is required for Thailand to be a party to the agreement as affirmed in Article 178 of the 2017 Constitution: 'The King has the Royal Prerogative to conclude a peace treaty, armistice, and other treaties with other countries or international organisations.'

issue) 1994; 5) The Seed Act 1975 and Seed Act (second issue) 1992; 6) The Importing and Exporting of Goods Act 1979; 7) The Enhancement and Conservation of National Environmental Quality Act 1992; 8) The Plant Varieties Protection Act 1999; 9); 10) The Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999; 11) The Community Forests Bill (CFB).

⁴¹ Union for Ethical Secretariat. 'ABS in Thailand', Amsterdam: June 2019: 'Thailand is not a party to the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits resulting from their Utilization. Nevertheless, it does have requirements on access and benefit sharing (ABS) in place, based on provisions in laws and regulations on plant varieties, biodiversity and Thai traditional medicine.' accessed <https://static1.squarespace.com/static/58bfcaf22994ca36885f063e/t/5d12407ab0c0f900019e940f/1561477243734/UEBT-+ABS+in+Thailand.pdf>

Once ratified, the agreement is not automatically binding in Thailand. Thailand has a dualism approach to include treaties in domestic law - treaties are only binding in Thai courts if they have been converted into national law with, for example, Parliamentary Law. Under traditional Thai practice, if the agreement is consistent with Thai law, it does not need to be ratified by the Parliament. However, without such ratification, it cannot be summoned directly in the domestic court as binding the court. With regard to human rights treaties, even though the Constitution does not approve this, there is still an international obligation not to damage human rights conventions, with or without national law to implement them. Some domestic courts are quite active in referring to international agreements, even if there are no domestic laws that implement them directly.⁴²

Discussion on international law into national law in Thailand shows that international law has no direct validity in Thai national law. There are a number of

⁴² Joe Leeds. *Introduction to Legal System and Legal Research of the Kingdom of Thailand*, 2016
<https://www.nyulawglobal.org/globalex/Thailand.html> accessed on 27 June 2023.

precedents that have established for customary international law, especially those involving diplomatic and consular immunity, which have been adopted by Thai court judges. However, the extent to which Thai courts adopt customary international law rules is generally uncertain and consistent with this. In order to be enforceable in Thai national law, the terms of the agreement must be enacted to Thai domestic law, unless the existing law rules. International law is binding in the Thai national legal order only if it is transformed into Thai national law or given legal force through the provisions of the Act.

Furthermore, Thailand as a signatory country in 2012 but not ratify the Nagoya Protocol yet, has imposed provisions to comply with the Protocol by regulating ABS in its national law.⁴³ The real benefit derived from the Protocol is the development of

⁴³ Say Sujintaya. *Thailand release draft biodiversity Act 12 February 2019* 'While Thailand is not a party to the Nagoya Protocol on ABS (a supplementary agreement to the CBD), the Draft BD Act would adopt its legal framework to ensure effective implementation and the fair and equitable sharing of genetic resources and associated benefits' <https://globalcompliancenews.com/category/asia-pacific/thailand/page/3/> accessed on 11 August 2023

protection mechanisms and the sharing of benefits from access to genetic resources. Thailand recognizes the extraordinary value and benefits of genetic resources and strives to develop principles and standards regarding access to genetic resources and fair and balanced benefit sharing from benefits derived from genetic resources.⁴⁴

A progressive development is that Thailand has adopted the concept of Access and Benefit Sharing (ABS) in its two Plant Varieties Protection Act B.E. 2542 (1999) and The Protection and Promotion of the Traditional Thai Medicinal Intelligence Act 1999. Article 48 The Thai Plant Varieties Protection Act (1999) specifies that:

'Out of the proceeds from permitting other persons to exercise the right over the local domestic plant variety, twenty percent shall be given to persons who preserve or develop the variety, sixty percent to community as joint income, and twenty percent to local administrative organisation, farmer group or co-operative for making transaction'.

⁴⁴ Office and Natural Resource and Environmental Policy and Planning. *Access and Benefit Sharing*, Biological Diversity Division Office and Natural Resource and Environmental Policy and Planning Thailand, (2014)

The PVP Act B.E. 2542 (1999) has unique qualities however, as it also tries to reconcile protection of new varieties with the protection of general domestic, local and wild varieties. For local and wild varieties, there are also mechanisms for access and benefit sharing to registered varieties. In this sense, it is a true *sui generis* system designed to suit the diverse agricultural conditions of Thailand. It seems that Thailand's PVP system is a combination between the Convention on Biological Diversity and Upov.⁴⁵

The Thai Plant Variety Protection Act recognizes the important role played by farmers and tribal peoples as custodians and cultivators of traditional crops. This recognition means recognizing the community's contribution and compensating them. There is an arrangement for the sharing of benefits for access and use of genetic resources. Twenty percent (20%) is given to the parties who conserve, sixty percent (60%) for the community for the public interest and twenty percent (20%) for local administrations, farmer groups or

⁴⁵ *Ibid.*

cooperatives as defined in Article 49 of the Plant Varieties Protection Act BE 2542 (1999):

"Out of the proceeds from permitting other persons to exercise the right over the local domestic plant variety, twenty percent shall be given to persons who preserve or develop the variety, sixty percent to community as joint income, and twenty percent to local administrative organisation, farmer group or co-operative for making transaction. The proceeds-sharing among the persons who preserve or develop the plant variety shall be in accordance with the regulations prescribed by the Committee."

In the case of any dispute regarding the sharing of proceeds under paragraph one, the Committee shall have the final say.⁴⁶

The Plant Variety Protection Act (PVP) was formed to comply with CBD, the Nagoya Protocol and the provisions of Article 27 paragraph (3) letter b of the TRIPS Agreement. This law is sui generis. The Department of Agriculture (DoA) has also stipulated ministerial regulations regarding the access and use of these genetic resources. The money earned is stored in

⁴⁶ The Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999, Article 49

a crop protection fund, to support conservation activities, research and development of plant species. These funds are also distributed to communities that conserve these plant species.

Furthermore, to implement the CBD Thailand established The Protection and Promotion of Traditional Thai Medicinal Intelligence Act 1999 (Law on the Protection and Promotion of Traditional Thai Medicines 1999). Regarding access and benefit sharing, the Thai Medicinal Intelligence Act 1999 stipulates that:

‘Section 19:

Whoever desires to apply a national recipe of Thai traditional medicine for drug recipe registration and for drug production licence under the law on drugs, or to conduct study and research with a view to improve or develop the new recipe of drug for commercial benefit, or to conduct study on national treatise on Thai traditional medicine with a view to improve or develop the new Thai traditional medical knowledge for commercial benefit, shall submit an application for licence thereto and pay fee as well as consideration for utilisation thereof to the licensor.’

CBD and the Nagoya Protocol recognize the role of indigenous and tribal peoples and wish to share the

benefits of their use to indigenous and tribal peoples. The distribution of benefit sharing depends on the legislation of each country governing the rights of customary law communities over the distribution of benefits. The state has obligation to prepare legislative, administrative or other policy efforts, with the aim of regulating the rights of indigenous and tribal peoples to the distribution of benefits from the use of genetic resources; and Contracting countries need to form policies through patents or sui generis, or a combination of both to protect genetic resources.

Regarding the issue, it is necessary to transform international law into national law regarding the rights of indigenous and tribal peoples to Access and Benefit Sharing in the use of genetic resources. The rules of international law that have been promised, agreed upon and decided jointly by countries to achieve a common goal cannot be directly applied to national law because international law and national law are two separate and structurally different legal systems.

CBD and Nagoya Protocol are two international treaties that are law making, generally accepted and regulate the establishment of international legal rules.

The obligation of the state to transform the provisions of international treaties into post-participation legislation is very important in realizing international treaties. The ratification is not an endorsement but approval, confirmation, willingness of the State to submit (consent to be bound) and bound by an international treaty.⁴⁷ So, by ratifying an international agreement, Indonesia is willing to be bound and accept the rights and obligations arising from the agreement. In practice, law enforcement officials, such as Judges, will certainly use national law in making decisions and providing justice. The judge will refer to the laws and regulations governing the source of national law as a reference for the use of law. How judges use international law in their decisions shows inconsistency. On one hand the judge applies international law directly in his decision but on the other hand the judge refuses to use international law without the transformation of international law into national law

⁴⁷ Sefriani. *Peran Hukum Internasional dalam Hubungan Internasional Kontemporer*, Jakarta: Rajawali Press, 2016, p. 102.

Being a Party in international CBD agreements and the Nagoya Protocol is Indonesia's will. The legal objective of the third pillar of CBD is benefit sharing over the use of genetic resources. The Nagoya Protocol is to realize benefit sharing over access and utilization of genetic resources. Indonesia's desire to have a sui generis regulation to regulate the rights of customary law communities can be seen from the aspect of the *ius constituendum* with the existence of the Draft Law on Indigenous Peoples. Benefit sharing arrangements are regulated in a limited manner in Article 28 that:⁴⁸

- (1) 'Indigenous Peoples have the right to a good and healthy environment.
- (2) The right to the environment as referred to in paragraph (1) shall be realized in the form of:
 - a. submitting proposals and/or objections to the planned business and/or activity that may have an impact on the environment;

⁴⁸ Rancangan Undang-Undang Masyarakat Hukum Adat (Draft of Indigenous People Law) <http://www.dpr.go.id/doksileg/proses2/RJ2-20171106-094054-7086.pdf> accessed on 20 October 2023.

- b. complaints resulting from allegations of environmental pollution and/or damage;
- c. beneficiaries of the use of traditional knowledge related to environmental management with economic value.'

The Benefit sharing arrangement in Article 28 paragraph (2) c is integrated with the right to a healthy environment but has not explicitly stipulated access and sharing related to access to genetic resources that subject to CBD dan Nagoya Protocol.

When looking at the Indonesian context, there are a number of national legal sources. One of them is the law. Based on Article 7 paragraph (1) of Law Number 12 of 2011 on the Establishment of Regulations, the type and hierarchy of regulations are (1) the Constitution of the Republic of Indonesia in 1945; (2) Laws/Regulations of the Government Substituting Laws; (3) Government Regulation; (4) Presidential Regulation; and (5) Local Regulations.

Those provision did not stipulate the international treaties that have been followed by Indonesia. Therefore, international treaties that have been

followed cannot be used as a legal basis for law enforcement officials, including police, prosecutors, lawyers and judges.

In fact, Indonesia has experienced no transformation of laws and regulations which resulted in the inability to carry out international agreements. One of them was when the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the “New York Convention”) was followed by Indonesia through ratification by Presidential Decree No. 34 of 1981.

The judiciary has not yet implemented the provisions of the New York Convention to recognize and enforce foreign arbitral awards because the judiciary requires implementing regulations. During this period, a debate arose between Sudargo Gautama and Supreme Court Justice Asikin Kusumaatmadja. The point is, as soon as the New York Convention is ratified, the judiciary must immediately recognize and implement the foreign arbitration award. The reason is because the New York Convention is an international agreement that is ‘self-executing’. Different from the opinion of Supreme Court Justice which requires implementing

regulations before they can be applied by judges in court. In fact, the New York Convention was not enforced until the Supreme Court Regulation No.1 of 1990 was enacted. This regulation contains procedures for implementing Foreign Arbitration Awards.

An international treaty is a bond that has been accepted by countries as international law and is obliged to be obeyed and implemented in national law in accordance with the principles of good faith and *pacta sunt servanda*. The transformation of international law into national law, the right of indigenous and tribal peoples to share benefits, is a state obligation after participating in an international treaty. How the state transforms ABS norms, concepts and values into new rights in national law depends on how the state places the position or position of international law in its national law which is generally regulated in its constitution. Indonesia does not clearly show the trend of monism or dualism adopted and the position of international treaties in the 1945 Constitution of the Republic of Indonesia and the hierarchy of laws and regulations so that there is inconsistency in transforming its international obligations. On the other

hand, several international treaties were first transformed into national law. Meanwhile, Thailand tends to adhere to the dualism manifested in its constitution and views international law as not part of national law before it is transformed into national law.

Unlike Indonesia, Thailand has the practice of making treaty and the status and position of it is clear. In the future Indonesia must establish a legal regime for international treaties by clarifying the status of international law based on the constitution. Considering the increasing involvement of Indonesia with the international community, it is important to develop Indonesian law.

The practice of transforming international law in Indonesia regarding the rights of indigenous peoples to share benefit from the use of their genetic resources has not been regulated in the provisions of national law as a right of indigenous peoples. Meanwhile in Thailand this transformation has been manifested in the Plant Variety Protection Act 1999 and Medicine Intelligence 1999 by regulating the rights of indigenous peoples to genetic resources and the right to share benefits. This transformation practice shows that Thailand's rights

and obligations as a state party is confirmed. Meanwhile, in terms of benefit and legal justice, it is realized through conformity with the international legal system and benefit sharing in accordance with the rights development policies required by international law.

CBD is the starting point of the ABS concept for legal rights or interests that can be related to genetic resources that were not previously known. In this sense ABS is one of the new and innovative legal concepts introduced in international law. However, the CBD has only created a concept of ABS rights policy. Therefore, the concept of ABS rights of indigenous and tribal Peoples needs to be formulated in national law by giving rise to the rights of indigenous peoples to genetic resources.

Transformation of ABS into national will not function unless the parties impose legal policies to fulfil their international treaty obligations (CBD and Nagoya Protocol) at the national level and build capacity to implement ABS measures. Such steps are also needed in addressing access and benefit sharing. Users need legal certainty in the provider country when accessing

genetic resources and the provider country requires effective legal action in the user country to ensure that they comply with benefit sharing and do not otherwise abuse or misuse genetic resources or related traditional knowledge.

C. Conclusion

The treaty such as CBD dan NP needs to transform and has certainty in national legal system in the frame realizing the goal of ABS law. The result of research shows that Indonesia and Thailand tend to use dualism doctrine. Unlike Indonesia, Thailand has regulated ABS law in municipal law and judges in Thailand use directly treaties in human rights cases. While Indonesia appears to be dualism in practice, yet there is some evidence of monism.

In the future Indonesia needs to formulate his concept about the relation between international law and national law. The practice of how international law applies in national law related to the theory of monism and dualism is reflected through the relations of national law and international law which are followed

and ratified by Indonesia. This situation will become difficult when Indonesia is faced with determining a doctrine of monism or dualism which will be applied consistently. Finally, Indonesia based on a review of the constitution and regulations as well as court practice, needs to make clear and fix choices on how international law applies and has validity in the national legal system. This certainty is important for realizing the Access and Benefit Sharing of Indigenous People according to the mandate of the CBD and Nagoya Protocol.

References

- A Bengwayan, Michael. *Intellectual and Cultural Property Rights of Indigenous Peoples in Asia*, Minority Rights Group International, UK: Kavita Graphics, 2003.
- Aguilar, Grethel. "Access to Genetic Resources and Protection of Traditional Knowledge in the Territories of Indigenous Peoples", *Journal Environmental Science & Policy* 4, 2001.
- Akehurst, Michael. *A Modern Introduction to International Law*, 4th edition, London: George Allen and Unwin, 1986.

Butt, Simon. "The Position of International Law Within the Indonesian Legal System", *Emory International Law Review*, 2014.

D'Amato, Anthony. "Treaty as a Sources of General Rule of International Law", North-western University School of Law, Working Papers, 1962.

E Watanabe, Myrna. "The Nagoya Protocol on Access and Benefit Sharing", *Bioscience Journal*, Volume 65 No. 6, June 2015.

Glokwa, Lyle. *A Guide to Designing Legal Framework to Determine Access to Genetic Resource*, United Kingdom: IUCN The World Conservation Union, 1998.

H Ott, David. *Public International Law in the Modern World*, London: Pitmen Publishing, 1987.

Jaderojananont, Peerapon. "The Protection of Biodiversity in Thailand: An Overview of the Implementation of the 1992 Convention on Biological Diversity" Paper Seminar International The Protection of Biodiversity, Fakultas Hukum Universitas Jambi: 19 October 2016.

Juwana, Hikmahanto, "Catatan atas Masalah Aktual Perjanjian Internasional", *Indonesian Journal of International Law*, Volume 5 Nomor 3, 2008.

I.I. Lukashuk. "The Principle of Pacta Sunt Servanda and The Nature of Obligation Law, *American Journal of International Under International Law*", Volume 83 No. 3 Juli 1989.

Keraf, Sonny. *Hukum Kodrat dan Teori Hak Milik Pribadi*, Yogyakarta: Kanisius, 1997.

- K. Joseph, Reji. "International Regime on Access and Benefit Sharing, Where are you?", *Asean Biotechnology and Development Review*, Volume 12 Nomor 3, Desember 2010.
- Krismawati, Amik. "Keunggulan dan Pengembangan Sumber daya genetik Durian Kalimantan Tengah", *Bulletin Plasma Nuftah*, Vol 18 No.2 Tahun 2012.
- Kurniawan *et al*, Faizal. *Unsur Kerugian Unjust Enrichment dalam Mewujudkan Keadilan Korektif*, *Yuridika Journal* Volume 33 Nomor 1 Januari 2018.
- Leeds, Joe. *Introduction to Legal System and Legal Research of the Kingdom of Thailand*, 2016.
- Lubis, Efridani. *Perlindungan dan Pemanfaatan Sumber Daya Genetik Berdasarkan Penerapan Konsep Sovereign Right dan Hak Kekayaan Intelektual*, Bandung: Alumni, 2009.
- N. Shaw QC, Malcom. *International Law*, Cambridge University Press, 2008.
- Phu Phuy *et al*, Pham. *Approaches to benefit sharing A preliminary comparative analysis of 13 REDD+ countries*, Bogor Indonesia: Cifor 2013.
- Prip, Christian and G. Kristin Rosendal, *Access to Genetic Resources and Benefit Sharing from theory Use (ABS) State of Implementation and Research Gaps*, Nansens Institute: Fridtjof, 2015.
- Office and Natural Resource and Environmental Policy and Planning, *Access and Benefit Sharing*, Biological Diversity Division Office and Natural Resource and Environmental Policy and Planning Thailand, 2014.

Office on Natural Resource Environmental and Planning
Ministry of Natural Resource and Planning,
*Thailand National Report Implementation of
Convention on Biological Diversity*, without year.

Rapar Th.D, J.H. *Filsafat Politik Aristoteles*, Jakarta:
Rajawali, 1993.

Schroeder, D. "Access and Benefit Sharing: It is time for
a Definition", *Journal Medical Ethics*, April 2007
(33)(4)

Sefriani. *Peran Hukum Internasional dalam Hubungan
Internasional Kontemporer*, Jakarta: Rajawali
Press, 2016

Shelton, Dinah. *International Law and Domestic Legal
System: Incorporation, Transformation and
Persuasion (Introduction)*, New York: Oxford
University Press, 2011.

Sobrevila, Claudia. *The Role of Indigenous People in
Biodiversity Conservation*, Washington D.C: The
World Bank, May 2008.

Sujintaya, Say. *Thailand release draft biodiversity Act 12
February 2019*.

Ten Kate, Karry and Sarah A Laird. *The Commercial Use
of Biodiversity Access to Genetic and Benefit
Sharing*, UK: Eartscand, 2000.

Union for Ethical Secretariat ABS in Thailand,
Amsterdam: June 2019

United Nation,
<https://www.un.org/en/events/indigenousday/>:

<https://nasional.kompas.com/read/2010/11/22/03211740/function.file-get-contents>, Makarim Wibisono. "Selamat Datang Protokol Nagoya", accessed 6 August 2018.

http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf