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# Negotiating the Nagoya Protocol: Indigenous Demands for Justice

Kimberly R. Marion Suiseeya\*

On October 29, 2010, following two weeks of intense negotiations, parties to the Convention on Biological Diversity (CBD) at the Tenth Conference of Parties (COP10) in Nagoya, Japan, adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. Although points of contention were few, they were substantive: beyond defining what resources and knowledge would be covered under the regime, negotiations centered on determining how to fairly distribute benefits from the use of genetic resources and deciding with whom benefits would be shared. Discussions threatened to break down almost daily, as parties would not budge from their positions. Just after the deadline to complete the final negotiations passed, negotiators announced that no agreement on access and benefits sharing (ABS) could be reached. Many parties and observers left the room in frustration; delegates were overheard saying “we failed,” and news of the failure circulated rapidly throughout the conference venue.<sup>1</sup>

For indigenous and local communities (ILCs), COP10 was a highly anticipated event for their pursuit of justice.<sup>2</sup> Living in direct contact with the majority of the world’s biological resources, ILCs are often marginalized by conservation

\* CEE relies on collaboration, in coordinating fieldwork, collecting and analyzing data, and thinking through meaning, and this paper reflects the efforts of the larger team working on site in Nagoya, Japan, at the CBD COP10. The CBD COP10 CEE team included project leaders J. Peter Brosius, Lisa M. Campbell, Noella J. Gray, and Kenneth I. MacDonald, and researchers Maggie Bourque, Catherine Corson, Juan Luis Dammert B., Eial Dujovny, Shannon Hagerman, Sarah Hitchner, Shannon Greenberg, Rebecca Gruby, Edward M. Maclin, Kimberly R. Marion Suiseeya, Deborah Scott, Daniel Suarez, and Rebecca Witter. The research was supported by the US National Science Foundation (award nos. 1027194 and 1027201). I would like to thank the following individuals for providing valuable feedback on earlier drafts of this paper: Lisa Campbell, Erika Weinthal, Shana Starobin, Rebecca Gruby, Catherine Corson, Divya Guru Rajan, Dominique Dery, Kris Voss, McKenzie Johnson, and three anonymous reviewers. Thanks to Kate Bulger and Kelly Carroll for research assistance. Additional financial support was provided by Duke University Graduate School, the US Department of Education’s Foreign Language and Area Studies program, the Forest History Society, and the BorderWork(s) Lab at the Franklin Humanities Institute.

1. Field Notes, ABS Informal Contact Group (ICG), 10/28/10; Event 1798, Experiences in Implementing High Seas Marine Protected Areas.
2. ILC is a formal CBD stakeholder category employed here to refer to formally designated ILC representatives and Indigenous Peoples more broadly.

interventions. They bear the majority of livelihood costs associated with conserving biodiversity, receive few additional benefits, and are often excluded from decision-making processes, while their traditional knowledge and beliefs are often positioned as inferior to “scientific” knowledge.<sup>3</sup> They are steadily losing control over their resources and related traditional knowledge.<sup>4</sup> In response, ILCs and their advocates have sought justice—understood here as embodying distributional, procedural, and recognitional dimensions—in diverse forums across multiple scales of governance, including the CBD.<sup>5</sup> At COP10, ILCs joined states, NGOs, and international governmental organizations (IGOs) to conclude nine years of formal ABS negotiations; an ABS regime would be a primary vehicle for ILC justice in the CBD.<sup>6</sup>

When Japan’s president of COP10 announced the Nagoya Protocol after several hours of post-deadline, closed door negotiations, it was met with mixed reactions. These ranged from outrage to defeat to cautious optimism that the protocol could become a “powerful tool for a more balanced implementation of the CBD’s three objectives.”<sup>7</sup> The CBD secretariat characterized the agreement as “historic,” emphasizing its balance of access and benefits, while also accounting for the role of traditional knowledge.<sup>8</sup> Yet others have called the Nagoya Protocol “a masterpiece of creative ambiguities,” suggesting that it does little to address the justice concerns of ILCs.<sup>9</sup> While the full scope of the Nagoya Protocol’s justice implications remains to be seen (it requires fifty ratifications to enter into force), it is unlikely to redress ILCs’ primary justice concerns. Its approach to justice is arguably only minimally different from the status quo.<sup>10</sup>

These outcomes are unsurprising. Absent a radical shift in power dynamics or powerful interests, it is unlikely that ILCs, a historically marginalized group of stakeholders, could significantly advance their interests.<sup>11</sup> Instead, ILCs and their advocates use events like COP10 to engage in discursive struggles that introduce new ideas, values, and norms that, over time, may shift the value orientation of global environmental governance (GEG).<sup>12</sup> Combining collaborative event ethnography (CEE) with discourse analysis, I examine the nature and scope of the ILC justice discourse in the ABS negotiations to investigate how ILCs and their advocates enact their global pursuit of justice. Positioning the pursuit of justice as an enduring, incremental, and fundamentally normative struggle, my analytical focus on the deliberations illuminates how possibilities for justice are embedded within this struggle.

3. Agrawal 1995; Colchester 2004; Reimerson 2013; Schlosberg and Carruthers 2010.

4. Colchester et al. 2008; Schroeder 2009.

5. Martin et al. 2013b; Schlosberg 2004.

6. Formal negotiations on ABS began October 2001 at the Ad-Hoc Open-ended Working Group.

7. IISD 2010, 27.

8. CBD 2010b.

9. IISD 2010, 26.

10. Aubertin and Filoche 2011.

11. Betsill and Corell 2001; Fisher and Green 2004; Ford 2003; Okereke et al. 2009; Reimerson 2013; Schlosberg and Carruthers 2010.

Drawing from the literature on civil society and global governance, I position the CBD as a site for discursive struggles for ILC justice. Following a detailed description of my methods, I describe the enactment of the justice discourse in the COP10 ABS negotiations to demonstrate that although expressions of justice were diverse and sometimes contested, delegates focused their deliberations on debating *how* to deliver justice rather than debating the *meaning*—or underlying conceptions—of justice. By focusing discussions on instruments of justice, stakeholders directed attention towards compliance and effectiveness, implicitly affirming the meaning of justice embodied in those instruments. This absence of contestation over meaning illuminates the possibilities for and constraints to justice in GEG.

### The CBD as a Site for Discursive Struggles for Justice

Scholars of GEG increasingly direct attention to questions of justice, investigating its meaning and how justice and injustice are produced across multiple scales of governance.<sup>13</sup> Although justice is understood to be pluralistic, multi-valent, and dynamic, there is a growing consensus among scholars of GEG that environmental justice incorporates three dimensions—procedural, distributional, and recognitional. Thus, justice exists when (1) participation in political decision-making around environmental policy is meaningful; (2) risks and benefits are equitably distributed; and (3) diverse identities, ways of knowing, and experiences are recognized.<sup>14</sup> For ILCs, justice demands attention to concerns about recognition especially, because GEG often directly impacts their ability to maintain their traditions, knowledge, and relationships with natural resources.<sup>15</sup> In practice, however, justice is largely approached through distributive and procedural terms, reflecting the prevailing neoliberal ideology in GEG.<sup>16</sup> The pursuit of ILC justice thus relies on stimulating normative shifts to expand how policy-makers think about justice. It relies on engaging in discursive struggles whereby ideas and norms of justice can be deliberated and debated. Such contestation can contribute to the evolution of interests of powerful actors.<sup>17</sup>

As an institution that provides unparalleled access for civil society and is underpinned by a global consensus on the importance of “participation, accountability and transparency” for effective environmental governance, the CBD affords ILCs and their advocates (often NGOs) an opportunity to pursue

12. Doolittle 2010; Ford 2003; Keck and Sikkink 1998; Perrault 2003; see also Hajer and Versteeg 2005.

13. Forsyth and Sikor 2013; Marion Suiseeya and Caplow 2013; Martin et al. 2013b; Schlosberg 2004; Sikor 2013; Sikor and Stahl 2011.

14. Walker 2009, 2012; Martin et al. 2013a; Schlosberg 2004, 2013.

15. See Schlosberg and Carruthers 2010 for a more indepth discussion on environmental justice and indigenous peoples.

16. Humphreys 2009; Okereke 2008.

17. See Checkel 1997; Fraser 2009; Humphreys 2009.

their justice agendas.<sup>18</sup> More than two-thirds of COP10's registered participants were non-party delegates, including representatives of ILCs, NGOs, businesses, education and research organizations, and IGOs, among others.<sup>19</sup> Furthermore, the CBD has an explicit justice-oriented mandate: in 1992 parties committed to promoting fair and equitable benefits sharing related to the use of genetic and biological resources (Article 1) and traditional knowledge (Article 8(j)), and to protecting customary use of resources (Article 10(c)).<sup>20</sup> Because of its relative openness to civil society and an unusually clear ILC justice mandate, COP10 is a site where we would expect to observe ILCs and their advocates directly and indirectly enact their pursuit of justice.

Scholars of environmental politics have directed considerable attention to the contributions of civil society—particularly NGOs—in GEG, identifying their roles in agenda setting, providing expertise, and acting as moral and ethical agents advocating greater democratic participation in international policy-making.<sup>21</sup> The changing roles of NGOs and their relationships with states are the subject of increasing critique.<sup>22</sup> In contrast to the past, where NGOs used “boomerang” strategies to influence states through outside channels in order to advance rights and justice agendas, they are now forming partnerships with states, accessing inside channels of influence, emblematic of global trends towards collaborative governance.<sup>23</sup> While NGOs may enhance the legitimacy, effectiveness, and democratic pursuit of GEG, their closeness to states may undermine their legitimacy as a voice for marginalized groups.<sup>24</sup> Of key importance to this article is the idea that actors exercise power through language by constructing and reshaping meaning, where non-state actors especially exercise agency through discourse and norm entrepreneurship.<sup>25</sup> Even actors with limited agency, such as ILCs, can affect change through discursive and rhetorical strategies.<sup>26</sup> Studying the performance of the pursuit of justice thus illuminates potential mechanisms of influence and contextualizes the outcomes of negotiations.<sup>27</sup> With this in mind, I direct attention to how relevant actors enacted the pursuit of ILC justice at COP10.

## Methods and Approach

To examine how ILCs and their advocates pursued justice during COP10 ABS negotiations, I use collaborative event ethnography (CEE), a team-based

18. Bäckstrand 2006, 470; Witter et al. 2011.

19. Compare this to UNFCCC COP18, where more than half of the registered participants, excluding media, were representatives from states.

20. Schroeder 2009; Schroeder and Pogge 2009.

21. Bäckstrand 2006; Betsill and Corell 2001; O'Neill 2009; O'Neill et al. 2004; Princen et al. 1994.

22. For an overview, see Betsill and Corell 2008; Newell et al. 2012.

23. Andonova 2014; Bernauer et al. 2013; Keck and Sikkink 1998.

24. Bernauer et al. 2013; Bexell et al. 2010.

25. Hajer and Versteeg 2005; Andonova and Mitchell 2010; O'Neill et al. 2004; Schroeder 2010.

26. Doolittle 2010; Reimerson 2013; Schroeder 2010.

method for gathering and analyzing data at mega-events, as discussed in other articles in this special issue. Researchers use a common analytical framework to identify themes and issues and to define and implement a research strategy, engaging with hundreds of meetings in order to understand “both the formal and informal nature of conservation policy-making in . . . international for[a].”<sup>28</sup> The method provides insights on how different stakeholders pursue interests, articulate ideas, and strategize across multiple, simultaneous events. It facilitates tracking of ideas, norms, and values as they ebb and flow across venues. Researchers share field notes, audio files, photographs, videos, and print materials. At COP10, we met multiple times every day to discuss observations and link findings across meetings.

### *Data Sources*

Data include transcripts of audio files, field notes and photos the CEE team collected during COP10. Events included official negotiations in working groups, contact groups, friends of the chair groups, and plenary as well as side events, press events, and the Ecosystems Pavilion (hereafter “side events”). Topically, the data include all ABS, indigenous peoples, and Article 8(j) events.<sup>29</sup> Article 8(j) of the CBD requires parties to “reserve, preserve and maintain knowledge, innovations and practices of indigenous and local communities . . .” as well as to “encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices,” and is thus directly related to ILC justice.<sup>30</sup> Article 8(j) negotiations occurred in contact groups and friends of the chair meetings. ABS regime negotiations primarily occurred in the ABS Informal Contact Group, where the chairs created three consultation groups to address specific negotiation sticking points comprised of subsets of stakeholders of the larger ABS Informal Contact Group. These groups were closed to non-party delegates, including members of our research team. Side events were organized by a variety of actors including governments, ILCs, NGOs, IGOs, and the private sector. Although side events are not part of the official negotiations, they are “opportunities to introduce experiences and best practices of the parties and organizations and exchange information and views.”<sup>31</sup> Their purpose is to serve as a secondary avenue for civil society to affect change and influence the negotiations.<sup>32</sup> Collectively, I refer to all of these events as the ABS negotiations.

During COP10 there were eighty ABS negotiation events: twenty-seven

27. Arts and Buizer 2009; Hajer 2006; Hajer and Versteeg 2005.

28. Brosius and Campbell 2010. See also, Campbell, Corson et al. this issue.

29. Events where “indigenous” was in the event title but not specific to ABS or 8(j).

30. CBD 1992a.

31. CBD 2010a, 33.

32. Raustiala 1997.

were official events and the remaining fifty-three were side events.<sup>33</sup> In total, seventy-three were open to non-party delegates, including our team. At least one member of our team attended fifty-seven—or 78 percent—of the ABS negotiations, comprising the data for this analysis. Additional data from four key informant interviews, as well as from press releases, official policy documents, and other media available during COP10 supplement the analysis. I triangulated transcripts with field notes and photographs to identify nearly every individual speaker in each event.

### *Data Analysis*

I analyzed the data by employing content analysis through a discourse analytic approach to describe the struggle for ILC justice that unfolded at COP10.<sup>34</sup> In my analysis, I soften two important assumptions in content analysis—that meaning is stable and language is readily divorced from its context—to bring together the systematic and interpretive strengths of content and discourse analysis, respectively.<sup>35</sup> This approach “provides an important way to demonstrate [the] performative links that lie at the heart of discourse analysis.”<sup>36</sup> In particular, I direct analytical attention to what was said, by whom, and in what contexts to trace the linguistic regularities that give meaning to justice.<sup>37</sup> Focusing on what was said and positioning language not as “a neutral messenger of given interests and preferences, but [as] influen[tial] [in] their very formation” contributes to developing “explanations of why and how contingent concepts and practices came into effect.”<sup>38</sup> This approach illuminates how language and contestations over meaning in international negotiations shape justice possibilities for ILCs.<sup>39</sup>

I coded all expressions of ILC justice according to actor and event types. Expressions of ILC justice are statements or actions used to demand justice, contest ideas of justice, or articulate experiences of ILC injustice. With the exception of a separate analysis of references to prior informed consent (PIC) identified in the results, expressions of justice do not include discussions of particular justice instruments, such as PIC, unless the speaker was specifically relating the instruments to a justice demand, idea, or experience. Through a thematic analysis, I identified the dominant threads of the ILC justice discourse. Descriptive statistics complement the analysis to highlight the frequency, location, and

33. The total count of events was generated using CEE team logs, the Official COP Guidebook and the Earth Negotiations Bulletin Daily Reports; it excludes cancelled events. See Campbell, Corson et al. (this issue) for a broader overview of COP10.

34. Hardy et al. 2004.

35. Herrera and Braumoeller 2004, 16; Laffey and Weldes 2004.

36. Hardy et al. 2004, 22.

37. Hajer and Versteeg 2005.

38. Feindt and Oels 2005, 166.

39. Checkel 1997; Fraser 2009; Hajer and Versteeg 2005.

**Table 1**

ABS Negotiation Issues and Related Justice Concerns

<i>Negotiation Points</i>	<i>Primary Justice Concern Related to ILCs</i>
Use of genetic resources and derivatives	Distributional justice between users and providers
Compliance	Distributional justice between users and provider countries Justice as recognition for ILCs from states and users
Traditional knowledge	Justice as recognition and distributional justice between ILCs, providers, and users

characteristics of speakers and events linked to the expressions. The next section describes the landscape within which the pursuit of ILC justice at the COP10 ABS negotiations unfolded.

## The Justice Landscape

### *The Agenda*

Heading into the Nagoya meeting, ABS negotiators had to overcome three sticking points: (1) whether to cover the *derivatives* of biological resources and not just the raw resources in the regime; (2) whether to include *dual compliance* mechanisms (i.e., compliance requirements for user and provider states); and (3) how to incorporate recognition and use of *traditional knowledge* into the regime.<sup>40</sup> Although the first two of these issues did not explicitly target justice concerns, each was central to ILC's pursuit of justice (see Table 1). Critical to the third point were parallel negotiations on Article 8(j) that focused primarily on developing work plans, identifying a focal issue area to clarify the scope of Article 8(j), and adopting a code of ethics to recognize and protect ILC cultural and intellectual heritage. These negotiation issues framed the agenda within which the pursuit of justice occurred.

The agenda and scope of COP10 were determined in advance, reflecting outstanding issues from earlier working group negotiations leading up to the conference. Although decisions formally occur in official events like contact groups, side events are intended to facilitate access and voice and are thus one avenue of influence for non-party delegates.<sup>41</sup> Non-state actors, including ILC organizations, pursue their agendas by linking their event topics to the official agenda.

40. Note that these three sticking points were also the topics of the three consultation groups that the chairs of the ABC Informal Contact Group formed.

41. Clark et al. 1998; Hjerpe and Linnér 2010; Nasiritousi et al. 2014; Schroeder 2010; Schroeder and Lovell 2012.



Although ILC struggles for justice in GEG were highly visible leading up to COP10, the pursuit of ILC justice in ABS negotiations was relatively muted.<sup>42</sup> Instead of heated debates and targeted demands for ILC justice, the justice discourse unfolded largely through rhetorical stories and statements as well as through sharing of lessons learned. In particular, three threads emerged: demands for fair benefits sharing; inclusion in decision-making processes; and recognition, discussed in turn below. Table 2 demonstrates the prominence of each thread across the negotiations.

Although a core mandate for the ABS regime and a key ILC justice concern was *fair benefits sharing*, it was the least prominent thread at COP10. The ILC demand for fair benefits is primarily one of distributive equity, balancing access with benefits sharing. Contestations that emerged were minimal and along three fronts: first, a tension between access and benefits, where many stakeholders felt that an emphasis on access for users (e.g., states, research organizations, and the private sector) overshadowed discussions on community benefits; second, debates over whether benefits should be delivered through direct or indirect transfers (i.e., instruments); and, third, concerns that states neglected their obligations to ensure effective and appropriate benefit distribution to affected communities. Underlying these debates was a challenge to the CBD's conception of justice in benefits sharing—justice in exchange—where justice obligations are measured via exchange ratios without a necessary consideration of an equitable prior division of existing resources.<sup>43</sup> While all delegates generally supported balancing access with benefits sharing, the deliberations centered almost exclusively on instruments for benefits sharing based on a justice in exchange concept; contestations over the meaning of justice in benefits sharing were virtually nonexistent.

The second most visible justice demand was for *equitable inclusion in decision-making processes*. This procedural justice demand emphasized the importance of equal representation, active participation, transparency, and trust for both instrumental and intrinsic reasons: “. . . it's [a] right . . . anyone has to be heard and every voice is important to be heard and especially this counts for those who are particularly affected by the decision made.”<sup>44</sup> The struggle emerged through two arguments on representation. First, presence is not influence, drawing on examples where dissenting voices were silenced or ignored: “we also have the right to say no.”<sup>45</sup> Second, identity or group membership does not confer representation: “[A]n indigenous brother was a mayor. He presented a document saying he'd done consultations but we realized it through a workshop. This is not similar to a consultation. Sometimes we think

42. Bavikatte and Robinson 2011.

43. Schroeder 2009; see also Langhelle 2000.

44. Field Notes, Event 2000, Financing Protected Areas: Mobilization of Funds, NGO representative; See also Clayton 1998 and Schlosberg 2007 for discussions on procedural justice.

45. Field Notes, Event 1771, ABS Protocol: Key to Implement the CBD, ILC representative.

**Table 2**  
Distribution of Justice Discourse by Event Host

Event Host	Percentage of Justice Discourse Expressions <sup>a</sup>	Justice Discourse by Thread <sup>b</sup>				Discussion of PIC/FPIC <sup>c</sup>		
		Benefits	Inclusion	Recognition	Total	PIC	FPIC	
NGO	33%	6%	11%	17%	9%	4%	4%	
ILC	19%	1%	8%	10%	54%	6%	47%	
IGO	19%	≤1%	9%	9%	18%	9%	9%	
Mixed (NGO/IGO)	14%	5%	4%	5%	6%	4%	1%	
<b>Official</b>	<b>5%</b>	<b>≤1%</b>	<b>4%</b>	<b>1%</b>	<b>10%</b>	<b>8%</b>	<b>2%</b>	
Secretariat	6%	2%	≤1%	≤1%	0%	0%	0%	
Mixed (NGO/ILC/IGO)	2%	≤1%	≤1%	1%	0%	0%	0%	
Other (research/donor)	2%	≤1%	≤1%	≤1%	3%	2%	1%	
<b>Total</b>	<b>100%</b>	<b>19%</b>	<b>37%</b>	<b>44%</b>	<b>100%</b>	<b>33%</b>	<b>64%</b>	

<sup>a</sup>*n* = 216

<sup>b</sup>Does not include PIC/FPIC unless coded as part of a contestation/demand.

<sup>c</sup>Discussion of PIC/FPIC refers to discussions on these as instruments, but were not specifically part of a justice demand or contestation.

because it is an indigenous brother we should accept it with closed eyes but even indigenous peoples can deceive on this issue."<sup>46</sup> Underlying these contestations were challenges to norms of inclusion as presence without influence or representation. Similar to deliberations on benefits sharing, discussions on inclusion were redirected towards instruments for facilitating inclusion, such as PIC. The common response argued that the practices for including ILCs were the *right practices*, but that they suffered from the *wrong implementation*. By pointing towards poor implementation and/or under specification of the justice instruments, deliberations shifted away from debating underlying norms of inclusion as presence.

The most prominent thread of the justice discourse was the struggle for *rights and recognition*. Specifically, ILC justice demands centered on rights to maintain and utilize traditional knowledge, resources, and institutions regardless of formal state legitimization of these rights; in effect, these were demands for self-determination and a difference-friendly egalitarian conception of justice as recognition.<sup>47</sup> They are intimately linked to ILC demands for both distributional and procedural justice, where justice through benefits sharing and inclusion are meaningless without recognition.<sup>48</sup> This thread emerged through two avenues: first, through stories of ILC experiences of injustices and lessons learned related to conservation policy, drawing on violations of community land, resource, and knowledge rights, marginalization, and exclusion from decision-making processes. Here, rights to access, manage, and benefit from biodiversity, traditional knowledge, as well as the legitimacy of and right to maintain customary institutions, were positioned as fundamental human rights.

The demand for recognition unfolded as a struggle against the centrality of the state as the sole arbiter of justice. This struggle was most prominent in debates over PIC, the CBD's main instrument for justice as recognition and inclusion. PIC accounted for 85 percent of all references to instruments for delivering justice across the justice discourse. In ideal form, PIC is a procedural avenue for "insuring community involvement, participation, decision-making, and self-determination" in ABS.<sup>49</sup> ILCs preferred adoption of free prior informed consent (FPIC) to PIC for two reasons: PIC generally applies only in cases where states have previously recognized the rights of ILCs; and the absence of "free" from PIC suggests coercion can be used to obtain consent.

Despite the prevalence and visibility of these concerns, there was little engagement on the underlying meaning of justice as recognition. Similar to the thread on inclusion, a common response invoked the logic of *right practice, wrong implementation*, redirecting the discussion to instruments rather than meaning. The second common response invoked structural constraints—*rules of*

46. Field Notes, Event 1878, FPIC: Experiences of Indigenous Peoples, ILC representative.

47. See also Martin et al. 2013a, 2013b.

48. Firestone 2003, 172.

49. Firestone 2003, 177.

*order*—embedded within the CBD to effectively eliminate debates over meaning. For example, states maintained that “free” could not be added to PIC because the CBD as signed in 1992 only referred to PIC and was thus considered an established practice to be maintained.<sup>50</sup> Following this statement, there were no further discussions on FPIC in official events. Although these data demonstrate the centrality of contesting meaning to the pursuit of ILC justice, more than half (61 percent) of the discussion centered on instruments for justice.

### *The Negotiation Space*

Half of the ABS side events at COP10 foregrounded ILC rights and knowledge, while the rest focused on ABS more broadly. The majority of side events emphasized sharing experiences and lessons learned, as well as new tools and ideas geared towards policy and project proponents. Approximately one-third, however, explicitly sought to influence negotiations by presenting language and policy options to be included in the ABS regime or by directing attention to issues deemed critical for the regime’s success. It is in this negotiation space—the events and the interactions between events—where the struggles for justice transpired.

The following descriptive statistics provide an overall sense of the distribution of the justice discourse. Across the fifty-seven events, there were 216 expressions of ILC justice, averaging 3.8 expressions per event. Within the negotiation space, however, the justice discourse was confined to half of the events (twenty-four side and four official events, or 49 percent of ABS negotiations).<sup>51</sup> Moreover, the justice discourse was not evenly distributed across these events. Three-quarters of the coded expressions of justice took place in ten side events, and only 5 percent of justice expressions were articulated inside official events. Table 2 shows the percentage of the coded expressions that occurred across the negotiation space disaggregated by event host. These data demonstrate the confined pursuit of ILC justice in terms of its distribution across event types, and the prominent role of NGOs, ILCs, and IGOs in shaping the negotiation landscape.

Within the official events, justice as inclusion was the dominant thread resulting from the exclusion of ILCs from the ABS consultation group on traditional knowledge: “[W]e are concerned we were not included in the final negotiations on [the traditional knowledge] paragraphs. IIFB is considering our position on the protocol. It is good practice [to] ensur[e] participation should be upheld in these negotiations.”<sup>52</sup> There was one mention of justice through benefits sharing and two articulations of justice as recognition. Moreover, despite PIC’s dominance as the CBD’s primary justice instrument, debates on PIC

50. Field Notes, Article 8(j) Friends of the Chair, 10/22/10.

51. Discussions over PIC and FPIC that were not part of justice expressions took place in nine additional events.

52. Field Notes, ABS ICG, 10/28/10 afternoon session, ILC representative.

and FPIC largely occurred outside official events: one individual side event accounts for nearly one-third of the PIC debate and three-quarters of the FPIC debate.<sup>53</sup> Beyond PIC debates, the justice discourse occurred mostly in events hosted by NGOs, followed closely by ILC and IGO events. Thus, despite the importance of an international ABS regime for ILC justice, the visibility and prominence of the ILC justice discourse during ABS negotiations was minimal. It emerged primarily in a handful of events with audiences dominated by non-state actors—not the party delegates negotiating the ABS regime.

### *Key Actors*

Official events have specific rules of engagement for party and non-party delegates. According to the CBD's rules of procedure, parties have full participation rights in official negotiation events: party delegates can introduce new text and recommendations and deliberate any topics related to the negotiations.<sup>54</sup> Non-party delegates may actively participate at the discretion of the COP president, a responsibility that in practice at COP10 was delegated to the chairs of each session.<sup>55</sup> Across the official events, ILCs had at least one seat at the negotiating table; in the Article 8(j) working group meetings, ILCs had three seats. The ABS informal contact group provided seats for "civil society" and "research organizations."<sup>56</sup> In official events, these non-party delegates could participate but had to secure support from a party delegate to provide new text or recommendations.<sup>57</sup> Side events have no formal participation restrictions for any delegates.

Eight key groups of delegates emerged to shape the final Nagoya Protocol: ILCs, the Africa Group (Africa), the Like-Minded Megadiverse Countries (LMMCs; e.g., provider countries), NGOs, users (including user countries, research organizations, and related businesses such as the pharmaceutical industry), donors, IGOs, the secretariat, and the host nation (Japan). Despite their interests in shaping the ABS regime, not all groups were engaged in the ILC justice discourse. For the purposes of this analysis, I categorized these groups fairly bluntly, based on their roles in the discourse: ILCs as those demanding justice; NGOs as the "experts" advocating for ILC justice and advising both ILCs and states; and states as the primary targets from which ILCs and NGOs demand ILC justice. Table 3 describes the interests of these groups and lists the most active actors within each group.

Among the more than seven thousand registered COP10 delegates, only

53. Event 1878, FPIC: Experiences of Indigenous Peoples, hosted by the International Alliance of Indigenous and Tribal Peoples of the Tropical Forest—SEA Region.

54. CBD 1992b.

55. CBD 1992b.

56. The participation of these stakeholders in the official negotiations was established in Decision VII/19 at COP7 in 2004. See: <http://www.cbd.int/decision/cop/default.shtml?id=7756>.

57. CBD 1992b.

**Table 3**

Key Groups and Interests in the COP10 ABS Negotiations

<i>Stakeholder</i>		
<i>Group</i>	<i>Interests</i>	<i>Selected Active Actors</i>
ILCs	Self-determination, livelihood security	<ul style="list-style-type: none"> <li>• International Indigenous Forum on Biodiversity</li> <li>• Indigenous Women's Biodiversity Network</li> <li>• Saami Council</li> </ul>
NGOs	Legitimacy, reputation	<ul style="list-style-type: none"> <li>• IUCN/CEESP</li> <li>• Third World Network</li> <li>• Church Development Service</li> <li>• Natural Justice</li> <li>• Global Forest Coalition</li> </ul>
States	Sovereignty, acquiring and/or maintaining power, reputation, legitimacy	<ul style="list-style-type: none"> <li>• Africa Group</li> <li>• Brazil</li> <li>• Like-Minded Mega-Diverse Countries (including GRULAC and Asia-Pacific Groups)</li> <li>• WEOG (including EU)</li> <li>• Canada</li> <li>• Australia</li> <li>• New Zealand</li> <li>• Japan</li> </ul>

seventy-nine directly engaged in the ILC justice discourse in the ABS negotiations. Table 4 demonstrates the degree of participation of these different actors and where they were most engaged. Where NGOs dominated the discourse, states barely participated. When states did engage, however, it was in both official and side events. In official events the CEE team had access to, the ILC representative only engaged in the justice discourse three times.<sup>58</sup> Two of these were acts of protest where the ILC representative highlighted ILC exclusion from the ABS consultation group on traditional knowledge without directly disputing the substance of a decision or agreement on text.<sup>59</sup> Although NGOs did not directly engage in official events because of structural constraints, the CEE team observed frequent consultations between NGOs and party delegates, as well as between NGOs and the ILC representative. For example, the key ABS negotiation advisor for the Africa group was a lawyer from Natural Justice, an

58. Here ILC representative refers to the official ILC delegate seated at the negotiation table.

59. Field Notes, ABS ICG, 10/27/10 morning and afternoon sessions.

international NGO whose mission is to “to facilitate the full and effective participation of Indigenous peoples and local communities” in biodiversity conservation and governance across multiple scales.<sup>60</sup> Natural Justice also provided consultation to ILCs in other official events.<sup>61</sup>

Of the seventy-nine engaged delegates, four individuals were particularly outspoken, accounting for one-quarter of the ILC justice discourse (see Table 5). However, even they only engaged in the discourse across five total side events.

The ways in which the different actor types engaged in the justice discourse, as indicated in the discussion of the agenda above, was relatively similar. Although both ILCs and NGOs were key actors directly contesting meaning, such moments of contestation were infrequent. Instead, deliberations focused on instruments and primarily unfolded between ILCs and NGOs.

Interestingly, the few heated contestations occurred in side events and between NGOs and ILCs. For example, in one crowded event, a well-known and respected ILC rights activist from an international NGO moderated a panel on indigenous community conservation areas (ICCAs). ICCAs are ILC-managed protected areas of biological and ecological significance. The NGO representative promoted ICCAs as an important instrument—and possibly a silver bullet—for securing justice as recognition: “[I]f you put it all together, [ICCAs are] a recognition of the self governance of indigenous peoples over their own territories.”<sup>62</sup> An indigenous leader pushed back, however, suggesting that ICCAs deny justice as recognition, and that the “designation of ICCAs attack[s] [the] foundation of traditional institutions—it affects the struggle for land rights” and therewith the identities of indigenous peoples.<sup>63</sup> The NGO representative quickly dismissed these concerns by pointing to the need for FPIC and moved on to the next question, effectively ending deliberation.

These data show that overall engagement in the ILC justice discourse was highly limited. While some actors engaged across multiple events, the majority participated in fewer than five events—6 percent of the ABS negotiations. Not only was the overall pursuit of justice limited in terms of engagement of different actors, there is no evidence to suggest that there was significant translation of the discourse between official and side events. Furthermore, the contestations over meaning, which were less frequently articulated than debates over instruments, emerged primarily between NGOs and ILCs, rather than between state and non-state actors. In the next section, I discuss these results to examine possible explanations for the absence of debate over the meaning of justice.

60. <http://naturaljustice.org>, accessed 12 March 2014; Field Notes, ABS ICG, 10/27/10 morning and afternoon sessions.

61. Field Notes, Article 8(j) Friends of the Chair, 10/22/10.

62. Field Notes, Event 2149, Strengthening What Works—Recognising and Supporting the Conservation Achievements of Indigenous Peoples and Local Communities.

63. Field Notes, Event 2149-Strengthening What Works—Recognising and Supporting the Conservation Achievements of Indigenous Peoples and Local Communities.

**Table 4**  
Participation in the ILC Justice Discourse

	<i>Total Delegates Engaged in the Discourse</i>	<i>Delegates Who Spoke . . .</i>				<i>Percentage of Delegates Engaged in Discourse in . . .</i>		<i>Contributions by Justice Thread<sup>c</sup></i>		
		<i>Once</i>	<i>2–5 Times</i>	<i>6–10 Times</i>	<i>≥11 Times</i>	<i>Official Events</i>	<i>Side Events</i>	<i>Benefits-Sharing</i>	<i>Inclusion</i>	<i>Recognition</i>
NGO	79	35	35	4	5	11%	89%	15%	34%	49%
ILC <sup>a</sup>	21	1	13	3	3	0%	100%	23%	29%	44%
State	21	8	12	0	2	10%	90%	7%	38%	56%
Other <sup>b</sup>	10	8	3	0	0	40%	60%	0%	45%	55%
	13	9	4	1	0	8%	92%	31%	47%	22%
Unknown	14	9	3	0	0	0%	100%	13%	38%	50%

<sup>a</sup>ILC here includes both the official ILC Delegate in the official events as well as delegates from Indigenous Peoples organizations and communities.

<sup>b</sup>Includes representatives from IGOs, as well as the secretariat, research organizations, media, and donors.

<sup>c</sup><sub>n</sub> = 216



**Table 5**  
Most Outspoken Delegates

<i>Organizational Affiliation</i>	<i>Events</i>	<i>Percentage of Total Expressions<sup>a</sup></i>
Third World Network (NGO)	3	12%
Tanzania (Indigenous Peoples <sup>b</sup> )	2	5%
Philippines (Indigenous Peoples <sup>b</sup> )	1	5%
Ecoropa (NGO)	2	4%

<sup>a</sup>*n* = 216.

<sup>b</sup>*Indigenous peoples are analytically distinct from the ILC representative. They are individual delegates who identify as indigenous, representing one specific group or organization of indigenous peoples.*

## Towards a Shared Meaning of Justice

The CBD provides ILCs and NGOs with relatively good opportunities to directly engage in negotiations. The justice demands that emerged at COP10—for fair benefits sharing, inclusion, and recognition—highlighted how contestations over meaning are critical to the pursuit of ILC justice whereby the delivery of justice requires changes to the existing conceptions of justice that underpin the CBD's justice practices. However, even with the access provided to non-state actors at COP10, the pursuit of justice was largely confined to debates over existing justice instruments or struggles between ILCs and NGOs. Why was the struggle for ILC justice so muted in the ABS negotiations?

One possible explanation is that both structural and capacity constraints limit effective and representative participation. It is possible that not everyone who should or would participate is able or willing to take the opportunity, and thus only particular discourses are represented.<sup>64</sup> Furthermore, the agenda for the negotiations is determined in advance, limiting the overall scope of the deliberations to existing sticking points. It is also possible that ILCs in particular are pursuing their justice agenda through other avenues—both within COP10 and outside the CBD—because they cannot cover the large number of simultaneous events and have determined their efforts would be more fruitful in other arenas.<sup>65</sup> Alternatively, ILCs may pursue other avenues because their critiques are sometimes silenced by NGOs and states. Or maybe ILCs are simply opting out, recognizing that they cannot compete within the system, especially when NGOs—ostensible advocates for ILCs—appear to be aligning more closely with states than ILCs in how they pursue justice. Yet, by engaging, even minimally, in the discourse of instrumentalization of justice as directed by states and redirected by NGOs, ILCs lend legitimacy to the agenda and the conceptions of justice that undergird the CBD's justice instruments of choice.

64. Dryzek and Stevenson 2011, 1871; Ford 2003.

65. See Hagerman et al. 2012 for evidence of the pursuit of ILC justice in the negotiations centered on climate change at COP10.

Reflecting closely on the role of NGOs and ILCs, another possible explanation emerges. In particular, the role of NGOs in redirecting the discourse towards an instrumentalization of justice and the absence of ILC contestation to this instrumentalization raises the possibility of a shared meaning of justice, or more precisely a justice metanorm that guides approaches to justice in GEG.<sup>66</sup> I identify two indicators that help establish the existence of a justice metanorm: first norms and practices that have “acquired a prescriptive, taken-for-granted status,” and, areas where shared meanings have emerged.<sup>67</sup> Importantly, the existence of a metanorm does not suggest that it, or its component norms and principles, are uncontested. Instead, a metanorm serves to constrain the institutional possibilities that can emerge from particular governance architectures.<sup>68</sup>

### *Prescriptive Status*

The justice practices prescribed by the CBD in 1992, namely PIC and mutually agreed terms (MAT), were the only practices deliberated and ultimately included in the Nagoya Protocol, despite their demonstrated ineffectiveness and the incompatibility of their underlying conceptions of justice—justice in exchange, inclusion as presence, and state centered authority—with the demands for ILC justice.<sup>69</sup> Their inclusion in the Nagoya Protocol and the near-exclusive emphasis on PIC in the negotiations demonstrates how the CBD’s “norms tightly constrain the range of acceptable agreements.”<sup>70</sup> The role of NGOs is particularly important in maintaining the prescriptive status of these instruments, as well as their underlying conceptions of justice. In particular, similar to the effects of overemphasizing the distributional dimension at the expense of alternative dimensions of justice, the instrumentalization of justice depoliticizes its pursuit.<sup>71</sup> In effect, the NGOs’ emphasis and redirection of the discourse towards PIC in particular reinforces the dominant justice framework of the CBD.

### *Shared Meaning*

The instrumentalization of justice in the ABS negotiations also shifts the focus of the discourse toward questions of compliance and effectiveness rather than legitimacy and meaning. Thus, opportunities for normative shifts become fewer. The justice conceptions within the dominant instruments become de facto meanings of justice, despite the clear demand for alternative conceptions. For example, underpinning the two common responses to contestations

66. Following Conca 2006, defined here as a set of common norms, principles, and ideas of justice that prescribe particular practices or institutional forms.

67. Checkel 1997, 481.

68. Aggarwal and Chow 2010; Conca 2006.

69. Firestone 2003; Minter et al. 2012.

70. Moellendorf 2009, 248.

71. Martin et al. 2013a.

of meaning—*right practice, wrong implementation and rules of order*—is the assumption that conservation actors have a unified understanding of justice, deeming contestation over meanings or practices founded on particular conceptions of justice unnecessary. The result is a limited deliberative space in which alternative justice possibilities could emerge.

The role of NGOs is particularly important for identifying instances of shared meaning: without instrumentalizing justice using established practices, the dominance of the underlying justice conceptions could be attributed largely to the exertion of power by states. In ABS negotiations, however, state and NGO conceptions of justice aligned, bound to the instruments they promoted. This may reflect the need for NGOs to adopt the dominant language of state-led governance in order to source legitimacy from states, which they require to advance their interests.<sup>72</sup> It also reflects, however, the evolving divisions between NGOs as members of epistemic communities, providing advice and expertise related to the negotiations, and that of civil society, where activists critically engage in contestations over the content and norms of international policy.<sup>73</sup> Thus, in the ABS negotiations, NGOs acted as norm enforcers (rather than norm entrepreneurs) supporting the existing conceptions of justice in GEG.

## Conclusion

The COP10 ABS negotiations demonstrate the challenges and complexities of the pursuit of ILC justice. In this article, I established the limited nature, scope, and engagement in the justice discourse and suggested the existence of a justice metanorm as one constraint to the pursuit of ILC justice. Not only was the pursuit of ILC justice enacted primarily by a handful of actors in a small subset of events, their engagement centered on deliberating *how* to deliver a pre-established notion of justice rather than tackling the questions of *what* and *whose* justice is demanded. Although plural, multivalent understandings of justice emerged at COP10, there was a convergence in the ABS negotiations towards a preexisting set of justice practices underpinned by particular justice norms and ideas. The absence of contestation over meaning is problematic because ILC justice ultimately demands shifts in the normative fabric and orientation of GEG—shifts that are only possibly through debates over the substance of justice.

These findings have a number of implications for how we understand contemporary GEG and its increasing emphasis on collaborative modes of governance.<sup>74</sup> First, despite the relatively broad access the CBD provides to non-state actors, including reduced barriers to active engagement in official events, ILCs remain marginalized across the negotiation space. This signals the possibility

72. For example, Barnett and Finnemore 1999.

73. Ford 2003.

74. Andonova and Hoffmann 2012.

that even as the deliberative space expands to include more actors, the space for introducing and contesting norms, ideas, and meanings remains constrained. Second, although NGOs have acted as powerful moral compasses in GEG, their role is shifting. While NGOs were the most engaged actors in the ILC justice discourse, they focused the discourse on instruments of justice rather than the underlying conceptions of justice. This raises questions about the extent to which NGOs advocate for justice as demanded by ILCs, or whether NGO interests are evolving to align with those of states. Both questions are concerning for NGOs, whose legitimacy is derived in part from their representation of weaker voices in GEG, and for ILCs and others searching for greater representation in GEG. Third, the possibility of a justice metanorm introduces a new and potentially powerful variable for understanding the realm of institutional possibilities for delivering justice to ILCs, questioning the extent to which there is space to debate institutional designs for addressing justice as recognition. This finding resonates with that of other scholars who have identified the role of metanorms and meta-regimes in shaping the larger institutional possibilities both in GEG and global governance more broadly.<sup>75</sup> Furthermore, and especially because of NGO support for the dominant conceptions of justice in the ABS negotiations, it is possible that the justice metanorm could extend its reach beyond state led GEG and into private, non-state, and hybrid forms of GEG, a possibility that demands further research into the existence and effects of a justice metanorm.

This analysis does not intend to suggest that ILCs made no gains towards justice at COP10. For example, the inclusion of references to the United Nations Declaration on the Rights of Indigenous Peoples in the Nagoya Protocol is an incremental gain that represents subtle and important shifts in the justice landscape for ILCs.<sup>76</sup> As one key informant suggested, this language starts “pushing towards a certain kind of jurisprudence . . . it creates a new discourse of peoplehood . . . [that] is linked to certain practices, which is in turn linked to certain lands . . .”<sup>77</sup> Although it represents a significant movement towards ILC justice, to keep moving forward those interested in ILC justice need to shift the discussion from instruments to consider the substance of justice. Norm entrepreneurship remains a critical role for actors seeking to bring about the normative shift that ILC justice demands.

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75. See, for example, Conca 2006, and Aggarwal and Chow 2010.

76. Bavikatte and Robinson 2011.

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