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Defending the right to say no: Traditional knowledge politics in Brazil and India

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Abstract

When accessing traditional knowledge, life scientists often violate the customary non-disclosure rules of indigenous communities. This article investigates how indigenous groups can prevent an unwanted access of their knowledge. It therefore compares biodiversity politics in Brazil and India. Brazilian indigenous movements effectively defend regulations to deny the disclosure of their knowledge, whereas the Adivasis in India have not achieved any statutory recognition of their customs. To explain these differences, the article draws on social movement theory. It shows that this approach has the potential to both explain the success chances and to carve out the constraints on indigenous political agency in environmental politics.

1 Introduction

In many countries of the Global South, indigenous communities live in close interaction with their natural environment. Through centuries of experience, they have acquainted themselves with substantial knowledge of local plants and animals which are used both for food and nourishment as well as for medicinal and religious purposes. Increasingly, ‘traditional knowledge’ (TK) has attracted the attention of life scientists, because they can use it as a starting point for inventions for which they subsequently seek intellectual property (e.g., patents) protection¹.

In the view of many lawmakers and environmental groups, the commercial exchange between life scientists and indigenous communities creates a triple-win situation by which economic and scientific interests can be combined with the sustainable use of biological resources. They presuppose that indigenous groups are willing to share their knowledge if they receive a fair compensation. Indigenous groups, however, are not always willing to disclose their experiences, even they are if financially remunerated. While not completely rejecting the ‘commodification’² of TK, their customary rules often prescribe a narrowly limited or at least conditional disclosure. The ignorance of these customs destroys the identities of the affected groups and contributes to the outbreak of violent contestations³. That is why indigenous activists and human right lawyers demand institutional safeguards to ensure that the access to TK is made conditional on the “prior informed consent” (PIC) of indigenous communities. In other words, they claim for “the right to say no” to the unwanted use of their knowledge⁴.

While the literature has anecdotally shown that the legal implementation of PIC provisions crucially depends on indigenous political agency⁵, little is known about the dynamics in this policy field. In order to fill this gap, the article draws on the insights of social movement theory. Based on this literature, it can be expected that the success of

indigenous political actors to defend their customary rules depends on their framing strategies, their ability to form alliances, and their access to political institutions⁶. In this article, social movement theory is not only used to explain the achievements of indigenous political agency. At the same time, it also serves as a diapositive to carve out its limiting factors. By that, it sheds light on the necessary success conditions for indigenous political agency, at least in environmental policies.

Empirically, the article focuses on traditional knowledge policies in Brazil and India. In both countries, indigenous groups claim for the legal recognition of their customary rules of conditional disclosure. However, only Brazilian regulations draw (at least legally) on the principle of PIC, whereas the Indian indigenous population (Adivasis) cannot rely on any statutory instrument to protect themselves against the unwanted access to their knowledge⁷. The differences are all the more puzzling in view of the fact that the relative proportion of Adivasis in the Indian society (8.2%⁸) is far higher than that of Índios in Brazil (0.2%⁹).

This article is structured as follows. Section 1 gives an overview of the norm conflicts between indigenous communities and external actors, the international legal framework, and the regulations in Brazil and India. The second section (2) justifies the case selection and shows why social movement theory might provide a heuristic to explore the success chances of indigenous political agency. While section 3 describes indigenous strategies in Brazil, section 4 deals with the political dynamics in India. Section 5 compares both cases with regard to the potentials and constraints of indigenous political agency in this field. The article concludes with a few remarks on the more general shortcomings of the chosen approach to identify possible future research directions.

1 Is there a right to say no?

The livelihood of many indigenous communities¹⁰ is predominantly shaped by the use of their surrounding biological resources. While partially integrated into a money-based economy, local animals and plants form the basis for nutrition and medicinal treatment, but they are also used for cultural practices and religious ceremonies. During the course of century-old experiences, indigenous groups have acquired tremendous knowledge on their natural habitat¹¹.

Within the communities, the use of biological resources and the hereto-related TK are regulated by very complex customary property rules, which differentiate between access, ownership, usufruct, and disposition rights¹². Quite often, these rules are intrinsically linked to religious beliefs and cultural practices, which constitute the collective identity of particular groups¹³. Against this background, TK is often kept secret, because it is considered to be sacred and inalienable¹⁴. In other cases, the disclosure is made conditional upon specific qualifications, e.g. the waiver of any commercial exploitation¹⁵. Irrespective of its cultural relevance, indigenous groups associate their customary property rules on TK as part and parcel of their self-determination rights¹⁶.

For external actors, these limitations are hardly comprehensible because they are at odds with their own worldviews and interests¹⁷. From the perspective of life scientists, indigenous practices are a rich source of information about potential active ingredients for pharmaceuticals and agronomic improvements, but the socio-cultural context conditions are perceived as negligible or at least subordinated to the overarching goal of scientific progress¹⁸. When neglecting customary non-disclosure rules, scientists frequently defend themselves by the non-egalitarian distribution of TK within the communities, the 'backwardness' of their cultures, and the potential use of their resources

for ‘mankind at large’¹⁹. But even if they admit that indigenous communities should be remunerated for the disclosure of their knowledge, they ignore that financial compensations in an only partially money-based exchange system are likely to trigger distributional conflicts and often lead to a loss of the groups’ social identities²⁰.

International regulations on the access to TK are highly ambiguous. On the one hand, the Declaration of the Rights of Indigenous Peoples (Art. 26.2) explicitly recognises the right of indigenous groups ‘to own, use, develop and control the lands, territories and re-sources that they possess by reason of traditional ownership or other traditional occupation or use’²¹. International trade law, on the other hand, does not contain any restrictions on the use of TK. Quite to the contrary, indigenous knowledge itself remains outside the definitional scope of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). This indirectly supports its unremunerated use as a basis for further (industrial) research, most notably in industrialised countries²². To a certain extent, international environmental law takes a middle ground. While encouraging the commercial exploitation of TK for the sake of a sustainable use of biological resources, the Convention on Biodiversity (CBD) and the hereto-related Nagoya Protocol stipulate that indigenous and traditional communities must be consulted on the access to their resources²³.

Against the background of intrinsically inconsistent international norms, legal scholars strongly recommend the establishment of “collision rules” in order to reconcile the recognition of indigenous customary rules with the legal system of state²⁴. They argue that the principle of indigenous ‘prior informed consent’ (PIC), if legally enforced, may serve as a bridge ‘between customary laws and positive law at legislative, judicial and administrative levels’²⁵. PIC thus facilitates a voluntary exchange of resources, but also

acknowledges that indigenous communities maintain the right not to disclose their knowledge to outsiders²⁶.

As of yet, however, industrialised countries have fiercely resisted any amendment of international law which might facilitate the recognition of PIC in commercial transactions²⁷. Most user countries, including the EU and the U.S., deny any meaningful extraterritorial obligation to ensure the compliance of their life science companies with indigenous rights in the provider states, e.g. by an amendment of the TRIPS agreement²⁸. That's why the establishment of collision regimes ultimately depends on the willingness of the domestic governments in the Southern periphery. In the developing world, the implementation of the international 'regime complex'²⁹ has stipulated a broad range of diverging national regulations. With regard to indigenous communities' rights to deny the disclosure of TK, Brazil and India are located at the extreme points of a continuum between legal recognition (Brazil) and neglect (India).

Brazilian laws explicitly make PIC prerequisite for any economic exploitation of TK. Until recently, any access had been subjected to a rigorous authorization procedure which focused on ensuring the indigenous communities' consent to the economic exploitation of their resources³⁰. In many instances, indigenous groups have made use of their non-disclosure rights to deny the unwanted access to their knowledge³¹. To curb bureaucracy, ongoing legal changes direct towards an ex-post verification of indigenous consent, but the requirement of PIC will remain. Moreover, indigenous communities are legally entitled to participate at the formulation of procedural mechanisms to ensure the abidance of PIC requirements, and the accordance of intellectual property titles for inventions remains dependent on the evidenced access approval of the (indigenous) TK holders³².

Although Brazilian regulations are frequently suffering from (mainly extraterritorial) enforcement problems³³, governmental authorities have shown times and again that they can effectively sanction at least their domestic industries if they circumvent legal requirements³⁴. Most notably, the public prosecution department consider PIC as an essential principle ‘to bridge (...) indigenous law and the law of the surrounding society, holding together the overall legal system in a sufficiently flexible and effective manner’³⁵.

In India, on the other hand, a collision regime between indigenous customary law and the legal system of the state is virtually absent. Both the National Biodiversity Act (2002) and the Biodiversity Rules³⁶ only request the consent of governmental authorities as prerequisite for any access to TK. The local biodiversity boards, which are assumed to represent the interests of the Adivasi (and other local communities), only have a consultative status³⁷. While the Indian Patent Amendment Act (2005) makes it mandatory to notify the patent authority about the use of TK in patent applications, there is no legal provision which would make it imperative to prove the PIC of the knowledge holders. Quite to the contrary, critical observers hint to the incoherence between India’s internationally strong stance against ‘biopiracy’ and its domestic neglect for the interests of the affected communities³⁸. The recently issued new ‘National Intellectual Property Rights Policy’ does not indicate any change in this regard³⁹.

Under these conditions, the recognition of PIC eventually depends on the benevolence of individual researchers. Some projects voluntarily respect indigenous customs, but many projects do not entail any PIC procedures at all⁴⁰. Even if indigenous groups receive a financial remuneration for sharing their knowledge, they are frequently negatively affected by unintended long-term consequences. Once they have disclosed their knowledge on particular species, other actors (local middle-men, police forces) often

try to block their access to the relevant biological resources in order to reap the profits for themselves⁴¹. By this, the lack of legally recognized PIC procedures contributes to the ongoing violent contestations in the Indian tribal belt⁴².

2 Explaining indigenous political agency

The differences between the Brazilian and the Indian approach appear quite astonishing, given that both cases are characterised by roughly comparable context conditions. In both countries, indigenous groups claim for a legal recognition of PIC. Their demands fall in line with the interests of other local communities. On the other hand, indigenous claims both in Brazil and in India meet opposition from public and private research institutions. Despite the predominant need for growth and technological leapfrogging in emerging economies, both countries are democratic political systems in which ethnic minorities and their cultural identities enjoy constitutional protection.

So how can we explain that Brazilian indigenous communities' claims have been far more successful than those of their counterparts in India? Anecdotal evidence from various countries suggests that at least the initiation of a debate on PIC depends on the self-initiative of indigenous actors⁴³. However, the literature on environmental governance seems ill-equipped to conceptualise indigenous political agency in this field, because its analytical (and partially normative) focus on top-down perspectives tends to eclipse indigenous opposition to the globally prevailing managerialist assumptions. Most notably in the more practical writings of this literature, indigenous actors remain the 'natural but often forgotten partners'⁴⁴. The ethnological literature, on the other hand, offers a very detailed understanding of the value systems of indigenous communities, but the emphasis on the distinctiveness of individual groups makes these writings hardly suitable for the understanding of collective action on a larger scale⁴⁵.

For this reason, this article draws on the insights of social movement theory to assess the conditions for effective indigenous political agency in this field. Social movement theory has already been applied in the in the Latin American context to understand indigenous human rights and constitutional policies⁴⁶. Departing from the basic insights of this approach, it can be assumed that the success of indigenous political agency depends on three basic conditions.

Firstly, it seems essential that indigenous groups are able to find a wording that represents their viewpoint and is acceptable to a broader audience⁴⁷. Thus, their capacity to frame their priorities in a way that corresponds to the (both nationally and internationally) prevailing discourse enables them to gather support from other parties and bridge socio-cultural differences⁴⁸. Secondly, indigenous groups should be able to build alliances. Cooperating with different allies may broaden the target audience due to complementary fields of attention⁴⁹. Although transnational networks or ‘advocacy coalitions’ may be particularly helpful in this regard⁵⁰, it is of crucial importance that social movements can rely on a solid social network at the domestic level as well⁵¹. Thirdly, it is assumed that indigenous groups will be more successful if they can make use of established institutional points of entry into the political system⁵². The success of such strategies will be enhanced if indigenous groups can also access the international arena. The ‘boomerang effect’ may also mean that they can harness the pressure of international organisations against their domestic government, at least if these have officially committed themselves to protecting their indigenous population⁵³.

The basic assumptions of social movement theory will be used as a heuristic tool to analyse TK politics in Brazil and India. Their application serves as a means to both understand the mechanisms of successful indigenous political agency and to carve out the constraints on political activism. Empirical evidence for this article has been obtained by

document-based process tracing and 136 interviews with indigenous activists, public officials, and representatives from research institutions, corporations, and non-governmental organisations in Geneva, Berlin, Brussels, Brazil, and India between 2009 and 2016. The selection of the interviewees was based on document-tracing (official minutes, reports, newspaper articles, weblogs, etc.) and recommendations from previous interlocutors. While most of the interviews were structured by a questionnaire with open questions, the sequence and focus of each conversation was adapted to the individual interlocutors' fields of expertise and interest. The confidentiality of all interview partners is ensured by not revealing their names or any other information that may endanger their anonymity.

3 The battle for PIC in Brazil

At least for the time being, Brazilian indigenous groups have effectively defended the right to deny the access to their knowledge. They have succeeded in developing a comprehensive policy frame, which has facilitated the establishment of an alliance with other societal actors which cannot be completely ignored in the political arena. The following section gives an overview on Brazilian indigenous political agency in a fiercely contested policy field.

Since the late 1970s, Brazilian indigenous leaders have adapted the political strategies of other marginalised groups (e.g. rubber-tappers) and used the environmentalist discourse to defend their customary practices⁵⁴. Their framing strategy was given an extra impetus by the Earth Summit in Rio de Janeiro in 1992, which hosted an 'earth parliament' of indigenous peoples⁵⁵. Brazilian indigenous movements perceived the debate on environmentalism as an opportunity to present their subsistence-based lifestyle as a sustainable alternative to the predatory exploitation of nature.

At the same time, their representatives connected environmental arguments with the more far-reaching claims for indigenous cultural self-determination. During the Brazilian transition to democracy in the 1980s, they succeeded in framing the abolishment of assimilationist policies as an integral part of the country's democratisation process⁵⁶. Certainly, their contribution to the democratic transition has helped indigenous groups to make their agenda acceptable to a broader public⁵⁷. However, more than twenty years after Brazilian democratisation, this argument is losing some of its appeal. It is for this reason that indigenous actors are currently emphasising the genuine link between human rights and environmental issues in order to defend their claims for the legal recognition of their customary rules⁵⁸. They present their community-based livelihoods as an alternative to the capitalist system of exploiting men and nature⁵⁹.

The broad and comprehensive policy frame has enabled indigenous representatives to cooperate with a range of other groups such as Quilombolas (descendants of the former African slaves), rubber-tappers, Ribeirinhos (riparian communities in the Amazon), and the influential Landless Movement⁶⁰. Despite slightly diverging priorities, all these groups agree on the need to protect subsistence lifestyles throughout the country⁶¹. Together, they are able to exert substantial political pressure, which has manifested itself in impressive demonstrations and marches both in the capital and in rural areas⁶². Even the conservative media in Brazil cannot afford to ignore their protests, which means that their claims are brought to the attention of the whole Brazilian society.

The 'environmentalisation of social conflicts'⁶³ also resonates with the perceptions of many Brazilian middle-class citizens, because the indigenous emphasis on the sustainable use of natural resources corresponds with their critical attitude towards neoliberalism and the conservative establishment of large landowners. Although the view

of indigenous groups as the ‘guardians of nature’ may be an oversimplification⁶⁴, indigenous representatives can draw on these perceptions in order to win support. Actually, the overlap between the interests of Brazilian environmental middle-class NGOs and indigenous groups is real with regard to their resistance to the deforestation of the Amazon basin and the excessive expansion of industrial agriculture⁶⁵. That is why indigenous movements and civil society actors can build up a mutually beneficial alliance against the agribusiness, which is denounced as a Trojan horse of global capitalism.⁶⁶

The influence of this network is reinforced by a close cooperation with like-minded groups throughout South America. Transnationally maintained websites and regular meetings make it possible for indigenous representatives and their non-indigenous allies to keep themselves in-formed about politically relevant developments in their region. Transnational contacts enable indigenous actors to track the political strategies of multinational agricultural and pharmaceutical companies in other countries. This often permits them to pre-empt their political moves in Brazil.⁶⁷ Moreover, indigenous groups and their allies get acquainted with the internationally prevailing buzzwords, which is of help for their discussions with politicians and public officials.⁶⁸

Given their broad network, indigenous activists have been able to select their partners carefully. They are well aware that their interests with regard to their customary practices over-lap only partially with the interests of the ‘the white men’.⁶⁹ Most notably, they remain critical of transnational environmental NGOs, whose representatives sometimes attempt to delegitimise indigenous speakers if they feel that their goals may conflict with conservationist priorities.⁷⁰ Keeping a careful watch on the activities and initiatives of transnational NGO and international organisations has not prevented indigenous groups from cooperating with them on a selective basis⁷¹, but they remain vigilant to prevent any misappropriation of their claims.

The broad interconnectedness of indigenous groups makes it imperative for Brazilian lawmakers to at least consider their claims.⁷² While Índios have only rarely been represented directly in the legislative chambers of Brazil's Congress⁷³, they have been able to win the sympathy of many left-wing deputies, involving both legislative activities and extra-parliamentary opposition.^{74 75} Marina Silva is maybe the most prominent example. The former senator, environment minister, and presidential candidate is an iconic figure of the rubber-tapper movement of the 1970s and 1980s, whose support for indigenous claims still carries tremendous political weight in Brazilian public discourse⁷⁶. Apart from this prominent figure, indigenous groups can also make use of the contacts of other traditional communities with the senators of their federal states.⁷⁷

Within the executive branch at least on the central level, Brazil's decision-making structures are characterised by a comparably high degree of openness to indigenous actors and their allies. For a long time, the Ministério do Meio Ambiente (Ministry of Environment, MMA), which takes a lead in TK policies, was well-known for its very participatory culture⁷⁸. Although the ministry has partially aligned its priorities with those of the Brazilian life sciences industries, indigenous groups and their supporters within the Brazilian civil society make successfully use of various forms of informal influence and open protest in order to prevent the ministry from ignoring indigenous concerns.⁷⁹ This strategy is reinforced by the assistance of the public prosecution department⁸⁰, whose officials pride themselves in their 'judicial activism' on behalf of indigenous and other minorities.⁸¹ Together with the Indigenous Authority and the Ministry of Justice, the Ministério Público forcefully defends the PIC requirement against the encroachment of other ministries and government bodies, which tend to act as proponents of the pharmaceutical and agro-industrial research sectors⁸². However, the support of these departments strongly depends on continuous lobbying efforts and a powerful self-

representation of the indigenous groups, which constantly remind decision-makers that a neglect of their interests will spur massive protests.⁸³

What is perhaps even more important is the fact that indigenous representatives have succeeded in becoming involved in international debates on TK⁸⁴. They frequently participate in the deliberations of the World Intellectual Property Organisation and they are strongly engaged in discussions in the context of the Convention on Biodiversity and the U.N. Permanent Forum on Indigenous Issues.⁸⁵ Indigenous activities on the international debate serve primarily defensive purposes. Their representatives effectively prevent the Brazilian government from committing itself to international agreements which are against indigenous interests, but they are not able to put up sufficient pressure for an internationally binding instrument to ensure the PIC principle on a global scale.⁸⁶ At least, however, the presence and visibility of indigenous actors in the multinational forums increases the responsiveness of Brazilian authorities on the domestic level, because they attempt to avoid international reputational damages.⁸⁷

All in all, the successful framing and alliance-building strategies of indigenous actors have ensured an institutional responsiveness which makes it possible for them to fend off the more far-reaching demands of the life science industry to facilitate the access to TK against their will. Their success, however, cannot be taken for granted and crucially depends on a continuously vigilant involvement with the ongoing debates.

4 Failed consent in India

Within the Indian context, the framing strategies of Adivasi representatives are suffering from several inconsistencies, which both aggravate their difficulties to form alliances and serve as a pretext for governmental authoritarianism. This section gives an overview on the largely unsuccessful political agency of indigenous groups to ensure a legal

recognition of their right to deny the access to TK.

As in Brazil, indigenous groups in India connect their political claims on TK to an environment-friendly and sustainable lifestyle. They refer to their traditional ethical principles which demand for harmonious relationships between human beings and their natural surroundings.⁸⁸ Nevertheless, it is rather difficult for Adivasi representatives to credibly defend their customary property rules by the sustainable use of environmental resources. Although their subsistence economy is generally based on sustainable practices, this does not preclude the occasional clearing of wooded areas or the killing of marauding elephants⁸⁹. Against this back-ground, the Adivasis' defence of their customary rules as being environmentally sound practices is often met with considerable scepticism both among traditional Hindus and urban environmentalist groups. Even scientifically trained biologists warn against 'romanticising' indigenous environmental practices.⁹⁰

Maybe even more problematic appears the second pillar of the Adivasi frame, which puts great emphasis on political self-determination. Against the historical background of the curtailment of their autonomy under colonial rule, many Adivasi communities associate the freedom to decide about the access to their resources with a general mistrust against the (Indian) state and its authorities.⁹¹ While the general lack of self-regulatory competencies is criticised by the majority, the various Adivasi groups and their spokespersons strongly disagree on desirable extent of political autonomy. Most activists would be completely satisfied with a formally guaranteed right to customary self-governance, including the right to decide autonomously and by traditional procedures about the access to natural resources and TK⁹². However, some Adivasi leaders formulate more far-reaching demands, which are often entangled (or can at least be associated) with secessionist positions.⁹³

The differing interpretations of self-governance have serious consequences. Firstly, the insistence on customary governance brings Adivasi groups into conflict with other local communities. Although the latter may share the interest in the possibility to withhold their TK, they are afraid that particular forms of indigenous customary governance (e.g., hereditary rules) could ultimately restrict their own access to natural resources.⁹⁴ Secondly, and perhaps more importantly, the mere associability of self-governance with secessionism serves as a pretext for the Indian government to prevent human rights NGO from supporting Adivasi groups in political terms.

As many Adivasi claims (e.g., with regard to land rights) interfere with the developmental goals of Indian authorities, human rights NGOs in India are subject to significant restrictions and rigorous surveillance as soon as they support indigenous actors in political terms.⁹⁵ At best they can provide clandestine practical support, which is however hardly useful for a broader public debate.⁹⁶ The only potentially powerful ally would be the comparably strong communist parties and their networks. However, the insistence of Adivasi representatives on their traditional customs is at odds with the prevailing modernisation ideology of Marxist intellectuals and leftist activists⁹⁷. Even if they oppose the political suppression of indigenous actors, they do not necessarily subscribe to the defence of culturally and religiously rooted customs.⁹⁸

Under these circumstances, Adivasi representatives often build alliances with transnational preservationist organisations (e.g., IUCN, Greenpeace) which have an interest exploring the Indian biodiversity to prevent its extinction.⁹⁹ However, this cooperation comes at a price. At least implicitly, most transnational NGO representatives remain sceptical about PIC, because they are afraid that this principle might also compromise their own access to indigenous resources.¹⁰⁰ That is why they put particular emphasis on the synergistic effects between environmental and developmental goals

which might be attained by an increased use of TK.¹⁰¹ While this argumentation helps Adivasi communities to claim financial remunerations for the disclosure of their knowledge, it directly contravenes the idea that indigenous groups should decide by themselves whether to share it with outsiders.

Given the distorted representation of Adivasi interests, a meaningful discussion about a collision regime between customary rules and the Indian legal system hardly takes place in the political arena. Even if Adivasis are directly involved with the law-making processes, hereto-related proposals remain scarce and are quickly swept under the rug. While one might assume that Adivasis could benefit from India's electoral quota for scheduled tribes and castes, the details of India's electoral law make it impossible for them to defend their specific interests. According to Indian regulations, all candidates have to finance costly electoral campaigns independently¹⁰², which means that they depend upon the financial support of the Indian elites.¹⁰³ As a result, most of the elected Adivasis belong to a 'creamy layer' which is quite detached from the realities of the local communities¹⁰⁴.

But even if elected Adivasi representatives try to defend the interests of local communities, they face serious constraints in the legislature. Given that even comparably progressive parties' officials are usually critical against indigenous identity concerns¹⁰⁵, it is often impossible for Adivasi lawmakers to represent the interests of their communities against the preferences of the party elites. Quite to the contrary, a tough stance on Adivasi issues negatively affects their standing within the party hierarchy. Thus, in the view of many indigenous law-makers, a substantial representation of Adivasi interests against the predominant ideology in the legislative chambers appears futile at best and self-destructive at worst.¹⁰⁶

Within the executive branch, the debate on TK is virtually monopolised by the Department of Industrial Policy and Promotion (DIPP) within the Ministry of Commerce & Industry.¹⁰⁷ The DIPP maintains a very close and opaque relationship with industrial federations and lawyers associations¹⁰⁸, but it shows no interest in the input of indigenous actors.¹⁰⁹ Instead, it has attempted to control flows of information to prevent other departments from gaining a foothold in the debate.¹¹⁰ However, it remains questionable whether indigenous movements could benefit from the involvement of other governmental bodies. During the debate on various legislative proposals, the Indian Ministry of the Environment and Forests (MOEF) has demonstrated a similar attitude to the DIPP with regard to indigenous voices¹¹¹.

Within the Indian bureaucracy, indigenous voices are routinely dismissed as naïve, backward, and ignorant.¹¹² A former representative of the powerful Council of Scientific and Industrial Research (CSIR) brings it to the point: Adivasis ‘need to be educated, because the whole world could benefit from their knowledge’.¹¹³ From this perspective, the introduction of a PIC requirement appears undesirable, as Indian researchers and decision makers are too afraid of the ‘non-cooperative nature of [the] tribal population’ which might endanger the access to their knowledge¹¹⁴.

For the same reasons, the Indian government is eager to prevent Adivasis from appealing to international organisations. When international meetings (e.g. the conferences of the Convention on Biodiversity) take place on Indian soil, security forces ensure that critical voices remain behind the fences.¹¹⁵ The few Adivasis who are allowed to participate at international meetings are carefully selected and controlled by the authorities. Allegedly, Indian authorities deny passports to indigenous activists if they can be anticipated to report critically about Indian politics during their stay abroad.¹¹⁶ The

result is that they cannot bring about the international pressure that might force the Indian government to let them participate in the debate on TK policies.

All in all, it seems fair to say that the failure of indigenous political agency in India can mainly be attributed to a complex interaction of legal and societal restrictions. Having said this, the framing and alliance-building strategies of indigenous actors do not appear helpful to overcome these obstacles. Against this background, the implementation of legal instruments to protect customary non-disclosure rules seems highly improbable, at least in the foreseeable future.

5 Success conditions and constraints on indigenous political agency

By and large, the case studies on TK policies in Brazil and India have confirmed the insight of scholars in legal pluralism that it would be misplaced to understand indigenous communities as mere norm recipients of domestic and international law¹¹⁷. Quite to the contrary, it could be shown that indigenous actors engage with the legal system in a creative way and attempt to bring contradictory demands in line in their own values and interests. To understand these processes of ‘juridification from below’¹¹⁸, it seems that social movement theory provides a useful heuristic tool for an analysis of the underlying dynamics.

The empirical evidence presented in this article has largely confirmed the basic assumptions of this literature. In the Brazilian case, indigenous groups have developed a consistent and widely accepted policy frame, which has enabled them to form close alliances with other societal actors. Due to its political weight, this coalition has succeeded in accessing the political system, which has in turn shown a considerable degree of responsiveness to its demands. Moreover, the access to international organisations helps indigenous activists to put pressure on the Brazilian government which in turn reinforces their recognition at least on the domestic level.

To be sure, the relative success of Brazilian indigenous representatives cannot be exclusively attributed to their political agency. Historical coincidences such as the Earth Summit in 1992 and the country's democratic transition as well as the favourable attitude within parts of the Brazilian middle-class and among left-wing decision-makers have facilitated their achievements. At the same time, the volatility of the political opportunity structures continuously endangers the sustainability of their accomplishments. However, it seems fair to say that indigenous actors have seized the opportunities to use them in their own favour.

The Indian case study, on the other hand, illustrates that the success chances of indigenous political agency may be significantly diminished by adversarial context conditions. While roughly deploying the same strategies as their Brazilian counterparts, Adivasi representatives have so far failed to bring about any substantial success. Their failure can be mainly explained by structural constraints. To begin with a practical issue, their occasional allegedly anti-environmental behaviour may be unavoidable but prevents them from constructing a broadly acceptable image of 'ecological savages'. Although there are no serious reasons to consider their lifestyles to be generally less 'sustainable' than those of the Brazilian Índios, occasional deviations, even if vitally necessary, effectively compromise the credibility of this policy frame. A similar constraint affects the Adivasi representatives' emphasis on political self-determination: While most of their claims do not go beyond the demands of Brazilian indigenous representatives, the mere associability of their wording with secessionism provokes a fierce repudiation within a society which perceives the country's territorial integrity to be endangered by latently hostile neighbour states.

Under these conditions, the formation of alliances becomes a challenging task and entails political compromises which ultimately contravene the original goals of

indigenous actors. The lack of a meaningful (self-) representation at least reinforces the paternalistic attitude both of possible allies and within the political arena, which in turn decreases the likelihood of a responsive behaviour from the side of decision-makers. In the end, the interplay between unfavourable political opportunity structures and failing political agency ends up in vicious cycle. The structural neglect of indigenous actors' claims leads to a degradation of indigenous living conditions which makes it even less possible to develop a viable strategy of political agency which in turn leads to a further deterioration of political and practical opportunity structures. Even well-intentioned forms of political co-optation (e.g., quota systems) seem unable to break up these negative feedback loops because they only contribute to the alienation between an elite of assimilated Adivasis and the political movements on the ground.

Finally, both case studies illustrate that the effectiveness of indigenous political agency finds significant limitations in the multi-level structure of an increasingly internationalised political opportunity structure. First of all, the Indian case shows that the engagement beyond the borders of the nation state can be severely compromised if it is impeded by governmental authorities. This holds particularly true if the political goals of indigenous actors are not fully in line with the interests of the prevailing transnational civil society organisations. But even if indigenous representatives are not (or less) confronted with these obstacles, they hardly have the possibility to challenge the competing interests of industrialised countries, which however would be necessary to overcome the ambiguities of the international legal frame-work.

Concluding remarks

All in all, the application of social movement theory to traditional knowledge politics in Brazil and India has illustrated that this literature offers a useful heuristic tool to explain

the success chances and to carve out limitations of indigenous political agency in this field. Having said this, it seems that this perspective is less suited to capture the underlying systemic framework conditions.

Diverging historical colonial legacies¹¹⁹, for example, might help to explain why indigenous actors in Brazil have less difficulty with developing policy frames which are appealing for other marginalised actors and at least acceptable in the broader societal discourse. The confusion on the implications of indigenous self-governance among the Adivasis themselves, on the other hand, could be related to the divide-and-conquer strategy of the British colonial rulers in the past centuries. Obviously, the combination of social movement theory and postcolonial perspectives would be challenging because it would require the mutual adaptation of two very different literatures, but it might be a fruitful exercise to develop an in-depth understanding of environmental conflicts.

A second enrichment would require the literature to connect indigenous political agency more systematically to the insights of critical political ecology. In an increasingly globalised world, local contestations are shaped by transnational and international political processes. Empirically, social movement scholars already make use of this insight to explain the dialectics of human rights law¹²⁰. The more critical literature could broaden the view to the extent that it puts more emphasis on structural power imbalances and their impact on trans- and international dynamics.

In sum, postcolonial and international political economy perspectives might add a historical and economic dimension to the analysis of marginalised actors' norm contestations and power struggles, which ultimately are at the core of the social movement literature.

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Notes

1. Dutfield, 2011
2. Zeller, 2008
3. Drahos, 2014, 159-162
4. Kohli & Bhutani, 2013, 19
5. For example, Tobin & Swiderska 2001; Dutfield 2014
6. Snow, 2004; Tarrow, 2012
7. Bavikatte & Tvedt, 2015, 11
8. Patnaik, 2013, 30
9. Verdum, 2009
10. The term 'indigenous' is highly contested e.g., Sheleff 1999: 29-54. In the context of this project, it applies to those groups which are usually subsumed and/or explicitly refer to the ILO Convention No. 169 and the U.N. Declaration of Indigenous Rights. The definition is mainly based on the communities' self-perception, which may in some cases deviate from national regulations.
11. Kohli, 2013
12. Greaves, 1996
13. Posey & Dut-field, 1996
14. Dutfield, 2011
15. Malayali, 2009
16. Orozco & Poonamallee, 2014, 277

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17. Whitt, 2009
 18. Martinez & Biber-Klemm, 2010
 19. Thapa & Devi, 2015, 99
 20. Francis, 2009
 21. Similar provisions can be found in the International Labor Organisation resolution no. 169.
 22. Dutfield, 2011
 23. Vermeulen, 2013
 24. Teubner & Korth, 2009
 25. Tobin, 2014a, 160
 26. Teubner & Korth, 2009, 164-165
 27. Eimer & Schüren, 2013
 28. Oberthür & Rabitz, 2014
 29. Raustiala & Victor, 2004
 30. Azevedo, 2005
 31. Bastos, 2009, 166-201; Abbott, 2014, 40
 32. ISA, 2015
 33. Vélez, 2010
 34. Novos Rumos, 2012
 35. Kishi, 2009, 311
 36. 2004, amended in 2014
 37. Chakrabarti, 2014, 78
 38. Preschard, 2013
 39. Government of India, 2016, 14
 40. Arjjumend & Bansal, 2015, 20-22
 41. Francis, 2009
 42. Drahos, 2014, 159-162
 43. For example, Tobin & Swiderska, 2001; Escobar, 2001; Carruthers, 1996; Dutfield 2014
 44. Sobrevila, 2008
 45. For example, Shah, 2010
 46. Cott, 2010
 47. Keck & Sikkink 1998; Snow, 2004
 48. Benford & Snow, 2000
 49. Della Porta & Diani 1999, 110-136; Rucht, 2004
 50. Finnemore & Sikkink, 1998
 51. Keck, 1995, 421
 52. Kriesi, 2004; Tarrow, 2012
 53. Keck & Sikkink, 1998

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54. Keck, 1995
 55. Posey & Dutfield, 1996
 56. Kyrillos & Stolz, 2013, 101-102
 57. Ramos, 2002
 58. da Cruz & Sayago, 2012
 59. Manaus Declaration, 2011
 60. da Cruz & Sayago, 2012
 61. Santilli, 2005, 33
 62. Guzmán, 2011
 63. da Cruz & Sayago 2012, 49
 64. Carneiro da Cunha & Almeida, 2004, 186
 65. Allegretti, 2008
 66. Brazilian indigenous rights activist, 28 July 2015, Brasília.
 67. Representative of an indigenous community in Roraima CIR, 4 August 2011, telephone and skype inter-view.
 68. Representative of an indigenous community, 18 August 2011, Brasília.
 69. Representative of an indigenous community, 3 August 2011, Brasília.
 70. Representative of a transnational NGO, 18 August 2011, Brasília.
 71. Allegretti, 2008
 72. Brazilian Congress member, 5 September 2012, Brasília.
 73. Guzmán, 2011
 74. Verdum, 2009
 75. Former minister of the Brazilian government, 2 August 2011, Brasília.
 76. Azevedo, 2005
 77. Member of the Brazilian Senate, 6 August 2015, Brasília.
 78. Soares, 2010
 79. Brazilian civil society actor, 30 July 2015, São Paulo.
 80. Ministério Público
 81. Representative of an indigenous community, 18 August 2011, Brasília.
 82. Bastos, 2009, 135-137
 83. Representative of the Brazilian Ministry of Justice, 3 August 2015, Brasília.
 84. Verdum, 2006
 85. Representative of a traditional community, 3 August 2011, Brasília.
 86. Representative of an indigenous community, 18 August 2011, Brasília.
 87. Representative of the Brazilian foreign ministry, 3 August 2011, Brasília.
 88. Written communication with an Adivasi activist, 28 October 2015.
 89. Shah, 2010, 105-120

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90. Representative of an Indian civil society group, 7 February 2012, New Delhi.
 91. Indian indigenous rights activist and scholar, 22 February 2012, Ranchi Jharkand.
 92. Nilsen, 2012
 93. Adivasi representative, 18 February 2012, Maheshmunda Jharkand.
 94. Adivasi representative, 18 February 2012, Maheshmunda Jharkand.
 95. Representative of a transnational environmental protection group, 7 March 2012, New Delhi.
 96. Member of an international human rights organization, 3 March 2012, New Delhi.
 97. Steur, 2011
 98. Representative of a communist movement, 6 February 2012, New Delhi.
 99. Representative of a transnational NGO, 28 February 2011, New Delhi.
 100. Representative of an international organization, 12 February 2012, New Delhi.
 101. Representative of an Indian civil society group, 25 February 2012, New Delhi.
 102. Wagner, 2006, 143-148
 103. Adivasi representative, 18 February 2012, Maheshmunda Jharkand.
 104. Singh & Saxena, 2011, 30
 105. Steur, 2011
 106. Indian Raja Sabha member, 28 February 2011, New Delhi.
 107. Indian legal scholar and activist, 9 February 2012, Cochin Kerala.
 108. Dutta, 2014
 109. Indian lawyer. 31 January 2012, New Delhi.
 110. Representative of an Indian ministry, 7 February 2012, New Delhi.
 111. Kohli, 2006
 112. Member of an Indian research institute, 29 February 2012, New Delhi.
 113. Representative of an Indian research institute, 5 March 2012, Pune Maharashtra.
 114. Thapa & Devi 2015, 102-103
 115. Representative of an Indian civil society group, 25 February 2012, New Delhi.
 116. Adivasi representative, 31 January 2012, New Delhi.
 117. Benda-Beckmann, 2009
 118. Eckert, 2009, 197
 119. Engle, 2010, 19-29
 120. For example, Finnemore & Sikkink, 1998

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