

**EMERGING ISSUES IN
CONSERVATION, MANAGEMENT
AND SHARING OF
BIOLOGICAL DIVERSITY :
FOCUS ON ABS, IPRS AND TK**

María Fernanda Espinosa
IUCN

Provisions on Access to Genetic Resources
and Benefit Sharing (ABS)

3 Objectives of the CBD

1. Conservation of biological diversity
2. Sustainable use of its components
3. Fair and equitable sharing of benefits derived from the access to and use of genetic resources including by access to and transfer of technology

CBD Provisions

- Article 8 (j) – Traditional Knowledge
- Article 15 – Access to genetic resources and Benefit Sharing
- Article 16 – Technology Transfer
- Article 19 – access and benefit sharing from Biotechnology derived from genetic resources

Article 15: ABS under the CBD

- Establishes the sovereign rights of States over biological resources
- Obligation to facilitate access
- applies to all genetic resources (excludes FAO ITPGR)
- Each party to take legislative administrative or policy measures to promote fair and equitable benefit sharing, including the use of Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT)

Article 16: Technology Transfer

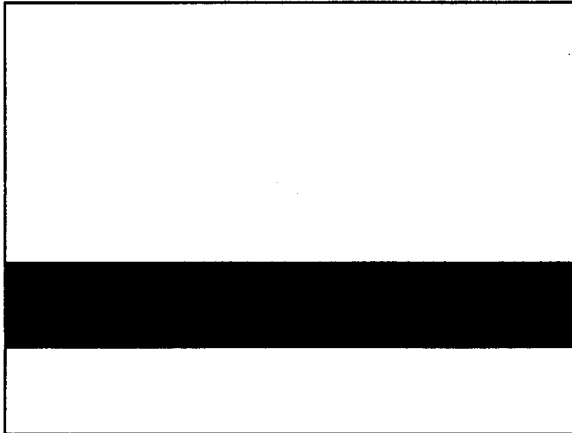
- For conservation and sustainable use of GRs
- On fair and most favorable terms
- Legislative and other measures to ensure access to and transfer of technologies using genetic resources
- Intellectual Property Rights (IPRs) should be supportive of the CBD's Objectives

Article 19: Biotechnology

- Legislative and other measures to provide for participation in biotechnological research for providers of genetic resources
 - Priority access to providers of genetic resources to biotechnologies based upon the resources provided
- CARTAGENA PROTOCOL ON BIOSAFETY

Article 8(j): Traditional Knowledge

- Parties to the CBD should respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities
- promote wider application of traditional knowledge, innovations and practices
- With participation and PIC from indigenous and local communities
- Promote equitable sharing of benefits



- The BG (COP VI-2002) : non binding instrument to support Parties in:
 - developing legislative, administrative and policy measures on ABS with particular reference to: Articles 8 (j), 10, 15, 16 and 19
 - Negotiating contractual arrangements on ABS

The Bonn Guidelines

- Support rights and obligations under CBD
- Shall not affect the sovereign right of States over biological resources
- Are voluntary and shall not substitute national legislation
- Shall be applied in a manner coherent with international agreements and institutions

Objectives

- Contribute to conservation and sustainable use of GR
- Provide guidance in developing ABS regulations
- Ensure capacity building for and inclusion of all stakeholders
- Promote provision of financial resources and TT
- Contribute to the development of mechanisms and ABS arrangements that recognize the protection of TK
- Contribute to poverty alleviation, inclusive of food security

**World Summit on Sustainable
Development 2002**

- WSSD Plan of Implementation Article 44(o)
Calls upon States to: “Negotiate an international regime on benefit sharing relating to genetic resources within the framework of the CBD taking into consideration the Bonn Guidelines”

- CBD COP7 endorsed the mandate from WSSD in Decision VII/29 and establishes the terms of reference for an Open-Ended Working Group to “elaborate and negotiate an international regime on ABS with the collaboration with the AWG on Article 8j.
- Collaboration from UNEP, FAO, WTO, UPOV and WIPO is also considered
- the participation of all relevant stakeholders, including NGO’s, the private sector, and indigenous and local communities

TORs include PROCESS, NATURE, SCOPE AND ELEMENTS FOR THE IR:

1. NATURE

The INTERNATIONAL REGIME could be composed of one or more instruments within a set of principles, norms, rules and decision-making procedures, legally-binding and/or non-binding.

2. SCOPE

- Access to genetic resources and promotion and safeguarding of fair and equitable sharing of the benefits arising out of the utilization of genetic resources in accordance with relevant provisions of the Convention on Biological Diversity;
- Traditional knowledge, innovations and practices in accordance with Article 8(j).

3. ELEMENTS (23) INCLUDING:

- Collaborative scientific research, and research for commercial purposes and commercialization
- Fair and equitable sharing of benefits from the results of research and development and the benefits arising from the commercial and other utilization of genetic resources
- Benefit-sharing including, *inter alia*, monetary and non-monetary benefits, and effective technology transfer and cooperation
- To promote facilitated access to genetic resources for environmentally sound uses, etc...

FAO ITPGRFA

- FAO International Treaty on Plant Genetic Resources for Food and Agriculture, entered into force in 2004
- Multilateral system of ABS for Annex I food crops (90% of the world's caloric intake)
- Recognizes the contribution of farmers and indigenous peoples to the conservation and development of PGR
- Promotes equitable sharing of benefits (which includes exchange of information, transfer of technology, capacity building, monetary benefits).

WIPO AND ICGRTKF

- In 2000 WIPO established the ICGRTKF
- Mandate to discuss three issues: abs, protection of TK, and protection of expressions of folklore
- MoU with SCBD for technical work on protection of TK (through a sui generis system) and disclosure requirements for patent applications
- Importance of Patent Cooperation Treaty and the Substantive Patent Law Treaty for ABS

WTO AND TRIPS

- Trade related Intellectual Property Agreements TRIPs. Article 27.3. B: relations with patents over life forms and biological processes, IPRs and protection of TK is under discussion.
- Consistency with the CBD remains an unresolved issue.

DOHA MANDATE

Para. 19 instructs the TRIPS Council to examine the relationship between TRIPS and the CBD and the protection of traditional knowledge and folklore (in the context of the review of Article 27.3(b))

- > Brazil, India et al: modify TRIPS to include requirements for disclosure of origin and evidence of PIC and benefit sharing in patent applications
- > US: no need to modify, CBD and TRIPS can be simultaneously applied, disclosure requirements contravene TRIPS
- > EU: open to discussing disclosure of origin as a "self-standing" requirement
- > Switzerland: amend WIPO's Patent Law Treaty to include voluntary disclosure requirements

TRIPs and ABS

- Amendments to TRIPs requested include:
 - (i) disclosure of the source of the biological resource and/or the traditional knowledge used in the invention
 - (ii) evidence of prior informed consent through approval of authorities under the relevant national regimes where applicable; and
 - (iii) evidence of fair and equitable benefit sharing under the national regime of the country of origin where applicable.

UN CONVENTION ON THE LAW OF THE SEA (UNCLOS)

- Marine Genetic Resources within National Jurisdiction are subject to CBD regime and under State sovereignty.
- Status of Marine GRs beyond national jurisdiction (BNJ) is still uncertain and pose problems with regard to ABS arrangements.
- Need for consistency between regional and global approaches has been recognized.
- Ongoing debate on whether or not GR's BNJ are common heritage or marine resources subject to high seas rights and obligations.

- Need to clarify key concepts (equity, justice, derivatives, etc...)
- Need to clarify the main objective of the IR
- Protection of TK is a complex and wide issue that goes beyond ABS (tenure and property rights, etc...)
- Long negotiation may require interim measures

Some key elements for the IR

A single monolithic instrument on a set of measures

Some key issues:

- Certificate of legal provenance
- Disclosure requirements for patent applications
- Measures for the protection of TK (sui generis protection system)
- Monitoring/ tracking of post-access to GR's

ABS Frameworks

Clear and effective ABS frameworks should allow :

- Legal Certainty
- Regulate access and sustainable use of genetic resources and benefit sharing arrangements
- Strengthen domestic biotechnology and research programs
- Protect and Strengthen traditional knowledge systems
- Maintain and revitalize TK and cultural diversity
- Inclusion and empowerment of local communities and women through PIC and negotiating national ABS frameworks and the international regime
- Contribute to MDG's (poverty, food security, health)