

## Access and Benefit Sharing: Indigenous Peoples Concerns in the Negotiations for an International Regime

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**Indigenous ritual for good harvest.  
Photo by: Sayan, SEARCO**

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## Executive Summary

The race is on towards the 2010 targets of the Convention on Biological Diversity (CBD). In the area of Access and Benefit-Sharing (ABS), deliberations by the Parties have accelerated following governments' call for action at the World Summit on Sustainable Development (WSSD 2002) to negotiate an international regime for fair and equitable sharing of benefits arising from the utilization of genetic resources. As an international regime would directly impact on Indigenous Peoples, it is important to see where the ABS discussions are going not only in the CBD but in related international processes.

The international community recognizes the contribution of Indigenous Peoples and local communities in sustaining biological diversity. Studies have shown that major areas with high biodiversity are within the territories Indigenous Peoples inhabit. Such areas are rich in genetic resources nurtured through their cultures, practices and traditional knowledge that are deeply rooted in the environment. Scientifically, these areas are natural repositories of biodiversity that help ensure the survival of various plant and animal species and microorganisms.

In the last 20 years biodiversity has become of vital concern not only because it is rapidly vanishing but also because of its economic potential, increasingly recognized by governments and industry, particularly biotechnology. This has changed how biodiversity is now regarded. In the past it was considered a 'common heritage of humankind' and thus with free access to it. Since the Convention on Biological Diversity was adopted in 1992, it has become a principle of 'national sovereignty.'<sup>37</sup>

This paper elaborates on the progress and complexities of present deliberations within the CBD, especially the hurdles these pose to Indigenous Peoples. It compares how access and benefit sharing and intellectual property rights are viewed in the Convention and other international instruments and trade-related treaties. It also presents recommendations towards advancing the rights and interests of Indigenous Peoples within CBD processes as 2010 targets near.

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<sup>37</sup> Victoria Tauli-Corpuz, *Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples*, Intellectual Property Rights Series 5, TWN 2003, p. 32-33.

## ACCESS AND BENEFIT SHARING

In 2004, the Seventh Conference of the Parties (COP7) decided to address the call made at WSSD to come up with an international regime on access and benefit sharing in relation to genetic resources. This was to take into consideration the voluntary Bonn Guidelines on ABS.<sup>38</sup> The COP mandated the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing (WGABS) to elaborate and negotiate the regime towards adoption of an instrument/instruments to implement the CBD objectives and Articles 15 and Article 8 (j).<sup>39</sup> This was to be done in collaboration with the Ad Hoc Open ended Inter-sessional Working Group on Article 8 (j) and Related Provisions (WG8j), which was mandated to review the international regime.

The COP7 decision included “**ensuring the participation of indigenous and local communities.**” It also stated that “**the international regime should recognize and shall respect the rights of indigenous and local communities.**”<sup>40</sup>

The terms of reference for WGABS cover the process, nature, scope and elements to be considered in the elaboration of an international regime. The scope underlines traditional knowledge (TK), innovations and practices in accordance with Article 8(j). The elements include the outcomes of the Working Group on Article 8(j), Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights.<sup>41</sup>

Among other elements that relate to rights of Indigenous Peoples are:

- (x) Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j)
  
- (xiv) Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights
  
- (xv) Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources, subject to the national legislation of the countries where these communities are located
  
- (xvi) Customary law and traditional cultural practices of indigenous and local communities
  
- (xviii) Code of ethics/code of conduct/models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities

### WG Meetings

Despite efforts by WGABS in its 3rd (February 2005) and 4th (30 January 3-February 2006) meetings to consider the elements and agree on acceptable text, a completely bracketed text<sup>42</sup> was forwarded to COP8. In March 2006, COP8 left the majority of the decisions on an international regime in brackets and gave the Working Group until COP10 in 2010 to finalize it.

Unfortunately, a large part of the bracketed decisions are pertinent to the recognition of rights of Indigenous Peoples in relation to genetic resources and associated traditional

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<sup>38</sup> See Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization available at [www.biodiv.org](http://www.biodiv.org)

<sup>39</sup> Decision VII/19

<sup>40</sup> Decision VII/19, D

<sup>41</sup> Decision VII/19 D, Annex: Terms of Reference for ABS, (d) elements, (xxiii)

<sup>42</sup> Bracketed text means there is no agreement to language. In this context, developing states have their preferred text in brackets, including possible optional text, alongside developed states' preferred text and optional text.

knowledge, as well as State compliance with international obligations and human rights law. A gap continues to exist in the Parties' various decisions relating to recognition of the rights of Indigenous Peoples to own, control, manage and develop the natural and biological resources, including genetic resources, found within their lands, waters and territories.

### **Positions on Nature of Regime**

Developing countries are generally for a binding regime, while developed countries take an opposing view. Given the unclear status of our being "rights holders" and recognition and protection of our inherent rights, Indigenous Peoples have held back commitment to support a binding regime.

On whether the regime should be a single instrument, such as a protocol or convention, or a series of related existing and new instruments and processes that are bound together (i.e, linking relevant WIPO, FAO, TRIPs and CBD treaties), developing countries are generally inclined to go with the former; and developed countries, the latter. Indigenous Peoples have no specific preference (See International Indigenous Forum on Biodiversity's *Report on Access and Benefit Sharing at COP8 (2006)*).<sup>43</sup>



**Traditional knowledge is passed down through the generations**  
**By Colin Nicolas**

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<sup>43</sup> Paper submitted to International Expert Group Meeting on the Convention on Biological Diversity International Regime on Access and Benefit Sharing and Indigenous Peoples' Rights, hosted by UNPFII, New York, 17-19 January 2007, p. 8

## What issues are discussed under the theme ABS?

### 1) Recognition and Respect of Indigenous Peoples Rights and Human Rights

Indigenous Peoples have constantly brought up Article 22.1 of the Convention in various CBD meetings. This requires that COP decisions be consistent with other international conventions, including international human rights law.<sup>44</sup> With reference to this article, the norm is that “pursuant to international law, parties do have an affirmative obligation to protect Indigenous peoples’ procedural and substantive rights in relation to any proposed regime.”<sup>45</sup>

#### ***Procedural Rights***

Procedural rights are cited in various CBD decisions to support Indigenous Peoples’ participation in developing an international regime. Some of these are the following:

(1) Decision VII/19 D paragraph 1 mandates that “the Ad Hoc Open-ended Working Group on Access and Benefit Sharing with the collaboration of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions, *ensure the participation of indigenous and local communities . . . to elaborate an international regime on access and benefit sharing* with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and its three objectives.”

(2) Decision VII/16 H paragraph 5 promotes appropriate mechanisms for better cooperation between the Ad Hoc Open-ended Working Groups on Access and Benefit Sharing and on Article 8(j) and Related Provisions to ensure the participation and involvement of indigenous and local communities in WGABS.

**(3) Decision VII/19 D preambular paragraph 6 “encourages Parties and Governments to provide the ways and means to allow for sufficient preparation and to facilitate effective participation of indigenous and local communities in the process of the negotiation and elaboration of an international regime.”**

However, a review of the implementation of some of the Parties’ decisions relevant to WGABS indicates certain shortcomings. WG 8(j)-4 did not make a substantive review of the outcomes of WGABS-3 and -4. This failure shows a lack of collaboration between the Working Groups, contrary to their mandate. In addition, the limited participation of indigenous representatives in WGABS indicates a weakness by the Parties to enforce their decision “to ensure full and effective participation” of indigenous and local communities in elaborating an international regime.

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<sup>44</sup> Debra Harry and Le`a Malia Kanehe, *The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples*, February 2005, p. 6

<sup>45</sup> Paper submitted to International Expert Group Meeting on the Convention on Biological Diversity International Regime on Access and Benefit Sharing and Indigenous Peoples’ Rights, hosted by UNPFII, New York, 17-19 January 2007, p. 5

## *Substantive Rights*

In COP7, Indigenous Peoples actively advocated for substantive rights in order for the Parties to decide that “*the international regime shall recognize and respect the rights of Indigenous and local communities.*” This language, proposed by the EU and supported by the African group, eventually gathered majority support from the Parties. However, some of them, such as Canada, Australia, New Zealand, and non-Parties to the Convention, i.e. the United States, opposed it and have asked the CBD legal counsel for an opinion to support their position.<sup>46</sup>

The following text was carried: “*the international regime should recognize and shall respect the rights of indigenous and local communities.*”<sup>47</sup> To Indigenous Peoples, this decision is non-mandatory or non-obligatory. They note that based on the language in which “should” is used instead of the obligatory “shall”, Parties will continue to negotiate an international regime without committing to firm recognition of the rights of Indigenous Peoples.<sup>48</sup>

However, relevant international human rights instruments to be considered in negotiations declare that all peoples have the right to self-determination and to freely determine and pursue their political, economic, social and cultural development.<sup>49</sup> Recent considerations have failed to interpret this under a correct principle (see Annex on IIFB Opening Statement in WGABS-3). In addition, Indigenous Peoples have not been provided sufficient and proper forums to articulate and deliberate their concerns in spite of various efforts to hold dialogues with government delegates from GRULAC, the European Commission and some Asian countries.

It is nevertheless worthy to note that a CBD Secretariat document, prepared for WGABS-5 cites the UN Declaration on the Rights of Indigenous Peoples (DECRIPS). The document states that the Declaration is regarded as “the most relevant developing human rights standard for indigenous peoples.”<sup>50</sup> It further refers to Article 29<sup>51</sup> as relevant to the development of ABS regimes that provide a comprehensive framework relevant to indigenous concerns.

## **2) Free and Prior Informed Consent and Mutually Agreed Terms**

Article 15 of the Biodiversity Convention sets out three main principles: 1) national sovereignty over all genetic resources, 2) access to biological resources should be carried out on “mutually agreed terms” (MAT), and 3) access is subject to the “prior informed consent” (PIC) of the country of origin. The voluntary Bonn Guidelines stress these principles by declaring the Parties as the competent national authorities from which consent should be sought. As such, the Parties recognize the sovereign rights of States over natural resources but not those of Indigenous Peoples over the resources on their lands and territories.

There are however recent changes in international human rights law that flow from the right to self-determination, including permanent sovereignty over natural resources (PSNR). In its wider application, not only the State but also non-State forming peoples, including Indigenous Peoples, are viewed to have a right to permanent sovereignty over natural

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<sup>46</sup> Debra Harry and Le`a Malia Kanehe, *The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples*, February 2005, p. 6-7

<sup>47</sup> Decision VII/19 D, Preambular paragraph 18

<sup>48</sup> Paper submitted to International Expert Group Meeting on the Convention on Biological Diversity International Regime on Access and Benefit Sharing and Indigenous Peoples' Rights, hosted by UNPFII, New York, 17-19 January 2007, p. 5

<sup>49</sup> Article 1.1, ICCPR; Article 1.1, ICESCR and Article 3, UNDECRIPS

<sup>50</sup> UNEP/CBD/WG-ABS/5/4/Add.1

<sup>51</sup> “The rights of indigenous peoples to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, ...”

resources.<sup>52</sup> The Final Report on Indigenous Peoples' Permanent Sovereignty Over Natural Resources (2004) , by UN Special Rapporteur Erica Daes, explains that this exercise of sovereignty by both the State and Indigenous Peoples within that State do not have to be mutually exclusive.<sup>53</sup>

Daes elaborates on the principle of Indigenous Peoples' collective rights to their lands and resources: "The developments during the past decades in international law and human rights norms, in particular, demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories."<sup>54</sup> She clarifies further that natural resources include genetic resources.<sup>55</sup>

The report of the International Experts Group (IEG) meeting on the International Regime on Access and Benefit-sharing and Indigenous Peoples' Human Rights (January 2006) sponsored by the UN Permanent Forum on Indigenous Issues (PFII) echoes this point in application to the CBD. It stated that

*while States hold sovereign rights to natural resources within their borders, those rights are relevant only in relations between the State and external legal subjects, such as other States and foreign corporations. Hence, the principle of State sovereignty offers no guidance as to the relationship of a State vis-à-vis peoples and individuals residing within its borders with regard to rights to genetic resources and associated traditional knowledge. It was concluded that peoples hold sovereign rights to natural resources within their territories; the parties to the Convention are bound to respect those rights, despite language on State sovereignty and references to domestic legislation contained in the Convention.*<sup>56</sup>

Further, in adopting the Declaration on the Rights of Indigenous Peoples, the UN General Assembly confirmed established international law. The Declaration highlights the right of Indigenous Peoples to control, protect and develop their cultural heritage, including traditional knowledge, and the right to their lands and natural resources.

Indigenous Peoples have consistently declared their position as "rights holders" over genetic resources within their lands and territories. As such, States do not have absolute sovereignty over resources within their territories and need to recognize their exercise of Free and Prior Informed Consent (FPIC) and the right to "accept or deny" access to genetic resources that originate from within their territories.<sup>57</sup>

### **3) Disclosure of Origin and Certificate of Origin/Source/Legal Provenance of Genetic Resources and Associated Traditional Knowledge**

The deliberations on these issues revolve around mechanisms on the disclosure of origin and are equally relevant to matters on "Free" Prior Informed Consent and Mutually Agreed Terms, especially if genetic resources come from indigenous lands and territories.

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<sup>52</sup> *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, E/CN.4/Sub.2/2004/30, para 9.

UN Special Rapporteur Erica Daes explains that it was "General Assembly resolution 1803 (XVII) in 1962 that gave the principal momentum under international law in the decolonization process. In this historic resolution the Assembly declared that "peoples and nations" had a right to permanent sovereignty over their natural wealth and resources and that violation of this right was contrary to the spirit and principles of the Charter and hindered the development of international cooperation and the maintenance of peace."

<sup>53</sup> *Ibid.*, para 46 (stating that "the term sovereignty is not limited to independent States, and is widely used in reference to various governing authorities within States, without in any way diminishing the sovereign status of the State")

<sup>54</sup> *Ibid.*, para 39

<sup>55</sup> *Ibid.*, para 42

<sup>56</sup> PFII, 6<sup>th</sup> Session, 14-25 May 2007

<sup>57</sup> PFII International Workshop on Methodologies regarding Free Prior and Informed Consent and Indigenous Peoples, January 17-19 2005

At the 3<sup>rd</sup> meeting of the Working Group, a polarized negotiation reflecting the “North-South” divide was evident in the discussions on these issues. Most of the Parties from the South insisted on ensuring a process that recognizes the rights of the Country of Origin/Provider Country, such as its involvement in research and development (Turkey) and compliance with national legislation (Brazil). The Like-Minded Megadiverse Countries (LMMC) pushed for a standardized certificate of origin accompanying biological resources, including its derivatives.

The EU, Japan, New Zealand, Canada and Mexico, however, were reluctant to accept a mandatory certificate or any new disclosure of origin requirements that are not currently within Intellectual Property Rights (IPR) law. These States further called for flexibility, functionality, viability, cost-effectiveness and a realistic process. Norway noted that a certificate of origin could facilitate enforcement of disclosure requirements in the patent application process.

A meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance, attended by 25 experts and seven observers in January 2007, proposed that a certificate could help address a number of the Parties’ concerns and cover several objectives, such as the protection of TK. Further discussions included analysis of the distinctions between the options of certificate of origin/source/legal provenance and the implications of each in achieving the objectives of Articles 15 and 8(j).<sup>58</sup>

To the Technical Experts Group, the basic role of the certificate is “to provide evidence of compliance with national access and benefit-sharing regimes”. Thus, it found it practical to refer to the certificate as a **certificate of compliance with national law**, in accordance with the Convention.<sup>59</sup>

## Indigenous Issues

A concern that arises from this proposal is whether or not national access and benefit sharing legislation recognizes the rights of Indigenous Peoples to both traditional knowledge and genetic resources and further, whether these rights have been incorporated into national ABS laws. For instance, if a country that recognizes Indigenous Peoples’ rights seeks access to genetic resources and TK in indigenous lands in another country which does not uphold similar rights, whose national legislation should be complied with?

Another issue is traditional knowledge associated with genetic resources. The Technical Experts Group noted that the intangible nature of TK presents practical difficulties and recommended further exploration to determine whether the certificate should be extended to it.<sup>60</sup>

In this regard the IEG has expressed concern on separating genetic resources from associated traditional knowledge as this would not only break the essential link between physical and intangible resources but potentially exclude TK from the certificate.<sup>61</sup> In order to protect the rights of Indigenous Peoples, they recommend that the proposed certificate cover two types of genetic resources: genetic resources without associated traditional knowledge, and genetic resources and associated traditional knowledge. This is also to ensure that Indigenous Peoples get a share in any benefits from the utilization of genetic resources and associated TK. The IEG stressed that the free, prior informed consent of

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<sup>58</sup> See reference document to WGABS 5, UNEP/CBD/WG-ABS/5/2, p. 3

<sup>59</sup> See reference document to WGABS 5, UNEP/CBD/WG-ABS/5/2, p. 7

<sup>60</sup> See reference document to WGABS 5, UNEP/CBD/WG-ABS/5/2, p. 8

<sup>61</sup> Report of International Expert Group meeting on the International Regime on Access and Benefit-Sharing and Indigenous Peoples’ Human Rights of the Convention on Biological Diversity, 6<sup>th</sup> Session, PFII, 14-25 May 2007

Indigenous Peoples must be upheld in national, regional and international instruments on ABS.<sup>62</sup>

A more complex issue is the legal status of derivatives arising from the innovations and development of genetic materials. Whether or not derivatives will be covered under the scope of the international regime is not clear. Compounding it is that these derivatives are usually patented with rights vested in the corporation or government research agency that developed them from the genetic resource. Thus typically under current law, recognition of ownership over the derivative does not lie with the country of origin or specific group of people from whose territory it was taken. This virtually disregards Indigenous Peoples' rights over genetic resources on their lands and associated traditional knowledge.

As genetic material is transported across national borders, a third layer of complexity arises because it is impossible to monitor successive derivatives developed from the original genetic material.

At WGABS-3 and -4, differing positions were taken on the issue of inclusion of products and derivatives in an international regime. Most of the developing countries - LMMC, GRULAC, Uganda, Egypt, among others - supported inclusion; Australia and other developed countries opposed it; and the EU wanted further discussion. Business representatives were of the view that an international regime cannot replace international frameworks. The International Indigenous Forum on Biodiversity (IIFB) and PFII reiterated their call that any ABS instrument should conform to existing and emerging international law and that such rights cut across issues

#### **4) Full and Effective Participation and Capacity-Building of Indigenous and Local Communities**

While directly affected by the Parties' decisions in the CBD, Indigenous Peoples remain in the perimeters and marginalized in the debate. During WGABS-3, indigenous representatives sought a series of dialogue with government representatives from the European Union, GRULAC and some Asian delegates, but these turned out to be futile.

Because of the increasing difficulty to have full and effective participation, IIFB submitted vital recommendations, subsequently called the Bangkok Proposal,<sup>63</sup> to improve procedural mechanisms of the Working Group. The IIFB urged that WGABS procedural aspects be consistent with the procedures agreed to by Member States for deliberations in WG8(j), such as:

- 1) Indigenous Peoples' representatives informally invited to participate with the Bureau as the Friends of the Chair
- 2) Indigenous Peoples' representatives informally invited to be Friends of the Chair in Working Groups, Sub-Working Groups and Drafting Groups
- 3) Access to administrative support
- 4) Amendments to the procedure related to speaking order.<sup>64</sup>

However the same difficulty regarding indigenous participation was encountered at WGABS-4 in Granada, Spain. The Bangkok Proposal was again raised but the Parties dealt with it as the least priority, resulting in very limited involvement of indigenous representatives as they awaited the Parties' decision on when and where they could participate.

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<sup>62</sup> *Ibid*

<sup>63</sup> The term used by the Parties referring to the IIFB proposal at WGABS-3 on improving procedural mechanisms to enable full and effective participation of indigenous representatives in WGABS

<sup>64</sup> IIFB Closing Statement, WGABS3, 14-18 February 2005, Bangkok, Thailand

Full and effective participation of indigenous and local communities, however, ultimately depends on governments' willingness to provide for it, including significant space for women to come into the whole process. This does not only mean CBD meetings or international processes but also the local, national and regional levels. This entails a vertical-horizontal process where institutional and procedural mechanisms are established to allow the flow of information and common understanding on crucial issues.

The effectiveness of participation also depends on the capacities of both Parties and stakeholders. At COP7, the Parties agreed on an Action Plan for capacity-building in order to effectively implement CBD provisions on access to genetic resources and benefit sharing, and in particular, the Bonn Guidelines on ABS. The Action Plan's implementation at all levels is to involve indigenous and local communities and all relevant stakeholders.<sup>65</sup> Key areas to be strengthened are:

- (a) institutional capacity-building at various frameworks -- policy, legislative and regulatory; administrative; funding and resource management; and mechanisms for follow-up, monitoring and assessment;
- (b) assessment, inventory and monitoring of genetic resources, and traditional knowledge, including taxonomic capacity, inter alia, within the context of the Global Taxonomy Initiative, and of in situ and ex situ conservation activities.<sup>66</sup>

One significant target to take note of are the Parties' actions to enhance the capacity of Parties towards "developing legislative, administrative and policy mechanisms for **the protection of genetic resources and related traditional knowledge** including, inter alia, **the development of sui generis systems, the promotion of existing forms of protection of intellectual property rights and the support for community-based approaches of indigenous and local communities.**"<sup>67</sup>

Decisions at COP7 pertaining to capacity-building of indigenous and local communities, concern information systems at all levels linked with the clearing-house mechanism. These also entail capacities for participation in decision-making, policy formulation and implementation for conservation, management and product development of genetic resources to enable indigenous people to benefit from the use of their traditional knowledge and practices related to such resources.<sup>68</sup>



Indigenous man from Africa at an international conference  
By ITS-Alliance

<sup>65</sup> Decision VII/19, Annex: Action Plan on Capacity-Building for Access to Genetic Resources and Benefit-Sharing, A (1)

<sup>66</sup> Decision VII/19, Annex, A: Action Plan on Capacity-Building for Access to Genetic Resources and Benefit-Sharing, B 5 (a)

<sup>67</sup> Decision VII/19, Annex, A: Action Plan on Capacity-Building for Access to Genetic Resources and Benefit-Sharing, B 5 (h)

<sup>68</sup> Decision VII/19, Annex, Action Plan on Capacity-Building for Access to Genetic Resources and Benefit-Sharing, B 5 (j)

## 5) Strategic Plan of CBD: Future Evaluation of Progress

A critical process relevant to the CBD Strategic Plan is evaluating how its implementation has progressed. At COP8, the Parties requested WGABS-5 to consider options for indicators and also invited governments and relevant international organizations, including indigenous and local communities, to submit their views to the Executive Secretary.

Indigenous representatives have observed that most of the suggested, if not set, indicators are **process indicators**. The IIFB has emphasized the need for **outcome indicators** in order for progress to be evaluated. At WGABS-3, Malaysia and Brazil supported the formulation of both process and outcome-oriented indicators. The EU supported process indicators, while Colombia suggested that TK-related indicators be referred to WG8(j).

The IIFB, through its Working Group on Indicators, has initiated development of indicators, which the Parties recognized at COP8. Although the IIFB initiative primarily aims to assist WG 8(j) in developing meaningful and practical indicators, TK is a cross-cutting issue that touches on most CBD agenda items. Thus, the suggested indicators can generally be applied to provisions relating to traditional knowledge and ABS.

More detailed information on the deliberations and negotiations of WGABS-3 and -4, especially with regards positions of various groups and/or countries on an international regime on ABS, is published by the International Institute for Sustainable Development (IISD), Earth Negotiations Bulletin, available online at <http://www.iisd.ca/biodiv/abs-wg3/> and <http://www.iisd.ca/biodiv/abs-wg4/>.

### CBD and other International Instruments

Beyond the CBD there are relevant treaties and agreements that the Parties take into consideration in negotiating on ABS that, to some extent, can limit or provide the basis for their decisions. These instruments are, among others, 1) the World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2) World Trade Organization - Trade-Related Aspects of the Intellectual Property Rights Agreement (WTO-TRIPS), and 3) International Union for the Protection of New Varieties of Plants (UPOV).

The CBD, WTO/TRIPS and WIPO have differing provisions concerning rights and obligations attached to biological and genetic resources, and the involvement of indigenous and local communities in related processes and systems.

*Under the WTO, the Agreement on TRIPS calls for the enactment of regulation for patenting micro-organisms and plant varieties through effective sui generis systems of protection. The WIPO intends to use the existing intellectual property regime in the protection of traditional knowledge and innovative systems, while the CBD has left the question of intellectual property rights unaddressed, leaving room for conflicting interpretations of the current, enforceable system. The CBD asserts that the member countries alone have the right over their genetic resources and can legislate access to genetic resources or specify terms in which access can be given.<sup>69</sup>*

The governments continue to debate whether CBD is the proper forum to deliberate on arrangements regarding issues on patenting plant and animal genetic resources. Some want to incorporate provisions of existing Intellectual Property Rights -- i.e. WTO-TRIPS, WIPO,

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<sup>69</sup> Parshuram Tamang, 'Access and Benefit-Sharing Legislation, Biodiversity Registration, and Indigenous Nationalities: The Case of Nepal; Indigenous Peoples' Contributions to COP-8 of the Convention on Biological Diversity, IIFB and IAITPTF, p. 13

ITPGM (International Treaty on Plant Genetic Material for Food and Agriculture) -- into CBD provisions.

Where intellectual property is concerned, the JUSCANZ states (Japan, United States of America, Canada, Australia and New Zealand) assert the primacy of WTO-TRIPs and existing IPR law as contained in WIPO treaties over CBD. Because these countries wield extensive power in WTO, the developing states hope that they can gain ground in the CBD where they have more influence.

### Comparison of Some CBD and TRIPs Provisions relating to ABS

Issue	CBD Position	TRIPs Position	Conflicts
Biological resources	Sovereign rights of nations	Private intellectual property	CBD implies sovereign rights of nations; TRIPs and IPR overlook this right, allowing patents
Use of biological resources	Provisions for fair and equitable benefit sharing	No provisions for benefit sharing	CBD recognizes legal rights to share; TRIPs and IPR negate that legal authority
Access to genetic resources	Prior Informed Consent	No provision of PIC	CBD diminishes incidence of biopiracy, TRIPs and IPR promote biopiracy
Involvement of indigenous and local communities	Require approval and involvement	No provision to involve IPs and local communities	CBD acknowledges role of Indigenous and local communities in conservation and provides rights to benefit; TRIPs and IPR do not

Source: After GAIA Foundation and GRAIN (1998), collated with IPR data from WIPO with TRIPs

Nehemiah Rotich of the United Nations Environment Program cautioned that there are contradictions between TRIPs and CBD that have to be resolved. She noted that intellectual property rights, applied to life forms, under TRIPs, run counter to CBD objectives, since the former's private property regime undermines the implementation of CBD on ABS.

The 2001 Doha Declaration (Paragraph 19) has broadened the discussion. It states that the TRIPs Council should look at the relationship between the TRIPs Agreement and CBD, and the protection of traditional knowledge and folklore. The Council's work is to be guided by TRIPs objectives (Article 7) and principles (Article 8), and must take development issues fully into account.

### Intellectual Property Rights

The main concern of Indigenous Peoples in these processes is the dominance of Western Intellectual Property Rights concepts over indigenous cultures, customary laws and property relations. Intellectual property rights serve as a legal means to appropriate knowledge, reducing it to a commodity that can be owned privately by an individual or legal person (e.g. corporations) who claims exclusive rights over such knowledge. Existing IPR, as established by WTO-TRIPS, WIPO, ITPGM, support *patents* that are Western intellectual property rights. Patents, originally meant to apply to inventions, issued to individuals and with a specific life span of around 20 years, are foreign to indigenous concepts.

In contrast traditional knowledge of Indigenous Peoples is created not just by individuals but collectively by accumulation and passed on from generation to generation. Innovations created from traditional knowledge are brought about by interrelations of Indigenous Peoples and their territories and natural environment, between generations and among community members. Knowledge holders are individuals and groups, clans or communities where a set of customary norms and collective systems guide the use of such knowledge as well as the sharing of its benefits, mostly of a non-monetary nature.

The primary weakness of the current IPR regime is that it fails to recognize Indigenous Peoples' collective ownership and regulatory mechanisms that have been developed to allow the evolution and innovation of traditional knowledge, and its continuity through the transfer of such knowledge. Thus, traditional knowledge has its own property rights system that does not fall within existing IPR.

### **Plant Variety Protection**

With regard to plant variety protection (PVP), this is aimed more at protecting the interests of commercial plant breeders rather than those of Indigenous Peoples and farmers. The International Union for the Protection of New Varieties of Plants 1991, with its high standards of protection for plant breeders, is seen as further facilitating the misappropriation of germplasm and traditional varieties bred and nurtured by Indigenous Peoples and farmers.<sup>70</sup>

A related issue is how the Food and Agriculture Organization's (FAO) International Treaty on Plant Genetic Material for Food and Agriculture will be reconciled with a future ABS international regime under CBD. The ITPGM objectives are conservation, sustainable use and equitable benefit sharing from the use of plant genetic resources, in harmony with the CBD, for sustainable agriculture and food security.<sup>71</sup> In particular, if the plant genetic material under question is used for food and agriculture then it seems clear that ITPGM will have precedence. However, if the same plant genetic material is used for non-food and agricultural purposes, such as pharmaceutical or chemical purposes, then arguably the ABS regime will apply.



**Indigenous people have many uses for different plants**  
**By Sayan, SEARCO**

<sup>70</sup> Vicotria Tauli-Corpuz, *Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples*, Intellectual Property Rights Series 5, Third World Network 2003, p. 31

<sup>71</sup> Article 1.1, International Treaty on Plant Genetic Material for Food and Agriculture

## Conclusion

The recognition of Indigenous Peoples' rights to genetic resources and associated traditional knowledge, including the incorporation of related international human rights instruments, remains a primary advocacy within CBD. The CBD and other environment and trade-related treaties continue to deny the link between the rights of Indigenous Peoples and local communities and equitable sharing in the benefits arising from the use of genetic resources and associated traditional knowledge.

While the CBD provides for a Prior Informed Consent process and extends this to indigenous communities, the PIC only refers to accessing of traditional knowledge. Unfortunately most of the States or countries where Indigenous Peoples' lands and territories are located do not recognize the existence of Indigenous Peoples. To date, only a few Parties have suggested that when accessing traditional knowledge, Indigenous Peoples and local communities have a right of prior informed consent. No Party has yet recommended that PIC should be recognized in relation to genetic resources originating from indigenous lands, waters and territories.

Further from a brief overview of national ABS measures or instruments already in use, a major lacuna exists due to the separation of genetic resources and associated traditional knowledge by the States. With this separation, genetic resources are considered as State-owned, while traditional knowledge belongs to or is held by particular Indigenous and local communities. In addition, most ABS measures do not explicitly address the issue of ownership.

The difficulties increase as only one side (States) speaks and decides while indigenous and local communities remain observers with limited voice and no power to decide. Whether it is developed or developing countries that influence decisions in the CBD, Indigenous Peoples and local communities remain marginalized, as they are mere observers in the whole process. Pursuing the advocacy at this level has had slow but progressive gains, but a careful look at the strategy and priorities could help move this further.



Traditional agricultural practices involve the use of a variety of methods.  
By IMPECT

## Recommendations<sup>72</sup>

### 1) Advancing Rights-Based Approach within the CBD

a. The procedural and substantive rights of Indigenous Peoples need to be pursued more actively in the CBD. With the non-mandatory agreement in Decision VII/19 D, to recognize such rights in an international regime, more efforts have to be focused on integrating elements consistent with international human rights law such as the UDHR, ICCPR and ICESPR.

Having been approved by the UN General Assembly and included in the working document (UNEP/CBD/WG-ABS/5/4/Add.1), the Declaration on Rights of Indigenous Peoples should be invoked as it further establishes our claim that States should recognize and implement their commitment to Indigenous Peoples' rights to decide on access and control over natural, including genetic, resources on their lands, waters and territories. UNEP/CBD/WG-ABS/5/4/Add.1 provides an opening for deliberating on Indigenous Peoples' permanent sovereignty over natural resources in their lands and territories located within national jurisdiction.

It is also significant for States to recognize that indigenous knowledge is a sub-category of traditional knowledge<sup>73</sup> to clarify existing gaps in the definitions of these terms.

b. In the above cited efforts, the support of various UN Human Rights bodies and agencies concerned with indigenous issues is essential, in particular the UN Permanent Forum on Indigenous Issues. The PFII could advise the various States or Parties on how best to consider indigenous rights and concerns when dealing with national or regional ABS measures. The following key recommendations of the International Experts Group report, forwarded to CBD as an information document for WGABS, should be supported:

- 1) It is relevant and significant to differentiate related provisions dealing with "genetic resources not associated with traditional knowledge" and "genetic resources associated with traditional knowledge."
- 2) The rights of States over genetic resources and traditional knowledge, found within Indigenous Peoples' lands and territories, are not absolute.

### 2) Full and Effective Participation of Indigenous Peoples in ABS Negotiations

Full and effective participation can be made at various levels – international, regional, national and local -- as well as in multiple forms, such as submissions to relevant notifications, case experiences/studies and other means where results and recommendations can become formal information documents at official CBD meetings.

*a) At the international level*, Indigenous Peoples should plan how to respond to various decisions and notifications for submission as well as the call for names of experts. Participation (e.g. the Bangkok Proposal) at WGABS level should be advocated. As in WG8(j), recognition of IIFB's advisory role has proven to result in more effective participation. Thus, similar practices should be supported in other processes within WGABS to ensure that indigenous and local communities can participate fully and effectively.

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<sup>72</sup> These recommendations are purely from the author intended to start some discussions among Indigenous Peoples in anticipation of upcoming meetings of WGABS, WG8(j) and COP as well as other relevant instruments as deemed appropriate.

<sup>73</sup> As WIPO explains, "indigenous knowledge would be the TK of indigenous peoples. Indigenous knowledge is therefore part of the traditional knowledge category, but traditional knowledge is not necessarily indigenous. That is to say, indigenous knowledge is traditional knowledge, but not all traditional knowledge is indigenous."

Indigenous Peoples should also engage more with regional groupings and negotiating blocs, such as GRULAC, LMMC, JUSCANZ, African Group, Small Island Developing States (SIDS), on the issue of full and effective participation. Strategies can be discussed within IIFB, including defining roles, responsibilities and focus. This effort could support related participation in regional processes.

*b) At the regional and national level*, Indigenous Peoples should monitor regional agreements and national ABS laws. In-depth analysis should be made on the status of ABS based on concrete situations and challenges Indigenous Peoples are confronted with. Regional processes are significant towards harmonizing positions at local and national levels that eventually contribute to the international debate.

In regions where regional agreements have been formulated (e.g. Andean Pact decision 391 on the Common Regime on Access to Genetic Resources; draft Central American Agreement on Access to Genetic Resources and Bio-chemicals and related Traditional Knowledge; African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources), they can conduct studies to look at the status, trends and lessons on ABS that can contribute to further improvement, reforms and amendments.

Where regional agreements are in the process of formulation (e.g. the ASEAN Framework Agreement on Access to Biological and Genetic Resources), lessons can be reviewed and a regional plan drawn up on engaging ongoing processes.

At the national level, Indigenous Peoples can analyze the content and implementation of national ABS measures and laws with regards a) recognition and protection of Indigenous Peoples' rights, b) actual implementation in cases where such rights are provided, and c) measures to take in the absence of rights' recognition.

### **3) Collaboration of WGABS and WG8(j)**

Collaboration mechanisms of these two Working Groups, which in recent meetings were not clarified, are crucial towards influencing and harmonizing ABS provisions. Indigenous representatives should propose a clearer and more productive mechanism to be submitted to the Secretariat and WGABS. One way to handle the collaboration would be to maximize WGABS-5 and -6 agenda 3.4 on **"traditional knowledge and genetic resources"** or to be consistent with CBD language, **"genetic resources and associated traditional knowledge."**

It may be strategic to discuss all the other agenda items such as: a) access, b) fair and equitable sharing of benefits, c) compliance (i) measures to support compliance with prior and informed consent and mutually agreed terms; (ii) internationally recognized certificate of origin/source/legal provenance; (iii) monitoring, enforcement and dispute settlement and; d) capacity-building and; e) Strategic Plan of the Convention: Future evaluation of progress under the agenda item on **"traditional knowledge and genetic resources."** A focused discussion would enable indigenous representatives to influence the decisions substantively.

Moreover there are two issues the Co-Chairs recommend to be considered as horizontal; a) TK and genetic resources and b) capacity-building. With the focus on the first, they may allow WG8(j) to make a substantive review of the outcome of WGABS on TK as it cuts across other agenda items. The review could also relate the outcomes to agenda items 6: International Regime on ABS, 8: Development of elements of *sui generis* systems for protection of TK, innovations and practices, and other relevant agenda items in WG8(j), such as full and effective participation.

Significant provisions in the Akwe Khon Guidelines could be considered with regards FPIC of indigenous and local communities when applied to access and development of genetic resources and associated traditional knowledge.

At WGABS-5, it is significant to remind Parties to request or decide that WG8(j)5 conduct a substantive review of the outcomes of WGABS and draw up proposals to be considered at its 6th meeting.

#### 4) Strategic Plan and 2010 Targets: Future Evaluation of Work Progress

The work of the IIFB Working Group on Indicators is a vital input to this agenda. Indigenous representatives should look at the results and adopt these or recommend other ABS indicators. A task at hand is how to ensure that the results will officially be considered at WGABS-5 and -6. This could be one theme of work for the International Experts' Group or as an outcome of the collaborative mechanism of WG8(j) and WGABS.

Indicators could address the process, such as actual incorporation of rights-based decisions in the ABS cross-cutting theme of the CBD. Outcome-oriented indicators could include among others:

- number of national ABS regimes incorporating recognition and protection of rights of indigenous and local communities over genetic resources and associated traditional knowledge
- number of countries (user and provider) that recognize inclusion of origin of genetic resource and associated traditional knowledge, including its derivatives, in any international certificate of origin/source/legal provenance to be developed
- number of countries (user and provider) that require disclosure of origin in patent applications
- number of countries that recognize free prior informed consent of indigenous and local communities as an essential element in ABS
- number, percentage and level of engagement in decision making, of indigenous participants, in drafting national ABS legislation

#### 5) Other Relevant Issues

*"Sui generis"* systems pertinent to protection of traditional knowledge are directly linked to ABS discussions on genetic resources and associated TK. Thus, discussions on *"sui generis"* protection mechanisms should include these topics.

Unique to indigenous peoples are their *customary laws*, **having** a set of norms that serve as rules and regulations for the sustainable use and conservation of natural and biological resources. These norms are a significant element of *sui generis* systems in indigenous societies, that could guide access and PIC requirements for use of genetic resources and associated traditional knowledge originating from their lands and territories. *Customary sustainable use*, being a related provision of Article 8(j), forms part of such a *sui generis* system.

It may be possible to include these relevant issues under the agenda item "genetic resources and traditional knowledge" of WGABS-5 and -6. It can reflect a concrete expression of the collaboration of both Working Groups on ABS and on Article 8(j).

A pending issue is *restitution and/or sharing of benefits from patented genetic resources and associated traditional knowledge*, previously pirated from Indigenous Peoples' lands. A difficulty arises when biological material and associated knowledge have already been

accessed without the consent of concerned knowledge holders. Thus, it would be timely to raise this particular concern under the agenda on dispute settlement.

A second pending issue is related to *sharing of benefits from genetic resources and associated traditional knowledge of a transboundary nature*. The recognition of rights of Indigenous Peoples possessing genetic resources and associated traditional knowledge of a transboundary nature is vital, underscoring the importance of regional agreements to bind national governments. Focused workshops among affected indigenous groups can provide guidance and recommendations on these long standing issues. These can be organized by the CBD Secretariat or concerned international institutions.

## **6) Coordinated Campaign and Advocacy on ABS Issues**

The IIFB can consider a coordinated campaign on ABS models and experiences arising from the use, including patenting, of genetic resources and associated TK in various parts of the world. Current initiatives by Indigenous Peoples are dispersed and localized but are potential tools for advocacy. The campaign can be linked and supported by partnership with civil society, relevant UN agencies and even sympathetic governments and CBD Secretariat. Various arrangements can be explored.

Many cases have also been written and published that should be considered and incorporated in relevant national, regional and international instruments.



**One among many plants used by indigenous peoples for various purposes.  
By Sayan, SEARCO**

## Annex

### EXCERPTS FROM INTERNATIONAL INDIGENOUS FORUM ON BIODIVERSITY (IIFB) OPENING STATEMENT

Ad-Hoc Open-Ended Working Group on Access and Benefit-Sharing, Third Meeting, Bangkok, Thailand 14-18 February 2005

Chairperson, Indigenous peoples remain deeply concerned about the proposed international regime on access and benefit sharing. Indigenous peoples are rights holders with inherent, proprietary, and inalienable rights to their Indigenous knowledge and biological resources. Genetic resources and traditional knowledge are inextricably linked. We have consistently stated that we are not participating in these discussions to facilitate access to our traditional knowledge nor the genetic resources in our territories. Rather, we participate to ensure our rights are recognized and respected by the Parties in the development of the proposed regime. Further, the proposed international regime must be consistent with international human rights laws and standards.

The CBD and its member states, under Article 103 of the UN Charter, read in conjunction with Article 1(3), are obliged to respect human rights. We note that COPVII decided to have this Working Group take into account their international human rights obligations in the elaboration of the proposed international regime on access to genetic resources and benefit sharing, in particular the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights.

We recognize the challenges confronting the Secretariat in addressing human rights laws however, we are extremely concerned about the misinterpretation of these laws as contained in Document ABS/3/2, para. 49-58. We consider the analysis is inadequate as there is a direct and fundamental human rights dimension to access and benefit sharing.

In particular, we note the right of self-determination and the corresponding right of permanent sovereignty over natural resources is the fundamental premise upon which Indigenous peoples have asserted their proprietary, inherent, and inalienable rights over their traditional knowledge and natural resources, including genetic resources.

We would like to reiterate the IIFB intervention, made at COPVII, that states must affirm and implement their obligations under relevant international human rights law. State sovereignty does not amount to absolute political or legal freedom. Sovereignty of states is limited by the Charter of the United Nations and by other principles of international law, such as human rights treaties. States must recognize that trade agreements, such as the TRIPs agreement and WIPO treaties, must be interpreted and applied consistently with human rights obligations.

We encourage the Parties to affirm that their existing human rights obligations are clearly reflected in the nature, scope, and elements of any proposed international regime. We further encourage that the Executive Secretary seek the expert advice, within the UN human rights system, to more thoroughly evaluate the linkages between human rights law and ABS. The CBD should remain mindful of and act consistently with existing and evolving human rights standards, regarding Indigenous peoples.

Finally, we note, previous COP decisions that recognize the unique role of Indigenous women as traditional knowledge holders and we call for their full and effective participation in the decision-making processes on ABS.

In conclusion, if sovereignty over our natural resources is to mean anything at all, it must mean that Indigenous peoples are the only competent authorities to control access to and use of the genetic resources and associated Indigenous knowledge within our territories.#