

Access and Benefit Sharing

(Agenda item III.3)

Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD COP10), 18-29 October, 2010, Nagoya, Japan

Summary of Recommendations

Draft ABS Protocol

IUCN encourages COP10 to urge Parties to:

- ✓ Agree on clear language that refers to the inter linkages between ABS and the other two objectives of the Convention and reflect them in Article 7 – “Contribution to Conservation and Sustainable Use”- of the current draft ABS Protocol text;
- ✓ Recognize, within the draft ABS Protocol text, the importance of ABS for sustainable socio-economic development;
- ✓ Agree on the inclusion of clear references to traditional knowledge (TK) associated with genetic resources throughout the final ABS Protocol text, including in those articles specifically addressing access (e.g. Articles 5 and 5 bis of the draft ABS Protocol), Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) related to indigenous and local communities, their customary laws and procedures; and
- ✓ Make appropriate reference to the UN Declaration on the Rights of Indigenous Peoples of September 2007 within the final ABS Protocol text.

Elements for further consideration in implementing the ABS Protocol

IUCN calls on COP10 to strongly encourage Parties to:

- ✓ Agree on a comprehensive list of access criteria to be implemented by all Parties to the ABS Protocol;
- ✓ Further develop model contractual clauses, sectoral or non-sectoral, to support the negotiation of MAT and thus also support fair and equitable benefit-sharing;
- ✓ Concur on a limited number of nationally determined check points within the compliance measures included in the final ABS Protocol, such as the obligation to disclose the origin/source of the genetic resources in patent applications, or to present a certificate of compliance (if existing) in research funding processes;
- ✓ Further consider the modalities of the establishment of an international ABS Ombudsperson to support the monitoring and enforcement of compliance with domestic ABS regimes as well as benefit-sharing agreements.

General Recommendations

In addition, IUCN calls on COP10 to urge Parties to:

- ✓ Adopt a holistic approach to the way different processes within the Convention are addressed, and more specifically, clearly bring into the ABS negotiations relevant discussions under the Strategic Plan for 2011-2020, and vice versa;
- ✓ Show leadership and flexibility during the ABS negotiations at COP10, given the imperative to adopt an ABS Protocol; and
- ✓ Search for creative solutions (e.g. the creation of specific common pools of genetic resources and/or related financial mechanisms) that will help to solve the open issues, build necessary compromises and lead to the adoption of a strong, efficient and effective ABS Protocol.

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Introduction

IUCN welcomes the progress made through the work of the Ad Hoc Open-ended Working Group on ABS (WGABS) since the Convention's fifth Conference of the Parties (COP5, Decision V/26) and commends the two Co-Chairs, Parties to the Convention and other (governmental and non-governmental) organizations and stakeholders for their tireless efforts to advance in the elaboration and negotiation of an international regime on ABS.

Now that the negotiation process is reaching its last stage, IUCN wishes to urge Parties, regional groups and blocks, and stakeholder groups, to demonstrate leadership and make every effort to agree on a strong, efficient and effective ABS Protocol under the Convention on Biological Diversity.

There are still a number of critical issues which need to be resolved, including definition of terms such as utilization of genetic resources instead of direct references to derivatives; temporal and geographical scope of the protocol; relationship with other international instruments and processes, facilitated access in cases of non-commercial research as well as emergency situations; regulation of misappropriation and agreement on compliance instruments, as well as traditional knowledge associated with genetic resources.

ABS, conservation and sustainable use

Access and benefit-sharing is intrinsically linked to the other two pillars of the Convention – conservation and sustainable use of biological diversity. This link has been part of the Convention's design of the third objective from the beginning: Through contractual benefit-sharing arrangements, ABS aims to facilitate the direct flow of (additional) monetary and non-monetary benefits from users of genetic resources and/or traditional knowledge (TK) associated with genetic resources, particularly commercial researchers, to those countries hosting or providing the genetic resources and/or the women and men in indigenous and local communities holding the traditional knowledge. Such benefit-sharing shall enable them to continue conserving, and equitably and sustainably using biological diversity. More broadly, ABS aims to work as

an incentive for conserving biodiversity – recognizing those who maintain their rich biological diversity and increasing awareness about biodiversity as a valuable asset. Moreover, ABS should allow for TK associated with genetic resources to be widely recognized and valued as an important contribution to technological development.

This link must be clearly expressed in the final ABS Protocol, including in its objective. To this end, the final ABS Protocol should provide for concrete measures to ensure that ABS works for the benefit of conservation and sustainable use of biodiversity. Existing experiences at regional, national and local levels should be taken into consideration for the design of measures in this regard.

Furthermore, the final ABS Protocol should include a strong call upon Parties to encourage countries of origin/providers and users of genetic resources and/or associated traditional knowledge to direct financial benefits arising from the utilization of genetic resources/associated traditional knowledge towards the conservation and sustainable use of biological diversity in support of the CBD objectives.

In the current draft ABS Protocol, Article 7 - "Contribution to Conservation and Sustainable Use"- is very weak.

IUCN thus strongly encourages COP10 to urge Parties to:

- ✓ Agree on clear language that refers to the inter linkages between ABS and the other two objectives of the Convention and reflect them in the above-mentioned Article; and
- ✓ Recognize the importance of ABS for sustainable socio-economic development.

ABC of ABS- Access, Benefit-Sharing and Compliance

Given the context of the current negotiations, IUCN recommends that Parties strive to agree on the basic building blocks of the ABS Protocol; in that respect, the instrument needs to address the key concerns of countries of origin/provider countries on the one hand, and user countries on the other hand, always

keeping in mind that every country has the potential to be both.

On the one hand, users need clear, transparent, predictable, equitable and efficient legal and administrative frameworks to secure legal certainty when accessing genetic resources (Article 15.2 CBD). Without legal certainty, there will be less access and as a consequence also less benefit-sharing in the end. Furthermore, lack of legal clarity will lead to cases of unintentional misappropriation.

IUCN thus calls on COP10 to strongly encourage Parties to:

- ✓ Agree on a comprehensive list of access criteria to be implemented by all Parties to the ABS Protocol.

On the other hand, countries of origin/providers have an interest in fair and equitable benefit-sharing as well as compliance. Fair and equitable benefit-sharing is based on Mutually Agreed Terms (MAT), which is in practice a contract between the country of origin/provider and the user that states the conditions of the access. Keeping in mind the diversity of ABS agreements and the potential complexity of ABS agreements, it is important to allow flexibility in the negotiation of MAT. In line with the concept of freedom of contract, the regime should thus not prescribe the specific content of ABS contracts. However, the regime could encourage the inclusion of some key issues in ABS contracts (such as change of intent/use, development of derivatives and products, etc.).

IUCN recommends that COP10 calls on Parties to:

- ✓ Further develop model contractual clauses, sectoral or non-sectoral, to support the negotiation of MAT and thus also support fair and equitable benefit-sharing, currently included under Article 15 – “Model Contractual Clauses” – of the draft ABS Protocol.

Different compliance measures should also be included in the final ABS Protocol. A non-bureaucratic solution for a certificate of compliance would be helpful, as well as a limited number of nationally determined check points. In addition, preventive as well as punitive measures to

discourage and sanction cases of misappropriation are needed. Cooperation among Parties in cases of violation of domestic access and benefit sharing legislation or regulatory requirements is sought.

In particular, IUCN calls on COP10 to urge Parties to:

- ✓ Concur on a limited number of nationally determined check points within the compliance measures included in the final ABS Protocol, such as the obligation to disclose the origin/source of the genetic resources in patent applications, or to present a certificate of compliance (if existing) in research funding processes; and also,
- ✓ Further consider the modalities of the establishment of an international ABS Ombudsperson to support the monitoring and enforcement of compliance with domestic ABS regimes as well as benefit-sharing agreements.

Such an Ombudsperson could be hosted by an organization which is internationally recognized for its neutrality and has the potential to provide technical and legal support to indigenous and local communities and other stakeholders as appropriate.

Traditional Knowledge

Although efforts have been made by the Secretariat and Parties to create positive synergies between ABS and traditional knowledge discussions, particularly in the context of both the *Ad Hoc Open Ended Working Group on ABS* and the *Ad Hoc Open Ended Working Group on Article 8(j)*, there are still considerable uncertainties in the manner in which the discussions that have been undertaken by these groups can further and more effectively interact and build upon each other.

IUCN has been strongly supportive of efforts to strengthen and consolidate the rights of women and men of indigenous and local communities over their traditional knowledge, in line with several human rights treaties and declarations, and has also been supportive of streamlining their specific interests into ABS discussions, as

well as into related fora such as the World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC), the UN Food and Agriculture Organization (FAO) and the World Trade Organization (WTO).

IUCN also believes that preservation and maintenance of TK, as a key element of safeguarding indigenous and local cultures, is critically important in the context of developing policy and legal mechanisms to protect indigenous and local communities' intellectual property rights. Also, protecting TK is vital for the conservation of biodiversity given the close relationship between cultural and biological diversity.

In that respect, it is essential that Parties make sure that reference to TK associated with genetic resources is clearly included in the final ABS Protocol.

IUCN thus calls on COP10 to strongly advise Parties to:

- ✓ Agree on the inclusion of clear references to TK associated with genetic resources throughout the final ABS Protocol text, including in those articles specifically addressing access (e.g. Articles 5 and 5 bis of the draft ABS Protocol), Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) related to indigenous and local communities, their customary laws and procedures; and
- ✓ Make appropriate reference to the UN Declaration on the Rights of Indigenous Peoples of September 2007 within the final ABS Protocol text.

The post-2010 Strategic Plan

The proposed text of the Strategic Plan of the Convention for the period beyond 2010 and which has been the subject of numerous meetings and discussions for more than a year does not sufficiently address ABS within its 2050 vision, 2020 mission and targets.

In that respect, it is important that the discussions here in Nagoya bring forward the intimate relation between the ABS process and the process of revision of the Strategic Plan of the Convention for the

post-2010 period. The adoption of the ABS Protocol should be clearly linked to the 2020 mission and targets as well as to the 2050 vision of the Strategic Plan and thus contribute to the achievement of the Strategic Plan and ultimately to the implementation of the Convention.

IUCN thus calls on COP10 to urge Parties to:

- ✓ Adopt a holistic approach to the way different processes within the Convention are addressed, and more specifically, clearly bring into the ABS negotiations relevant discussions under the Strategic Plan for 2011-2020, and vice versa.

In the current draft Strategic Plan for the Post-2010 period, target 16 on access and benefit sharing reads: *"By 2020, access to genetic resources is [promoted] [facilitated] [enhanced], and benefits are shared consistent with national legislation [and the international [regime][protocol] on access and benefit sharing, and the regime is in force and operational [and an access and benefit sharing fund providing timely, adequate and predictable funds to developing countries, in particular the least developed among them, small island developing States and countries with economies in transition as a precondition for the fulfillment of their commitments under the protocol]]. {Footnote: final formulation of this target is pending final agreement on the international regime at COP-10, noting that there is consensus that the Strategic Plan will include a target on access and benefit sharing}."*

IUCN supports a simpler and clearer formulation of this target, as follows: *"By 2020, at the latest, the international regime on Access and Benefit Sharing (ABS) is in force and operational, sustainable access to genetic resources and traditional knowledge associated with genetic resources is enhanced, and equitable benefits are shared consistent with the international regime on ABS."*

An "ABS Package Approach"

In sum, the basic building blocks of the final ABS regime need to respond to the key concerns of countries of origin/provider and user countries. First, countries of origin/providers have an

interest in fair and equitable benefit-sharing as well as general compliance with their national ABS regimes, when existent. Compliance with domestic ABS regimes could be supported through modern tracking and monitoring systems, as well as mandatory actions of user countries, including flexible checkpoints, to prevent the acquisition and utilization of genetic resources and/or traditional knowledge associated with genetic resources in violation of domestic ABS legislation of the country of origin/provider and/or the approval and involvement of the holders of such traditional knowledge.

Second, users need clear, predictable, transparent, equitable and efficient ABS legislation and administrative frameworks which enable access to genetic resources and/or traditional knowledge associated with genetic resources and provide for legal certainty and clarity in order to further improve future compliance with national ABS regimes. The protocol will thus benefit greatly from the development of a list of clear access criteria that will need to be implemented by all Parties and that can be further developed by the Conference of the Parties serving as the Meeting of the Parties to the ABS Protocol.

IUCN wishes to remind Parties that the final ABS Protocol needs to align with international and national human rights commitments, including on gender equality and equity *vis a vis* the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). IUCN is supportive of the efforts and interventions made by the "Like-Minded in Spirit Group of Women" in regards to mainstreaming of gender considerations within the final ABS Protocol text.

The future ratification and practical implementation of the ABS Protocol will depend on its successful harmonization with specialized agreements (such as the International Treaty on Plant Genetic Resources for Food and Agriculture, or the International Convention for the Protection of New Varieties of Plants (UPOV Convention), as well as with other ongoing ABS related processes (such as developments under the United Nations Law of the Sea Convention, the World Health Organization, or the World Intellectual Property Organization and its Intergovernmental Committee on

Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore). Indeed, such harmonization must close potential gaps in the CBD's ABS regime rather than create loopholes.

In order to ensure that this goal is met, it will be crucial to include a review clause in the final ABS Protocol which mandates the Parties to the protocol to assess and, if necessary, amend its provisions to close any potential gaps resulting from different ABS processes.

Finally, IUCN calls on COP10 to urge Parties to:

- ✓ Show leadership and flexibility during the ABS negotiations at COP10; and
- ✓ Search for creative solutions (e.g. the creation of specific common pools of genetic resources and/or related financial mechanisms) that will help to solve the open issues, build necessary compromises and lead to the adoption of a strong, efficient and effective ABS Protocol.