

**The Convention on Biological Diversity and the
Nagoya Protocol: Sources of Innovation in ABS for
Marine Genetic Resources in ABNJ**

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Genetic Resources**

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**United Nations General Assembly Ad Hoc Open-ended Informal
Working Group to study issues relating to the conservation of
and sustainable use of marine biological diversity beyond areas
of national jurisdiction**

Art Glowka (1931-2013)



For over 50 years, a
passionate, outspoken
citizen scientist and
environmental advocate
for the biological
integrity of the Hudson
River and Western Long
Island Sound

Overview

- **Concept of access and benefit sharing (ABS)**
- **Highlight:** CBD/Nagoya Protocol Innovation vis the workshop topics
- **Major Message:** CBD/Nagoya Protocol are useful sources of principles and experiences

CBD: Basic Framework for Action

- **Near universal membership:** 193 parties (192 States and the European Union) (multi-stakeholder forum) (UNCLOS: 165)
- **Comprehensive “biodiversity” focus**
- **Applicable to terrestrial and marine areas**
- **National level:** Broad commitments for action by Governments
 - ✓ Within and beyond the limits of national jurisdiction
- **Three objectives:**
 - ✓ Conservation
 - ✓ Sustainable use
 - ✓ Benefit-sharing from use of genetic resources (access and benefit-sharing)

Origins of ABS

Pre-CBD: Access by anyone for any purpose with no obligation to share benefits with provider(s)

Equity: Primary principle driving CBD ABS negotiations

- Aim: Redirect benefit flows back to provider(s)

Conservation incentives: Provide a value to biodiversity to help conservation

- Aim: Direct benefits back to provider(s) for biodiversity conservation

[High expectations for big financial windfalls from biotech ("Green Gold")]

CBD Innovation: "New" Equity Relationship

Access to genetic resources



Fair and equitable share of the benefits
derived from their use

CBD Provisions

Fundamental access-related principles (Art 15):

- Sovereign rights over natural resources (art 15(1))
- Prior informed consent (PIC) (art 15(5))
- Mutually agreed terms (MATs) (including the sharing of benefits arising from the commercial and other utilization of genetic resources) (art 15(4) and (7))

CBD Provisions

Six fundamental benefit-sharing obligations:

- Research and development results (article 15(7))
- Commercial or other benefits derived from use (article 15(7))
- Access / transfer of technology using genetic resources (article 16(3))
- Participation in biotechnological research on genetic resources (article 19(1))
- Priority access to results / benefits arising from biotechnological use (article 19(2))
- Traditional knowledge associated with genetic resources (article 8(j))

Nagoya Protocol: At Glance

WSSD (2002): “International regime”

CBD (2004): WG-ABS mandated to negotiate

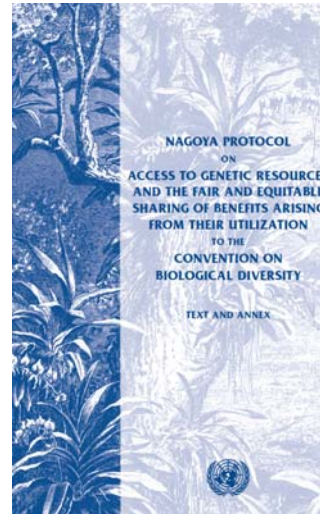
- Highly participatory process

Adopted: 29 October 2010

- 92 signatories
- 16 ratifications (no developed countries)
- Entry into force: 50 ratifications

Operationalizes: CBD third objective and article 15

Objective: Ensure benefits arising from utilization of genetic resources are shared fairly and equitably



CBD and Nagoya Protocol Innovations vis the Workshop Topics

Meaning and Scope

•Substantive scope:

- ✓ Objective: Fair and equitable benefit sharing arising from “utilization of genetic resources”(CBD art 1/NP art 1)
- ✓ “Genetic resources”: Genetic material (CBD art 2) + biochemical compounds (derivatives) (NP art 2(e))

•Geographic scope: Marine areas within national jurisdiction (CBD art 4(a)/NP art 3))

•Temporal scope: Non-retroactive (CBD/NP)

Extent and types of research, uses and applications

•“Utilization of genetic resources”: Research and development on genetic/biochemical composition of genetic resources (NP art 2(c))

•“Subsequent applications and commercialization” (NP art 5(1))

•CBD Group of Legal and Technical Experts on Concepts, Terms, Working Definitions and Sectoral Approaches (2008)

Technological, environmental, social and economic impacts

- Processes and activities under Parties’ jurisdiction or control in ABNJ (CBD art 4(b))
 - ✓ Identified (CBD art 7(c)) and regulated or managed (CBD art 8(l)) (**NB:** Largely overlooked)
- EIA obligations (CBD art 14(1) and marine/coastal EIA guidelines decision XI/18)

CBD and Nagoya Protocol Innovations vis the Workshop Topics

Access-related issues

- Sovereign control (typified by case-by-case regulatory approach)
- Access measures: Legal certainty, clarity and transparency (NP art 5(3))
- Facilitate access to genetic resources for "environmentally sound" uses (CBD art 15(2))
- Create conditions to promote research contributing to biodiversity conservation (+/- simplified access measures) (NP art 8(a))

Types of benefit-sharing

- Bilateral emphasis **[NB: but See references to CBD financial mechanism (CBD arts 15(7) and 16(2)) (overlooked/untested) and NP art 10 (GMBM)]**
- Trigger: Utilization (but can extend to subsequent applications and commercialization) (NP art 5(1))
- Monetary and non-monetary benefits (short, medium and long-term) (NP art 5(3) and Annex)
- Encourage benefits to support biodiversity conservation (NP art 9)

CBD and Nagoya Protocol Innovations vis the Workshop Topics

IPR issues

- IPR issues interrelated with technology transfer (CBD negotiations: extremely contentious)
- General obligation to provide, or facilitate access to and transfer of, technology, including biotechnology (CBD art 16(1)/NP art 23)
- Terms of transfer (CBD art 16(2)):
 - ✓ Fair and most favourable terms (including concessional or preferential terms where mutually agreed)
 - ✓ +/- CBD financial mechanism
 - ✓ Terms consistent with "adequate and effective" protection of IPRs (when transfer is to developing countries)
- Each Party to create a framework permitting tech transfer on mutually agreed terms to countries providing genetic resources (including technology protected by patents/IPRs) (CBD art 16(3))
- Each Party to take measures to encourage their private sector to facilitate access, transfer and joint development of technology to both the governmental and private sectors of developing countries (CBD art 16(4))
- Parties recognise IPRs could influence Convention implementation and agree to cooperate to ensure IPRs are supportive of and do not run counter to Convention's objectives (CBD art 16(5))

Other CBD and Nagoya Protocol Innovations

ABS compliance-related measures

•Monitoring use (NP art 17):

- ✓ Designate "check points" to collect information at any stage of value chain (research, development, innovation, pre-commercialization or commercialization)
- ✓ Internationally recognized certificate of compliance

Model contractual clauses and codes of conduct (NP art 19 & 20)

Financial resources and financial mechanism (GEF) (CBD art 20/21 & NP art 25)

Capacity-building: Self-assessments by countries could include marine genetic resources (NP art 22)

Transboundary cooperation: "Shared" [marine] genetic resources (NP art 11)

ABS Clearing-House (NP art 14)

Cooperative procedures and mechanisms to promote compliance with Protocol obligations (NP art 30)

Thank you for your attention!

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