



Dealing with Traditional Knowledge under the ABS Protocol

By Daniel Robinson and Brendan Tobin

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Access to and use of genetic resources is often facilitated through traditional knowledge held by indigenous and local communities. The inclusion of measures to secure protection of traditional knowledge is thus of critical importance for any meaningful international ABS regime. Mention is made of traditional knowledge at various places in the draft protocol, though not in Article 1 on Objectives.

The lack of reference to traditional knowledge in the draft Protocol's Objective is a glaring omission given the mandate of COP 7 Dec VII/19D, calling for the effective implementation of Article 8(j). However, the most recent draft Protocol does include several key Articles relating to traditional knowledge in the form of either bracketed or unbracketed text. The relevant articles are Article 3 (in part), Article 5 and Article 9.

According to Article 3 (Scope) of the draft Protocol text: "This Protocol shall apply to genetic resources [and associated traditional knowledge] within the scope of [Article 15 of] the Convention on Biological Diversity and to the benefits arising from the [utilisation] of such resources [that were acquired after the entry into force of this Protocol for a Party with Parties providing such resources] [or its derivatives]." This provision is likely to be limited to traditional knowledge associated with genetic resources acquired after entry into force of the Protocol, but may apply to benefits arising from the continued use of traditional knowledge acquired before the Protocol or to new uses of such knowledge, as associated with genetic resources - this has been subject to intense debate.

There are several important considerations here regarding the scope of traditional knowledge in the Protocol. Much traditional knowledge may be considered to be in the 'public domain', it may be seen as documented national heritage (e.g., Ayurvedic TK in India), or may already be used by researchers and/or companies. On the one hand, many indigenous and local communities (ILCs) and developing countries are keen to see that 'continued' and 'new' uses of already acquired traditional knowledge are subject to obligations for prior informed consent and fair and equitable benefits. On the other hand, many of the most industrialised countries only want the Protocol to apply to genetic resources (and associated traditional knowledge) acquired after the entry into force of the Protocol. The prospect of applying benefit-sharing obligations to TK collected prior to the entry into force of the protocol is likely to prove not only controversial but very complex, if not impossible in some cases.

Questions remain over what it means to say that traditional knowledge is 'associated' with genetic resources. When quizzed about bioprospecting cases, many in industry have argued that ILCs would actually very rarely have had 'traditional' knowledge of 'genetic' resources, but rather would have traditional knowledge of the use of plants, animals and their products or parts (and derivatives/biochemical extracts) more broadly. The CBD's use of

'genetic' resources in the context of ABS is quite limiting. Some national ABS systems have expanded the scope of their laws to also require fair and equitable benefit sharing for 'biological' resources more broadly (e.g., the South African bioprospecting regulations and the Australian state and federal biodiscovery laws), for the derivatives of these, and for associated traditional knowledge.¹ Therefore, it is very important for traditional knowledge holders that the ABS Protocol includes all use of TK related to utilisation of 'biological resources', 'genetic resources' and their 'derivatives' (which currently are in brackets in the draft, in Article 2 'Use of Terms') to avoid any ambiguity. It is noteworthy that negotiators at the It is noteworthy that negotiators at the Interregional Negotiating Group (ING), established by the WGABS to negotiate the text of the draft Protocol have now opted to define 'utilization of genetic resources' rather than 'genetic resources' themselves for the purpose of identifying obligations on PIC and benefit sharing. Negotiators in the CBD ABS Working Group may find that defining utilisation of TK associated with genetic resources may prove more useful than attempting to define what 'associated with genetic resources' means of itself. The scope of the word 'traditional' is also problematic, and the users and competent national authorities are likely to grapple with this when the Protocol enters into force.

Some commentators have criticised that fact that the provisions for access and prior informed consent (PIC) would be subject to national legislation in the draft Protocol (e.g. in the bracketed text in Article 5).² This is one of the key points raised by the Indigenous Peoples Forum on Biodiversity. Many developing country governments will take years to develop adequate national ABS regimes, and thus the Protocol should specify that access should be subject to PIC from competent national authorities and traditional knowledge holders, irrespective of the presence of national legislation. The repeated mention in the draft of 'subject to national legislation' threatens to undermine the effective implementation of the Protocol, rendering TK as something that only really is recognised at the discretion of governments. This is highly problematic from the perspective of many indigenous groups.

Article 5 *bis* of the ABS draft Protocol details access to traditional knowledge associated with genetic resources. Paragraph 1 requires Parties to take legislative, administrative or policy measures to ensure that traditional knowledge associated with genetic resources

¹ According to the CBD, "'Genetic material' means any material of plant, animal, microbial or other origin containing functional units of heredity" and "'Genetic resources' means genetic material of actual or potential value." These functional units of heredity (DNA) can be found in many different types of cells within organisms. Genetic resources might include seeds, cuttings, cell cultures and other types of genetic material. A broader interpretation of 'genetic resources' to include biological resources (even if they do not contain functional units of heredity) is preferable when considering the rights of traditional knowledge-holders over various plant-based or biological products. Whether or not a broad interpretation is taken will be spelled out in Article 2 of the Protocol, which is still partially bracketed.

² See Swiderska, K. Sept. 2010. 'Equitable Benefit-Sharing or Self-Interest' IIED, London.

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(or its derivatives) 'held' by ILCs is accessed with their PIC. One conceivable issue here relates to how stakeholders and users will identify who 'holds' traditional knowledge. This will be especially difficult where traditional knowledge is held orally (i.e. where there is no publicly written record), and will likely be a common problem around the world. Thus, strong non-compliance measures (discussed below) would be particularly important so that ILCs can report the misappropriation of privately or secretly held traditional knowledge to authorities for appropriate action. From the perspective of ILCs it would be preferable to also have text in Article 5 *bis* relating to the respect of customary laws and protocols. Such reference is made in Article 9, discussed below.

Paragraph 2 of Article 5 *bis* requires appropriate and effective measures to ensure access has been sought in accordance with paragraph 1. This implies monitoring of access and benefit-sharing arrangements as detailed in Article 13, and should allow for recourse where indigenous groups feel that negotiations have not been on mutually agreed terms (MAT, see Art. 14). Substantial commitments from national authorities and other relevant parties towards observance and compliance of users with certificates of compliance (a disclosure requirement) will be required. Paragraphs 3 and 4 of Article 5 *bis* deal with non-compliance of paragraph 1, and the relatively weak phrasing seems to be the only text vaguely dealing with misappropriations of traditional knowledge. This section needs to be strengthened considerably, including by adding a definition of misappropriation and procedures for remedying it. In addition, reference could be made to Article 31 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which asserts that indigenous communities own and control their knowledge.

Article 9 of the current negotiating text contains important details relating to the treatment of traditional knowledge in the Protocol. Paragraph 1 contains bracketed text on consideration of community level procedures, indigenous and local community laws, customary laws, community protocols and procedures. The wording 'take into consideration' is extremely weak and falls short of the provisions of UNDRIP which require due respect, due recognition, and due consideration of customary law in recognition and adjudication of resource and land rights and dispute resolution relating to indigenous peoples rights.³ It is vitally important that ILC's customary laws, decision making procedures and protocols are followed by users of genetic resources, derivatives and associated traditional knowledge. Revision of Article 9 paragraph 1 of the draft Protocol text to ensure that prior informed consent processes requires observance of and due respect and recognition for community level procedures, customary laws, and community protocols is considered vital to secure protection of indigenous peoples and local communities human rights and their cultural integrity.⁴ There are concerns from some developing and developed countries about the definition of customary laws, community protocols and procedures. This makes the following paragraph of the draft Protocol (article 9, paragraph

3 See Tobin, B. (2010) "'The Law Giveth and the Law Taketh Away': The Case for Recognition of Customary Law in International ABS and Traditional Knowledge Governance." Policy Matters 17, pp16-25. IUCN.
4 Ibid.

3) even more important.

Article 9, paragraph 3 of the current negotiating text also makes important provisions for Parties to provide support towards the development, by indigenous and local communities, of community protocols in relation to access to traditional knowledge associated with genetic resources (or derivatives) and benefit sharing, minimum requirements for mutually agreed terms, and model contractual clauses for benefit sharing. By supporting the development of community protocols, ILCs will be empowered to control access procedures on their own terms and on the basis of their values and customs, but the strength of this ILC control will be in line with whatever text is agreed upon in Paragraph 1.

Paragraph 4 of Article 9 contains an important provision for the prevention of restrictions on customary use and exchange of genetic resources, derivatives and associated traditional knowledge. This provision seems relevant in circumstances where - such as in the case of the Indian Plant Variety Protection and Farmer's Rights Act - local communities can register for protection of domestically bred plant varieties (potentially to the exclusion of other local breeders). Some have suggested that this has or will cause an 'anticommons tragedy'.⁵ It may also be important to ensure that traditional medicines can still freely be used and exchanged, and that there are limitations on exclusive or monopolistic control.

Lastly, Paragraph 5 of Article 9 is still heavily bracketed. This is a contentious provision related to publicly available or already obtained traditional knowledge associated with genetic resources. In fact, contention over publicly available 'traditional' knowledge of ILCs has been a very common occurrence in many cases claimed as 'biopiracy.' This paragraph encourages 'reasonable measures' towards fair and equitable benefit-sharing arrangements with the [rightful] holders of this knowledge. Industry is likely to have some objections to the requirement that they enter into benefit-sharing arrangements retrospectively or for use of publicly available information. The weaker terms used (i.e. 'reasonable measures') may make this paragraph more palatable to industry. However, to be effective, this paragraph and/or Articles 13, 13 *bis* and 14 must require declaration of the use of TK and demonstration of measures taken to enter into fair and equitable benefit-sharing agreements (this is something that should ultimately link to patent disclosure requirements). Depending upon the terms chosen, it is important that users are required to establish benefit sharing arrangements where publicly available traditional knowledge is used. If this is not a requirement, then one could reasonably assume that users will continue to claim that they are simply using 'public domain' knowledge and that they have no obligation to share benefits with ILCs - irrespective of whether these communities willingly made their knowledge publicly available or if it was misappropriated (documented and acquired without PIC).

5 See Ramanna, A. and Smale, M. (2004) "Rights and Access to Plant Genetic Resources Under India's New Law" in Development Policy Review, 22 (4): 423-442.