

Convention on Biological Diversity (CBD), National Legislation and ABS

Pratap K Shrestha
Regional Representative & Scientific Advisor

**Discussion Program on Access and Benefit
Sharing in Relation to Crop Genetic Resources**

5 August, 2013

Hotel Shangri-La, Kathmandu, Nepal



Convention of Biological Diversity (CBD), 1993

- Opened for signature at the Earth Summit in Rio de Janeiro, Brazil, on 5 June 1992 and entered into force on 29 December 1993
- Objective: Conservation, sustainable use, and fair and equitable benefit sharing from the use of GRs
- Scope: All biological and genetic resources
- Member countries: 193 as of today
- Focal Ministry: Ministry of Forest and Soil Conservation (MFSC)



Nagoya Protocol on Access and Benefit Sharing, 2010

- Adopted on 29 October 2010 at the 10th meeting of COP in Nagoya, Japan
- It is a supplementary agreement to the CBD; requires separate process of accession
- Provides a transparent legal framework for the implementation of third objective of CBD
- Core obligations of Nagoya Protocol:
 - Access obligation
 - Benefit sharing obligation
 - Compliance obligation
 - Tools/ mechanisms to assist implementation



Nepal in CBD and AGRBS Draft Bill

- Nepal signed the CBD on 12 June 1993, ratified on 15 September 1993, and became party on 21 February 1994
- As a party to CBD, Nepal has obligation to formulate and enforce national law to regulate access and benefit sharing
- MFSC, Focal Ministry of Nepal prepared first draft of AGRBS in 2002
- Draft of AGRBS went through a series of review and refinement but yet to be enacted



Nepal Biodiversity Strategy (NBS) 2002

- NBS produced in 2002 as a means to fulfill its obligations as a signatory to CBD
- Implementation mechanism for NBS:
 - National Biodiversity Coordination Committee
 - Thematic Sub-committees – 5
 - National Biodiversity Trust Fund (NBTF)
 - National Biodiversity Unit – Executive role
 - Biodiversity Coordinator
- No stand alone national policy on biodiversity conservation and sustainable use



AGRBS Draft Bill 2002

- **Background:**
 - AGRBS to serve as a national legislation for the implementation of CBD in Nepal
 - AGRBS Bill drafted in 2002 with limited consultation with concerned stakeholders – top down and lack of transparency
 - Strong resistance from CSOs representing indigenous people and communities
 - Final draft pending for approval



AGRBS Draft Bill: Key Provisions & Critiques

▪ Application of the Bill:

- Nepal has sovereign right over its genetic resources and materials
- Bill covers all genetic resources
- Bill covers genetic resources in both *in-situ* and *ex-situ* conditions in and outside Nepal
- Bill will be applicable in Nepal and will also apply to Nepali as well as non-Nepali citizen residing anywhere outside Nepal
- *Critique: No special consideration to GRFA, particularly with reference to ITPGRFA*



AGRBS Draft Bill: Key Provisions & Critiques

▪ Some key definitions:

- Local community = Inhabitants having access to or using GRs and GMs based on traditional knowledge, skills, innovation, technologies and practices, including indigenous and ethnic minority of the region of origin of such GRs
- Access = GRs and GMs in both *in-situ* and *ex-situ* conditions; and associated traditional knowledge, skills, innovation, technologies and practices



AGRBS Draft Bill: Key Provisions & Critiques

- **Some key definitions:**

- *Critique:*

- *Definition of “community” objectionable to indigenous and ethnic communities – term “indigenous communities” to be used independently*
 - *Access to GRs in “ex-situ” conditions not well defined/ elaborated*
 - *Implication of inclusion of “genetic materials (GMs)” may create confusion*



AGRBS Draft Bill: Key Provisions & Critiques

- **Ownership of genetic resources and materials:**

- Ownership based on *in-situ* location of GRs and GMs – owned by owner of the property where GRs and GMs are found
 - Three types of ownership of GRs and GMs: individual; local community and government
 - *Critique:*
 - *Community ownership of GRs not well defined, may conflict with individual ownership*
 - *Ownership of GRs in ex-situ condition not explicitly defined*



AGRBS Draft Bill: Key Provisions & Critiques

- **Ownership on traditional knowledge:**
 - Local community holds the ownership of their traditional knowledge
 - Local community shall receive priority in access, used and benefit sharing if conservation and use of such GRs and GMs is based on their traditional knowledge
- *Critique:*
 - *No individual rights to traditional knowledge*
 - *No private incentive for disclosure and use*



AGRBS Draft Bill: Key Provisions & Critiques

- **Documentation and registration:**
 - Individual or joint documentation by any individual, local community, organization, local authority or Nepal Government
 - Two stages documentation process:
 - Submit advance notice to the Council or to the designated authorized body
 - Obtain PIC for the documentation from the owner of the GRs and GMs
- Registration with NGRCC



AGRBS Draft Bill: Key Provisions & Critiques

- **Documentation and registration:**

- *Critique:*

- *“Organization” and “local authority” not defined*
 - *elaborated*
 - *Individuals and organizations also required to submit advance notice to the authority*
 - *Registration with NGRCC centralized*
 - *Register to be deposited at VDC and Municipality Office*
 - *Section 8 (6) regarding IPF not clear*
 - *Type of GRs not specified, no clear mention about IPR protected crop varieties*



AGRBS Draft Bill: Key Provisions & Critiques

- **Access to GRs and GMs:**

- Two stages process:
 - Submit application for preliminary and scientific study, and for sample collection
 - Submit proposal for access license on prescribed format along with study report
 - Obtain PIC through “public hearing” implemented by VDC or Municipality
 - NGRCC signs access agreement with third party and also monitor its implementation



AGRBS Draft Bill: Key Provisions & Critiques

▪ Access to GRs and GMs:

▪ Critique:

- Access also required for in-country collection, research and training
- No PIC for preliminary study and sample collection – what if community object
- No provision for submission of preliminary study report to “community” – Section 11 (4)
- PIC through “public hearing” managed by VDC and Municipality authorities
- NGRCC not obliged to provide information as a clearing-house body (refer NP-ABS)



AGRBS Draft Bill: Key Provisions & Critiques

▪ Benefit sharing terms:

- Fair and equitable benefit sharing based on the nature of ownership of GRs and GMs
- Benefit sharing ratio (percentage):

Parties	When owner is government	When owner is other than government
Nepal Government	50	20
NGRCC	30	29
Local community, individual or organization	20	51

- Owner to pay 10% of share to local authority



AGRBS Draft Bill: Key Provisions & Critiques

▪ Benefit sharing terms:

- Provision for benefit sharing from the access, use and export of GRs and GMs taken place before the implementation of the Bill
- Irrespective of other provisions, Government and Council can access, use and export GRs and GMs/GRs in *ex-situ* conditions within and outside Nepal following specified procedures



AGRBS Draft Bill: Key Provisions & Critiques

▪ Benefit sharing terms:

- *Critique:*
 - *Contention on benefit sharing allocation – low allocation to “community” (less than 50%)*
 - *Royalty and fee as per Section 20 (jha) accounted in the benefit or not*
 - *Allocation of benefit to local authorities as per Section 24(3) should come from allocation to Nepal Government*
 - *Allocation of benefits from GRs accessed and used before the Act need to be included*
 - *Need definition on IPR in Section 23*
 - *No mention about non-monetary benefits*



AGRBS Draft Bill: Key Provisions & Critiques

- **Bill implementing agency/body:**
 - Establishment of National Genetic Resource Conservation Council (NGRCC) as an autonomous implementing body
 - NGRCC reporting to National Biodiversity Coordination Committee (NBCC)
 - NGRCC authorized body for contact, communication and administer access
 - Provision of farmers representation
 - Provision of Council Fund - purpose not clear



AGRBS Draft Bill: Key Provisions & Critiques

- **Bill implementing agency/body:**
 - *Critique:*
 - *Requirement of 10 years experience for representation of farmer, women, dalit and indigenous and ethnic community*
 - *No CSO representation*
 - *Functions such as coordinating documentation and providing information not mentioned*
 - *Council's Fund not linked to National Biodiversity Trust Fund*
 - *Use of Council's Fund too broad – no mentioned how much will go to program*



AGRBS Draft Bill: Key Provisions & Critiques

- **Some key issues:**

- Access to and benefit sharing from the use of GRs and GMs in *ex-situ* outside Nepal
- Documentation and access to GRs and GMs in *ex-situ* collection within Nepal
- CBD defines access to GRs (not GMs) of country of origin (those in *in-situ* conditions)
- No mention for separate provisions for PGRFA within the domain of ITPGRFA



AGRBS Draft Bill: Key Provisions & Critiques

- **Investigation of court case and prosecution:**

- Provision of pursuing court case and prosecution (Chapter 5)
- Conditions of illegality of ABS and punishment levels (cash and imprisonment)
- *Critique:*
 - *Need re-ordering of illegality conditions as it has implication on punishment levels*
 - *Punishment of illegal use should also consider the amount of benefits accrued*



AGRBS Draft Bill: Key Provisions & Critiques

▪ Miscellaneous (Chapter 6):

- Formation of Biodiversity Committees at national, district and local levels
- Function, responsibilities and authorities to be defined through notification
- *Critique:*
 - *Missing link with Council – Section 27(4); Section 33*
 - *Some key functions need to specified to outline the scope of these Committees*



AGRBS Draft Bill: Key Provisions & Critiques

▪ Overall observations and suggestions:

- A good foundation but need major review in light of other agreements, such as ITPGRFA and Nagoya Protocol on ABS (NP-ABS)
- Consideration to provisions of NP-ABS: PIC, community institutions, gender, special nature of AgBio, GMBS
- Need for recognizing and strengthening community institutions and capacity building
- Sharing and utilization of benefit going to “communities”



