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 June1992 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

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

- 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



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

- 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

- 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 pay10% of share to local authority

Benefit sharing terms:

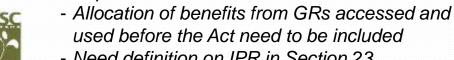
- Provision for benefit sharing from the access, use and export of GRs and GMs taken place before the implementation of the Bill
- Irrespective of other provisions, Government and Council can access, use and export GRs and GMs/GRs in ex-situ conditions within and outside Nepal following specified procedures



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 (iha) accounted in the benefit or not
 - Allocation of benefit to local authorities as per Section 24(3) should come from allocation to Nepal Government



- Need definition on IPR in Section 23
- No mention about non-monetary benefits



- 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 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



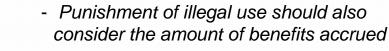
- Some key issues:
 - Access to and benefit sharing from the use of GRs and GMs in ex-situ outside Nepal
 - Documentation and access to GRs and GMs in ex-situ collection within Nepal
 - CBD defines access to GRs (not GMs) of country of origin (those in *in-situ* conditions)



 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





- 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"

