

# A CISDL LEGAL BRIEF



## A New Regime on Access to Genetic Resources and Benefit-Sharing?

Montreal, March 14, 2003

This brief<sup>1</sup> outlines the role of the *Convention on Biological Diversity*<sup>2</sup>, as well as other national, regional, international and non-state initiatives in creating access to genetic resources and benefit-sharing (ABS) systems. The different regimes offer insights into the relationship between international sustainable development law and ABS. They also generate ideas for elements that should be included in an international regime on ABS, as proposed at the World Summit on Sustainable Development in 2002. The CISDL suggests that such an international regime must have clear goals, be legally binding and be broad in scope. Only in this way will we be able to create a system that includes the environmental, social and economic aspects of sustainable development.

### 1. Defining the Issue

Access to genetic resources and benefit-sharing incorporates all three strands of sustainable development:

- **Environment:** genetic resources need to be protected both for their inherent value and for their potential contributions to human well-being, particularly in the areas of agriculture and medicine.
- **Society:** genetic resources do not exist in splendid isolation. They have been conserved, used, and developed by local and indigenous communities for centuries if not millennia. These groups often have unique knowledge of the resources. Their contributions can be very valuable and must be recognized and encouraged. Furthermore, human rights law protects both their rights to food and health as well as their right to share in scientific advancements and its benefits.<sup>3</sup>
- **Economy:** research into, and commercialization of, genetic resources is necessary to feed a growing population and to treat new and re-emergent diseases. Intellectual

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<sup>2</sup> 5 June 1992, 31 I.L.M. 818 (entered into force 29 December 1993) [CBD].

<sup>3</sup> See for example, the *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3 at Articles 11 and 12 for food and health, respectively, and Article 27 of the United Nations *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) for scientific advancements.

property rights (IPRs) are a recognized component of commercial endeavors. They can contribute to the environmental and social aspects of international biodiversity sustainable development law by providing incentives for protection. The concern is, however, that IPRs will block access to genetic resources and will undervalue the input of local and indigenous communities.

## **2. Access to Genetic Resources and Benefit-Sharing (ABS) in the Convention on Biological Diversity**

The *Convention on Biological Diversity* (CBD)<sup>4</sup> attempts to weave together the three strands of sustainable development. It aims to use the economic incentives created by the potential commercial value of genetic resources towards the conservation of these same resources. It also aims to create a framework for access to genetic resources and equitable benefit-sharing. These goals are reflected in the objectives of the Convention as set out in article 1:

The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

The rest of the Convention elaborates on how these objectives should be achieved. Articles 8 and 15 are particularly important in laying the foundation for ABS.

Article 8, entitled ‘*In-situ* Conservation’, and specifically subsection j, has generated significant discussion in regards to the social aspect of ABS. It mandates the Contracting Parties to “as far as possible and as appropriate”, protect indigenous and local knowledge and innovations as well as encourage their use with the participation of, and benefit-sharing for, these communities. Article 15(1) recognizes state sovereignty over natural resources in the context of access to genetic resources. This is very important as it allows states to control access to these resources, allowing for the possibility of profiting from providing access. It also constituted somewhat of a shift in international law. Previously, international law had held that plant genetic resources, at a minimum, were the common heritage of humanity.<sup>5</sup> Under Article 15, access to genetic resources is to be on mutually agreed terms subject to prior informed consent.<sup>6</sup> Article 15(7) also provides a framework for the implementation of the third objective of the Convention, namely fair and equitable sharing of benefits.

While it is beyond the scope of this brief to explore them in any detail, articles 16 to 21 of the Convention also relate to ABS. The articles on access to and transfer of technology and the handling of biotechnology and distribution of its benefits affect the interface of intellectual property rights and genetic diversity in particular.<sup>7</sup>

## **3. Emergent Regimes on Access to Genetic Resources and Benefit-Sharing**

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<sup>4</sup> CBD, *supra* note 2.

<sup>5</sup> See International Undertaking on Plant Genetic Resources, *infra* note 26 at Art. 1.

<sup>6</sup> CBD *supra* note 2 at Art. 15, paragraphs 4 and 5.

<sup>7</sup> CBD *supra* note 2 at Art. 16 and 19.

The CBD was largely responsible for establishing that there **should** be access to genetic resources and benefit-sharing. Since then, the question has become **how** to have ABS. In the past eleven years, numerous national, regional, international and non-state regimes have been initiated to implement ABS. There is much to be learned from examining the successes and failures of these initiatives as we look towards the creation of an international regime.

### a. National regimes

According to the Secretariat to the CBD, more than 50 countries have adopted, or are in the process of adopting, ABS policies and legislation.<sup>8</sup> These policies generally take one of four forms:

- Access provisions contained in general/framework environmental or sustainable development laws;
- Access provisions in nature conservation or biodiversity laws;
- Access provisions incorporated into existing laws through amendment; or
- Specific access and benefit-sharing laws.<sup>9</sup>

South Africa's proposed *National Environmental Management: Biodiversity Bill*<sup>10</sup> is one of the newest national initiatives on this issue, falling into the second category of the typology above. It includes provisions on ABS within the context of broader conservation legislation.

South Africa ranks as the third most biologically diverse country in the world and it has a long history of traditional and colonial use of its genetic resources.<sup>11</sup> The country ratified the CBD in 1995<sup>12</sup> and the government is now attempting to implement some of the Convention's principles through the Biodiversity Bill. The government sees the Bill as a way to strategically position South Africa as a player in the global bioprospecting arena.

The Bill is divided into ten chapters covering a range of issues including: the establishment of a National Biodiversity Institute to replace the current National Botanical Institute (chapter 2); a regulatory framework for integrated management of South Africa's

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<sup>8</sup> Secretariat for the Convention on Biological Diversity, *International Regime on Access and Benefit-Sharing: Proposals for an International Regime on Access and Benefit-sharing*, 7 January 2003, UN Doc., UNEP/CBD/MYPOW/6 at 8, online: Convention on Biological Diversity <<http://www.biodiv.org>> (date accessed: 10 March 2003) [*Proposals for an International Regime*].

<sup>9</sup> *Ibid.* at 9.

<sup>10</sup> South Africa, *National Environmental Management: Biodiversity Bill*, 8<sup>th</sup> draft, Gazette 24311, Notice 49, 24 January 2003, online: South African Government Online <<http://www.gov.za/bills/index>> (date accessed: 10 March 2003) [Biodiversity Bill]. One of the first measures was Costa Rica's creation of a National Biodiversity Institute (INBio) in 1989. See Jorge Cabrera Medaglia, *The Legal Frameworks and Public Policy on Access to Genetic Resources and Benefit Sharing: The Case of Costa Rica* (2002) Report prepared for the University of California, Davis. Other examples include the Republic of Korea, India and Bolivia, see *Proposals for an International Regime*, *supra* note 8 at 9.

<sup>11</sup> South Africa, Department of Environmental Affairs and Tourism, *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity*, Notice 1095 of 1997, May 1997, online: Department of Environmental Affairs and Tourism, South African government <<http://www.environment.gov.za/PolLeg/WhitePapers/Biodiversity/Contents.htm>> (last modified: 12 February 2002) [Biodiversity White Paper].

<sup>12</sup> Secretariat of the Convention on Biological Diversity, "Parties to the Convention on Biological Diversity/Cartagena Protocol on Biosafety", online: Convention on Biological Diversity <<http://www.biodiv.org/world/parties.asp>> (date accessed: 10 March 2003).

biodiversity (chapter 3); and provisions on the prevention, control and elimination of alien species (chapter 5). Of most interest for the purposes of this brief is chapter 6 on 'Bioprospecting, Access and Benefit-Sharing'.

Chapter 6 is meant to regulate bioprospecting of genetic resources and "ensure the equitable sharing of benefits arising from the commercialisation through bioprospecting of traditional uses or knowledge of indigenous biological resources, with persons or communities practising these traditional uses or knowledge".<sup>13</sup> Under section 77 of the Bill, bioprospectors must have entered into a benefit-sharing agreement in order to use traditional knowledge and these agreements must include certain information.<sup>14</sup> Section 76 requires individuals to have a permit in order to engage in bioprospecting. Permits are regulated under chapter 7 of the Bill, which does not define any compulsory information requirements for a permit application.<sup>15</sup>

The Biodiversity Bill has come under fire for its perceived lack of continuity from the policy indicated in the government's Biodiversity White Paper.<sup>16</sup> Furthermore, the Bill does not meet some of the requirements of the CBD. It only requires benefit-sharing arrangements with holders of traditional knowledge, thus excluding other potential knowledge-holders. Section 77(2) prohibits holders of traditional knowledge from unreasonably refusing to enter into benefit-sharing agreements where the knowledge to be used is in the public domain and not protected by IPRs.<sup>17</sup> This is essentially the opposite of the type of prior informed consent required under the CBD.

## **b. Regional regimes**

One of the difficulties with national ABS regimes is that they may encourage a 'race to the bottom' mentality. If two neighbouring countries share similar genetic resources and one offers access at a lower cost than the other, the 'cheaper' state is likely to garner more interested customers, other things being equal. Various writers have discussed the creation of a 'biodiversity cartel' to circumvent this problem.<sup>18</sup> While the feasibility of such a cartel on a worldwide scale seems dubious, some parts of the world have established regional regimes governing ABS. One such example is the efforts of the Andean countries.

The Andean Pact Decision 391<sup>19</sup> was the first subregional legislative measure on access to genetic resources and benefit-sharing in response to Article 15 of the CBD. The

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<sup>13</sup> Biodiversity Bill, *supra* note 10 at s. 75(1).

<sup>14</sup> *Ibid.* at s. 77(1) and (3).

<sup>15</sup> *Ibid.* at s. 83.

<sup>16</sup> Rachel Wynberg and Markus Burgener, "A Critical Review of Provisions Relating to Bioprospecting, Access and Benefit-Sharing in the Biodiversity Bill". (February 2003) online: Biowatch South Africa <[www.biowatch.org.za/biodiv\\_consol.htm](http://www.biowatch.org.za/biodiv_consol.htm)> (last modified: 18 February 2003).

<sup>17</sup> *Ibid.*

<sup>18</sup> See for example, D.S. Tilford, "Saving the Blueprints: The International Legal Regime for Plant Resources" (1998) 30 *Case Western Reserve Journal of International Law* 373 at 436-440; Walter V. Reid et al., "A New Lease on Life" in World Resources Institute, *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development* (Washington, D.C.: World Resources Institute, 1993) 1 at 44-46.

<sup>19</sup> Andean Pact (1969) found online at <http://users.ox.ac.uk/~wgtrr/andpact.htm> [Decision 391]. Examples of other regional regimes include the *Central American Agreement on Access to Genetic Resources and Biochemicals and related Traditional Knowledge*, the *Framework Agreement* of the Association of South-East

“Common Access Regime for Genetic Resources”, also referred to as the Cartagena Agreement, is a “general norm that establishes applicable minimum rules in all the member states.”<sup>20</sup> Member states can, in turn, decide to regulate individually or to apply the law in a direct way. Decision 391 regulates access to genetic resources, the equitable distribution of benefits derived from their use, and recognizes the contributions of indigenous people through the access contracts.

In addition to establishing a framework for Member states to regulate access within their borders, Article 10 of Decision 391 requires Member states to “define mechanisms for cooperation on matters of mutual interest connected with the conservation and sustainable use of genetic resources and their derivatives and related intangible components.”<sup>21</sup> The Decision also requires Member states to notify each other immediately “of all applications, resolutions and authorizations of access and of the suspension and termination of contracts signed.”<sup>22</sup> Such notification must be given to the Board of the Andean Community on Genetic Resources, which is composed of representatives from each of the designated national authorities. The Andean Community has the task of ensuring that the Decision is carried out effectively and that appropriate mechanisms and information sharing systems are put in place to promote respect for the terms of the decision and the sustainable and equitable use and access to genetic resources.

Decision 391 includes an effective framework for addressing the concerns of Member states, the scope of access to be contracted for, and the mechanisms necessary to ensure protection of the resources from the states’ perspective; however it falls a little short of protecting the rights of indigenous or local communities. The Decision guarantees the direct participation of communities and local populations, and the distribution of benefits associated with genetic resources, but a legal vacuum exists since at the international level, intellectual property systems protect individual and private rights only. Indigenous organizations do not feel that the Common Regime values the knowledge associated with their resources. It is felt that by separating the “tangible component” of genetic resources (plants, animals, microorganisms) from the intangible component (indigenous knowledge) the Decision is excluding the indigenous communities from an important step in the process of determining access. The indigenous communities feel that local organizations in whose territories resources are often located, and who are guardians of associated knowledge, should be parties to the initial contract to access genetic resources, not just in determining which activities will be permitted in the exploitation of the resource.<sup>23</sup> The need to integrate the tangible and intangible components of genetic resources is at the core of this debate.

### **c. International regimes**

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Asian Nations and the *African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* by the Organization of African Unity, see *Proposals for an International Regime supra* note 8 at 6-7.

<sup>20</sup> Molina, Patricia, “Fact sheet: Access to Genetic Resources in the Andean Community.” South-South Biopiracy Summit – “Biopiracy – Ten Years Post-Rio,” 22-23 August 2002; Johannesburg, South Africa. Online: Biowatch South Africa <http://www.biowatch.org.za/pmolina.htm>.

<sup>21</sup> Decision 391, *supra* note 19, at Art. 10

<sup>22</sup> Decision 391, *supra* note 19, at Art. 48, 49.

<sup>23</sup> Molina, *supra* note 20.

As will be discussed below, the *Plan of Implementation of the World Summit on Sustainable Development*<sup>24</sup> suggested the creation of a multilateral regime on ABS. Apart from this recommendation, the only other legally-binding multilateral instrument on issue is the Food and Agriculture Organization's *International Treaty on Plant Genetic Resources for Food and Agriculture*.<sup>25</sup>

The predecessor to the Treaty on Plant Genetic Resources was the *International Undertaking on Plant Genetic Resources*<sup>26</sup>, a non-legally binding resolution of the Food and Agriculture Organization (FAO) that was passed in 1983 and amended three times between 1989 and 1991<sup>27</sup>. In 1993, in light of the CBD, the FAO began negotiations to turn the International Undertaking into a legally binding treaty.<sup>28</sup> These negotiations were successfully completed in November 2001 resulting in the Treaty on Plant Genetic Resources, which will come into effect once the 40<sup>th</sup> instrument of ratification is received.<sup>29</sup> The Treaty is thus currently not in force but it is helpful nonetheless to examine some of its provisions.

The objectives of the Treaty are contained in Article 1:

the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.

The centerpiece of the Treaty is “a ‘multilateral system for access and benefit-sharing’, which for certain categories of PGRFA ... guarantees facilitated access in return for benefit-sharing”.<sup>30</sup> In establishing the multilateral system, countries had to be careful not to undermine the sovereign rights of states over their natural resources as enshrined in article 15 of the CBD. Article 10 of the Treaty achieves this by basing the existence of the multilateral system on the exercise of sovereign rights.

The multilateral system created by the Treaty only covers, as the name suggests, plant genetic resources for food and agriculture (PGRFA).<sup>31</sup> Furthermore, the system includes only those species of PGRFA listed in Annex I of the Treaty.

This is because certain countries that are generally rich in biodiversity – even if not particularly so in PGRFA – wanted to limit the application of the multilateral system, thereby leaving the potential for bilateral arrangements under Article 15 of

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<sup>24</sup> *Plan of Implementation of the World Summit on Sustainable Development*, WSSD Res. 2, 17<sup>th</sup> plenary meeting, (4 September 2002) in United Nations, *Report of the World Summit on Sustainable Development* (New York, UN, 2002) at 6-72, online: United Nations: Johannesburg Summit 2002 <<http://www.johannesburgsummit.org>> (last modified: 22 January 2003).

<sup>25</sup> 3 November 2001 [Treaty on Plant Genetic Resources or Treaty].

<sup>26</sup> FAO Res. 8/83, UN FAOOR, 22d Sess., UN Doc. C/83/REP (1983) [International Undertaking].

<sup>27</sup> *Agreed Interpretation of the International Undertaking*, FAO Res. 4/89, UN FAOOR, 25<sup>th</sup> Sess., UN Doc. C/89/24 (1989); *Farmers' Rights*, FAO Res. 5/89, UN FAOOR, 25<sup>th</sup> Sess. (1989); FAO Res. 3/91, UN FAOOR, 26<sup>th</sup> Sess. (1991); being Annex I, II, and III respectively to the International Undertaking.

<sup>28</sup> H. David Cooper, “The International Treaty on Plant Genetic Resources for Food and Agriculture” (2002) 11 Review of European Community and International Environmental Law 1 at 2.

<sup>29</sup> Treaty *supra* note 25 at Art. 28.1. As of March 10<sup>th</sup>, 2003, the Commission on Plant Genetic Resources for Food and Agriculture had received 15 instruments of ratification, acceptance, approval and accession.

<sup>30</sup> Cooper *supra* note 28 at 4; Treaty *supra* note 25 at Art. 10.2.

<sup>31</sup> Treaty *supra* note 25 at Art. 3.

the CBD to be applied for all other plant genetic resources, including medicinal plants and others that may have potential value under bilateral deals.<sup>32</sup>

Thirty-five species are listed in the annex, including most of the major food crops. In addition, under Article 11.2, only those genetic resources (of the species listed in the annex) that “are under the management and control of the Contracting Parties and in the public domain” are a mandatory part of the multilateral system. All other holders of PGRFA are invited to include their resources in the system.

Article 12 of the Treaty governs terms of access to the genetic resources covered in Annex I. Access is to be provided to other contracting parties as well as to legal and natural persons under their jurisdiction.<sup>33</sup> State parties should provide facilitated access, which is subject to a number of conditions in Article 12.3. These conditions include, *inter alia*, that facilitated access should be free or with only minimal cost to cover expenses,<sup>34</sup> and that access must respect existing property rights – both intellectual and otherwise.<sup>35</sup> Article 13 addresses the sharing of benefits arising from the use of the PGRFA in the multilateral system. Benefits are to “be shared fairly and equitably through ... the exchange of information, access to and transfer of technology, capacity building and the sharing of benefits arising from commercialization”.<sup>36</sup> Article 13 goes on to provide more detail on what each of these mechanisms entails.

The final element to be discussed is the role of IPRs in the multilateral system. This was one of the most contentious issues during the negotiations. All parties agreed that IPRs should not be applied to the resources as received from the multilateral system.<sup>37</sup> The difficult part was whether IPRs should be available for ‘components’ or ‘derivatives’ of PGRFA from the multilateral system. Developing countries were willing to agree to IPRs on derivatives, e.g. new plant varieties derived from the resources obtained from the system, but not on parts or components, e.g. genes or proteins. The solution was to use vague language in discussing the relationship between IPRs and the PGRFA in the multilateral system paving the way for conflicts of interpretation in the future.<sup>38</sup>

#### **d. Non-state initiatives**

Apart from the state-led regimes, there are numerous ABS efforts initiated by universities, corporations, civil society, and other international organizations. One of the largest of these regimes is that of the Consultative Group on International Agricultural Research (CGIAR) and its International Agriculture Research Centres (IARCs).<sup>39</sup> The work of this

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<sup>32</sup> Cooper *supra* note 28 at 5.

<sup>33</sup> Treaty *supra* note 25 at Art. 12.2 subject to Art. 11.4 which provides for an assessment of the inclusion of PGRFA held by natural and legal persons in the multilateral system two years after the Treaty enters into force. This assessment will be used to decide if natural and legal persons will continue to have facilitated access.

<sup>34</sup> Treaty *supra* note 25 at Art. 12.3(b).

<sup>35</sup> Treaty *supra* note 25 at Art. 12.3(f).

<sup>36</sup> Treaty *supra* note 25 at Art. 13.2.

<sup>37</sup> Treaty *supra* note 25 at Art. 12.3(d).

<sup>38</sup> Cooper *supra* note 28 at 8-9; Treaty *supra* note 25 at Art. 12.3(d).

<sup>39</sup> CGIAR is arguably a state-led initiative because many of its funders are state agencies. It was not instigated by states, however, and its governing body is not composed of state representatives so for these reasons it has been included here. Other non-state initiatives include voluntary codes of conduct such as the *Micro-Organisms Sustainable Use and Access Regulation International Code of Conduct* and the GlaxoSmithKline corporate policy on ABS, see *Proposals for an International Regime, supra* note 8 at 7.

organization points to another problem area for ABS regimes: how to manage access to genetic resources and benefit sharing for those resources that are conserved *ex situ*.

CGIAR is a fairly informal body, created in 1971 at the instigation of the Ford and Rockefeller Foundations and now funded by various states, corporations, multilateral agencies such as the World Bank, and private foundations.<sup>40</sup> There are 16 IARCs scattered about the globe and while the CGIAR is the central coordinating body, each of the IARCs operates largely independently. Eleven of the IARCS also have genebanks. The geographic origins of much of the material in the genebanks is unknown but it is safe to say that the state where the IARC is located is not the same as the state of origin for much of the germplasm. The other relevant feature of the IARCs is that the material in the genebanks is available for use by non-IARC scientists. This has created difficulties in recent years with accusations that other researchers have attempted to obtain intellectual property rights over material obtained from an IARC genebank.<sup>41</sup>

The features of CGIAR and the IARCs raise a variety of questions. On what terms should access to the genetic material in the IARC genebanks be granted? Should IPRs on the material be allowed? If yes, in what form, i.e. on whole, unaltered organisms obtained from an IARC, on parts thereof (genes, proteins, etc.), or on derivatives therefrom? How should the benefits of any use of the genetic resources be shared with the state or community that first provided them? CGIAR and the IARCs have attempted to resolve these problems through a variety of means.

First of all it is important to note that the CBD only applies to genetic resources collected in accordance with the Convention's provisions.<sup>42</sup> Given the much longer history of the IARCs than the CBD, very few of the resources in the IARC genebanks fall within the purview of the Convention. Instead, CGIAR and the IARCs have had to develop their own solutions.

The first big step was the 1994 agreements between the individual IARCs and the FAO<sup>43</sup> placing the bulk of the Centres' germplasm under the auspices of the FAO to be held "in trust for the benefit of the international community".<sup>44</sup> These Trust Agreements included provisions that the Centres would not claim legal ownership of the germplasm nor seek IPRs over the germplasm or related information.<sup>45</sup> Access to the genetic resources is provided under Article 9 and where this involves transfer of the resources or related

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<sup>40</sup> CGIAR, "Co-sponsors and Members", online: CGIAR <<http://www.cgiar.org/members/index.html>> (last modified: 31 October 2002).

<sup>41</sup> Rural Advancement Foundation International & Heritage Seed Curators Australia, "Plant Breeders Wrongs: An Inquiry into the Potential for Plant Piracy Through International Intellectual Property Conventions" (1998), online: ETC Group <[http://www.etcgroup.org/documents/occ\\_plant.pdf](http://www.etcgroup.org/documents/occ_plant.pdf)> (date accessed: 10 March 2003).

<sup>42</sup> CBD *supra* note 2 at Article 15.3.

<sup>43</sup> "The Agreement Between [name of Centre] and the Food and Agriculture Organization of the United Nations (FAO) Placing Collections of Plant Germplasm under the Auspices of FAO" in System-wide Genetic Resources Programme, *Booklet of CGIAR Centre Policy Instruments, Guidelines and Statements on Genetic Resources, Biotechnology and Intellectual Property Rights*, vers. 1 (Rome, 2001) at 2-7 [Trust Agreements].

<sup>44</sup> *Ibid.* at Art. 3(a).

<sup>45</sup> *Ibid.* at Art. 3(b).

information to outside parties, the Centres must ensure that these parties are bound by the same restrictions on ownership and IPRs.<sup>46</sup>

The Centres provide access to the resources in their genebanks via Material Transfer Agreements (MTAs). In 1998, CGIAR and the Centres developed a standard MTA which includes a reiteration of Article 3(b) on ownership and IPRs from the Trust Agreements.<sup>47</sup> The MTA is included on the packaging accompanying the resources sent to a third party and, according to the MTA, “acceptance of the material constitutes acceptance of the terms of this Agreement”. The MTA does not, however, prevent the recipient from applying for IPRs on parts of the material or derivatives therefrom, as the MTA only applies to the germplasm as received from the Centre.<sup>48</sup>

The Trust Agreements with the FAO were to be in accordance with the International Undertaking. When the Treaty on Plant Genetic Resources replaced the International Undertaking, it included provisions accommodating the Trust Agreements. Article 15.1 calls upon the IARCs to sign agreements with the Governing Body of the Treaty that will supersede the Trust Agreements with the FAO.<sup>49</sup> Once the Treaty enters into force, the IARCs will develop new MTAs to reflect the Treaty’s provisions on facilitated access and benefit-sharing.<sup>50</sup> Also, under Article 11.5, the Multilateral System created by the Treaty shall include the PGRFA in Annex I held by the IARCs.

This multiplicity of solutions to the CGIAR-IARC situation does not resolve all the questions but it does go a long way to putting the genetic resources of this institution on much more stable footing.

#### **4. The Bonn Guidelines & the World Summit on Sustainable Development**

In May 2000, the Parties to the CBD held their fifth conference. At that meeting, they “established the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing with the mandate to develop guidelines and other approaches for submission to the Conference of the Parties at its sixth meeting”.<sup>51</sup> The Ad Hoc Open-Ended Working Group met and developed the draft Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising Out of Their Utilization<sup>52</sup>. The Guidelines were adopted, with some amendments, at COP6.<sup>53</sup>

As their name suggests, the Bonn Guidelines are meant to serve as a point of reference for policy, legislative and contractual matters related to ABS. In essence, they elaborate on the key provisions in the CBD on ABS, particularly those addressing mutually agreed terms and prior informed consent. The provisions on prior informed consent include basic principles and elements, the requirement that consent be granted by a competent

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<sup>46</sup> *Ibid.* at Art. 10.

<sup>47</sup> “Material Transfer Agreement (MTA)” in *Booklet of CGIAR Centre Policy Instruments supra* note 43 at 13.

<sup>48</sup> Crucible II Group, *Seeding Solutions*, v.1 (Ottawa: International Development Research Centre, 2000) at 66.

<sup>49</sup> Cooper *supra* note 28 at 6.

<sup>50</sup> Treaty *supra* note 25 at Art. 15.1(b).

<sup>51</sup> *Proposals for an International Regime, supra* note 8 at 2.

<sup>52</sup> Being the Annex to *Access and benefit-sharing as related to genetic resources*, CBD COP Dec. VI/24 A, 2002, UN Doc. UNEP/CBD/COP/6/20 [Bonn Guidelines or Guidelines].

<sup>53</sup> *Proposals for an International Regime, supra* note 8 at 2.

authority, and that it be obtained through certain procedures and processes.<sup>54</sup> Mutually agreed terms for benefit-sharing also includes certain basic requirements, although by its very nature, mutually agreed terms is a much more open and flexible concept.<sup>55</sup>

The Bonn Guidelines were also referred to in the Plan of Implementation of the World Summit on Sustainable Development (WSSD). Chapter IV of the Plan of Implementation addresses the protection and management of the natural resource base of economic and social development. In particular, paragraph 44 focuses on biodiversity, and subsection (n) encourages the implementation and further development of the Guidelines. Subsection (o) calls for action to “[n]egotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”.

## **5. The Meaning of an International ABS Regime in International Sustainable Development Law**

The Plan of Implementation of the WSSD points to the next step in the development of ABS – an international regime on benefit-sharing. How should international sustainable development law (ISDL) relate to such a regime? “An ISDL approach to International Biodiversity Law should aim to develop and enhance understanding of the inter-linkages between biodiversity-related policies and law at the national, regional and international levels”.<sup>56</sup> This means that an international regime must be integrative in at least two different ways – it must meld the social, environmental and economic goals of sustainable development, as well as integrating the lessons learned from the implementation of ABS efforts in different national, regional and international fora. Some of these efforts already suggest means by which this might be accomplished.

There are two types of examples of the relationship between ISDL and ABS: 1) How existing regimes may already integrate the various components of ISDL; and 2) How the organizations that work on ABS maintain the integrative nature of ISDL.

One of the main purposes of the Trust Agreements between the IARCs and the FAO was to resolve a potential conflict between the Centres and the CBD. With Article 15 of the CBD establishing the sovereign right of states to their natural resources, this raised the question of who owned the genetic resources in the IARC genebanks. Were they the property of the IARC, of the host nation where the IARC is located, or did their origins need to be traced so that they could become the property of their source state? Placing the resources in trust for the international community resolved the problem and developed the sorts of interlinkages required for ISDL.

The second example of the interface between ISDL and ABS is well-illustrated by the work of the World Intellectual Property Organization (WIPO) in this area. The organization writes that

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<sup>54</sup> Guidelines *supra* note 52 at IV(C).

<sup>55</sup> Guidelines *supra* note 52 at IV(D).

<sup>56</sup> Marie-Claire Cordonnier Segger, Ashfaq Khalfan, Salim A. Nakhjavani, *Weaving the Rules for Our Common Future: Principles, Practices and Prospects for International Sustainable Development Law* (Montreal: CISDL, 2002) at 185.

[I]n order to avoid duplication of work and maintain a comprehensive view of the multi-dimensional aspects of genetic resource policies before the [Intergovernmental] Committee, the Member states have requested ... that WIPO should coordinate its work closely with other relevant intergovernmental fora which are active in the field of genetic resources, in particular the CBD and the ... FAO. ... Through this close institutional cooperation, any work of the Intergovernmental Committee will be consistent with, and complementary to, the work that is being done in the framework of the CBD, the FAO and other international genetic resource fora.<sup>57</sup>

Collaboration by international organizations is not universal, however, and there are some areas of dissonance. To date, the World Trade Organization (WTO) has not allowed the requests of the CBD Secretariat to be granted observer status to the TRIPs Council.<sup>58</sup> Regardless of whether there are current conflicts between the CBD and TRIPs, the Secretariat should have observer status in order to help prevent conflicts from arising in the future.

## 6. Suggestions for an International ABS Regime

The Secretariat to the CBD suggests that there are two basic questions that must be addressed in following through on paragraph 44(o) from the WSSD: the scope of the regime and the nature of any 'international regime'.<sup>59</sup> Another important question not raised by the Secretariat is what the objectives of an international regime will be. Sittenfeld et al., writing from the perspective of national bioprospecting policies, say that

The ultimate goal of access and benefit sharing should be clear. If the main aim is to make money, it is bound to fail. In case the objective is to create national capacity, a value added industry, or the conservation of natural biological resources, then it is necessary to make the right connections, and develop coherent policies on access, biodiversity conservation and sustainable use.<sup>60</sup>

While international objectives may be different from national ones, the central message of a clear goal remains the same.

The brief case studies in Part 3 offer valuable insights for answering these questions. On the issue of scope, the Treaty on Plant Genetic Resources defined its reach broadly in Article 3 and then narrowed it through Annex 1. This illustrates two possible default positions: either assume all resources are excluded from a regime except those explicitly included or assume everything is included unless otherwise excluded. Constructing an international regime that is narrow in scope would largely defeat the purpose and leave the CBD as the governing international law in most situations. Creating a broad system

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<sup>57</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, "Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing" 10 September 2001, UN Doc. WIPO/GRTKF/K/2/3 at 7.

<sup>58</sup> Secretariat for the Convention on Biological Diversity, *Access and Benefit-Sharing as Related to Genetic Resources: Progress Report on the Implementation of Decisions V/26 A-C*, 9 January 2002, UN Doc., UNEP/CBD/COP/6/19 at 9, online: Convention on Biological Diversity <<http://www.biodiv.org>> (date accessed: 10 March 2003). TRIPs is the *Agreement on Trade-Related Aspects of Intellectual Property Rights* which forms part of the WTO. Its implementation is monitored by the TRIPs Council.

<sup>59</sup> *Proposals for an International Regime*, *supra* note 8 at 4.

<sup>60</sup> Ana Sittenfeld, Jorge Cabrera Medaglia, & Marielos Mora, "Bioprospecting and Biotechnology: Some Policy Issues" [on file with author] at 6.

makes more sense. This would make it more difficult to use a listing process of the type found in the Treaty thus suggesting that a presumption of inclusion is more sensible.<sup>61</sup>

Another aspect of scope to be considered is what is meant by ‘utilization of genetic resources’ in the Plan of Implementation. Does utilization include the use of traditional or local knowledge in identifying interesting genetic resources? If so, this changes significantly the parameters of benefit-sharing that must be established and in all likelihood makes them more difficult to define. At the same time, however, including traditional and local knowledge may avoid other difficulties and criticisms such as those faced by the Andean Pact Decision which is perceived as inadequately valuing indigenous knowledge.

The nature of an ‘international regime’ refers to whether or not the regime should be a legally binding instrument.<sup>62</sup> Looking to the Treaty on Plant Genetic Resources, we see that it was preceded by the non-legally binding International Undertaking. The International Undertaking was broader in scope and stronger in language but ultimately not very effective because it alienated many potential participants. Nonetheless, it provided a starting point for the negotiations that led to the Treaty, which now enjoys much broader support. Should an international ABS regime follow a similar path? To some extent it already has a non-legally binding foundation – the Bonn Guidelines. These could form the basis for further negotiation to create a legally binding regime. Certainly at a time of increasing international agreements in various spheres, anything that is not binding is more likely to be left by the wayside in attempts to reconcile the different instruments.

The final question raised above concerns the guiding policy for an international ABS regime. If such a regime is to be negotiated within the context of the CBD then presumably its goals should follow those of the Convention, namely the conservation of biodiversity, sustainable use thereof and fair and equitable sharing of the benefits arising from use. The South Africa case study points out some of the hazards of not having a clear vision. The Bill has been criticized for not following the policy set out in the government’s White Paper, its objectives are less than straightforward and the government appears to be having difficulties drafting the Bill, given that it is on its eighth version. Whatever the negotiating parties decide should be the goals of the international regime, they must be clear, consistent and attainable.

## **7. The Way Forward**

Hamilton writes that the international community is potentially creating two inconsistent lines of international law: the environmental treaties that attempt to protect biodiversity and the trade agreements that formalize the international expansions of intellectual property rights.<sup>63</sup> ISDL seeks to avoid this outcome by integrating the environmental, the social, and the economic into international biodiversity law. There are signs of progress.

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<sup>61</sup> Cooper *supra* note 28 at 6.

<sup>62</sup> *Proposals for an International Regime*, *supra* note 8 at 5.

<sup>63</sup> N.D. Hamilton, “Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources” (1993) 28 *Tulsa Law Journal* 587 at 612-613.

One encouraging development is the most recent draft text of the Free Trade Area of the Americas released in November 2002.<sup>64</sup> The draft chapter on IPRs includes several provisions referring to the CBD. Among these are Article 5.2 requiring Parties to give effect to parts of the CBD and Article 5.3, which, in different forms, aims for each Party to ratify the treaties mentioned in Article 5.2. There is also a whole section devoted to the relationship among traditional knowledge, access to genetic resources and IPRs (Section 6). Article 1.2 of this section requires the relationship to be in accordance with the CBD. These provisions, however, are still in square brackets, so it is entirely possible that none of them will appear if and when there is a final agreement. It is significant, though, that they have made it into the second draft; states opposed to their inclusion will have to make other concessions if they want them removed.

This sort of recognition of ABS issues in international trade agreements is what is required if sustainable development is going to be put into practice. Confining ABS to environmental treaties or human rights language is insufficient to create ISDL that is truly integrative. A new international ABS regime can help bridge the disciplines and create a system that includes the environmental, social and economic aspects of sustainable developments. A legally binding international regime on access to genetic resources and benefit-sharing that is negotiated within the Convention on Biological Diversity, builds on the Bonn Guidelines and draws on the experiences of other ABS initiatives would be a very valuable contribution to international sustainable development law.

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<sup>64</sup> Free Trade Area of the Americas, chapter on Intellectual Property Rights, document FTAA.TNC/w/133/Rev.2, online: FTAA <<http://www.ftaa-alca.org/>> (date accessed: 9 November 2002).