

ABS aspects of the Moorea Biocode Project

The Moorea Biocode Project (MBP) is a scientific research program intended to make the exhaustive inventory of the genetic resources of Moorea island in French Polynesia –including all terrestrial and marine species of wild fauna and flora, using the new genetic “Barcoding” approach. Samples are collected at the Moorea Ecostation and barcodes are obtained in foreign laboratories partners of the Project and member of the “Biocode Consortium”¹.

Committed to the letter and the spirit of the Convention of Biological Diversity (CBD)², this projet aims at complying with the international obligations regarding the access to genetic resources and the fair and equitable sharing of the benefits arising out of their utilization (ABS).

The purpose of this paper is to consider the main ABS obligations under the CBD (1), and shows the absence of ABS legislation in French Polynesia (2) in order to present the specific agreements adopted in the frame of the Moorea Biocode Project to voluntarily comply with CBD obligations (3).

1- Existing obligations on Access and Benefits Sharing (ABS) under the Convention on Biological Diversity (CBD)

Prior to the CBD and since the International Undertaking of the FAO in 1983, genetic resources were considered as the common “heritage of humankind”³. Breaking with the idea of free access and utilization of genetic resources, the CBD recognized in 1992 the “sovereign rights of States over their natural resources”⁴. In return, member States have the obligation to “take legislative, administrative or policy measures” in order to regulate the access to their genetic resources and ensure the fair and equitable sharing of the benefits arising from their utilization⁵. If access is subject to “prior informed consent” (PIC)⁶ to be granted by the providing State, both the Access and the Sharing of the Benefits are subjects to “mutually agreed terms” (MAT)⁷ between the user and the provider State. While monetary benefits arise from “commercial and other utilizations of genetic resources”, non-monetary benefits are the “results of research and development”⁸. Importantly, States also have the obligation “to create conditions to facilitate access to genetic resources for environmentally sound uses” and “not to impose [improper] restrictions” with regards to CBD objectives.

¹ The Biocode Consortium includes the University of California Berkeley (UCB) and its Natural History Museums (BNHM), the “Centre National de la Recherche Scientifique” and the “Ecole Pratique des Hautes Etudes” (UMS 2978 CNRS – EPHE), the Association for Marine Exploration, the Florida Museum of Natural History (FLMNH), the Smithsonian Institution (SI), the “Institut de Recherche pour le Développement” (IRD) and the “Muséum National de Histoire Naturelle” in Paris (MNHN).

² Convention on Biological Diversity [hereinafter CBD], Rio de Janeiro, 5 June 1992, 31 ILM 818, 823 (1992). The Convention broadly defines “genetic resources” as “any material of plant, animal, microbial or other origin containing functional units of heredity” of “actual or potential value”(CBD, Art.2).

³ International Undertaking on Plant Genetic Resources for Food and Agriculture, Nov. 23, 1983, Resolution 8/83 Twenty-second Session of the FAO Conference, Rome, 1983 available at <http://www.fao.org/ag/cgrfa/iu.htm>.

⁴ CBD, Art. 15(1)

⁵ CBD, Art. 15(7)

⁶ CBD, Art. 15(5)

⁷ CBD, Art. 15(4) and 15 (7)

⁸ CBD, Art. 15(7). The Appendix II of the Bonn Guidelines provides an indicative list of both monetary and non-monetary benefits, available at <http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf>.

2- Absence of implementation of ABS obligations in French Polynesia

In our case, genetic resources are not directly belonging to France (State Party to the CBD since the 11 September of 2003⁹), but to French Polynesia, which is one of its overseas territories. According to its autonomous Status of 2004¹⁰, French Polynesia has the legal authority for environmental law concerns. Therefore, it can directly implement CBD provisions in adopting its own ABS legislation. However, there is no ABS legislation in force in French Polynesia even if a draft text is in suspense since 2006, unlike other countries in the South Pacific, like Vanuatu that specifically addresses research activities on genetic resources in its 2002 Environmental Act¹¹. Another option would be to have a regional Strategy on ABS for all Pacific islands but nothing is planned in that sense for the moment. In any case, France is not showing the way to its overseas territories, not having adopted itself any ABS legislation implementing CBD provisions. Furthermore, as long as the international community has adopted no international regime¹², CBD provisions on ABS cannot be properly implemented where no specific legislation exists.

3- Specific agreements related to the Moorea Biocode Project complying with ABS obligations

The Moorea Biocode Project is subject to research authorizations granted by French Polynesia for accessing to its genetic resources. The Gump Station in Moorea is authorized to lead its scientific research projects through the general cooperative agreement (renewed on 24 October of 2007) concluded between French Polynesia and the regents University of California Berkeley (UCB), administratively responsible for the Station. Foreign (non-European Union) researchers are also subject to specific authorizations granted by French Polynesia and called “Protocoles d’accueil” to carry out their research activities at the Station. Finally, with a view to the CBD obligations on ABS that “encourage the equitable sharing of the benefits arising from the “knowledge, innovations and practices” of “indigenous and local communities”¹³, a general cooperative agreement exists between UCB and a community based organization called “Te Pu Atitia”. Therefore, the Project (under the general auspices of UCB Gump Station) can be considered to be respectful of the rights of both French Polynesia and its indigenous and local communities over genetic resources and their utilization, as recognized in the CBD.

Furthermore, a specific Memorandum of Understanding (MOU) related to the ABS aspects of the Project is under discussion between the members of the Biocode Consortium and French Polynesia to address more specifically the fair and equitable Benefits Sharing obligation of the CBD. This MOU is a voluntary code of conduct - as no ABS legislation nor international regime is yet in force, that aims

⁹ List of the Parties to the CBD, available at: <http://www.cbd.int/convention/parties/list/>.

¹⁰ “Loi organique n° 2004-192 du 27 février 2004 modifiée portant statut d'autonomie de la Polynésie française”, ensemble la loi n° 2004-193 du 27 février 2004 modifiée complétant le statut d'autonomie de la Polynésie française”, in particular the Art. 14, para. 6, on the legal authority of French Polynesia on Environmental Law concerns.

¹¹ Republic of Vanuatu, Environmental Management and Conservation Act [hereinafter EMCA], No. 12 of 2002. Any kind of “research” “activity”, for “commercial application” or not, “undertaken to harvest or exploit [...] genetic resources” in the broad sense - including “derivatives” and even related “knowledge, innovation and customary practices”, is considered to be a “bioprospecting” activity (EMCA, Art.2) requiring a permit (EMCA, Part 4, Division 1).

¹² The ABS international regime is supposed to be established 2010. More information is available at: <http://www.cbd.int/abs/regime.shtml>.

¹³ CBD, Art. 8(j)

to facilitate the transfer of the genetic resources (or “Material”) collected in the frame of the Project between the members of the Biocode Consortium and to ensure the traceability of the Material in recording and informing the relevant authorities of French Polynesia of transfers to a third Party. Transfers are only authorized for non-commercial purposes and commercial utilizations are subject to an additional binding contract to be concluded between French Polynesia and the user institution. Furthermore, the origin of the Material from French Polynesia has to be mentioned in any publication. Finally, the members of the Biocode Consortium are committed to only generate non-monetary benefits and to freely share the results of their research by making them publicly available. Even if not formally a Material Transfer Agreement (MTA), this MOU represents a non-binding agreement intended to pave the way for providing a future model MTA in the frame of non commercial research on biodiversity and help French Polynesia to build its own ABS policies with the objective of facilitating scientific research for biodiversity conservation purposes.

Lastly, even if the workshop organized by the Consortium for the Barcode of Life (CBOL) on “ABS in Non Commercial Research” held in Bonn, Germany on the 14th to 20th November 2008 failed to give a specific definition of “non-commercial research”, it managed, at least, to identify some characteristics differentiating it from commercial research¹⁴. As all fundamental research can potentially generate some commercial applications, the frontier between the non-commercial and commercial research remains very uneasy to draw in terms of the activities involved. Finally, the conclusions of this workshop were communicated to the ABS Working Group of the CBD in order to facilitate the non-commercial research activities in the future international regime on ABS. This very controversial regime is to be established in 2010, if only a consensus can be reached amongst the diverging interests of the international community... Lets see if it is possible!

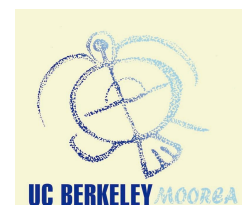
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¹⁴ See the final workshop report, UNEP/CBD/ABS/GTLE/1/INF/2, Concepts, Terms, Working Definitions and Sectoral Approaches Relating to the International Regime on Access And Benefit-Sharing - Submission from the international workshop on the topic of “Access and Benefit-sharing in Non Commercial Biodiversity Research”, Bonn, 17-19 November 2008, available at : <http://www.cbd.int/doc/?meeting=ABSGTLE-01>.