IUCN Explanatory Guide to the Nagoya Protocol on ABS

Side Event at ICNP 1

Montreal, June 2011

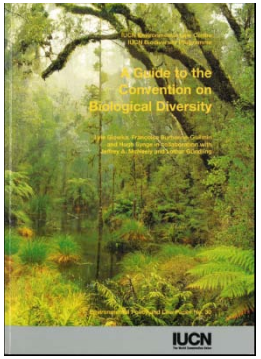
Thomas Greiber
Senior Legal Officer, IUCN Environmental Law Centre (ELC)
Sonia Peña Moreno
Senior Policy Officer- Biodiversity, IUCN Global Policy Unit (GPU)

Why an Explanatory Guide?

- Adoption of the Nagoya Protocol as a great success
- Protocol‘s text is **complex, innovative, but also sometimes ambiguous**
- **Clear understanding** of text, resulting obligations for and commitments of Parties is essential to ensure future implementation
- Still many open questions as to **what is going to change after the Protocol enters into force**
- **Relationship of the Protocol with other specialized instruments** needs to be explained

What is an Explanatory Guide?

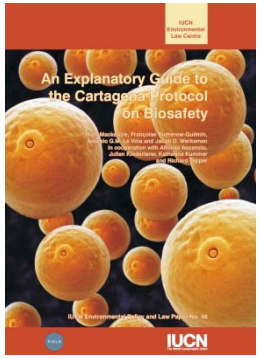
- **Introduction** to a specific international agreement
- **Objective and neutral explanation** of agreement article by article



- **Not supposed to be an IUCN interpretation**, but a comprehensive analysis of legal provisions to support their understanding
- **Ideas and experiences** regarding implementation
- Provision of **supplementary material**

Who is this Guide for?

- The target audience of this Guide is **broad**, including:
  - Lawyers as well as non-lawyers; policy-makers as well as private sector and civil society
  - Everyone who did not sit on the negotiation table and is trying to understand the Protocol
  - Those who need to understand the Protocol more generally in order to put it in practice



Process so far

- Selection of lead authors and some contributors
- First inception and coordination meeting (mid-May)
- Development of draft outline (annotated table of content)
- Agreement on writing format, structure, tone
- Division of tasks and “clustering of articles”
- Initial agreement on the timeline, deliverables and review process

Inception meeting at IUCN ELC

Draft outline

- Introduction
  - Overview
  - Challenges to implementation of ABS
  - The road to Nagoya and beyond
  - The Nagoya Protocol: an overview
  - Other ABS-related instruments and processes
  - Implications of the Nagoya Protocol

Draft outline (2)

- The Nagoya Protocol
  - **Preamble** – Role and legal nature; cross-references with specific articles and different terminology
  - **Article 2 – Use of terms** - What *might be* in and what *might be* out? Derivatives vs. utilization
  - **Article 3 – Scope** – Looking back to history of negotiations (inclusions and exclusions) and outcome
  - **Article 4 - Relationship with international agreements and instruments** – Concerns underlying each paragraph; key terms, such as supportive (4.2) – mutually supportive (4.3), instrument - agreement, relevant work – practice…

Draft outline (3)

- **Article 5 – Fair and Equitable Benefit-Sharing** – Meaning of fair and equitable (in the context of CBD and equity in other instruments); PIC and MAT interrelation; utilization, subsequent application, commercialization
- **Article 6 – Access to Genetic Resources** – Explanation of provider-user paradox; need to expressly declare no-PIC decision?; meaning of each “access standard”
- **Article 7- Access to TK associated with Genetic Resources** - Reference to “domestic legislation” here (but no such reference in Art. 5.5): Is Art. 5.5 on benefit-sharing stronger?

Draft outline (4)

- **Article 8 – Special considerations** - Explanation and scenarios regarding key terms: due regard, present, imminent…
- **Article 10 – Global Multilateral Mechanism –** No speculation
- **Article 12 – TK associated with Genetic Resources** - Examples from Australia, South Africa, Canada…
- **Article 13 – NFPs and CNAs –** Different roles and duties of both
- **Article 14 – ABS CH and Information-Sharing** – Lessons learned from CBD and BS CHM; relevance for compliance, enforcement, monitoring

Draft outline (5)

- **Articles 15-17 – Compliance, monitoring** – Provider vs. user measures; missing link between Art. 15 and 14; why TK in separate article; checkpoints; complexity of Art. 17, interrelation with other articles, and ambiguity in terminology used
- **Article18 – Compliance with MAT**- Title might be misleading (rather about enforcement; differences in view of Art.15-17 and Art. 30)
- **Article 21 – Awareness-raising, capacity** – Examples; lessons learnt from previous initiatives
- **Annex – Monetary and non-monetary benefits –** Case studies

Draft outline (6)

- Guidance for developing laws and regulations for implementing the Nagoya Protocol
  - Summary of the potential options, elements and challenges discussed under the different articles
- Appendices
  - Appendix I: Glossary of key ABS term
  - Others
- Supplementary materials

Style of writing

ARTICLE 4 RELATIONSHIP WITH INTERNATIONAL AGREEMENTS AND INSTRUMENTS

1.The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. ….

BACKGROUND (Brief introduction to/summary of the article)

EXPLANATION (Analysis/explanation of text of each article, paragraph by paragraph)

POTENTIAL OPTIONS, ELEMENTS AND CHALLENGES FOR IMPLEMENTATION (Guidance on what is needed to make the Protocol operational)

Style of writing (2)

- **Explanation side**: objective and neutral
  - Explaining instead of interpreting
  - Emphasis is on providing clarity about legal provisions
  - Different *points of view* need to be reflected
  - Looking back at the negotiation history – if needed

- **Implementation side**: making it work
  - Forward looking instead of criticizing deficiencies
  - Lessons learned +
  - Non-prescriptive!

Style of writing (3)

- Technical but as simple as possible
  - Addressed to diverse target audiences
  - Using *creative* means of communication

- Easy to read as a *stand-alone Guide*
- Highlighting ambiguity without trying to resolve it!

Style – case studies

Box 5. Examples of genetic modification

GM bacteria

Possibly the most important area of genetic modification, albeit in containment, is that of single-cell organisms modified to act as chemical factories for the production of food additives (including flavour enhancers) and fine chemicals. In 1997, the U.S. Environmental Protection Agency approved the first genetically engineered bacteria for agricultural use. The bacterium, a strain of *Rhizobium meliloti*, contained genes from five different species and was genetically altered to enhance its ability to provide nitrogen to alfalfa plants on farmland.[21]

GM agricultural crops

One of the most prominent developments of genetic modification technology has been the creation of transgenic agricultural crop varieties. Many millions of hectares of commercial transgenic crops are grown annually, although it is impossible to obtain exact figures as official data are not always available. In 2001 alone there were 35.7 million hectares of GM crops grown in the United States, 3.2 million hectares in Canada, 11.8 million hectares in Argentina and at least 1.5 million hectares in China.[22] From the two traits currently used, herbicide-tolerant crops are grown on 77% of the area, crops producing the Bt-toxin on 15%, "stacked" varieties producing Bt-toxin and showing herbicide-tolerance on 8%. Most of the harvest is used as animal feed.

Many other traits have been inserted into agricultural crops but are grown on a small scale or have not yet been commercialized. Papaya has been modified to provide resistance to papaya ringspot virus.[23] Rice yellow mottle virus attacks rice in Africa – modern biotechnology has produced a rice resistant to the virus.[24] Vaccines against diseases of the gastro-intestinal tract have been produced in bananas and potatoes.[25]

GM Trees

Biotechnology companies have linked up with key players in the industrial forest sector to support research that will increase tree growth rates, modify wood structure, alter trees' reproductive cycles, improve tolerance to certain herbicides and even store more of the gases that are responsible for global warming. While forest-related biotech research is still in its infancy compared with agriculture, field trials of GM trees have proliferated around the world. Recent research shows that, since 1988, there have been 184 GM tree field trials globally. More trials have been conducted with poplar than any other species due to its popularity as a pulp and paper species. The U.S. has released the largest number of GM trees via field trials, with 74% of the world-wide total.[26]

GM Animals

The first GM animal was a mouse,[27] which was developed in early 1988, when the Harvard Oncomouse was patented in the USA. The technology has been applied during the 1990s to some mammals, including cattle, pigs, sheep,[28] and mice.[29] It has also been applied to poultry. The creation and use of GM animals continues to increase. In Great Britain in 2000 there were 581,740 procedures in which GM animals were used or bred, 14% more than in 1999. Around 99% of these involved mice.[30]

GM Fish

Commercial aquaculture has made use of GM technology and there is also specialist interest for aquarium species. The Atlantic and Pacific salmon has received most media attention, particularly those that contain an

Cont.

Style – tables

Box 53. Examples of trade-related measures under the Protocol

Article	Trade-related measure	Measure taken by	Product	Timing	Character
8.1	Notification of Party of Import prior to export	Party of Export	LMOs	Prior to first intentional transboundary movement	Required
10.3(a)	Conditions attached to the import that affect internal sale	Party of Import	LMOs	Prior to first intentional transboundary movement	Authorized
10.3(b)	Import ban	Party of Import	LMOs	Prior to first intentional transboundary movement	Authorized
10.3(c)	Request for additional information prior to import	Party of Import	LMOs	Prior to first intentional transboundary movement	Authorized
10.3(a), 4	Unconditional approval of import	Party of Import	LMOs	Prior to first intentional transboundary movement	Authorized
12.4	Risk assessment	Party of Import	LMOs	Subsequent to first intentional introduction	Authorized
15	Risk assessment	Party of Import	LMOs	Prior to first intentional transboundary movement	Required
18.2(a)	Identification as "may contain" LMOs	Party of Export	LMO-FFPs	Prior to any intentional transboundary movement	Required
18.2(b)	Identification as LMOs	Party of Export	LMOs destined for contained use	Prior to any intentional transboundary movement	Required
18(c)	Identification as LMOs	Party of Export	LMOs destined for introduction into the environment	Prior to any intentional transboundary movement	Required

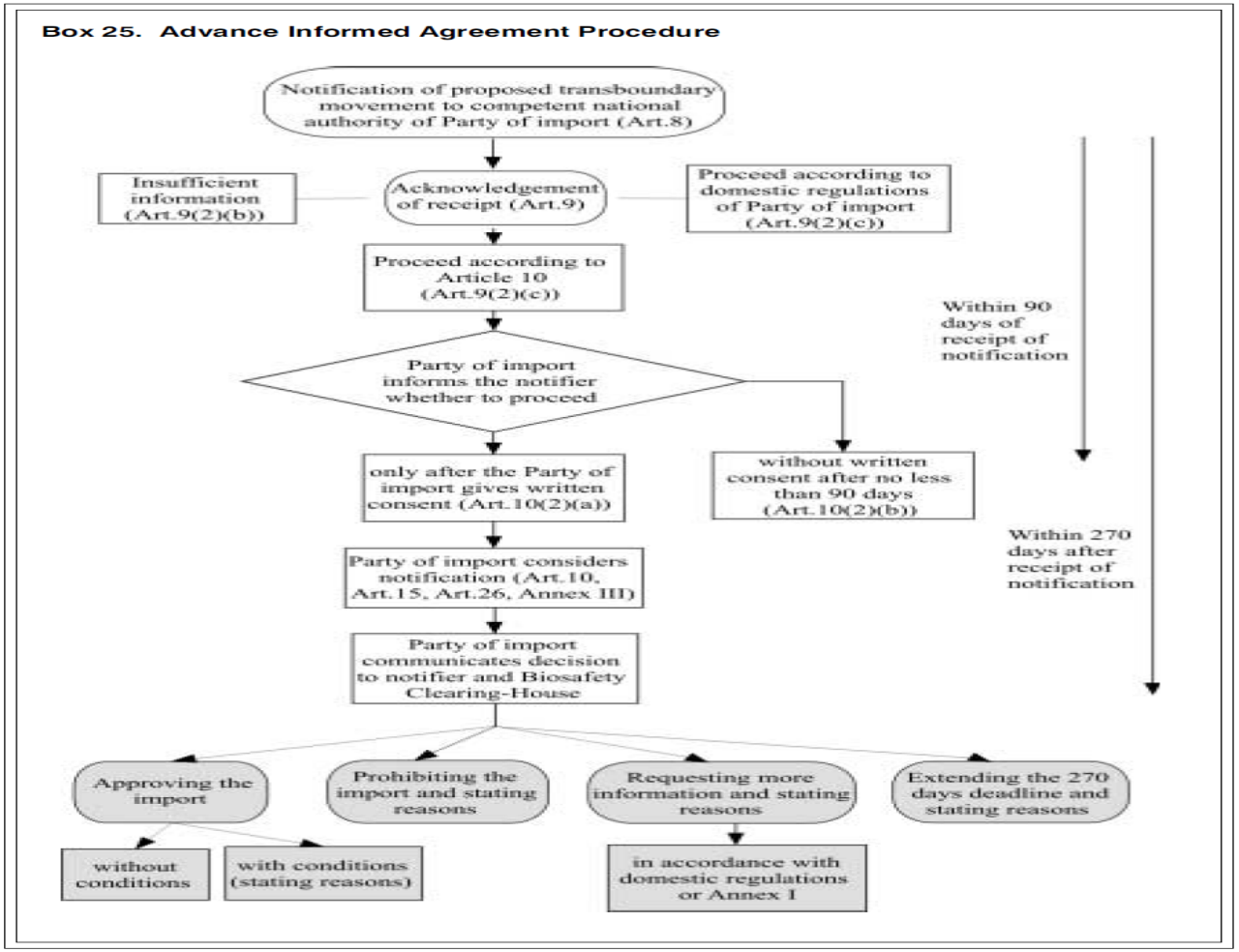
Style – comparative overviews

Box 10. Provisions relating to transboundary movements only and provisions addressing a broader scope of activities

Whether or not a provision applies only to transboundary movements of LMOs or has a broader scope may be subject to interpretation and it is not possible to give definitive guidance here at this stage. The table below makes an initial attempt to identify provisions of the Protocol applying to transboundary movement only and those with a broader application. The distinction is made on the basis of whether or not the core of the provision is limited to transboundary movements; in other words, looking at the general content of a provision rather than at whether or not the wording contains the specific term "transboundary movement". In some instances, one paragraph of an article relates to transboundary movement only, while another one has a broader scope.

Provisions related to transboundary movements (TBM) only		Provisions with a broader scope	
Article	**Content**	**Article**	**Content**
5	Exemption from the Protocol of TBM of certain pharmaceuticals for human use	1	Objective
6	Exemption from AIA procedure of transit TBM and of TBM of LMOs destined for contained use	2	General provisions
7	Application of the AIA procedure	3	Use of terms
8	Notification	4	Scope: TBM, transit, handling and use of LMOs
9	Acknowledgement of receipt	11(1)–(3)	Procedure for LMOs intended for use as food/feed for processing
10	Decision procedure	15(1)	Risk assessment general
11(4)–(9)	Procedure for LMOs intended for use as food/feed for processing	16	Risk management

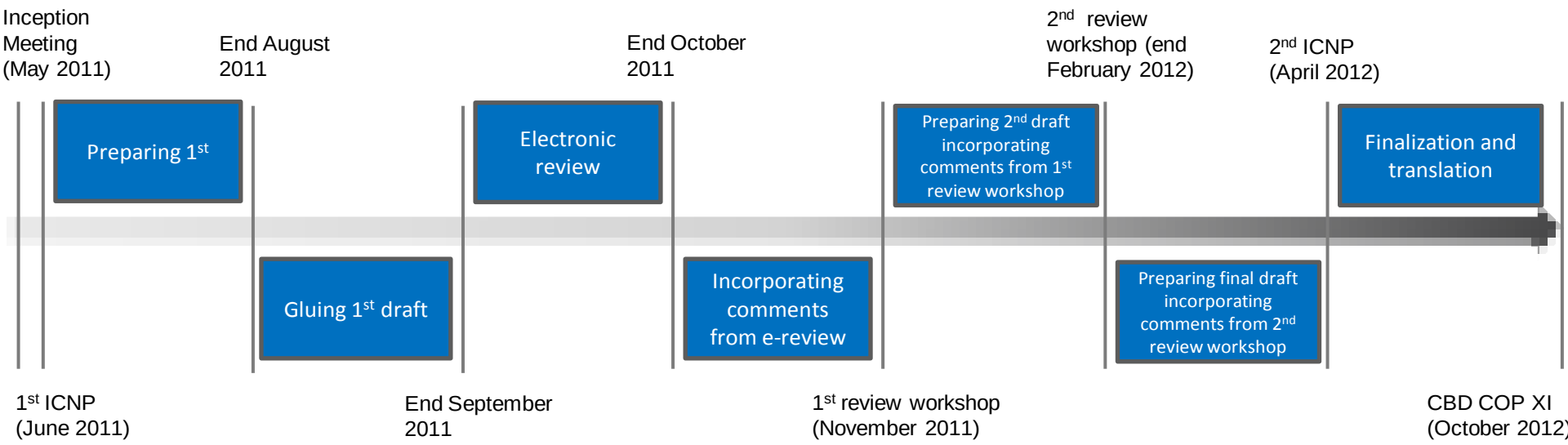
Style – graphs and charts



Review process

- Identification of reviewers
  - Regionally balanced
  - At least some key negotiators
  - Different stakeholder groups (civil society, business, research, ILCs, etc.)
- Standardized process
  - Facilitate analysis and compilation of individual comments provided
  - BUT not being “over”-prescriptive
- Engagement through both, electronic review as well as 2 review workshops

Process & timeline



Q+A

- What are the main challenges you are facing and how can the Explanatory Guide help you in this regard?

- Are you willing to contribute to the electronic review process?

We welcome your feedback!

Thomas Greiber, Senior Legal Officer, IUCN Environmental Law Centre (ELC)
thomas.greiber@iucn.org

Sonia Peña Moreno, Senior Policy Officer- Biodiversity, IUCN Global Policy Unit (GPU)
sonia.pena-moreno@iucn.org