

## Briefing Note: National access laws (challenges), continuing monitoring and enforcement issues<sup>1</sup>

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### Introduction

This briefing note focuses on five, often closely related, problem areas in the national implementation of access and benefit-sharing (ABS) regimes pursuant to Article 15 of the Convention on Biological Diversity (CBD):

- Misunderstanding of basic concepts;
- Lack of awareness of basic objectives and purposes;
- Disconnect between national needs and international framework;
- Lack of information creates protectionist reactions; and
- Dispersed capacity and lack of coordination.

The situations leading to each of these being considered as problem areas are examined in turn. The examples presented are not intended to be exhaustive but, rather, sufficient to illustrate each problem area. The potential effects of these problem areas on questions of implementation, in particular in terms of monitoring and enforcement, are considered as a conclusion to this note.

### Misunderstanding of Basic Concepts

#### *Definition of genetic resources*

Misunderstanding of basic concepts in access to genetic resources begins at the most fundamental level: the definition of the term *genetic resources*. The majority of countries, and more particularly stakeholders and interest groups within those countries, have tended to assume clarity in this definition and have not considered issues such as natural/physical interpretations vs. political-legal interpretations or the relevance of national situations and interests. The key difficulty this creates is that ABS regimes have rarely clearly iterated what is, and what is not, regulated within their scope.

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<sup>1</sup> This briefing note is drawn from various experiences in facilitating national policy dialogue, providing technical assistance in legislative and regulatory development, negotiating collaborative and contract research agreements and surveying national situations and policy processes regarding access to genetic resources. These experiences are primarily from Africa but include some work in Asia and South America. The comments made and conclusions drawn are the author's observations during these experiences and do not reflect the official positions of either GRPI or SEAPRI.

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*Interpretation: sovereignty and benefit sharing*

Two further issues of interpretation appear to be common sources of problems in the national implementation of ABS regimes: national sovereignty and benefit-sharing.

A number of countries and actors have interpreted the CBD's recognition of national sovereignty as meaning state ownership. However, national sovereignty clearly refers to national rights to determine the ownership and control of genetic resources and not to any particular outcome of this determination. This question is critical to the structure of ABS regimes and may often be affected by existing legal frameworks, such as constitutional rights to property and land and tenure laws. Recognition of customary law and practice is also sometimes a feature of these existing frameworks.

On one level, the interpretation of benefit-sharing is an exact parallel to the question of ownership and control: who receives the benefits? On another level, it relates to the nature and form of benefits, with a tendency towards unrealistic emphasis on financial returns at the expense of historically more successful in-kind and reciprocal benefit-sharing strategies.

*Intellectual property rights*

The role and potential of intellectual property rights (IPRs) is frequently misunderstood with little distinction made between fundamental IPR principles and implementation policies. Many countries are also proposing the extension of the IPR system to new subject matter while simultaneously objecting to current asymmetries and the IPR implementation policies of other countries. Deeper analysis and exploration of prevention of misappropriation and freedom to operate based approaches combined with efforts to specifically limit some of the more extreme interpretations of IPR implementation might provide broader benefit sharing options and address some concerns regard abusive IPR practices.

## **Lack of Awareness of Basic objectives and Purposes**

*Reactive vs. proactive approaches*

The clearest sign of a lack of awareness with regards the objectives and purposes of ABS is that most ABS regimes are being developed as direct reactions to the existence of the international framework and without any proactive effort to further identify national objectives. Most countries make little or no effort to identify national objectives, or approaches to internationally established objectives, and simply adopt international objectives without independent analysis. This reactive, rather than proactive, approach to developing national regimes means that governments are usually seeking to undertake policy development in an abstract context, without any reference to specific situations and interests, leading to fundamental flaws in the mechanisms adopted.

*Failure to distinguish between sectors*

One of the major drawbacks to reactive approaches is the unquestioning adoption of the relatively homogenised approach to ABS provided by the CBD framework. The weaknesses resulting from a failure to distinguish between sectors are best illustrated by the motivations for the development of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR). However, the distinctions that have been made, such as between commercial and academic projects, have proven to be problematic. More sophisticated approaches, recognising the need for varying approaches to mechanisms such as access restrictions and benefit sharing requirements, are beginning to emerge in some countries but international discourse has, thus far, failed to recognise and adapt to these approaches. The

majority of ABS regimes still tend to be developed through the generalisation of approaches to one sector to all other sectors.

#### *Political and scientific contexts*

The question of political context is largely one of capacities to assess one's desired objectives in terms of the objectives of other actors. Investing political capital in positions that other actors will never accept, or compromise with, is largely time wasted unless as a part of a wider negotiating strategy.

In terms of scientific context, countries have generally failed to take account of scientific standards and potential future developments in the formulation of ABS regimes.

### **Disconnect between National Needs and International Framework**

#### *Asymmetry between scale and nature of efforts at the national and international levels*

A simple examination of the volumes of ABS-related activities at both the national and international level demonstrates a tremendous asymmetry of efforts in terms of time, resources and the application of available capacity. Even a number of activities that do work at the national level focus on translating international regimes down rather than bringing national interests and experiences forward for consideration at the international level.

#### *Command and control, and often one-sized fits all, approach*

As is suggested above, the international framework still tends to relate to national efforts in terms of command and control, usually involving one size fits all solutions. Rather than seeking to highlight how the international framework may further national objectives the emphasis is on how national systems must adapt to international rules.

#### *Regulatory capture*

The structures and funding available at the international level have tended to facilitate regulatory capture of national level ABS processes. Particular interest groups, usually promoting heavy regulatory approaches based on the experiences of limited sub-sectors, have tended to predominate, with only limited funding, and thus minimal access to policy processes, available to alternative approaches.

### **Lack of Information Creates Protectionist Reactions**

#### *Limited awareness of national policy (if there is one)*

The limited amount of research and documented national level experience available suggests that the majority of stakeholders are generally unaware of any national policy processes and decisions, if these even exist. In such a situation, and in light of high profile reports of biopiracy and multi-million dollar genetic resource derived profits, stakeholders tend to assume the responsibility for filling the real or perceived policy vacuum.

#### *Limited communication between sectoral actors*

As much as key actors are unaware of national processes, they also tend to be unaware of each others interests and positions and therefore their unilateral approaches to ABS tend to reflect narrow perspectives and experiences.

*Policy-making processes isolated from sectoral interests*

The mirror of sectoral actors being isolated from national processes is that national level policy-making processes are equally isolated from details regarding the interests of these actors. Instead they tend to react to international pressures, as mentioned above, in combination with assumptions regarding national interests or information from well-placed narrow interests.

*Individual reactions driven by perceived closed group advantage or desire to 'protect national heritage'*

The relative isolation of actors in ABS processes tends to encourage individual protectionist reactions. This is partly the result of perceived comparative advantages among groups such as plant breeders or traditional health practitioners but belief in a personal role in 'protecting national heritage', usually from biopiracy, is also a common theme. Underlying all of these reactions appears to be some element of fear of the unknown: lack of knowledge of frameworks creates fear of abuse and of personal responsibility.

## **Dispersed Capacity and Lack of Coordination**

*Under-utilisation of scattered capacity*

The legal and policy capacity to develop and guide ABS regimes is generally scattered in developing countries, with very few reaching the critical mass necessary to address the issue comprehensively from their own resources. In the absence of resources to coordinate and develop this expertise, the tendency is towards excessive dependence on outside capacity with relatively generic approaches to ABS.

*Means of keeping knowledge current a challenge*

The scattered nature of capacity in ABS issues, and the large volume of information generated at the international level, means that there is frequently only a limited ability for individuals and groups to stay current with developing trends. This obviously limits the effectiveness of these individuals and groups but also probably hampers international debate, as national views and experiences are only sporadically presented.

*Applied and theoretical knowledge often distinct*

There is still a considerable divide among ABS practitioners between those working in applied and theoretical contexts. In terms of its effects this is similar to the issues raised above, i.e. it promotes a disconnect between pragmatic and conceptual approaches to regulation.

*Lack of forward planning*

Given that most ABS regimes tend to be developed as a response to external stimuli, whether this is the international framework, concerns over biopiracy or the availability of resources, they are generally short term in their outlook. Regimes are designed to address current concerns and are rarely effectively integrated into longer term conservation, scientific or development strategies.

## **Conclusion**

At the national level, the primary problems in the development, monitoring and enforcement of ABS regimes are the facts that countries generally remain in a situation of applying systems and standards that do not reflect national situations and objectives. What a country is actually trying to achieve with its ABS regime is usually unclear and, in the absence of clearly defined localised objectives, there are no benchmarks against which to measure success or

failure. In addition, expectations regarding the outcomes, in particular benefits, of ABS regimes are generally not based on any form of methodical assessments. As a result of these two problems, enforcement mechanisms are usually beyond the administrative, human and financial capacity of the states implementing them and virtually no thought is given to monitoring as there is little or no awareness of the nature of the activities that need to be monitored.