DISCUSSION PAPER

Access Laws: Challenges in Implementation, Monitoring and Enforcement

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It has been said time and time again, that the Convention on Biological Diversity (CBD) has created a new paradigm in regards to international and national access to genetic resources and benefit-sharing policies and laws.

This is, strictly speaking, true. Indeed, a considerable set of new regional and national policies and instruments (including institutional cods of conduct, treaties, non binding rules, policy orienting decisions, strategies, laws, regulations) have been crafted and put into force. Some of these include the FAO International Treaty, Decision 391 in the Andean Community, Executive Order 247 in the Philippines, the Bonn Guidelines, COP Decisions, institutional ABS policies in Kew Gardens, New York Botanic Gardens, Limbe Botanic Gardens, the ICBG projects, among other well known examples.

These establish sometimes general, sometimes very detailed, procedures and institutional structures intended to regulate how and under what conditions biological materials can be accessed and utilized.

It is also evident that biotechnology related projects have increased in number worldwide and companies and institutions, especially (but not exclusively) in the North, are investing heavily in research and development (R&D) in this sector, in a search for new products in a wide range of areas and industries.

The key (still fully unanswered) question is whether, and how, this new paradigm shift has impacted R&D (and even conservation activities in general). Initial evidence would seem to suggest that although some institutions have taken important steps in adapting to this new situation, many consider these laws and policies (and some in particular) as excessively burdensome and a practical deterrence to continuing R&D activities.

Not that the CBD's ABS principles are intrinsically wrong, but simply that the manner in which some countries have taken steps to further develop them into laws and policies has been fueled by excessive economic expectations reflected in their laws and regulations. This argument may be more or less true. What does seem quite clear ten years after the CBD came into force is that: a) countries all over the world are having considerable problems in implementing and putting into practice their national laws and policies (for different and widely varied reasons) and thus, b) the benefit sharing principle (and underlying spirit of the CBD) has not been adequately met and realized. It could be useful to briefly speculate as to why this is so: a need for capacity building at the national level; incoherent laws and

legislation; practical realities in the field; lack of total political commitment by some Governments, and; a common and standardized (inadequate!) approach to ABS legislation.

Reasons may vary across the board and some may be more valid than others. The fact is that making the CBD work in practice - particularly in the area of ABS - has proved especially complicated in practice. It is quite interesting to notice how much the political and conceptual debate has "progressed", with ABS mentioned in almost every single international forum, ranging from WIPO and TRIPS Council to FAO, UNESCO, regional bodies, botanical congresses and so on. This is in contrast to the limited success stories available (or which have been documented) demonstrating how benefits derived from access to and use of genetic resources have been effectively shared.

Part of the problem has to do, perhaps, with the issue of actually documenting these stories and exposing the sometimes very discrete ways in which these benefits manifest themselves. Not every project and R & D effort will generate a blockbuster drug. This seems very clear. From teaching students collecting techniques to actually identifying an active compound there are literally dozens of steps and landmarks where in different ways benefits can be realized and eventually shared. Most people seem to be looking and scrutinizing for the royalty rate alone - in this context, it could be argued that the manner in which benefits materialize and previous to that, incorporated into policies and laws, needs to be re evaluated.

On the other hand, an often overlooked and sidelined fact is that there is little hope in ensuring that the CBD's ABS principles (and all policies and regulations for that matter) are realized if there is no recognition that " countries of origin", by developing laws, will not be able to successfully implement these principles. Just the mere nature of genetic resources and emerging technologies and ex situ facilities and new areas of interest (deep sea beds and microorganisms)..... make the task of trying to regulate access to genetic resources on the provider side, particularly challenging if not impossible. The fact that 75 % of the world's in situ biodiversity is in a few megadiverse countries (including Canada and the US!) does not change this scenario, unless there is the thinking that border controls are an option.

The way in which one can overcome these problems is by proposing that ALL countries commit to ensuring the CBD's ABS principles are realized. Not only the "country of origin" but all countries in their providing/source and recipient capacities. This requires understanding that there may be common but differentiated measures needed to achieve this and that some countries may have a greater burden in doing so. Some interesting proposals have already been made and discussed in this regard, including adding requirements to patent applications and developing a certificates of origin system. The FAO IT Multilateral System is also an example of a mechanism in which parties share common but different responsibilities and burdens in relation to a closed set of resources.

In this regard, we would like to propose that the world does not necessarily need yet another international instrument (a protocol to the CBD as the reflection of an "international regime" which already exists!), unless it clearly addresses aspects which are not covered in existing instruments and policies. If for example, a negotiation focussed on obligations regarding the use of genetic resources per se, or centered its attention on biotechnologically derived products, or addressed some mechanism by which random international audits could be

undertaken on certain projects (ABS related) to verify whether and how benefits are being shared, or even established a set of possible sanctions when contract or MTA provisions are not complied with, then we may be moving into interesting and potentially useful terrain.

We don't necessarily require more laws and regulations which state collaboration and cooperation as an objective. Five more years of discussions are not needed either (in our modest opinion). We need cost-effective measures (better laws) which efficiently promote collaborative approaches and attitudes among countries and institutions and, most importantly, focus on how best to make some of our existing tools and instruments more operational.

Without abdicating to sovereign rights nor putting aside the just, valid and certainly legitimate expectations and interests of countries rich in biodiversity, it is still possible to find alternatives and options by which genetic resources can generate benefits to them and their communities.