

Vision and Nature of an International Regime on Access and Benefit-sharing (ABS)

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Introduction

Following decisions of the 2002 World Summit on Sustainable Development (WSSD), the 7th Conference of the Parties to the Convention on biological diversity has decided to start the elaboration and the negotiation of an International Regime on access to genetic resources and benefit-sharing (ABS-IR). The already existing Ad'hoc open-ended Working Group on ABS has been mandated to run the negotiation in collaboration with the Ad'hoc open-ended Intersessional Working Group on Article 8 j and related provisions. This Working group on ABS should operate in accordance with the terms of reference contained in the annex of the decision.

In this short paper you will find some personal reflections on the future of the ABS-IR based on the outcome of the COP 7 meeting contained in decision VII/19 and focused on the following issues: objectives, scope, elements and nature of the IR as well as negotiation process.

Central Issues associated with the Negotiation of an International Regime (IR)

According to decision VII/19 operative paragraph 1, the aim of the IR shall be *to effectively implement the provisions in Article 15 and 8 j of the CBD and the three objectives of the CBD*. This is of course a very general and broad objective. It simply reflects the fact that the objective of the International regime was not discussed as such by COP 7. Therefore clarification of the objectives of the IR shall be one of the priorities of the Ad'hoc open-ended Working group.

The first question we might ask in this context is why do we need an international regime? Answering this question will require that each Party performs its own need/gap analysis of existing legal and other instrument at national, regional and international level. Based on the position expressed in previous CBD meetings we might however already assume that:

- Needs vary greatly from country to country (even among developing biodiversity rich countries); and
- Many important gaps have already been identified in the current ABS Regime (e.g. the Bonn guidelines) such as: (i) the lack of any obligation on Parties with users of generic resources under its jurisdiction to take measures to ensure compliance with PIC and MAT ; and (ii) the lack of an effective dispute settlement mechanism.

¹ The views presented in this paper are solely those of the author and do not necessarily represent the views of the Swiss Agency for Environment, Forests and Landscape.

One possible approach to clarify the objectives of the ABS-IR would be to look at the 12 objectives of the Bonn guidelines which are already more specific and practical oriented.

Another approach could be to categorize the 21 elements listed in decision VII/19 that shall be considered for inclusion in the IR. We did this exercise and ended up with the following outline (for information the letters in parenthesis refer to the elements listed in *part d* of the Terms of reference):

- Ensure fair and equitable sharing of the benefits (ii, iii, v, vi, vii, xii);
- Facilitate access for environmentally sound uses (iv, vii);
- Ensure compliance with PIC and MAT (ix, x, xi, xiii, xiv, xx) including Dispute settlement (xxi);
- Recognize and protect traditional knowledge (xv, xvi, xviii);
- Support capacity building (xvii, xix);
- Promote and encourage collaborative scientific research (i) including technology transfer (include basic research as well as R&D); and
- Address specifically the transboundary nature of some genetic resources and associated traditional knowledge (viii).

This outline could serve as a concrete starting point to discuss the objectives of the ABS-IR. When doing this, the following issues could be taken into consideration:

- How specific shall the objective of the IR be? How can we focus on practical oriented objectives?
- Shall the IR address all ABS related issues or focus on some elements such as enforcement of Prior Informed Consent or Mutually Agreed Terms including Benefit Sharing?
- How to address the concerns of indigenous and local communities? Can the objectives related to associated traditional knowledge be more specific?
- How to ensure an acceptable balance between rights and obligations as provider and user countries bearing in mind that most countries will be both user and provider?
- What shall be covered at multilateral level? What shall be addressed by national law? How to define the relationship between national and multilateral level?

Scope

According to decision VII/19, the scope of the IR is defined so far by the two following generic elements: genetic resources and traditional knowledge. Discussion shall take place to address the following issues related to scope:

- *Broad or limited scope?* Shall the IR address all genetic resources and related traditional knowledge like the CBD and the BG or shall it, like the FAO-IT, focus on specific groups of genetic resources (plants, animals, micro organisms etc.) or type of uses (commercial, taxonomic research etc.)

- *Comprehensive and simple*
- *Duplication with other forum and initiative*
- *Derivatives*
- *Multinational nature of some genetic resources*

Elements of the IR

In order to operationalize the IR, mechanisms and tools shall be developed. Examples of potential mechanisms and tools are listed below. Each of them shall be closely analysed in order to evaluate its pertinence and the best way and/or the most appropriate instrument to ensure its efficient and timely implementation.

- *Mechanisms to ensure compliance with PIC and MAT and to ensure fair and equitable sharing of benefits*
 - Disclosure of origin/source of genetic resources and traditional knowledge (user measure) in IPR applications
 - Certificate of origin/source/ legal provenance (provider measure)
 - Other systems such as standards and company certification
- *Dispute settlement mechanism*
- *Capacity building mechanism*
- *Mechanism to ensure the flow of information through the Clearing House Mechanism*
- *Collaborative scientific research and technology transfer*
- *Financial mechanisms*

Nature

The determination of the nature of the IR will, of course, depend on the clarification of the potential objective, scope and elements. Decision VII/19 is open on this issue since the IR could be composed of one or more legally binding and/or non-binding instruments.

The first step shall be to clarify and reach a common understanding on what we mean by both “an international regime” and “negotiate under the CBD”. Are we going to develop a new protocol under the CBD as another international instrument on ABS or are we going to establish a framework or an umbrella instrument that might integrate already existing instruments or instruments under development? In other word will the ABS-IR be independent or integrated.

An integrated IR shall include already existing legally binding instruments such as the IT-FAO and voluntary instruments such as the Bonn guidelines pertinent for ABS. The development of additional instruments to fill the gaps could be foreseen both within and outside the CBD. The elaboration and implementation of a certificate system would be an example of a possible legally binding instrument that could be developed within the CBD. On the other hand, the proposed amendment to the Patent Cooperation Treaty (PCT) to include the disclosure of the source/origin of genetic resources and traditional knowledge in patent application would be an example of a new instrument developed outside of the CBD but integrated in the ABS-IR. The same could also apply to any development coming out of the WIPO Intergovernmental

Committee on intellectual property and genetic resources, traditional knowledge and folklore.

The advantages and disadvantages of each approach should be discussed by the working group bearing in mind the particular needs of the countries and the foreseen duration of the negotiation process.

Process

Decision VII/19 required that the development of the IR shall be done in collaboration with the Working group on 8 j and in cooperation with other international organisations such as UNEP, FAO, WTO, UPOV and WIPO. Even though a basis for collaboration and cooperation already exists, a new mechanism that offers more flexibility and efficiency shall be explored. This will pose new challenges in terms of process management especially if the option of an integrated IR is chosen.

Conclusions

For the first time in the history of the Convention on Biodiversity, decision VII/19, that kick-starts negotiation of the International regime on ABS, was imposed on the COP through commitments taken by Governments in other international bodies, the WSSD and the UN General Assembly. This might explain why COP 7 kept all options open and let the full responsibility of defining the objective, the structure and the legal nature of the regime fall on the Ad'hoc open-ended working group. In this regard the effective participation of indigenous and local communities as well as the close cooperation of other international bodies in the negotiation process will represent unique challenges. For CBD veterans, Kuala Lumpur looks like a reminder of Jakarta in 1995 where COP 2 decided to start the negotiation of a Protocol on Biosafety. It took 8 years for the Protocol to enter into force and it will probably take a few more years until this instrument is really operational. Can we wait so long for an international regime? Of course not, governments and all stakeholders shall continue to work towards implementation of the Bonn guidelines and the FAO-IT to gain sufficient practical experience. Based on this experience, governments shall negotiate simple and pragmatic measures to cover the most important gaps at international level. Only this might allow a rapid conclusion of the negotiation on the IR.