

Vision and Nature of an International Regime: Minimum Requirements and Options from a Practical Developing Country Perspective¹

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Substantive Issues

A. Minimum requirements

Core objectives of an international regime

The core operative objectives and associated mechanisms of any international regime should be clearly iterated as soon as possible. Recognising there is considerable difference of opinion regarding some aspects of access to genetic resources and that the process of international negotiations inevitably introduces some element of ambiguity into final text, these operative objectives and associated mechanisms should be relatively few and approached in the simplest manner possible. Anything overly complex will stretch the capacities and resources of developing countries and risk the perpetuation of fears regarding asymmetries in the utility of the system to different regions, sub-regions and interest groups.

User country and enforcement measures

User measures, and the related questions of enforcement and compliance, are the central issue that must be addressed by any international regime. The key weakness of even the best formulated and implemented access and benefit-sharing (ABS) policy or regulatory framework is that users of genetic resources are frequently not based in the country of immediate origin of those resources. This is primarily an issue of countries agreeing to respect each others legal and policy principles and measures regarding access and benefit sharing. However, a clear distinction should be made between the activity of 'access' and downstream principles regarding 'use'. Countries will not necessarily need to recognise each others policies and laws regarding patentability and similar matters in a general sense but, rather, will only need to agree to recognise the terms and conditions attaching to 'access', which may or may not include case-specific restrictions on patentability etc.

In this context any international regime should make user measures a universal requirement on the basis that access is not always a question of developed country actors accessing genetic resources from developing countries.

¹ 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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Accompanying any provisions on user measures is the need for an approach to enforcement. The civil legal systems of developed countries are still largely inaccessible to developing country actors and the option of establishing criminal penalties for irregular activity, now a major feature of intellectual property rights systems has, thus far, only been discussed in a limited manner in developing countries. The absence of an effective means to enforce or protect one's rights means that, in practice, one has no rights.

Monitoring mechanism

Some form of limited monitoring mechanism, as is currently being proposed by some experts in the context of the International Treaty on Plant Genetic Resources for Food and Agriculture, should be considered. This mechanism would not need to have a particularly heavy mandate but could concentrate on tracking trends and screening and forwarding complaints for the consideration of the international regime's governing body. If this mechanism identified widespread patterns of abuse the governing body should have the authority to consider any further measures that might be necessary to limit such behaviour.

Minimum standards and harmonisation

There should be no general approach to minimum standards or harmonisation and any efforts in this regard should be strictly limited to the core objectives of an international regime. The differences of opinion on key issues and the relative asymmetries in negotiating power regarding these issues preclude the development of any comprehensive 'global ABS' regime. Relatively recent experiences in the context of TRIPs and the proposed Substantive Patent Law Treaty have highlighted these facts. In addition, information on the ground increasingly suggests that a wide degree of flexibility in the nature and structure of access regimes between, and even within, countries is a prerequisite for the development of effective systems.

An effective regime addressing user measures would allow countries to establish and experiment with their own standards and approaches safe in the knowledge that these would be respected in other countries.

B. Additional options

Categorisation

Work on the identification and description of the various uses of genetic resources might assist countries in recognising the radically different dynamics that apply in some of these uses. Such a recognition would further the development of national ABS systems to cater to the needs of different users while the use of any categorisation system in formal approval processes might allow for some tracking of trends and interests in the field. Such a system might be modelled on existing examples such as the International Patent Classification.

Supporting Components

Information clearing and monitoring

Some form of information clearing system covering regulatory and policy approaches, experiences and ongoing developments could be useful, particularly if it considered monitoring developments in scientific and commercial practice regarding access to genetic resources. Despite constructive efforts by the CBD Secretariat (and to some degree WIPO), the primary sources of practical information for those regulating, or negotiating, access to genetic resources are informal international networks of individuals who, for one reason or

another, are aware of each others' activities and share some measure of trust. While these networks can be effective for those with access to them, they perpetuate an exclusive model of expertise in ABS and isolate many individuals and organisations in need of assistance and advice. It should be recognised that this need for assistance and advice exists in both developed and developing countries and in both the public and private sectors. Many actors simply do not know how they should approach ABS issues even though their intentions are good.

Capacity building

National level capacity building, particularly in policy analysis and implementation, remains a critical need in the field of ABS. Most countries do not even have the capacity to assess whether ABS capacity building would be a worthwhile exercise, in terms of opportunity cost, for them or not. A number of ABS regimes, and processes for developing such regimes, have proven to be dysfunctional because the actors involved simply did not understand enough about what they were trying to achieve and why.

In the event that countries determine that formal ABS systems with more than minimal access procedures are appropriate for their situations, capacity building will also be required to ensure that there is at least some ability to implement and oversee such a system and to forward experiences to the international level in a coherent manner.

Conclusion

The main challenges facing the development of an international regime are twofold. One is the often polarised views of some actors and stakeholders regarding ABS related issues and the risk that these actors and stakeholders will refuse to support any international regime that does not accommodate their view. This is the primary reason why any regime should focus on clear issues that have achieved widespread, if not always universal, acceptance. The second challenge is that national level capacities in many aspects of ABS are still extremely low leading to decisions often being made on the basis of faulty assumptions and much international, and even national, discourse being characterised by mistrust and combative positions. Greater attention to national level capacity, combined with the development of effective user measures, will reassure developing countries that they understand ABS issues sufficiently to be able to comfortably engage in collaborations with developed country actors.