

DISCUSSION PAPER

Nature of an International ABS Regime

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The CBD-COP7 decision provides for the international ABS regime to consist of a wide range of possible elements across an extensive list of international instruments and processes.

The World Summit on Sustainable Development plan of action called for the negotiation of an international regime under the Convention on Biological Diversity. Therefore, central to the development of an international regime are the three CBD objectives. Accordingly, a fundamental objective of access and benefit-sharing from the use of genetic resources is to support conservation and sustainable use of biodiversity, in particular in situ conservation/sustainable use of species and ecosystems.

The cornerstone concept underlying the international ABS regime can be found in CBD, namely that states have sovereign rights over their own biological/genetic resources. Under CBD Article 15, access is to be facilitated and access is to be provided based on prior informed consent and benefit-sharing negotiated through mutually-agreed terms.

Although traditional knowledge was not included within the scope of CBD Article 15 (Access to Genetic Resources), it is now clearly within the scope of the negotiations on an international ABS regime. My understanding is that some countries included access and benefit-sharing aspects of CBD Article 8(j) in their national ABS laws and then subsequently negotiated the expansion of the scope to include both genetic resources and associated traditional knowledge into the voluntary CBD Bonn Guidelines and the CBD COP7 decision to negotiate an international ABS regime.

Not unlike the CBD, the international regime may include wide-ranging objectives that seek to attain, *inter alia*, environmental, innovation, trade, investment, equity, scientific, development, social and cultural outcomes.

Ultimately, the regime will first and foremost manifest itself as environmental protection/regulation in order to ensure conservation and sustainable use of genetic resources. In the longer term, the most important aspect of access is not facilitated access (i.e. efficient prior informed consent regulations) but rather ensuring access to genetic species into the future through measures to conserve and sustainably use in-situ species and their associated ecosystems. There is no access when species and ecosystems are lost forever. This is a concern for both users and providers of genetic resources.

¹ The views expressed are solely those of the author.

It is clear that developing the market institutions (e.g. property rights, regulatory instruments) and providing economic policy incentives to assist in the creation and growth of markets for genetic resources alone cannot be a panacea for reversing the rate of loss of species and ecosystems. Other government action will be needed.

One strategy may be to create national parks or other wild spaces that will be protected from logging, agricultural expansion and urban sprawl so that species will be available for research by future generations. The establishment of protected areas in developing countries in support of retaining unique ecosystems for ABS purposes will likely require the infusion of significant new financial support and capacity-building by developed countries, consistent with the WSSD Plan of Action on Biodiversity (para. 44).

Alternatively, in certain cases it may be feasible to integrate ABS policy into resource/landscape management; for example, a survey of the unique ecosystems/genetic resources and biodiversity which has been traditionally-used by indigenous and local communities could be incorporated into forestry management plans so as to preserve species for future biotechnology research.

The principle point is that conservation-based environmental measures will be essential to achieve the economic and trade objectives of the international ABS regime and conversely ABS policy will need to be integrated into national protected areas and landscape/resource management strategies.

Potential CBD Protocol on ABS?

If countries were to agree to negotiate an ABS protocol under the CBD this instrument would undoubtedly establish the marketplace rules to govern investment, commercialization and trade in in-situ biological/genetic resources. This hybrid instrument would include elements borrowed from, *inter alia*, multi-lateral environmental agreements, trade agreements and intellectual property treaties.

The key trade-off in the negotiation may revolve around access and benefit-sharing. Going beyond facilitated access and transparency under the CBD Bonn Guidelines, there will be pressures to include national treatment and investment provisions consistent with basic trade principles. In return, there will be pressures for all countries to adopt national "user" measures to recognize and enforce property rights of other countries.

Another key issue in the negotiation of such a protocol would be the national-level prior informed consent procedures for accessing genetic resources as compared to the community-level PIC procedures for accessing traditional knowledge and related genetic resources. In effect, the protocol may contain provisions related to two separate *sui generis* access/property regimes.

Another important negotiation could revolve around the nature of property rights created for genetic resources and traditional knowledge under such a protocol - would these rights be real property, intangible property, information property or intellectual property? Civil Code,

common law and customary law differences in property rights concepts will likely rise to the forefront of discussions.

Any monitoring/enforcement could contain elements of both property rights and environmental regulation. For example, there may be aspects that can be adapted from the certificate system under CITES which governs trade in endangered species and includes export permits, import permits, border measures and enforcement in the marketplace.

Potential Evolution of a Potential CBD Instrument

The development of a potential CBD instrument could occur in stages. One potential evolution of an instrument is presented below in order to encourage discussion as to how such an instrument might evolve over time.

The negotiation of a CBD protocol on ABS could initially focus on a declaration to reinforce that States have sovereign rights over their own genetic resources and that Parties agree to adopt legal measures in support of the basic ethical principle that that one should not profit in one country from undertaking illegal activities (i.e. unauthorized access and export of genetic resources) in another country. Such a declaration would need to be drafted in such a way to allow some national flexibility to determine how to implement under both civil and common law systems.

Perhaps a second stage could be the negotiation of a protocol under CBD which would seek to establish minimum standards and enforcement. Goals of such a protocol could be to harmonize national laws along the lines of the voluntary Bonn Guidelines, to encourage other countries to enact national ABS laws and to promote the adoption of "user" measures. Such an instrument could resemble WIPO treaties such as the Paris Convention (Industrial Property) and the Berne Convention (Copyrights) where minimum standards are established but there is a significant degree of flexibility for countries to implement the Conventions based on national circumstances. These Conventions allowed flexibility since generally there was a lack of redress for Parties where there was non-compliance. An element of UPOV that could be adapted to ABS is the UPOV reciprocity requirements whereby access to new plant varieties is restricted to nationals of countries that have ratified UPOV under national law. Such reciprocity may be important for encouraging some countries to ratify the protocol.

Such a protocol could also be evolutionary like UPOV and some WIPO treaties which have different negotiated levels of standards over time (e.g. UPOV 1978 and UPOV 1991). Dispute mechanisms could be a later element included in a phased approach to a protocol. Generally, multi-level treaties also have the benefit of creating an incentive for laggard countries to ratify at the lower level of obligations in advance of the coming into force of the higher standard.