

DISCUSSION PAPER

A few thoughts on the international regime and provider / user measures

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The International Regime

The overall goal of an International Regime on access and benefit-sharing (ABS) should be to simplify and increase the transparency of international transactions related to genetic resources and associated traditional knowledge (TK), and therefore to help deliver the third objective of the Convention on Biological Diversity (CBD).

To this end, two types of measures could be considered: those that facilitate access for environmentally sound uses and measures that ensure the fair and equitable sharing of benefits. In international negotiations, these measures are often called 'provider measures' and 'user measures'. This terminology is however not accurate. Measures that facilitate access can also be taken by users whilst measures that ensure benefit sharing can be taken by providers. The Bonn Guidelines have already cast some light on what the above measures could be. The Guidelines will be an essential component of the international regime.

In relation to access, the development of clear, non-discriminatory national frameworks is essential. Minimum standards could be established. For instance, there should be a one-stop shop for those who require access to genetic resources: e.g. through one national competent authority and/or focal point. National measures should also include consultation mechanisms that would require the prior informed consent of indigenous communities before genetic resources and associated TK they hold can be accessed. The advertising of such national arrangements would also be important to raise awareness of those who seek access to genetic resources. One possibility in this respect is to include specific paragraphs in the customs declaration.

National ABS frameworks only exist so far in a limited number of countries and present limitations. Most of them predate the Bonn Guidelines and there is limited evidence that a serious effort to revise them has taken place since COP 6. A considerable effort in capacity building would be necessary to help developing countries put in place appropriate national regimes. Therefore, capacity building will be an essential element of the international regime. Financial resources to this end could be found through a combination of public and private funds. In addition to GEF and bilateral development co-operation, one could think of private funds coming from companies that have a keen interest in bio-prospecting activities. Partnerships in this respect could be sought.

¹ The views expressed here are the author's only and do not reflect the point of view of the European Commission.

In relation to ensuring benefit sharing, a number of measures at national/regional/international level could be envisaged. These measures could include a combination of voluntary and binding instruments. The limited experience gained in the implementation of the Bonn Guidelines in Europe has certainly shown a surprising low level of awareness of CBD rules among some stakeholders, particularly in the private sector. More efforts are necessary for the development of institutional policies, codes of conduct and corporate policies that would, for instance, introduce the use of material transfer agreements as a standard practice. The development of regional networks of ABS focal points, the use of Clearing House Mechanisms and the use of Corporate Social Responsibility processes are all tools to explore in this respect. Moreover, the potential of voluntary certification schemes, such as ISO 14001 or the stricter EU EMAS scheme should not be neglected. These measures could be promoted by countries as incentives for compliance.

Measures at the national level are necessary but will not be sufficient to achieve the above-mentioned objective of an international ABS regime. In particular, they do not address the main challenges of an international regime: they are not enough to track the genetic resources and TK across jurisdictions nor they offer a possibility of claiming benefit sharing in other jurisdictions. Therefore some international tools need also to be envisaged.

These could include measures in relation to intellectual property rights (IPRs) such as disclosure of origin in IPRs applications. It needs to be stressed that only some genetic resources and associated TK are used for inventions that are protected by patents or other intellectual property rights like plant variety rights. Therefore, measures such as disclosure of origin could only be one type of a wider range of measures that altogether could contribute to ensure benefit sharing. The issue of a disclosure requirement in patent applications has been the subject of hot debate for a few years now in many fora including the CBD, WIPO and TRIPs. A disclosure requirement for patent applicants could indeed be of help to increase the transparency of international transactions related to genetic resources. However, it will be essential to frame such a requirement in a way that it does not discourage innovation therefore causing a lose-lose situation where the sustainable use of genetic resources is discouraged and benefits are not generated. Moreover, it will also be necessary to achieve an international agreement on a disclosure requirement in order to try and preserve a level playing field among different parts of the private sectors in the different parts of the world.

The ongoing discussions in WIPO offer, at least in the short term, the most obvious road ahead to achieve such an international agreement. An international disclosure requirement should be an important component of the international regime on ABS. Should such a global agreement prove to be impossible to achieve in the present political situation, it would be important for individual or groups of countries who favour such a requirement to consider implementing it unilaterally showing that it can work in practice.

Also in WIPO, the development of an international *sui generis* system for the protection of TK is also an important tool to ensure its respect and preservation. Such a system should be compatible with the customary law of indigenous peoples: it could actually focus on the recognition of such laws and should constitute an essential element of the international regime. Other systems of protection outside patent law could originate from the work of the CBD Art. 8j) group. However, it will be necessary to ensure the complementarity of the outcomes of the work of WIPO and of the latter group.

Finally and importantly, another measure at the international level that could help ensuring that benefit sharing takes place is the so-called certificate of origin/legal provenance. An internationally recognised certificate could accompany the genetic resources and associated TK throughout the chain of transactions that ultimately generate benefits thus bringing more transparency into the system. There are many issues related to the practicability of such a certificate that need to be addressed.

What would be its relationship with Material Transfer Agreements? Would it be additional or would it replace them? Is it possible to develop a one fit all international certificate that would be utilised for all uses and all types of genetic resources? Should it be limited to a template? How would it apply to pre-CBD resources for which there is no benefit sharing obligations and to post-CBD but pre-certificate resources?

If an internationally agreed certificate of origin existed, it could be 'enforceable' across the jurisdictions in which it is recognised. Through a system of mutual recognition, it would, in fact, be possible to open up access to justice for the countries of origin of genetic resources in the countries where the users are located. Existing international civil liability regimes could be inspirational in this respect.

In relation to arbitration, when genetic resources have been the subject of a contract, that contract could provide for arbitration as a means to quickly solve possible disputes. Parties to the contract could resort to the arbitrator of their choice, e.g. the Permanent Court of Arbitration.