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THE INTERNATIONAL REGIME ON ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING : IN SEARCH OF THE RIGHT PATH

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Introduction

Often, complex issues become more complicated because of misunderstandings of key concepts and fundamentals that lie at their core. This short essay will argue that the development of the international regime on access to genetic resources and benefit sharing (international regime on ABS) risks failure because of misconceptions regarding the nature of «a legal regime», only partial comprehension of the role and implications of existing ABS instruments, rules and principles, and, most importantly, because more than ten years after the entry into force of the Convention on Biological Diversity (CBD), scientific input has not been able to permeate sufficiently into policy discussions and contribute effectively to the adoption of *sound* policies, laws and regulations at all levels. Therefore, policies and laws tend to respond more to a pre conceived ideal, rather than to what can effectively (and even technically) be achieved in practice. These initial thoughts derive in turn from a preliminary analysis of the direction and content of papers, debates, declarations and negotiations which have taken place to date in relation to the international regime on ABS.

Indications of failure in the development of the international regime on ABS could, among others, include : development of a regime which basically duplicates and looks very similar (in form and structure) to the Bonn Guidelines and other ABS instruments; claiming success simply because a binding instrument is developed and agreed upon by Parties (whatever its content); discussing the binding or non binding nature of the regime at an initial stage of negotiations; focusing negotiations on genetic resources only as physical, tangible entities; not including an assessment and impact of bioinformatics, genomics, proteomics and other technologies and disciplines.

On the other hand, this essay will also try to demonstrate that the only possible scenarios where success can legitimately be claimed and invoked will materialize if:

- a) there is an express recognition that an international regime on ABS is *already* in place and what is needed is to identify where complementary measures and adjustments are required within the existing regime²,
- b) what is negotiated and developed are measures, tools and mechanisms which focus on monitoring genetic resources, compliance and enforcement of ABS agreements, and

- c) disclosure of origin and legal provenance provisions and obligations are further accepted, consolidated and incorporated into international and national instruments³.

Focusing on b) and c) would definitely cover areas which could contribute to the strengthening and consolidation of the international regime on ABS. Furthermore, finding viable options under which national ABS measures and provisions are recognized outside national jurisdictions (whether by administrative or judicial bodies given the case), would also assist in making regulatory efforts (especially of countries of origin or providing resources) operational and truly effective⁴.

Policy and regulatory tendencies over the past 10 years: progress to date

The number of policies and laws are not an indication that the CBD objectives regarding ABS are being realized. Nonetheless, they are an important step in the complex and evolving process of designing an effective and efficient international regime on ABS. And certainly, numerous policies and legislation have been enacted worldwide, addressing ABS and in some cases related issues such as traditional knowledge, technology transfer, biosafety, etc. (see Box 1 below)⁵.

To date, there are certain facts (some of them very obvious but surprisingly underscored over the years) that should inform and be taken into account by this process, in a much more dynamic manner:

- Effectiveness of national ABS laws has been put into question in many countries – this is not only due to weak national institutional capacities,
- Basic scientific endeavors (e.g. taxonomy projects) have been affected worldwide as restrictions regarding access to biological materials are imposed⁶,
- New technologies and disciplines (e.g. proteomics, genomics and bioinformatics) are making the relevance of physical materials diminish, especially in certain research fields⁷,
- Total movements of biological materials and genetic resources are impossible to monitor and control,
- Most analysts, policy makers, etc. know genetic resources are important (in economic, ecological and cultural terms) but nobody really has a precise idea of how these resources generate benefits in a number of fields and how mechanisms operate to distribute/share benefits⁸,

- Genetic resources are shared by a wide range of countries (particularly megadiverse countries), making individual origin very complicated to identify⁹.

With these in mind, it is easier to speculate at this stage why the CBD ABS objectives are so elusive and why there may be a need (and opportunity) to rethink how the international regime on ABS could become more functional, and demonstrate that the generation and equitable sharing of benefits among countries and communities within them is possible.

The existing international ABS regime

Suggesting that an international regime on ABS does not exist and, at the same time, that an international regime on ABS needs to be negotiated, is a contradiction in form and substance. In form because as will be demonstrated, an international regime on ABS has been fully in place and in force probably even before 1992 – albeit with different principles than those enshrined in the CBD.

Just taking a couple of definitions from standard dictionaries as to the nature of a legal regime may clarify this:

A legal regime is defined as «mode or system of rule or management»¹⁰, or «a set of rules, policies and norms of behaviour that cover any legal issue and that facilitate substantive or procedural arrangements for deciding that issue». In the case on an *international regime*, this can be defined as «a set of norms of behaviours and rules and policies that cover international issues and that facilitate substantive or procedural arrangements among countries»¹¹.

With these simple definitions, it seems obvious that a set of rules, norms, behaviors, policies regarding access to and use of genetic resources *has* existed and been recognized at least since the early 80’s. Thus, the international regime on ABS may be divided into two moments:

- Pre CBD phase: with the notion of the «common heritage of mankind» informing most policies and laws, including the International Undertaking on Plant Genetic Resources (1983),
- Post CBD phase: with the recognition of sovereign rights of States, prior informed consent (PIC) and benefit sharing, as the guiding principles for the development of subsequent national laws and regulations.

Box 1. The international regime on ABS (policy and regulatory instruments)	
International instruments (binding and non binding)	Convention on Biological Diversity (CBD - 1992) International Treaty on Plant Genetic Resources for Food and Agriculture (2001) Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Derived from their Utilization (2002) CBD Conference of the Parties Decisions Institutional codes of conduct regarding ABS of institutions (e.g. FAO codes on collecting of materials from <i>in situ</i> sources) Declarations and policy position papers by countries and institutions (e.g. Declarations by the Megadiverse Group of Like Minded Countries) Traditional exchange practices among scientists (these do not fall <i>strictu sensu</i> under the category of an “instrument” but they are customary practices by an important sector of stakeholders which make use of genetic resources in their daily activities e.g. exchange practices by Kew Botanic Gardens, Smithsonian Institute, and others) Plant breeders regimes which include breeders and farmers exemptions could also be considered part of the overall ABS regime
Regional and national instruments	Decision 391 of the Andean Community on a Common Regime on Access to Genetic Resources (1996) Executive Order 247 (and its regulation) prescribing guidelines for access to biological and genetic resources in the Philippines (1996) Law 7788, Biodiversity Law of Costa Rica (1998) Organization of African Unity Model Legislation for the Protection of Rights of Local Communities, Farmers Breeders and the Regulation of Access to Genetic Resources (1998) Provisional Measure 2.186-16 which develops principles and rules for access to and use of the genetic patrimony of Brazil (2001) Law 2058 of Nepal which addresses access to genetic resources and traditional knowledge (2001) Law 4780. Biodiversity Law of Costa Rica (with a specific chapter on access to genetic resources) (2001) Decision 486 of the Andean Community on a Common Regime on Industrial property, and which develops disclosure of origin and legal provenance of genetic resources and traditional knowledge (2002) National biodiversity strategies

In terms of substance, it can be argued that the CBD has favored a contractual approach to ABS. Mostly access contracts (whether agreements, Memorandums of Understanding, Material Transfer Agreements) and, in some cases, authorizations and permits, are the preferred instruments with under which specific obligations are established on access to and use of genetic resources. From

a review of all regional and national instruments mentioned in Box 1 above, without exception, contracts are the instrument of choice linking and binding providers and users of genetic resources. Furthermore all countries (developed and developing alike) offer examples of MoU, contracts, agreements, etc. under which genetic resources have been accessed and used in country or abroad.

From the above, it seems clear that an international regime on ABS is in place and that the mandate to negotiate an international regime is, at a minimum, equivocal. This seemingly very conceptual discussion is very important because the negotiating process is strongly influenced by this mandate and seems to require refocusing of its objectives and goals.

The drive for an international regime was originally initiated by the Group of Like Minded Megadiverse Countries (Declaration of Cancun, 2002) who managed to include in paragraph 44(o) of the Plan of Implementation of the World Summit on Sustainable Development (2003) a call for action to “...negotiate within the framework of the Convention on Biological Diversity, taking in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”. Decision VII/19 of the CBD COP (Kuala Lumpur, February, 2004) confirmed the Parties decision to undertake a process to negotiate an international regime on ABS.

Focus of the negotiation process (as proved by the Third Meeting of the Ad Hoc Open Ended Working Group on Access to Genetic Resources and Benefit Sharing held in Bangkok in February, 2005), is already geared towards discussing whether a binding instrument is needed, whether a protocol should be promoted, what will be the elements of this regime, etc., all of which dangerously sidestep a necessary phase in the process : evaluating the architecture of the existing regime and identifying its exact limitations and gaps in order to only then decide how to address these limitations and cover the gaps.

The additional risk is that if an international regime on ABS is negotiated, all other existing instruments which are not mentioned or referred to in this new regime, are overshadowed and lose political weight in the international arena.

What is needed ?

A basic exercise is required to identify where the limitations and flaws in the international regime on ABS exist. To some extent and sometimes intuitively problematic areas – and in some cases potential solutions – have been identified over the years.

It seems clear and has been accepted for example, that national ABS legislation itself will not suffice to ensure benefit sharing principles of the CBD are realized. «User measures» have thus been proposed to overcome this difficulty. Disclosure of origin measures are one way in which users can contribute to the overall implementation of the CBD, without leaving countries of origin with the burden of developing access laws, monitoring and tracking, proving origin, claiming benefit sharing, etc. It also seems obvious that unless there is some reliable information shared regarding how genetic resources are being utilized in foreign jurisdiction, claiming benefit sharing becomes increasingly complicated. Tracking and monitoring efforts coupled with contractual compliance and enforcement of ABS agreements are also being proposed as an option towards effectively realizing the CBD objectives. These also are related to liability issues, which have hardly been explored.

More aggressive proposals include the creation of a biodiversity cartel and even returning to the idea of creating an international fund for genetic resources – to which monetary benefits could accrue and which would then be distributed especially among countries of origin.

Option 2 appears initially as a preferred alternative if only Bangkok results and agenda for the Granada meeting are taken into account. Option 4 and 5 however, seem more appropriate approaches which, in essence serve to consolidate and strengthen the existing international regime on ABS.

Box 2. Possible options to support the existing regime on access to genetic resources				
Option 1 The existing ABS is sufficient as its stands and efforts need to be made towards <i>implementation</i> (e.g. sources are made available to strengthen institutional capacities to apply ABS principles and obligations)	Option 2 A new legal instrument (a Protocol to the CBD, an Annex to the CBD, a specific COP Decision) integrates <i>existing</i> ABS principles and laws (e.g. something similar to the Bonn Guidelines but maybe binding in nature)	Option 3 A new legal instrument (a Protocol to the CBD, an Annex to the CBD, a specific COP Decision) <i>creates</i> new/enhanced rules and principles on ABS (e.g. a biodiversity cartel; the Multilateral System under the FAO IT; an international fund)	Option 4 Adjustments and modifications are made to existing tools and mechanisms in instruments such as: laws, Decisions, conventions/treaties, etc. in order to ensure positive synergies among them (e.g. incorporate disclosure requirements into IP laws; develop operational ABS contracts or MTAs; rules which address compliance of contracts in foreign jurisdictions)	Option 5 A new legal instrument (a Protocol to the CBD, an Annex to the CBD, a specific COP Decisions) <i>integrates</i> the specific and detailed adjustments and modifications in Option 4 (e.g. an ABS, TK, disclosure provisions, related instrument)

Recommendations

The next meeting of the Ad Hoc Open Ended Working Group on Access to Genetic Resources and Benefit Sharing to be held in Granada in early 2006 should focus its attention on:

- a) identifying the main and specific problems and gaps which the international regime on ABS has and highlighting the potential options and alternatives to overcome these (including advances in new technologies and disciplines such as genomics and bioinformatics),
- b) evaluate existing instruments and tools (incorporated into different international agreements and regional and national laws and regulations) to assess whether (and which) adjustments may be necessary and the nature of these adjustments (e.g. a new tool, complementary measures, express interpretation)¹²,
- c) possibly, this evaluation will identify the areas of monitoring of genetic resources and compliance and enforcement of ABS agreements and disclosure of origin and legal provenance provisions and obligations, as those

which require consolidation and their express recognition as part of the international regime on ABS,

- d) evaluate how existing tools and instruments address this and, if they don't, elaborate new guiding principles and elements to create new legal tools and instruments,
- e) only then discuss binding or non binding nature, scope issues, definitions, whether what is required is a protocol to the CBD, maybe an Annex to the CBD, maybe a

specific and detailed COP Decision, or maybe a concerted interpretation of certain tools and instruments, eventually a degree of harmonization in certain aspects of national laws, etc.

- f) COP Decisions (to which Parties obligate themselves) and even an Annex to the CDB should be also considered as potentially useful instruments under which to incorporate tools and instruments to strengthen the international regime on ABS.

Endnotes

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² The ABS Project has produced a publication which explains what an international regime is in legal terms and, furthermore, provides with very illustrative recommendations as to how to design and develop and international regime on ABS. See: Summary Handbook for CBD Delegations : Options and Process for the Development of an International Regime on Access and Benefit Sharing. IUCN Environmental Law Centre, 2005, Available at : <http://www.iucn.org/themes/law/abs01.html>

³ One of the most recent detailed and comprehensive review of "disclosure" and related issues is: Chouchena-Rojas, M. Ruiz, M. Vivas, D. Winkler, S. Disclosure Requirements : Ensuring Mutual Supportiveness Between the WTO TRIPS Agreement and the CBD. IDDRI, CIEL; ICTSD, QUNO, IUCN, Gland, December, 2005. Available at : <http://iucn.org/bookstore>.

⁴ These measures can be categorized under the concept of "user measures" or measures adopted by countries which traditionally use genetic resources as a means to support the realization of the overall objectives of the CBD and, in particular, countries of origins efforts to ensure their interests in the equitable sharing of benefits are safeguarded. See: Barber, C. Johnston, S. Tobin, B. 2003. User Measures. Options for Developing Measures in User Countries to Implement the Access and Benefit Sharing Provisions of the Convention on Biological Diversity. UNU/IAS report, Tokyo, Japan.

⁵ For a comprehensive review of existing ABS policies and laws see : Carrizosa, S. Brush, S. Wright, B. McGuire.P (Eds.). 2004. Accessing Biodiversity and Sharing the Benefits: Lessons from Implementing the Convention on Biological Diversity. IUCN Environmental Policy and Law Paper 54, IUCN Environmental Law Programme, IUCN, Gland, Switzerland and Cambridge, United Kingdom.

⁶ See : Grajal, A. Biodiversity and the Nation State: Regulating Access to Genetic Resources Limits Biodiversity Research in Developing Countries. In: Conservation Biology, Vol. 3, Nº 1, 1999. Also suggested is: Mansur, A. Cavalcanti, K. Xenofobia na Selva. In : Veja, Vol. 32, No. 33, 1999.

Finally, a useful document is also : Hoagland, E. 1997. Access to Specimens and their Genetic Resources: An Association of Systematics Collections Position Paper.

⁷ See report : Primer Taller Regional sobre Biopiratería y Temas Conexos (Bogotá, Colombia, 1 – 2 de setiembre de 2005). Organizado por: Comunidad Andina, Instituto Humboldt, Instituto Socioambiental, Sociedad Peruana de Derecho Ambiental, UICN – SUR, en el marco de la Iniciativa para la Prevención de la Biopiratería (con el apoyo de IDRC) Available at : <http://www.biopirateria.org>.

⁸ Ten Kate and Laird provided with a very useful initial approach to identifying how genetic resources are used in a series of industries, though further, more detailed analysis is almost five years later, required. See: Ten Kate, K. Laird. S. 1999. The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit Sharing, Earthscan Publications Ltd. London.

⁹ Vogel has argued that the fact that genetic resources are shared among a few megadiverse countries around the world (at least in *in situ* conditions), a Biodiversity Cartel is the only economically sensible solution to safeguard their interests in these resources. See: Vogel. J The Transaction Costs of a Biodiversity Cartel (in press, as part of the publication: A Moving Target: Tracking and Monitoring the Flows of Genetic Resources).

¹⁰ Webster's Revised Unabridged Dictionary (1913).

¹¹ Blacks Law Dictionary. Eighth Edition, 2004.

¹² Ruiz, M. An Assessment of the Advantages and Disadvantages of an International Regime for Access to Genetic Resources and Benefit Sharing. Policy and Environmental Law Series. No. 16, February, 2004. Available at : <http://www.spda.org.pe>.

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