

Towards an International Regime on Access and Benefit-Sharing for Genetic Resources and Associated Traditional Knowledge

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Long recognized as a key element for successful implementation of the Convention on Biological Diversity, the issue of access to genetic resources and benefit-sharing has, in recent years, moved from a side event to the centre stage of international environmental law-making. The UNU-IAS Biodiplomacy Initiative is working to support effective international ABS governance through policy research, outreach activities, and capacity development.

Negotiating an international regime on access to genetic resources and benefit-sharing (ABS) may, for many, appear to be a relatively light-weight venture in the grand scheme of environmental governance, given the magnitude of such issues as climate change and desertification. Even within the scope of the Convention on Biological Diversity (CBD) itself, the importance of ABS may be seen to pale against the backdrop of the pressing issue of biodiversity loss. While much has been made of the value of genetic resources and the potential for benefit-sharing, some countries have tended to put the issue on the back burner in the face of more pressing demands such as poverty reduction and food security.

ABS, however, has proven to be one of the most dominant themes in the CBD; almost half of all the decisions of the Conference of the Parties (COP) address the issue of ABS. The most of ambitious of these – the Bonn Guidelines – sets out a range of complementary (but voluntary) ABS measures that both “provider countries” and “user countries” should consider adopting in order to promote realization of the CBD’s ABS objectives. These guidelines represent one of the major achievements of the convention process. At the same time, regional initiatives within the Andean Community, the African Union, and Association of South-East Asian Nations (ASEAN), and national efforts by Parties to the Convention, have led to development of regional and national ABS regimes involving a mixture of regulatory, contractual, and policy measures.

Despite this attention, the issue remains contentious, both within the convention process and in other forums, leading to a call by the World Summit on Sustainable Development (WSSD) for negotiation of an international regime on benefit-sharing relating to genetic resources within the framework of the CBD. As a result of these endeavours, the COP to the CBD gave a mandate to the ad-hoc ABS Working Group to negotiate an international regime, which for many countries means a Protocol on ABS.

A collective responsibility for ABS governance

Since the adoption of the CBD in Rio in 1992, there has been much debate regarding measures needed to give force to the third objective of the CBD on ABS. Three dominant positions that emerged during this debate have been:

- It is the responsibility of countries where resources are obtained to regulate and control access and negotiate benefit-sharing (the position of many industrialized countries).
- It is the responsibility of countries that have large biotechnology, pharmaceutical, and agro-industrial capacity to ensure resources used in their territories have been obtained with prior informed

consent (PIC) and subject to mutually agreed terms (MAT) (the position of developing countries).

- All bioprospecting is biopiracy, as the international system of intellectual property rights facilitates expropriation of rights over genetic resources and traditional knowledge through the granting of patents without requiring PIC and MAT (the position of many non-governmental organizations (NGOs) and indigenous peoples).

Decision 6/24 adopted at COP 6 in The Hague covered a package of issues incorporating the Bonn Guidelines and a number of associated sections, including one on intellectual property rights, that were key to overcoming the political impasse inherent in these positions. The guidelines include measures addressed at countries both as providers and as users of genetic resources, thereby recognizing the need for action by all countries to implement ABS law and policy. While it is recognized that all countries are users of genetic resources, it is clear that the emphasis in the Bonn Guidelines is primarily on user countries with strong biotechnology, pharmaceutical, and agro-industrial capacity. The guidelines have already inspired varying levels of action in developed countries to commence adoption of user measures. Countries such as Belgium, Denmark, Germany, Japan, Switzerland, and, most notably, Norway have in recent years adopted legislative and or policy measures in this area, and others such as Australia and Canada are making positive steps in this direction.

The UNU-IAS Biodiplomacy Initiative has played a prominent role in building awareness on the importance of user measures and in promoting policy research in this area. In 2003, UNU-IAS published an influential study¹ that was welcomed by many as being the first of its kind and helping to place in context the debate on possible user measures.

The Institute also promoted international debate on the issue by hosting a high-level roundtable meeting in Paris in November 2003, through a collaboration with the Institut du Développement Durable et des Relations Internationales (IDDRI). The roundtable brought together more than 40 government, NGO, industry, and indigenous stakeholders to discuss the role of user measures in ABS governance. This collaboration has now been strengthened by the addition of the Centre for Philosophy of Law (CPDR) of the Catholic University of Louvain. The second Paris Roundtable on ABS Governance, held in November 2004, focused on the issue of certificates of origin.

Section C of Decision 6/24 is potentially its most significant element, as it marks the first time that the CBD had adopted a Decision that specifically addressed the issue of intellectual property rights, calling upon countries to encourage the declaration of the origin of genetic resources and the source of traditional knowledge in patent applications. Although the CBD itself recognizes that intellectual property rights (IPR) should support and not run counter to its objectives, both the International Committee on CBD (ICCBD), which met prior to the entry into force of the Convention, and, subsequently, the COP demonstrated a reluctance to discuss IPR-related issues. With the adoption of Decision 6/24, the CBD broke that trend, setting out the possibility that future negotiations may lead to further efforts by the CBD to define measures to ensure IPR

support its objectives.

The Biodiplomacy Initiative has been active in helping to promote informed debate on issues relating to IPR and ABS, in particular through its policy studies on issues relating to disclosure of origin, certificates of origin, and the role of registers and databases in protection of traditional knowledge.²

Decision 6/24 has, therefore, aided the development of international law on ABS by:

- establishing soft law guidelines that are both comprehensive and functional,
- securing recognition of the obligation of countries as both providers and users to adopt ABS measures,
- acting as a catalyst for the adoption of user measures, and
- affirming the mandate for the CBD to address IPR issues in so far as they affect the realization of the Convention's objectives.

In doing so, it has provided a clear framework for negotiators to build upon.

From theory to practice

COP 7 prescribed the terms of reference for the ABS Working Group to "elaborate and negotiate an international regime on access to genetic resources and benefit-sharing". The nature of the proposed regime was defined only in broad terms, however, with no specific objectives.

One of the key issues of focus, therefore, for the third meeting of the Ad Hoc Open-ended Working Group on Access and Benefit Sharing (ABS), which met from 14 to 18 February 2005 in Bangkok to begin the negotiations on an international regime on access and benefit-sharing, was the need to establish clear objectives for any regime. During the early part of the debate in Thailand, a draft text was prepared for consideration by delegates that included a wish list of possible objectives, from regulating access through protection of traditional knowledge to the issue of poverty alleviation. UNU-IAS provided input to this debate, suggesting that in developing the regime's objectives, delegates should not restrict themselves to the objectives of the CBD, but also draw upon other sources such as the Millennium Development Goals and the Plan of Implementation of the WSSD for inspiration.

During the week of negotiations, two sub-working groups discussed the elaboration of the international regime (scope, objectives, and elements) and addressed the use of terms that are not defined in the CBD; additional approaches to complement the Bonn Guidelines on ABS, such as an international certificate of origin/source/legal provenance, measures to ensure compliance with prior informed consent and mutually agreed terms; and options for indicators for ABS, to be used for evaluating progress in the implementation of the CBD's Strategic Plan. A UNU-IAS report on "The Feasibility, Practicality and Cost of a Certificate of Origin System for Genetic Resources" served as an information document for the negotiation

process. (This comparative study of procedures to document transfers of genetic resources and a proposal for an international certification scheme are discussed elsewhere in this issue.)

By the end of that week, and after long negotiations, the delegates agreed on several final documents. The documents included recommendations on further work, annexes on an international regime on ABS (options on nature, scope, potential objectives, elements clustered by subject matter, potential additional elements, and options), and a matrix to identify and analyse the gaps in international instruments. Parties and others are invited by the Working Group to undertake further analytic work and submit more information on an international regime, existing national definitions and other relevant terms, an international certificate system, the disclosure of origin/source/legal provenance, and options for ABS indicators.

The results of the meeting are modest, but as much as could have been expected in the first round of negotiations. A further meeting of the Working Group (ABS-4) will take place in Spain in early 2006, prior to COP 8 in Brazil later that year.

During ABS-3, UNU-IAS, IDDRI and CPDR jointly held a side event to present and discuss the results of the Second Paris Roundtable on "Practicality, Feasibility, and Cost of Certificates of Origin". Another side event was jointly organized by UNU-IAS and the Japan Bioindustry Association (JBA) to present the results of the international symposium on "ABS: Experience, Lessons Learned and Future Vision", held in Tokyo in October 2004.

Knowledge gaps in the negotiations

The success of the negotiation process will depend in no small part on the extent to which delegations have access to sound policy analysis of options for ABS law and policy, user measures, and the components of an international regime. Some of the more critical issues that need to be considered are:

- the effectiveness of existing international ABS measures;
- the role of intellectual property rights;
- the effectiveness of contractual mechanisms for securing equitable benefit-sharing;
- the role of *sui generis* regimes for protection of rights over traditional knowledge;
- the role of customary law and practices of indigenous peoples in regulating access to genetic resources and traditional knowledge;
- the role of scientific and technical policy;
- mechanisms for securing technology transfer;
- compliance mechanisms and access to justice;
- the effectiveness of voluntary measures;
- the tracing of gene flows, certificates of origin, and disclosure of origin requirements; and
- the capacity development needs of stakeholders.

Bringing clarity to these issues will be important for ensuring the adoption and effective implementation of any regime. Many of the hurdles that need to be overcome in the process of developing an effective system of international ABS governance have been



This report is available for download from http://www.ias.unu.edu/binaries/UNUIAS_UserMeasures_2ndEd.pdf

apparent since the entry into force of the CBD. However, commitment to providing the funds necessary for in-depth policy analysis relating to them has not been as forthcoming as might have been hoped regarding the importance of this issue for both developing and developed countries, for food security and industrial growth, not to mention for the protection of the ancestral and human rights of indigenous peoples. The measure of commitment of countries to the effective development of a regime on ABS that secures fair and equitable sharing of benefits and facilitates access to resources may be gauged from the level of support given to ensure the negotiations are carried on in a manner which is conducive to full and informed participation of all stakeholders.

The UNU-IAS Biodiplomacy Initiative is committed to supporting the negotiation process through its policy research outreach activities and capacity development programme. As part of this process, UNU-IAS together with IDDRI and CPDR have developed a collaborative research and outreach programme that will include a range of roundtables and workshops as well as research on cutting-edge issues relating to international ABS governance. The programme is intended to complement and assist the ongoing international debate of ABS issues through the provision of an informal arena for discussion of complex issues of ABS governance, in particular through the annual Paris Roundtables on ABS governance. A steering committee of leading experts in ABS, IPR and traditional knowledge issues – drawn from a range of national, international, NGO, academic, and civil society actors – has been formed to provide guidance on the focus for the programme, the annual roundtable, and associated research activities.³

The Biodiplomacy Initiative is also looking into issues relating to traditional knowledge and its relationship to ABS governance from a number of different angles (discussed elsewhere in this issue). These include the links between intellectual property rights, traditional knowledge, and the public domain, and the role of customary law and practice in regulating ABS and protecting traditional knowledge.

An important element of the Biodiplomacy Initiative's work on ABS is to turn policy into practice. To this end, the Initiative places great emphasis on capacity development and is actively involved in promoting the development of a global capacity development programme on ABS. Work has also included capacity development workshops in the Pacific, Latin America, and Central Asia.

UNU-IAS has begun to develop capacity development initiatives that seek to promote the implementation of The Action Plan on Capacity Building for Access and Benefit-Sharing adopted by COP 7 in its Decision VII/19. This Action Plan acknowledges that capacity for access and benefit-sharing is an integral part of efforts to manage and develop genetic resources. Furthermore, the Action Plan provides a framework for identifying country, indigenous, and local community priorities and mechanisms for implementation and funding.

One area of particular interest for UNU-IAS has been Small Island Developing States (SIDS). This interest has stemmed from the recognition that SIDS – a large component of the Parties to the Convention – have special vulnerabilities and constraints, especially in the area of resource management. As a research and capacity development institution, UNU-IAS has been involved in capacity development in SIDS through a project (with the South Pacific

Environment Programme, International Marine Project Activities Centre, Christensen Fund, and United Nations Environment Programme) that focused on the Role of Customary Law and Practice of Indigenous and Local Communities in Natural Resource Management. UNU-IAS will continue its engagement of SIDS by reviewing ABS capacity development in SIDS at the national and sub-regional levels, and providing input and research efforts to assist SIDS in relation to the International Regime on Access and Benefit-Sharing.

Creating a link between theory and practice is crucial to development of an effective system of ABS governance. The Biodiplomacy Initiative is well positioned to make this link due to the experience of UNU-IAS senior staff and research fellows on ABS issues, and as a result of its hands-on involvement in capacity development and its cutting-edge applied research agenda.

It is hoped that this, in turn, will attract top-level Ph.D. and post-doctoral graduates working on ABS, traditional knowledge, and intellectual property rights to apply to the UNU-IAS fellowship programme. Attracting these fellows, and providing the opportunity for their direct involvement in the negotiation process and preparation to participate in the development of national, regional, and international ABS law and policy, responds to the Institute's educational mandate, and is intended to be one of the most important aspects of the programme in the long term.

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- 1 "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 available online at http://www.ias.unu.edu/binaries/UNUIAS_UserMeasures_2ndEd.pdf.
 - 2 Ibid. See also, "The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis", UNU-IAS report available online at http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf; and B. Tobin, D. Cunningham and K. Watanabe (2004), "The Feasibility, Practicality and Costs of a Certificates of Origin System for Genetic Resources", a working paper submitted by UNU-IAS to the Secretariat of the Convention on Biological Diversity and presented at the third meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, Bangkok, 14–18 February 2005.
 - 3 A summary of the 2nd Paris Roundtable results is available online at <http://www.iddri.org/iddri/telecharge/biodiv/workshop-abs.pdf>.