

International Regime on Access and Benefit Sharing



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NEGOTIATION DYNAMICS AND SOUTH ASIAN ISSUES

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South Asia has immensely diverse ecosystems comprising a vast and unique variety of faunal and floral species — the Sunderbans in India and Bangladesh; the magnificent coral reefs and atolls in the Maldives and Lakshadweep islands in India; the Thar desert in India and Pakistan; two rich biodiversity hotspots in the eastern Himalayas in Nepal, India and Bhutan, and the Western and Eastern Ghats of India and Sri Lanka; the dense and virtually untouched virgin forests of Bhutan; and the ancient forests in Sri Lanka.¹ Yet, the diversity and richness of South Asia's ecosystems still remain largely unknown and undocumented.² The majority of the people living in South Asia are dependent on the natural resource

base of their region for survival. But, with the perception that biological resources are a common heritage of humankind, the benefits that accrue from the use of genetic resources and associated traditional knowledge have been exploited by those with technological advantage and financial resources.³ Such exploitation has also led to unfair rules of patenting and monopolistic intellectual property claims, which has fueled the North-South divide on the issue of access to genetic resources and traditional knowledge, and the sharing of benefits arising out of their use.⁴ Increasing realization of the exploitation and monopolization of their genetic resources and traditional knowledge by technologically and financially

rich countries compelled many developing countries to restrict access to their genetic resources and traditional knowledge. Therefore, in 1992, the Convention on Biological Diversity (CBD) was instituted as the international regime that would serve as the basis to negotiate issues of access and benefit sharing (ABS) related to genetic resources.⁵ However, even after 17 years of the institution of the CBD, the issue of ABS is still fraught with significant problems, mainly because of the lack of enforceability of the Convention due to its legally non-binding nature. In this context, this brief discusses the negotiation dynamics of the international regime on ABS, and issues for South Asian countries.



Access and benefit sharing issues in the CBD

The CBD recognizes that states have sovereign rights over their biological resources and seeks to facilitate their sustainable use. It also has provisions for making available benefits arising out of the use of such resources to their providers. The preamble of the CBD recognizes the “desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity”. The philosophical underpinning of the CBD is to balance the right of countries that are resource providers with that of the users so that the former too have a share and say in the benefits.

While Articles 8(j) and 15 of the CBD form the bedrock of the ABS mechanism, Articles 1, 3, 16, 19, 20 and 21 are also intrinsic to regulate the functioning of the ABS regime (*See box for the provisions of the articles*).

Current international regime on ABS

In 2000, the Conference of Parties to the CBD, at its fifth meeting in Nairobi, Kenya, realized that the ABS regime was lacking effective implementation. Hence, it established the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing to develop

guidelines in order to assist with the implementation of the ABS provisions of the Convention. Consequently, the Working Group developed the “Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization”, which was adopted by the Conference of Parties at its sixth meeting (COP 6) in 2002. The Bonn Guidelines are intended to guide, on a voluntary basis, both users and providers of genetic resources on the mechanics of the ABS regime. They establish standards for the participation of stakeholders, principles of a prior informed consent (PIC) system, and minimal requirements for mutually agreed terms (MAT), and provide examples of monetary and non-monetary benefits.⁶

Post COP 6, the World Summit on Sustainable Development called for action to “negotiate within the framework of the Convention on Biological Diversity, bearing 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”. It also sought to promote “the wide implementation of and continued work by the Contracting Parties on the Bonn Guidelines as an input to assist the Parties when developing and drafting legislative, administrative or policy measures on access and benefit-sharing as well as contract and other

arrangements under mutually agreed terms for access and benefit-sharing”.

According to the report of the Seventh Meeting of the Working Group on Access and Benefit Sharing (the WGABS7 Report), Article 15 of the CBD does not compel Parties to adopt access legislation; they are only obliged to take measures with the aim of sharing benefits. Such a non-binding nature of the CBD has become a stumbling block in achieving ABS goals. Moreover, India and other like-minded countries have been emphasizing that national action alone is not sufficient to ensure the realization of benefits to the country of origin or provider country. Therefore, genetic resource-rich countries, such as the African Group, the Like-minded Megadiverse Countries (LMMC) and other developing countries, have called for a legally-binding international agreement that would prevent the misappropriation and misuse of genetic resources and their derivatives, protect traditional knowledge, and ensure fair and equitable sharing of benefits arising from their use.⁷

The seventh meeting of the Conference of Parties held in Kuala Lumpur, Malaysia in 2004 took the decision “to mandate the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing ... to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing”. Further, they set a target, as envisaged in the “Bonn Mandate”, to negotiate such a regime on ABS by the 10th meeting of the Conference of Parties (COP 10) to be held in Japan in 2010. Consequently, the fifth and sixth meetings of the Ad Hoc Open-ended Working Group continued the elaboration and negotiation of the international regime on ABS. Therefore, the ongoing negotiations hold a promise of change.

COP 9 and the seventh Ad Hoc Working Group meeting

The ninth meeting of the Conference of Parties (COP 9) held in Bonn in May 2008 instructed the Working Group to complete the elaboration and negotiation of the international regime at the earliest possible time before COP 10. It further instructed the Working Group to “finalize the international regime and to submit for consideration and adoption by the Conference of the Parties at its tenth meeting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and its three objectives, without in any way prejudging or precluding any outcome regarding the nature of such instrument/instruments”.

During COP 9, the nature of the international regime became one of the most contentious issues. For the LMMC and the African Group, issues of primary importance are the prevention of biopiracy and the institution of a legally-binding international system to ensure fair and equitable sharing of benefits arising out of the use of genetic resources and associated traditional

knowledge.⁸ On the other hand, countries such as Canada, Australia, Japan and New Zealand have been opposing a legally binding regime historically.⁹ The compromise text of the Decision of COP 9 reflects this divide, as it states that COP 9 “further instructs the Working Group on Access and Benefit-sharing, after the negotiation of comprehensive operational text at its seventh meeting, to start its eighth meeting by negotiating on nature, followed by clearly identifying the components of the international regime that should be addressed through legally binding measures, non-legally binding measures or a mix of the two and to draft these provisions accordingly”.

Most of the text document remains heavily bracketed, reflecting the lack of consensus on the exact scope and meaning of the terms and phrases used in the text. The scope, in brackets, of the international regime extends to biological resources, genetic resources and their derivatives and associated traditional knowledge.¹⁰ It excludes, among others, human genetic resources, genetic resources acquired before the entry into force of the international regime, and species/crops listed in Annex

I of the International Treaty on Plant Genetic Resources for Food and Agriculture. As per the WGABS7 Report, the objective of the international regime is to effectively implement the provisions in Articles 1, 3, 8(j), 15, 16 and 19.2 of the CBD. However, delegates remain divided whether to include Articles 1, 3, 16 and 19.2 along with Articles 15 and 8(j), for which there exists broad consensus.

The various broad issues covered in the draft text are discussed below.

Access to genetic resources

In recognition of the sovereign rights and authority of Parties to determine access, as under Article 15 of the CBD, Parties are required to create conditions, subject to allowed safeguards, to facilitate access to genetic resources for environmentally sound uses by other contracting parties. Access to genetic resources, where agreed, shall be on MAT and also on PIC of the contracting party providing access. At the seventh meeting of the Working Group, the European Union introduced a proposal to modify the language on compliance with international access standards as a precondition for compliance

Box: CBD Articles intrinsic to regulate the functioning of the ABS regime

Article 1 stipulates the objectives of the CBD, which are: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

Article 3 states the Convention's principle: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Article 8(j) stipulates that, by taking the consent of indigenous communities, the State should preserve and maintain their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and encourage the equitable sharing of the benefits arising out of the utilization of such knowledge, innovations and practices.

Article 15 recognizes the sovereign rights of States over their natural resources, and lays down the requirements that any access should be based on mutually acceptable terms and subject to prior informed consent (PIC) of the party providing the access.

Article 16 recognizes the need for access to and transfer of technologies among Contracting Parties as essential elements to attain the objectives of the CBD.

Articles 19, 20 and 21 discuss the guidelines and mechanisms of funding.

with national ABS legislation, and the delegates agreed to work on it.

On the other hand, the International Indigenous Forum on Biodiversity stated in its proposal that access to genetic resources and associated traditional knowledge should be subject to the free and fair consent of indigenous peoples and local communities—a step that was supported by the African group.¹¹ The proposal envisages that international access standards should not require harmonization of domestic access legislation to support compliance across jurisdictions. Furthermore, to help countries frame more uniform and meaningful laws on ABS, it seeks an internationally developed model domestic legislation.

The draft text aims at establishing legal certainty, clarity and transparency; and non-discrimination of access rules. Furthermore, it proposes to have simplified access rules for non-commercial research.

Benefit sharing

The draft text states that the benefits, which ensue from the use of genetic resources, must be shared in a fair and equitable manner. Parties have attempted to define “fair and equitable benefit sharing” in a way so as to make it non-exhaustive and inclusive, for example, by encompassing some minimum conditions, like allowing democratic and meaningful participation of all stakeholders, including stakeholders at the local level, in policy decisions and contract negotiations.

It also envisages an independent third-party review to ensure that effective PIC precedes MAT.

Mutually agreed terms

According to the draft text, ABS should be based on MAT. For that, delegates discussed

adopting measures to ensure the participation and involvement of indigenous and local communities in the process. Furthermore, the text details the process of making information about MAT publicly available, so that the conditions of the less powerful parties at all levels in the sharing relation would be strengthened.

The text also stipulates that the type of benefits to be included in MAT may include monetary and/or non-monetary benefits, and lays down a list of what could be monetary and/or non-monetary benefits. Furthermore, the text envisages development of menus of model clauses for potential inclusion in MATs.

Prior informed consent

The relevance of PIC is significant due to concerns about companies, research institutions, other entities, and individuals acquiring and using genetic resources and traditional knowledge from biodiversity-rich countries without the knowledge and permission of the rightful owners and holders.¹² Therefore, the draft text states that PIC should be the first step in the process of ABS. In order to receive/provide PIC, Parties are to consider model clauses and use relevant inventories/catalogues of typical utilizations of biological and genetic resources and related monetary or non-monetary benefits.

Misappropriation and misuse

The draft has documented several cases of misappropriation and misuse of genetic resources, including those for which patents have been obtained in “user” countries.¹³ Many developing countries lobbied for the inclusion of provisions to prevent such misuse and misappropriation. Developed countries argued to rely on contracts, but the others opposed it saying that contracts had not been honored in the past. Moreover, developing countries’ concern was to put in place prevention mechanisms that would work even in the absence of contracts.

The seventh meeting of the Working Group examined the possibility of establishing an internationally agreed definition of misappropriation and misuse of genetic resources and associated traditional knowledge, and found that it would make the enforcement of contract violations in user countries easier.

Trans-boundary measures

The ninth meeting of the Working Group recognized that there are cases where the origin of the biological/genetic resource is not clear. For example, the Himalayas extend across different countries in South Asia making available the same biological/genetic resource in all of them. In such cases, as



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stated in the draft, a multilateral system of exchange should be developed. To ensure the fair and equitable sharing of benefits arising out of the use of such trans-boundary resources, the draft calls for Parties to enter into bilateral or multilateral agreements based on MATs. The draft also mandates Contracting Parties to facilitate the inclusion of different indigenous and local communities, within and across boundaries that share a particular knowledge, innovation or practice, in the negotiation of relevant ABS arrangements, and support the fair and equitable sharing of the benefits arising from such agreements among these indigenous and local communities.

Domestic regimes in South Asia

All the countries in South Asia have signed and ratified the CBD, but only Bhutan and India have put in place related national legislation. The Biodiversity Act of Bhutan 2003 explicitly protects indigenous rights over traditional knowledge. The involvement of indigenous communities in

decision-making, related to the use of traditional knowledge, is achieved through activities such as community-based natural resource management projects. Bhutan's Biodiversity Action Plan 2002 envisages realizing additional benefits from its biodiversity and includes bioprospecting as one of the various means of achieving the same. In furtherance of Article 8(j) of the CBD, Bhutan has carried out *in-situ* and *ex-situ* conservation efforts and set forth preconditions and other precautionary measures for an effective bioprospecting programme.

In India, the Biological Diversity Act 2002 aims at regulating access to biological resources and associated traditional knowledge so as to ensure equitable sharing of benefits arising out of their use. Furthermore, the 2002 amendment to the Patent Act 1970 excludes from patentability plants and biological processes and invention, which in effect is traditional knowledge. The National Environment Policy 2006 discusses taking measures to formulate an appropriate system for PIC and fair

and equitable benefit sharing in respect of biological materials and associated traditional knowledge, to enable the country and local communities derive economic benefits by providing access.

Most of the remaining countries in South Asia have prepared drafts of national legislation on ABS and PIC. But the lack of political will, opposition to the draft from various quarters of the society, and generally weak legislative processes in these countries, have prevented them from enacting the legislation.

Bangladesh has a draft Biodiversity and Community Knowledge Protection Act, awaiting enactment since 1998. The Act seeks to create appropriate systems of access to biological and genetic resources based on PIC of concerned communities, and fair and equitable sharing of the benefits arising out of their use.

Nepal also has a draft bill and a draft policy on ABS that was developed in 2002. The bill recognizes the sovereign right of individuals, community and the government over biological and genetic resources and associated traditional knowledge, and seeks to control biopiracy by regulating access. Similarly, Nepal Biodiversity Strategy 2002 commits to the equitable sharing of benefits on a sustainable basis.

The Maldives has developed a National Biodiversity Strategy Action Plan that emphasizes *in-situ* and *ex-situ* conservation, strengthened legal and institutional framework, community participation, and implementation of issues related to biodiversity. However, there are no specific goals addressing access and benefit sharing. Pakistan and Sri Lanka also have draft ABS laws. Whereas Pakistan's draft law includes provisions of PIC, MAT and Material Transfer Agreement, the mechanism of obtaining PIC is not



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laid down in Sri Lanka's draft law, but left to a "to be formed" Inter-Agency Committee. Sri Lanka's draft law also restricts itself to genetic resources.

Issues for South Asia

South Asia requires an exhaustive international ABS regime to address the issues of access to biological and/or genetic resources and traditional knowledge, and stop biopiracy. Moreover, since the obstacles to the achievement of the CBD's three objectives are global in nature, they can be tackled only through an international approach.¹⁴

The implications of realizing the agenda put forth in COP 9 would be manifold and greatly help countries strengthen measures on ABS. An international regime on ABS, especially if binding, will be in furtherance of the longstanding desire of developing countries, including those in South Asia.

However, the text, which is the outcome of the seventh Ad Hoc Working Group Meeting, contains brackets around terms, phrases and entire paragraphs in some places, pointing to the fact that most issues remain unresolved and controversial. Therefore, there

are concerns that the negotiations would not be completed within the set timeframe. Nevertheless, the developing world, including countries in South Asia, should bear in mind that negotiations should not be rushed into, for it is extremely important to arrive at balanced and carefully thought-out solutions as envisaged in the operational text of the ABS regime.

On the domestic front, the legal environment in South Asia lacks not only regulatory measures, but also implementation of measures that already exist. Therefore, South Asian countries should strive to strengthen their legal, regulatory and administrative frameworks on the ABS regime. ■

Notes

¹ UNEP. 2001. Biodiversity, Key Environmental Concerns, State of the Environment—South Asia Part II. www.rrcap.unep.org.

² *ibid.*

³ TWN. 2006. Global Rules on Access and Benefit-sharing of Biodiversity Take Shape in Granada Meeting. www.twinside.org.

⁴ *ibid.*

⁵ www.icimod.org/abs/

⁶ Ni, Kue-jung. 2006. The Incorporation of the CBD Mandate

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⁷ ICTSD. 2005. Faultlines Surface at Access and Benefit Sharing Negotiations. *Bridges Trade BioRes* 5 (4), March. <http://ictsd.net>.

⁸ TWN. 2008. Agreed Roadmap to Complete Access/Benefit Sharing Regime. www.twinside.org.sg.

⁹ *ibid.*

¹⁰ Chiarolla, Claudio, Harry Jonas, Stefan Jungcurt, Nicole Schabus, and Elsa Tsioumaniet. 2009. Summary of the Seventh Meeting of the Working Group on Access and Benefit-sharing of the Convention on Biological Diversity. *Earth Negotiations Bulletin* 9 (464), April. www.iisd.ca.

¹¹ *ibid.*

¹² Perrault, Anne, and Oliva Maria Julia. 2005. Prior Informed Consent and Access to Genetic Resources. Paper presented at ICTSD/CIEL/IDDRI/IUCN/QUNO Dialogue on Disclosure Requirements: Incorporating the CBD Principles in the TRIPS Agreement On the Road to Hong Kong WTO Public Symposium, Geneva, April 21, 2005. www.iprsonline.org.

¹³ *ibid.*

¹⁴ Chiarolla *et al.* 2009. Note 10.

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