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Making Sense of the Draft Protocol on Access and Benefit Sharing for COP 10

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HIGHLIGHTS

INTERNATIONAL EQUITY Never before has international equity stood as much in the limelight as it stands today in the context of the access and benefit sharing (ABS) negotiations under the Convention on Biological Diversity (CBD). The adoption of a draft ABS Protocol at the tenth meeting of the CBD's Conference of the Parties (COP 10) would make a decisive step forward in influencing the private and public sectors' involvement in promoting the implementation of the CBD's benefit-sharing objective.

THE NEED FOR AN ABS PROTOCOL However, eight years after the UN World Summit on Sustainable Development's call for negotiating an international ABS regime, the prospect of potentially failing to adopt an ABS Protocol at COP 10 may cast a leaden shadow on the Convention's future role in international biodiversity governance. With only few days of negotiations left to untangle remaining disagreements before COP 10, the consensus to be reached in Nagoya needs to deliver an ABS Protocol likely to capture the value of biodiversity, provide incentives for its conservation and protect fundamental rights of indigenous and local communities, including their rights to traditional knowledge.

ENHANCE THE CONTRIBUTIONS OF BIODIVERSITY In the absence of low-hanging fruits for a compromise at COP 10, a strong sense of responsibility should guide CBD Parties in deciding the extent to which their negotiating strategies shall be constrained by what a legally-binding Protocol on ABS can realistically achieve to enhance the contributions of biodiversity and ecosystem services to food security, health, human livelihoods and poverty alleviation among others.

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Making Sense of the Draft Protocol on Access and Benefit Sharing for COP 10

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Introduction

Never before has international equity stood as much in the limelight as it stands today – not only as a "general principle of law recognised by civilised nations,"[1] but also as the international obligation to share in a fair and equitable manner the benefits arising from the utilization of genetic resources under the Convention on Biological Diversity (CBD). However, eight years after the World Summit on Sustainable Development's call for negotiating an international access and benefit sharing (ABS) regime, the prospect of potentially failing to adopt an ABS Protocol at the tenth meeting of the CBD's Conference of the Parties (COP 10) in Nagoya may cast a leaden shadow on the Convention's future role in international environmental governance. Equally concerning is the risk posed by the fact that all CBD Parties are under a strong pressure to adopt an ABS Protocol at all costs at COP 10, because the success of this meeting is perceived to depend on the Protocol's adoption as much as the success of the climate change negotiations in Copenhagen leaned on reaching an agreement on emission reduction targets for the post-2012 period, when the Kyoto Protocol expires. In the CBD, the risk posed by the negotiating rush towards a consensus outcome at COP 10 is that the ABS Protocol may fall short of paying due regard to the unintended consequences of its potential lack of clarity, functionality and enforceability. The general objective of this paper is to explain to the non-specialist some key issues at stake in the ABS negotiations under the CBD and their potential implications not only for the biodiversity agenda at COP 10, but also for the future of international biodiversity governance. Section one of this paper provides an historical account of the draft ABS Protocol's recent negotiations.[2] Then, the paper considers three key questions that may help clarifying the differences as well as the relationship between the fair and equitable benefit-sharing objective of the Convention and its other two objectives, namely the conservation and sustainable use of biodiversity. Section two highlights why biodiversity is an issue for international coordination and how an ABS Protocol can contribute to it. Section three explains how key sectors of biodiversity-related activities can be influenced through the adoption of an ABS Protocol. Section four considers how ABS management can be transformed after increasing the islands of innovation and the potential contribution of the Protocol to a paradigm shift on ABS. The fifth section reviews key outstanding issues under the draft ABS Protocol's negotiations. Finally, the sixth section endeavours to make sense of the draft ABS Protocol for COP 10 and concludes by highlighting its most important implications for the future of international biodiversity governance in the post-2010 period.

An intensive negotiation process

In 2002, the perceived failure to implement

1. Article 38 of the Statute of the International Court of Justice.

2. UNEP/CBD/WG-ABS/9/ING/1. The Interregional Negotiating Group (ING) was established by the Ad Hoc Open-ended Working Group on ABS at its resumed ninth meeting (Montreal, 10-16 July 2010). Where necessary, the ensuing discussion refers to the draft text of the ABS Protocol, as amended by the ING at its first meeting in Montreal (18-21 September 2010).

the third objective of the CBD,[3] namely poorly regulated access to genetic resources, claims of misappropriation of such resources and lack of fair and equitable benefit sharing, were all factors which contributed to the UN World Summit on Sustainable Development (WSSD) call for action to "negotiate within the framework of the CBD, 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."[4] Following the call, the Conference of the Parties (COP) of the CBD at its seventh meeting in 2004 decided to mandate the Working Group (WG) on ABS, with collaboration of the WG on Article 8(j),[5] in order to negotiate an international regime on ABS "with the aim of adopting an instrument or instruments to implement the provisions in Articles 15 and Article 8(j) [...] and the three objectives of the Convention."[6]

The most recent meetings of the negotiations on an international ABS regime under the CBD have shown intensified efforts to finalise a Protocol to be adopted by the Conference of the Parties at its tenth meeting in Nagoya, Japan, from 18 to 29 October 2010. Initially expected to be the last negotiating session before Nagoya, the ninth meeting of the Ad Hoc Open-ended Working Group on ABS (ABS 9) (Cali, 22-28 March 2010) for the first time considered a draft protocol, which was tabled as a Co-Chairs' text and further elaborated during the session – but not *formally* negotiated (the Cali Annex).[7] However, on the road from Cali to Nagoya, a series of extra negotiating sessions had to be scheduled to provide the COP with a realistic chance to adopt an ABS Protocol, while avoiding stalling the agenda of what the UN have hailed as "the most important meeting of the Convention so far."[8]

The first resumed session of ABS 9, which was held in Montreal from 10 to 16 July 2010, for the first time agreed to *formally* negotiate the draft ABS Protocol on the basis of the Cali Annex. While making some progress, the resumed session of ABS 9 recognised the need to continue negotiating the draft text before Nagoya and established an Interregional Negotiating Group (ING), which subsequently met in Montreal, from 18 to 21 September 2010. A second meeting of the ING is scheduled to take place in Nagoya from 13 to 15 October 2010. Then, the second resumed session of ABS 9 on 16 October 2010 shall formally adopt the ING's text and submit the draft ABS Protocol to COP 10 for its adoption.

ABS at the heart of international biodiversity governance

Several compelling reasons exist for improving international coordination of domestic and trans-boundary conservation activities. However, in the realm of international biodiversity governance, international coordination is perceived by the overwhelming majority of CBD Parties, in particular by the Like-Minded Mega Diverse Countries (LMMC),[9] as a *sine*

3. The third objective of the Convention is "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding." CBD, Article 1.

4. See paragraph 44(o) of the Johannesburg Plan of Implementation. See also Siegele L. (2008).

5. Article 8(J) of the CBD states: "Each Contracting Party shall [...] subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

6. CBD COP Decision VII/19D, paragraph 1.

7. Previous key developments on ABS policy-making include: the decision by COP IV establishing an expert group on ABS in 1998; and the decision by COP V establishing the WG on ABS in 2000. For an overview of the process leading to the international ABS regime negotiations, see: Hodges and Daniel (2005).

8. See: A/64/865 (2010), "Background paper for the high-level meeting of the General Assembly to be convened on 22 September 2010 as a contribution to the International Year of Biodiversity", at paragraph 11. Besides the ABS Protocol, COP 10 "will establish the strategic framework and programme for the next phase of implementation. It will review the experience of implementing the Convention, the progress achieved by Parties in implementing their national biodiversity strategies and action plans, and progress towards the 2010 biodiversity target. It will adopt an updated strategic plan and a programme of work for the period to 2020, further develop the strategy for resource mobilization and review the effectiveness of the financial mechanism."

9. Seventeen countries rich in biological diversity and associated traditional knowledge have formed the LMMC group. They are: Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico,

qua non for the effective implementation of the CBD's third objective. Indeed, fair and equitable benefit sharing is claimed to have been neglected at the same time by the global South, civil society organizations and indigenous peoples. The key argument for international cooperation in this area is that national ABS measures, which are enacted mostly in countries that perceive themselves as being provider of genetic resources, have no teeth in all those cases where the research and development on genetic resources and associated traditional knowledge as well as the commercialization of derivative products take place in other jurisdictions. Hence the ongoing negotiations of a legally-binding Protocol on ABS to ensure, on the one hand, obedience to international minimum standards of compliance with domestic ABS legislation or regulatory requirements of provider countries[10] and, on the other, compliance with minimum access standards to facilitate users' access to genetic resources.[11] If the negotiations at COP 10 succeed to strike a balance between the complementary aspects of benefit sharing, access and compliance under the Protocol, then the latter's adoption will remarkably strengthen international biodiversity governance.

Influencing key sectors of biodiversity-related activities

From the viewpoint of the conservation and sustainable use of biodiversity, the traditional focus is on biodiversity loss and the sectors of activity with "the greatest influence over the present and future state of global biodiversity."[12] However, such focus acquires different connotations as international equity concerns take centre stage in the ABS discussion. As we move into the realm of bioprospecting,[13] a shift also occurs with regard to defining the most relevant sectors of biodiversity-related activities and the means that can be used to influence them. Historically, the agriculture, forestry, fishery, mining, oil and energy sectors are among those which have proven to have the greatest impact on biodiversity. However, bioprospecting activities do not necessarily entail a loss of biodiversity[14] and the range of sectors that are directly concerned by ABS legislation is much narrower. It includes primarily: life science and pharmaceutical industries; seed and crop protection; personal care and cosmetics; botanicals and horticulture sectors; and basic biological research, including academic and public sector research.

The adoption of a Protocol on ABS would make a decisive step forward in influencing the private sector's involvement in promoting the implementation of the CBD's benefit-sharing objective. In particular, the Protocol will provide an umbrella framework setting out minimum ABS standards for all parties and sub-sectors.[15] In practice, corporate decision-making is influenced by a complex set of economic factors, which ultimately affect shareholder value, and the extent to which corporate actors can gather complete information on markets and regulatory frameworks. Relevant public sector institutions are also influenced by economic considerations, although they are more likely to balance them with the public interest as defined by the applicable domestic regulatory requirements and their institutional mandates. In conclusion, national legally-binding ABS requirements to be adopted by both user and provider countries in accordance with an ABS Protocol may provide the highest degree of certainty that the existing incentive structures shift towards promoting public and private sectors' involvement in ABS implementation.

Peru, Philippines, South Africa and Venezuela.

10. Article 12 of the draft Protocol.

11. Article 5, *ibid*.

12. IDDRI (2009), Annual Report, pp. 16-19.

13. Bioprospecting activities can be understood as "a range of activities associated with the search for a novel biodiversity, whose component parts may be utilised in a product or process and developed for commercialization." Rogan-Finnemore M. (2005).

14. While environmental impact assessment (EIA) is an important tool to ensure that bioprospecting and associated scientific research is carried out without damaging fragile ecosystems, this particular regulatory aspect of ABS is a marginal one. In particular, Article 5.1*ter* of the draft ABS Protocol states: "[...] all applications for access [...] shall be accompanied by a full environmental impact assessment, conducted by an independent third party, certifying that the access requested is for environmentally sound uses as defined by the providing country." Besides bioprospecting, research and development on the genetic makeup of biological materials is normally carried out in *ex-situ* labs. Therefore, R&D activities *per se* have no direct impact on the biodiversity that is found in natural habitats and ecosystems.

15. See below the discussion on specialised ABS regimes and sectoral approaches in section 5.

How can ABS management be transformed after increasing the islands of innovation?

At the outset, the key concept of "innovation" needs to be defined. The attributes of what we expect to be relevant "innovations" make it clear that such a concept shall be understood in a broad sense, which encompasses novel institutions, legislations, policies and technologies.[16] While a range of ABS best practices has developed and pilot projects have been undertaken since the entry into force of the Convention, how to replicate and scale-up these positive experiences has proven to be problematic. A fundamental difficulty is that often the isolated success of such innovative experiences may depend at the same time on: 1) the goodwill of particular companies; 2) the public investments made by national implementing agencies; 2) the support made available by active non-governmental organizations and other technical assistance providers; 4) and the extent to which the involved indigenous and local communities are cohesively organised and have procedures in place to grant their prior informed consent and to negotiate mutually agreed terms with the users, as appropriate.

In this regard, the potential contribution of the draft ABS Protocol shall be to provide a real paradigm shift towards promoting a transition from the *ad hoc* project-based approach to ABS to a normative approach[17] that consistently establishes the incentives that are required to ensure coordinated action of all the above stakeholders on a long-term basis.[18] In addition, the international biodiversity governance framework under the ABS Protocol will need to account for, and promote, the diversity of innovations in technologies, practices, laws and policies, which are relevant to biological diversity and the different constituencies that contribute to its conservation, sustainable use and benefit sharing.[19] Hence, the need to design specific requirements in order to ensure that implementation efforts do not generate perverse effects on the targeted as well as on the non-targeted constituencies of stakeholders in the biodiversity innovation and conservation arenas.[20]

Outstanding issues under the draft ABS Protocol

With only four extra days of negotiations left to untangle the remaining disagreements that have characterised country positions in Montreal in September 2010,[21] it is difficult to make predictions on how their different agendas could be reconciled at COP 10.

While the LMMC are the strongest advocates of an ambitious and comprehensive Protocol, with a broad scope of application and strong compliance measures, several overlapping coalitions have emerged as key players in ABS negations. Usually allied of the LMMC, the Like-Minded Asia Pacific and the African Group are also proactive supporters of a legally-binding Protocol, with the latter emphasising the importance of: the Protocol's potential application to pre-CBD *ex situ* collections of genetic resources; the cross-cutting nature of TK; and the legal recognition of indigenous and local communities' rights (often in support of proposals by the International Indigenous Forum on Biodiversity).[22]

At the other end of the spectrum, the reactive

16. In the ABS context, technological innovation is primarily understood as *biological* innovation –comprising, for instance, gene-based inventions– while the general concept of "innovation" refers to "the search for, development, adaptation, imitation and adoption of technologies that are new to a specific context." *The 'system of innovation' approach and its relevance to developing countries* (2005), [online] SciDevNet. Definition based on Dosi G. (1988), p. 222. Against this backdrop, although *biological* innovations in the life science take centre stage in ABS policy- and law-making due to their economic value and the remarkable amount of R&D investments, other kinds of innovations are extremely important for biodiversity. Therefore, the ABS Protocol needs to encompass not only formal scientific innovations and technologies but also informal innovations and relevant non-scientific knowledge including traditional knowledge.

17. Billé R., Rochette J. (2010).

18. Such a normative approach under the ABS Protocol shall be contrasted with the current incentive structure, which appears to promote *ad hoc* on-off efforts that cannot be easily replicated in different contexts and at different scales.

19. A fundamental reason for adopting a cross-cutting approach to TK protection under the ABS Protocol being that in several instances strengthening TK may provide the crucial missing link between benefits sharing, conservation and sustainable use of biodiversity *vis-à-vis* the need to replicate and scale up relevant ABS instruments.

20. For instance, the ABS Protocol needs to pay due regard to the concerns of the non-commercial academic research community, among others.

21. IISD-RS (2010).

22. Further information on the IIFB is available at: http://www.iifb.net/about_iifb.htm

stances of most industrialised countries, including the European Union, Switzerland, Canada, Australia, New Zealand, Japan and the United States (non-party), have often shown different degrees of flexibility on the various issues under negotiation. However, they appeared to be generally concerned with limiting the narrow application of the Protocol by *inter alia*: rejecting its retroactive application; excluding TK, pathogens, non-commercial research and emergency situations, and other genetic resource sub-sectors within the mandate of other inter-governmental bodies or organizations; and requesting compliance with access provisions. In addition, other countries and coalitions have sometimes played the role of mediators between the most radical proposals, notably Norway and the Central and Eastern Europe.

Besides the general need to achieve an overall balance between the three pillars of the Protocol, namely benefit sharing, access and compliance, several outstanding issues remain on the negotiating table. On material scope and subject matter exclusions,[23] a possible compromise may depend on whether the COP will agree to delete all the references to explicit subject matter exclusions (and inclusions) of specific genetic resource sub-sectors from draft Article 3 (Scope). At the same time, Article 3.*bis* (on the Protocol's relationship with other instruments) will need to address the concerns of Parties that want to have some exclusions, for instance, by providing scope for the legal recognition of what some negotiators have termed "tacit exclusions."

While specialised ABS regimes and sectoral approaches are contentious subjects, it may be envisaged that the Protocol will provide an umbrella framework setting out minimum ABS standards for all parties and sub-sectors. Besides, Parties would be free to develop ABS instruments for specific sub-sectors.[24] At the same time, such new instruments would need to conform to the Protocol's minimum standards. The question remains whether such an approach would not push several Parties beyond their comfort zone, because it may not allow decoupling access from benefit sharing –for instance, in the case of pathogens– until a more specific ABS sectoral instrument is actually ratified by the concerned Parties.

On temporal scope, countries' positions have ranged from the proposed retroactive application of the ABS Protocol to "new" and "continuing uses" of genetic resources, including those acquired before its entry into force, to the strict application of the principle of non-retroactivity of international treaties. To bridge the gap between these two approaches, a third proposal was (informally) made that envisages the establishment of a voluntary benefit sharing fund to provide compensation for genetic resources acquired in the "grey" period between the entry into force of the CBD in 1993 and the entry into force of the ABS Protocol.

On the question of whether derivatives should be covered only by the Mutually Agreed Terms (MAT) of ABS contracts[25] or should be regulated also by the draft ABS Protocol, a compromise may depend on the eventual acceptance of a draft definition of "utilization of genetic resources." Such definition encompasses derivatives directly resulting from such "utilization," even if they do not contain coding-DNA,[26] while excluding other non-directly derived manufactured products. On the cross-cutting issue of benefit sharing from the utilization of traditional knowledge (TK), the most controversial aspects include: some Parties' concern that the legal recognition of the rights of indigenous and

23. Such exclusions currently cover *inter alia*: pathogens; human genetic resources; genetic resources beyond national jurisdiction or located in the Antarctic Treaty Area; commodities; and plant genetic resources included in the Multilateral System of the FAO International Treaty.

24. The most remarkable example is the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. Article 3 *bis*, paragraphs 2 and 4, of the draft ABS Protocol, states "Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialised access and benefit sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol. [...] This Protocol is the instrument for the implementation of the ABS provisions of the Convention. Where a specialised international ABS instrument applies [...] this Protocol does not apply for the Contracting Party or Parties to the specialised instrument in respect of the specific genetic resource covered by and for the purpose of the specialised instrument." See also: Chiarolla (2010).

25. MAT are only between a specific provider of genetic resources and the user of such resources.

26. Article 2 of the draft ABS Protocol defines a "derivative" as "a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if they do not contain functional units of heredity."

local communities (ILCs) over their TK might strengthen their claims over the associated genetic resources; and the provisions that require Parties to take into account the "laws, customary laws, community protocols and procedures" of ILCs in implementing relevant obligations under the Protocol.

Finally, alongside the long-standing proposals tabled at the World Trade Organization to require disclosure of origin as an obligation under TRIPs,[27] the establishment of compliance checkpoints and related tools (including proposals on *inter alia*: the use of certificates of compliance;[28] requiring mandatory disclosure of origin in intellectual property right (IPR) applications; using IPR offices as checkpoints;[29] and denying to further process IPR applications as the remedy for non-compliance with disclosure requirements[30]) will be critical aspects of the "package deal" to be delivered by the negotiations at COP 10.

Making sense of the draft ABS Protocol for COP 10

In the draft ABS Protocol, the yawning gaps that still remain between alternative options on all the above issues seem to prelude to acrimonious negotiations, which in turn may lead to week compromises based on so called "constructive ambiguity." To put it in other words, all delegations will need to "sell back" to their capitals the agreed compromises. Furthermore, they may be able to do so only to the extent to which such compromises are ambiguous enough to pass the scrutiny of their narrow mandates.

Against this backdrop, the idea that the "lowest common denominator" of positions, which are poles apart, may lose most of the initial strength should not be surprising. While the ABS Protocol as a whole will be a legally-binding instrument, some of its provisions may not contain legally-binding obligations. Therefore, the above described "lowest common denominator" approach could affect the legal nature of the ABS Protocol, whose core provisions may be flooded with vague expressions, such as "subject to national legislation" or "as appropriate." These legal expressions indicate the different degrees of flexibility that are allowed in implementing binding commitments. Whether a compromise along the lines described above would be a satisfactory one in terms of devising an instrument likely to capture the value of biodiversity, provide incentives for its conservation and protect the fundamental rights of indigenous and local communities is a whole different matter which would require some serious scrutiny.[31]

In the absence of low-hanging fruits for a compromise at COP 10, the idea of reaching a limited agreement on *interim* arrangements, including the modalities to continue negotiating an ABS Protocol after Nagoya, seems to be a secure recipe for disaster. This is because the *demandeurs* of a strong ABS Protocol have made it clear that the immediate adoption of the Protocol, the revision of the new Strategic Plan and funding are the "package deal" that they expect from Nagoya. Thus, developing countries can be foreseen to block progress on all non-ABS items of the COP agenda to create as much pressure and as many bargaining chips as necessary to secure the desired outcomes on ABS. As a matter of fact, under "Mission of the Strategic Plan", developing countries have tabled a proposal to increase funding "at least in the order of 100-fold increase, in accordance with the principle of 'common but differentiated responsibility' [...]" as a precondition for taking "effective and urgent action to halt the loss of biodiversity by 2020." This provides a clear picture of the magnitude of commitments that the global South may be seeking in exchange for agreeing to compromise its most radical propositions in the ABS Protocol.[32]

The recent high-level meeting on biodiversity of the UN General Assembly (22 September 2010) has underscored that "the action taken over the next two decades will determine whether the [...] environmental conditions on which human civilization has depended for the past 10,000 years will continue beyond this century. If we

27. "TRIPs" stands for "WTO Agreement on Trade-related Aspects of Intellectual Property Rights." For further information on the TRIPs Council negotiations see: http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm. See also: Graham Dutfield (2005).

28. Article 5.2(d) and Article 13.1.

29. Article 13.1(a)(iv).

30. Article 13.*bis*(b).

31. See, for instance, the 2007 UN Declaration on the Rights of Indigenous Peoples, available at: http://www.iwgia.org/sw248.asp

32. UNEP/CBD/COP/10/4, p. 45.

fail to use this opportunity, many ecosystems on the planet will move into new, unprecedented states in which their capacity to provide for the needs of present and future generations is highly uncertain."[33] Beyond UN rhetoric, in the unfortunate event that COP 10 resembles the climate negotiations in Copenhagen, nobody outside the conference centre in Nagoya will find interesting to know how the different coalitions may share the blame for having failed to provide an effective framework and support for coordinated action on biodiversity for the coming decades. With the climate deadlock at Copenhagen still looming over multilateral environmental governance, a strong sense of responsibility should guide CBD Parties in deciding the extent to which their negotiating strategies shall be constrained by what a legally-binding Protocol on ABS can realistically achieve to enhance the contributions of biodiversity and ecosystem services to food security, health, human livelihoods and poverty alleviation among others. ■

33. A/64/865 (2010), at paragraph 23.

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