Access and Benefit-sharing Friends of the Co-Chairs meeting, 26-29 January 2010, Montreal, Canada

Paper on Selected Key Issues submitted by the Co-Chairs

Introduction

1. This paper proposes selected key issues for discussion by the Friends of the Co-Chairs (FOCC) with a view to identifying possible solutions that will facilitate and advance the elaboration and negotiation of the International Regime (IR). This paper is neither meant to be exhaustive nor definitive. It is solely intended to initiate discussion at the meeting. The Co-Chairs look forward to feedback from participants and to a constructive discussion of these issues at the meeting.

2. Participants in the meeting will be invited to highlight emerging areas of convergence on the elements of the International Regime and to address key outstanding issues with a view to finding potential solutions.

General Comments

3. Access and benefit sharing as they interrelate with compliance appear to represent the emerging heart of the International Regime. This may appear obvious to some. However, the Regime talks are in fact organised along the lines of main components and it is, therefore, difficult to discern cross-component relationships—such as those amongst access, benefit-sharing, and compliance (i.e., the so-called '"ABC" of ABS).

4. While the questions and comments below are organised by main component title, the underlying question is, under the International Regime, what are the relationships between access and benefit-sharing, between compliance and benefit-sharing and between compliance and access? This is a conceptual question but with major practical implications for the negotiations and for the ultimate shape and function of the Regime when adopted and implemented.

5. As we enter the final stages of the IR negotiations, these interrelationships require further immediate consideration. This is also true of certain terms and concepts -- particularly "use/utilization" -- which have the potential to connect key components and meet the needs of both providers and users. Our friends will be asked to explore these and other such possibilities.

6. The Friends of the Co-Chairs meeting is intended to focus on problem-solving of key issues in the negotiation of the Regime given it is occurring *ad-portas* to the final round of negotiations.

7. The FOCC discussion will require some creativity and 'open-thinking', but may also involve identifying potential relevant existing language solutions (the Bonn Guidelines, to cite one obvious potential source).

Benefit-sharing

The issue

8. How can the International Regime ensure the fair and equitable sharing of benefits arising out the utilization of genetic resources, and where appropriate, of the use of associated traditional knowledge, acknowledging that there is no benefit-sharing without appropriate access?

Questions

- How can the IR level the playing field in order to ensure the sharing of benefits arising out of the utilization of genetic resources?
- To what extent can the IR draw on the Bonn Guidelines?
- Would it be useful for the IR to provide international minimum conditions and standards for benefit-sharing arrangements to be recognized as 'fair and equitable' bearing in mind different potential uses/users?
- Should the IR include provisions to ensure that benefit-sharing arrangements contribute to the conservation and sustainable use of biological diversity?
- Should the Regime address the sharing of research results for the benefit of conservation and sustainable use of biodiversity as well as to create local research capacity?
- Should the Regime address benefit-sharing responsibilities of third parties including intermediaries with countries of origin or Parties that have acquired resources in accordance with the CBD?
- Is there a sufficient understanding on whether or not and how model clauses for contracts and other MAT would solve asymmetric conditions, imperfect information and uncertainty regarding fair and equitable benefit-sharing elements?
- Should the IR indicate how to promote at the national level the sharing of benefits for the use of TK associated with genetic resources?
- Should the IR address transboundary genetic resources and/or associated TK and the benefits generated? If so, how?

Access

The issue

9. How to reconcile/balance the sovereign rights of States over their genetic resources, and their authority to determine access, with the need for legal certainty, clarity and transparency of access procedures?

Questions

- What does "facilitated access" mean and how to balance "endeavour to create conditions to facilitate access" and the authority of national governments to determine access?
- How can the IR ensure legal certainty, clarity and transparency of ABS requirements?
- What are the potential links between simplified procedures and compliance?
- Can there be legitimate access without mutually agreed terms or benefit sharing?
- Do Parties have the sovereign right not to require PIC?
- Should we attempt to define environmentally sound "uses" or should we leave this to the discretion of the state providing PIC?
- Do we need to address non-discrimination in the IR and if so what are its potential implications?

- Under which conditions would a simplified procedure be desirable? For non-commercial research? Other situations?

Compliance

The issue

10. Is the promotion, monitoring and enforcement of compliance at the international level with national ABS laws and ABS arrangements across national jurisdictions is at the crux of the regime? Would deciding on jurisdiction and deciding on applicable law remain the most problematic issue?

Questions

11. What measures are needed in the IR to ensure compliance with ABS national legislation and ABS agreements?

12. Tools to promote compliance:

- What measures should be included in the IR to ensure awareness raising to ABS?
- Could model and default clauses for mutually agreed terms be included in the IR? Could the IR draw from the Bonn Guidelines?
- Could codes of conduct/best practices be included in the IR?

13. Tools to monitor compliance:

- Should an ABS clearing house mechanism be established by the IR? What should it cover?
- Would certificates of origin/source or legal provenance be an option, in particular for those countries that do not have ABS national legislation in place?
- Should an internationally recognised certificate of compliance be part of the IR? If so, what should it provide for?
- Should check points be identified and included in the IR?
- Should disclosure requirements be included in the IR? If so, how should they be circumscribed?
- Are additional tools/mechanisms needed in the IR to ensure the tracking or monitoring of genetic resources?

14. Tools to enforce compliance:

- Should enforcement of judgments and arbitral awards across jurisdictions be addressed by the IR? If so, how?
- Is there a need for enforcement of benefit-sharing arrangements outside a given country's jurisdiction even when that country has ensured ABS law and regulations are in place and contract law is fully utilized?
- How to enforce benefit-sharing responsibilities of third parties including intermediaries with countries of origin or Parties that have acquired resources in accordance with the CBD?
- How can the IR ensure access to justice in situations of non-compliance with ABS legislation and/or ABS agreements?
- Should remedies and sanctions be included in the IR to address situations of non-compliance with national ABS requirements?

Traditional knowledge associated with genetic resources

The issue

15. How to ensure that the benefit sharing arising out of the utilization of traditional knowledge associated with genetic resources is subject to PIC and MAT of indigenous and local communities (ILCs)?

Questions

- Should the IR have minimum standards for the fair and equitable distribution of benefits arising out of the utilization of traditional knowledge?
- Who has/is the competent authority to determine access to TK associated with genetic resources? How is it exercised?
- Where and how to draw the line between prior informed consent of governments and the prior informed consent of ILCs? Would ILCs grant PIC on access to genetic resources with associated TK?
- Should the IR include provisions to protect traditional knowledge, innovations and practices? If so, how to relate this protection with provisions on compliance and enforcement?
- How to deal with trans-boundary situations of shared TK and the benefits generated?
- Could associated traditional knowledge be incorporated in the IR as stand alone component and establish relevant links in the text of other components?
- Do ILCs have the right to exchange amongst themselves, genetic resources and associated traditional knowledge, for traditional purposes?
- To what extent would you agree or disagree with the following and why:
    - Associated traditional knowledge could be incorporated in the IR as stand alone component and establish relevant links in the text of other components;
    - The IR could confirm the rights of ILCs over their traditional knowledge associated to genetic resources and those rights are to protected;
    - There are obligations to fulfil with respect to access and benefit sharing arising from the use of traditional knowledge associated to genetic resources;
    - There is a need to develop national legislative and administrative policies on the use of associated traditional knowledge;
    - ILCs have the right to exchange amongst themselves, genetic resources and associated traditional knowledge, for traditional purposes.

Capacity

The issue

16. The building of capacity associated with ABS implementing institutions and organizations, as well as appropriate transfer of relevant technologies and related funding appear to collectively represent the key issues.

17. How should the IR reflect in specific provisions for capacity building and related funding, the range of institutional development and the capacity to add value and to support all aspects of the IR's implementation?

Questions

18. In order to be credible, would the IR need to at minimum:

- Build capacity to develop national policies and law?
- Build capacity in all Parties to take relevant legislative, administrative or policy measures?
- Facilitate private and public investments in genetic resource research and development by for example enhancing institutional capacities?
- Provide means to address potentially asymmetric bargaining power between parties (users and providers) in negotiating MATs?

- What are the potential synergies in a regional approach to implementation?

19. Bearing in mind that capacity-building does not replace the substantive provisions of the IR, can the above be accomplished through a streamlined IR text together with an annex of supported actions for implementation?

Scope

The issue

20. Whether or not the scope of the International Regime should be different from the one agreed upon in the Bonn Guidelines?

Questions

21. Some have pointed out that the scope of the Bonn Guidelines, adopted by consensus of the Parties, is directly relevant to the regime and could simply be adapted as follows:

> "All genetic resources and associated traditional knowledge, innovations and practices covered by the Convention on Biological Diversity and benefits arising from commercial and other utilization of such resources should be covered by the international regime on access and benefit sharing, with the exclusion of human genetic resources."

22. Others have argued that the scope of the CBD, in particular its Article 15, would be the scope of the IR.

- Is either of these possible solutions?
- If not, is their a compelling rationale for the regime scope to be either broader than the scope of the CBD or narrower?

Objective

The issue

23. The "Objective" provision in most international instruments is typically concise and clear -- rarely extending beyond two lines and generally not addressing the means with which to achieve the objective. The issues within the IR do not appear to merit deviation from this approach.

Question

- On what basis (beyond those related negotiating tactics or strategy) would you object to the following simplified language?

"Effectively implement the provisions in Articles 15 and 8(j) of the Convention and its three objectives, specifically by facilitating appropriate access to genetic resources and ensuring the fair and equitable sharing of benefits arising out of their utilization."

Terms and definitions

The issue

24. Whether additional terms and definitions are necessary to define the IR's obligations and/or scope to support its effective and adequate implementation?

Questions

- Can clarity and certainty be assured by the IR for users and providers without defining key terms?
- If additional terms and definitions are needed is it practical to negotiate these in the time remaining?
- Is it desirable to use in the IR terms such as "derivatives" and "products" without actually defining them?

- Is there a need to define “utilization”, “misappropriation” or “misuse”?
- Is there a need to define “traditional knowledge associated with genetic resources”?
