

Ref.: SCBD/SEL/OJ/SGa/71094

12 March 2010

NOTIFICATION

Co-Chairs Informal Interregional Consultations (CIIC) and Ninth Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing: Co-Chairs' Guidance Note

Dear Madam/Sir,

With reference to the Co-Chairs Informal Interregional Consultations (CIIC) and to the ninth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (WGABS-9), the Secretariat is pleased to circulate the attached document entitled "Co-Chairs' Guidance Note".

As indicated in the note, it is intended to provide guidance in the streamlining, consolidation and finalisation of the text of the International Regime (IR) without prejudice to the positions of delegations or to the integrity of the Montreal Annex. It is a response by the Co-Chairs to informal requests from a number of Working Group members for the Co-Chairs to provide some informal guidance of this nature.

The Co-Chairs provide this informal document, trusting that it will prove useful for the CIIC, the Regional and Inter-regional Consultations and for WGABS-9 itself.

The document is also available on the Secretariat's website as part of the pre-session documentation for the WGABS-9 meeting under the following link:
<https://www.cbd.int/doc/?meeting=ABSWG-09>.

Please accept, Madam/Sir, the assurances of my highest consideration.

Ahmed Djoghlaif
Executive Secretary

To: CBD National Focal Points, ABS National Focal Points, international organizations, indigenous and local community organizations and stakeholders

Co-Chairs' Guidance Note

Purpose

1. The purpose of this note is to provide guidance in the streamlining, consolidation and finalization of the text of the international regime. As such, this document has no formal status and is not intended for negotiation.
2. The note seeks to neither prejudice the positions of delegations nor to affect the integrity of the Montreal Annex. Rather it is a response to informal requests from a number of Working Group members for the Co-Chairs to provide some informal guidance of this nature.
3. Now is the time to focus on what is achievable, finalising a Regime that at its core includes obligations targeting key measures while recognising the need for some flexibility at national levels.
4. ABS international regime is about the balance between the sovereign rights of states over their genetic resources (GRs) and the need to ensure legal certainty, clarity, predictability and transparency for both providers and users.

The vision

5. The international regime would enable a network of national laws and policies to foster a fair and open system for both users and providers.
6. The international regime would acknowledge the social, economic and environmental benefits arising from the utilization of genetic resources and associated traditional knowledge, innovations and practices.
7. The international regime at its core is a compliance and enabling regime for access and benefit sharing.
8. The international regime would not replace or substitute national laws, rather complement such laws and policies. However the international regime should seek to promote, guide and influence the establishment and evolution of national laws.
9. The international regime would anticipate all countries in the future being, optimally, both user and provider countries and build capacity in this regard.
10. The international regime would essentially address transboundary issues – i.e., how to ensure compliance with national laws once genetic resources have left the provider country.
11. The international regime would recognise link between benefit sharing and the actual and the potential value of biodiversity.
12. Given the above, it follows that the international regime should include provisions that stipulate certain specific general obligations for users and providers, allowing details regarding terms and conditions to be agreed through contracts and other MAT.
13. The following principles/characteristics – applying to users and providers alike -- have been variously promoted by a range of governments and stakeholders as desirable attributes of international and domestic ABS systems:
 - (a) Transparent;
 - (b) Effective;

- (c) Adaptable;
 - (d) Fair and just;
 - (e) Flexible;
 - (f) Predictable;
 - (g) Efficient;
 - (h) Simple;
 - (i) Reciprocal;
 - (j) Mutual.
14. The international regime could be envisioned as working at two levels:
- (a) Contracting Parties;
 - (b) Individual users and providers, within and amongst Contracting Parties' jurisdictions.
15. In addition, another key aspect of the Regime would be its important potential to not only build and support national and regional genetic resource governance and management structures, but to attract investments, facilitate biodiversity research and to improve capacity to conduct endogenous value-added R&D.
16. The international regime should recognise the important function and responsibility played by intermediaries (e.g., botanical gardens and other ex situ collections) who can be both users and providers of genetic resources.
17. The international regime needs to embrace a long-term vision recognizing the value of genetic resources in and of themselves to biodiversity (as an eco-system service) and human society.
18. The international regime would not undermine existing rights and obligations under the Convention on Biological Diversity.

Selected considerations

19. An overly flexible or `loose` international regime risks generating undue costs for both users and providers through inefficiencies related to high transaction costs and may unduly disadvantage those with limited resources or means.
20. A highly prescriptive international regime may limit the flexibilities obtained by user and provider through MAT and risks acting as a disincentive to investment in genetic resources and their use.
21. A “sticks and carrots” approach may be optimal in pursuit of a “hybrid” international regime – i.e., prescriptive but flexible.
22. A balance of obligations for both providers and users is necessary.
23. It is best to work on the basis of interdependent legal certainty for both providers and users
24. The crucial role of researchers (particularly in public sector) should be accounted for -- their role in identifying and adding value (scientific, technical and technological, etc) to genetic resources and potential uses and users.

25. Recognition that benefits are generated both from use-related activities (e.g., after access is granted) and benefits related to ex ante and ongoing activities (e.g., conservation, taxonomic work, generation of traditional knowledge)

Mutually agreed terms (MAT)

26. Three aspects of MAT, related to:

(a) Point of access – PIC including under MAT (including benefits generated related to conservation, building of knowledge including traditional knowledge, innovations and practices as well as endogenous scientific knowledge;

(b) Benefits arising out of use of genetic resources by the research community;

(c) Benefits sharing arising from the commercial and other utilization of genetic resources.

27. Understand that monitoring, tracking and reporting link to down-stream use-related benefit sharing as well as upstream (i.e., to conservation, building of knowledge including traditional knowledge, scientific and technical knowledge).

28. Value of information:

(a) As a tool for promoting, monitoring and enforcing compliance;

(b) Capacity to track and monitor the flow and use of genetic resources and the benefits arising from that flow and use

29. The link between the loss of biodiversity and the loss actual and potential value of genetic resources affects benefits arising both from upstream activities *ex ante* at the point of access and downstream use-related benefits arising from genetic resources.

The “Package”

30. This is a compliance regime for both access and benefit-sharing, as well as an enabling regime.

31. The basic principles are opportunity, fairness, equity and sustainability in all ABS activities.

32. A three-tier approach is necessary to deal with genetic resources and traditional knowledge, innovations and practices:

(a) Compliance related to access to genetic resources and the benefits arising from their utilization means compliance with ABS national laws, including PIC granted by national competent authorities and MAT terms and conditions;

(b) Compliance related to access to traditional knowledge, innovations and practices associated with genetic resources and the benefits arising from their utilization means compliance with relevant national laws, including PIC granted by competent authorities of indigenous and local communities, and MAT terms and conditions;

(c) Customary exchange and use of genetic resources and associated traditional knowledge, innovations and practices needs to be promoted and protected in accordance with national laws and relevant international commitments;

33. Compliance means legal certainty at two levels:

(a) Provider and user Contracting Parties;

(b) Providers and users as individuals/legal entities.

34. For users, legal certainty means criteria for rules and procedures in ABS national laws, including PIC and MAT linked to compliance measures in user countries.

35. For providers, legal certainty means compliance measures in user countries for the fair and equitable benefit sharing arising from access and use of their genetic resources in accordance with ABS national laws, including PIC and MAT. This certainty could be enhanced and benefit-sharing improved in three potential ways:

(a) Internationally recognized certificate of compliance with ABS national laws, including PIC and MAT issued by national competent authority(ies);

(b) Obligation for the user to disclose updated information on compliance with ABS national laws including PIC and MAT at agreed checkpoints and to notify this information to the CBD/CHM

(c) Mutual supportiveness of the international regime with other relevant international agreements/organizations means that disclosure of information and the respective notification from users should be sent to them including ITPGRFA, WTO/TRIPS, and WIPO.

Nature

36. If the regime is to include one or more legally binding provisions, a protocol under the Convention on Biological Diversity is envisioned.

Preamble

37. The critical importance of genetic resources to food security, public health, environmental protection and conservation and the mitigation of climate change.

38. The need for mutual supportiveness between intellectual property instruments and ABS instruments in the framework of the CBD.

Objective

39. The international regime would aim to ensure the fair and equitable sharing of benefits arising from the utilization of genetic resources, and the conservation of biological diversity and the sustainable use of its components.

Scope

40. The international regime would apply to genetic resources within the scope of the Convention on Biological Diversity and to the benefits arising from the utilization of such resources. Further, the international regime would apply to traditional knowledge associated with genetic resources within the scope of the Convention on Biological Diversity and to the benefits arising from the utilization of such knowledge.

Compliance

41. Information is a key component affecting compliance but does not sufficiently address the issue of access to justice regarding enforcement of compliance.

42. Compliance is primarily understood as referring to compliance with national ABS laws and other measures and with ABS contracts and other mutually agreed terms. There is an overwhelming desire to be in compliance and remain in compliance.

43. Legal certainty is a shared objective for both users and providers.
44. Costs of compliance as well as costs of non-compliance (users and provider) must be considered.
45. The international regime should address the following two typical major scenarios:
- (a) Users are subject to legal action in their countries to comply with national ABS laws of the countries providing the genetic resources;
 - (b) Users have obtained an ABS contract and are subject to legal action to enforce such contracts in the user country, provider country or designated third country jurisdiction
46. Accounting for these scenarios, the international regime would have the positive effects of lowering transaction costs for the system as a whole and with ABS national laws in place, would help users and providers conclude sound contracts and to ensure contract terms are followed.
47. The following provisions are envisioned for compliance with national ABS laws:
- (a) Parties take appropriate, effective and proportionate measures to ensure that genetic resources utilized within their jurisdictions have been obtained in accordance with provider country national ABS law;
 - (b) Parties to take appropriate, effective and proportionate measures to sanction or remedy situations of non-compliance with provider country national ABS law by users within their jurisdictions
 - (c) Parties to cooperate in cases of alleged violation of national laws of the provider country.
48. The following provisions are envisioned for compliance with contracts and other mutually agreed terms:
- (a) Parties to encourage providers and users to include provisions in MAT covering international dispute resolution;
 - (b) Parties to take legislative, policy and other measures to ensure opportunities exist to seek recourse under their legal systems in cases of dispute;
 - (c) Parties to take measures to address cases of alleged non-compliance with MAT including facilitating access to justice; facilitating mutual recognition and enforcement of foreign judgements; and facilitating cooperation and providing assistance to those seeking legal redress.
49. Development of model contractual clauses, codes of conduct and best practice standards, together with a concrete measure to raise awareness of access, benefit sharing and compliance, would be useful in support of compliance provisions.
50. Tracking and reporting functions are integral in the monitoring of compliance. Accordingly a provision on monitoring, tracking and reporting is envisioned, emphasizing the potential positive impact of the disclosure of information (info on PIC and MAT). Checkpoints would be needed in such activities.
51. The following provisions could promote compliance:
- (a) Exchange of information through an ABS Clearing-House;
 - (b) Monitoring the utilization of genetic resources, bearing in mind costs and practicalities, through an international system, exemplified by a proposed internationally recognized certificate of compliance;

(c) Obligations for the user to disclose information and to notify CBD/CHM on updated compliance with ABS national laws including PIC and MAT (mandatory requirements and modalities to be determined).

Access

52. It is apparent to all that access is interlinked with benefit sharing in a “positive loop” which represents an opportunity for both users and providers, noting that all Parties are or would eventually be both providers and user countries.

53. The core provisions in the international regime related to access would, in the context of States exercising their sovereign rights over their natural resources (including the authority to determine access to genetic resources) focus on:

- Setting out clear rules, procedures or other measures for legal certainty, clarity and transparency in order to create conditions for appropriate and fair access, consistent with the three objectives of the Convention on Biological Diversity.

Benefit-sharing

54. Again noting the inter-linkages between access and benefit sharing, the core provisions in the international regime related to benefit sharing would focus on:

(a) Parties taking legislative and other measures aimed at fairly and equitably sharing benefits derived from genetic resources with the country providing such resources;

(b) Noting that benefit sharing is on mutually agreed terms;

(c) Noting that benefits may be both monetary and non-monetary and accounting for the fact that benefits result from effective participation in research activities and the results generated from those activities.

Derivatives

55. It is recognized that derivatives resulting from the expression or characterization of genetic resources are a key issue to be addressed or included in the International Regime and that there is a growing understanding that the International Regime should ensure sharing of benefits from derivatives.

56. Given the above, and once more noting the ABS relationship, derivatives could be addressed in the Regime through “use of genetic resources” and benefit sharing arising from their use in mutually agreed terms (MAT).

National focal points and competent national authorities

57. National focal points and competent national authorities on ABS should be designated by Parties to perform a range of functions critical for effective access and benefit sharing.

Traditional knowledge associated with genetic resources

58. The international regime should address traditional knowledge associated with genetic resources. Given its importance, this may most optimally be done through the inclusion of specific provisions (i.e. as a main component), with some judicious linkages established between these provisions and others in the international regime.

59. The international regime should protect and encourage customary use of genetic resources and customary exchange of those resources amongst indigenous and local communities. It should encourage the fair and equitable sharing of benefits arising from the utilization of knowledge, innovations and practices of indigenous and local communities with the approval and involvement of the holders of such knowledge.

60. Acknowledge and support the role played by indigenous and local communities as providers of traditional knowledge associated with genetic resources in the subsequent use of these resources and the benefits generated by such use.

61. The international regime should acknowledge that traditional knowledge associated with genetic resources has value in and of itself and that such value should be recognised upfront in benefit sharing provisions with MAT.

Capacity

62. Capacity would be addressed in the international regime in the context of the following aspects:

- (a) Capacity to comply with international regime obligations;
- (b) Capacity to negotiate ABS agreements;
- (c) Capacity for ABS governance (to prepare, apply and enforce ABS national laws including PIC and MAT);
- (d) Capacity of provider countries to develop endogenous research capabilities to add value to their own genetic resources.

Contribution to conservation and sustainable use

63. A provision is recommended to encourage providers and users to direct benefits arising from the utilization of genetic resources towards the conservation and sustainable use of biodiversity.

64. Further, it should be recognized that such benefits will in turn help to preserve and maintain the traditional knowledge of indigenous and local communities and their contribution to the three objectives of the Convention on Biological Diversity.

Relationship with other international instruments

65. The international regime to be mutually supportive of the International Treaty on Plant Genetic Resource for Food and Agriculture, the World Intellectual Property Organization, and the Agreement on Trade-Related Aspects of Intellectual Property Rights under the World Trade Organization.