

Briefing Paper

Patents on genetic resources contradict 'facilitated access'

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Access to genetic resources and fair and equitable benefit sharing is one of the three pillars of the CBD.

Art. 1 *The objectives of this Convention, to be pursued in accordance with its relevant provisions, 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, including by **appropriate access** to genetic resources*

Art. 15.1 *Recognizing the sovereign rights of States over their natural resources, the authority to determine **access** to genetic resources rests with the national governments and is subject to national legislation.*

Art. 15.2 *Each Contracting Party shall endeavour to create conditions to **facilitate access** to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.*

The CBD states that access to genetic resources has to be 'appropriate' and for environmentally sound uses. The rights of indigenous peoples and local communities, including the right of prior informed consent, are integral to the concept of 'appropriate access'.

Most discussions and decisions taken by the Conference of Parties to the CBD on access to genetic resources focus on the 'first access to genetic resources'.

The fact that in most cases there will be a chain of users meaning a series of access which should all be bound to follow an ABS regime is easily neglected. Within the CBD, the question of how intellectual property rights affect access to genetic resources was only taken up in Decision VI/24 C (3a) which requested the Executive Secretary to undertake further information gathering and analysis with regard to the impact of intellectual property regimes on access to and use of genetic resources and scientific research. The paper prepared for the second meeting of the ABS working group identified several access-related problems linked to intellectual property:

- Tensions between IPRs and the achievement of their wider social objectives, particularly those related to the needs of poor producers;
- Impediments to the effective development of science due to restricted flow and exchange of information;
- Increased product development costs (that translate to high prices for consumers).

But working group discussions have not resulted in concrete recommendations.

Already before the discussion about the negative impact of IPRs was raised in the CBD, the Commission on Genetic Resources for Food and Agriculture of the FAO took up the issue. Carlos Correa in his study paper 'Access to plant Genetic Resources for Food and Agriculture' requested by the FAO came to a clear conclusion: It is a matter of fact that patents are restricting access.

"The granting of a patent entails the right to prohibition (ius excluendi) the use of the patented material in the countries where the rights have been recognized. According to article 28.1 (a) of the TRIPS Agreement, patents relating to products confer the right to

prevent third parties not having the patentee's consent from 'making, using, offering for sale or importing for those purposes the product'"

The negotiations leading to the International Treaty on Plant Genetic Resources for Food and Agriculture have considered the negative impacts of IPRs. The outcome is contained in Art. 12.3(d):

"Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System;"

The International Treaty has comparable goals as the CBD and with Art. 12.3(d) the Treaty took an important but not sufficient step in addressing this controversial, but crucial issue.

It will be important for the ABS working group to develop a related provision to ensure that no IPRs will restrict access in the international regime. In the terms of reference for the ABS working group, the topic of facilitated access has been mentioned several times. The wording of such an article should avoid the ambiguity of Art. 12.3(d) of the International Treaty. In particular, the term 'in the form received' should not be used in an international ABS regime. It has to be stated clearly that no IPR restricting access shall be granted for the original organism and its isolated components as well as for modified organisms and modified genetic material.

If not, the whole CBD would lose its balance, forcing countries of origin to provide access on the one hand, but giving users patent rights on the other hand, which could prevent any further access for a minimum of twenty years.

If an international regime were to prohibit any intellectual property or other rights that limit the access to genetic resources, this would not result in the elimination of benefits to be shared. This argument which is often put forward by the biotech-industry lacks any credibility. First of all, many patented inventions are based on genetic resources but do not contain the genetic material any longer (e.g. a new drug). Secondly, up to now huge markets - for example the herbal cosmetic or food supplement markets - gain large profits with products based on and containing genetic resources that are not covered by patents at all. These should also be subject to benefit sharing.

Demanding a strong article about restricting property rights in the new regime is also in line with Art. 16.5 of the CBD, which states, that patents and other intellectual property rights should be supportive of and do not run counter to the objectives of the CBD.

Necessary elements of an international ABS regime related to patents and other IPRs

- The international regime must make sure that recipients of genetic resources shall not claim any intellectual property or other rights that limit subsequent access to the original organism and its isolated components as well as for modified organisms and modified genetic material. Any access shall be consistent with the objectives of the CBD and the rights of indigenous peoples and local communities.