



Cutting the Gordian Knot: Resolving conflicts over the term “utilisation”

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The wording of the CBD’s third objective - to ensure the fair and equitable sharing of benefits arising from the utilisation of genetic resources - has proven unfortunate and presented a major stumbling block to negotiation of an effective international regime on ABS. A literal definition of genetic resources would, in effect, exclude from the remit of any regime biochemical compounds, which do not contain functional units of heredity. Developing countries have long argued that any regime must deal with, not only genetic resources but also proteins, metabolites, and other so-called derivatives of genetic resources.

After years of relatively fruitless endeavours to clarify what resources are to be covered by an ABS regime, recent meetings in Montreal have led to an interesting potential solution. During the July meeting of the Interregional Negotiation Group (ING) it became increasingly clear that the way forward was not to define genetic resources but rather to focus on a definition of the “utilisation of genetic resources.” A “small group” was formed to develop such a definition, though it was not given the mandate to negotiate but rather any outcome was to be negotiated in the ING. The small group relied upon the report of the Meeting of the Group of Legal and Technical Experts on Concepts, Terms, Working Definitions and Sectoral Approaches (GLTE) that met in Windhoek, Namibia in December 2008.

The GLTE effectively cut the Gordian Knot of deadlocked ABS negotiations by stating in its report that the ABS Protocol is about implementing Article 15 of the Convention on Biological Diversity (CBD) which focuses on the “utilisation of genetic resources.” This implied that rather than trying to define “genetic resources,” which would have different interpretations depending on whether one is a lawyer, scientist, or an anthropologist, it makes more sense to list out what constitutes the

utilisation for the purposes of the ABS Protocol. The GLTE also provided a list of possible uses of genetic resources in its report.

The working definition of “utilisation of genetic resources” that was developed by the small group in the July ING Meeting foresaw an Annex that would list out the different uses of genetic resources which would also include “derivatives,” thus making it unnecessary to define the latter term. Negotiations on this utilisation definition were reopened at the September ING meeting. In this context, Canada stated that capital instructions required them to bracket the term wherever it appears in the draft ABS Protocol until the definition was negotiated and agreed to. This position effectively halted the negotiations with the Like Minded Mega Diverse Countries (LMMC) and the Like Minded Asia Pacific Group (Asia Pacific Group) who refused to continue the negotiations unless the issue was resolved. The Co-Chairs of the ING, after closed-door consultations with key negotiators at the ING, re-convened the small group to further refine the July definition of “utilisation of genetic resources.” Parties agreed that this definition would be bracketed with a footnote stating that it had not been negotiated.

The small group eventually came up with a new working definition for the disputed term along with a working definition of “derivatives”:

“Utilization of genetic resources” means to conduct research and development on the genetic and biochemical composition of genetic material/biological resources/genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention.

“Derivative” means a naturally occurring biochemical compound resulting from

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the genetic expression or metabolism of biological or genetic resources, even if they do not contain functional units of heredity.

There were two significant concerns that the small group sought to address. First, the inclusion of naturally occurring biochemical compounds such as resins that do not contain functional units of heredity. This is especially important since genetic material under the CBD is defined as containing plant, animal, microbial, or other material containing “functional units of heredity.” Second, the importance of addressing the issue of “proximity” (i.e., at what point does the utilisation end for the purposes of the ABS Protocol? Or how significant should the use of a genetic resource be for it to be considered utilisation?).

Interestingly references to the Annex that was to list out the different uses of genetic resources were dropped, as the definition itself was considered comprehensive enough to cover all possible uses of

genetic resources.

Moreover, the definition of derivatives was kept, as the Group of Latin American Countries (GRULAC) requested to keep the text until they were satisfied with the outcome of the negotiations on the new utilisation definition. Finally, GRULAC insisted on the inclusion of biochemical compounds or metabolites that do not contain functional units of heredity in the definition of “utilisation of genetic resources.”

The September meeting of the ING ended with an understanding that the definition of utilisation developed by the small group would be the definition that would be negotiated by Parties in Nagoya, Japan.

With this understanding we may be no closer to a categorical definition of genetic resources but for now a working solution may be on the table.

