

ABS and Biodiversity Conservation: Does the Design of the ABS system allow for the realization of the Post-2020 Framework?

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International law provides for mechanisms for coupling the use of biodiversity and its conservation. One of these mechanisms is fair and equitable sharing of benefits arising from genetic resources. The system of access and benefit-sharing (ABS) aims to fairly distribute benefits deriving from utilising nature between the providers of genetic resources (such as biodiversity-rich countries) and users of genetic resources (such as universities, biotechnology or pharmaceutical companies, natural history museums and botanical gardens). The international access and benefit-sharing (ABS) system was put in place with the hope that it would aid the international community in conserving biodiversity and thereby attaining its international conservation targets. Nevertheless, the inability to achieve our global conservation targets were documented by the Secretariat to the Convention on Biological Diversity in its 5th Global Biodiversity Outlook, in which we had to face the grim reality that we have failed every single one of our goals and subsequent targets (Secretariat of the Convention on Biological Diversity (2020) Global Biodiversity Outlook 5. Montreal).

We have been long witnessing the inability of the Nagoya Protocol as well as the ABS Framework as a whole to result in a significant amount of benefits. We do not base this argument solely on the 5th Global Biodiversity Outlook, but also on the academic literature which has been criticising the ineffectiveness of the ABS framework in achieving its goals (Scholz et al, 2022; Heinrich et al, 2020; Laird et al, 2020; Sirakaya 2020; Sirakaya 2019; Smith et al, 2017; Morgera et al, 2015; De Jonge 2010). We witness the academic literature debating whether ABS, an international legal framework aiming at building trust-based relationships under the principles of fairness and equity between the Global North and the Global South, is currently achieving more than the bureaucratisation of obtaining the prior informed consent of the holders of sovereign rights over genetic resources.

The international community is currently negotiating its next set of conservation targets and indicators under the auspices of the Convention on Biological Diversity. The first draft of the Post-2020 Global Biodiversity Framework bases its methodology around the theory of change. The theory of change is expressed as the need to strive for a holistic paradigm shift in global policy action as well as the economic, social and financial models related to the conservation of biological diversity. This approach is considerably welcome, as this is the first time we recognise that our

current system based around the use and conservation of biological diversity is not suitable to achieve our conservation goals. The implementation of the Global Biodiversity Framework is the ultimate space to discuss the ability of the Nagoya Protocol as well as the ABS Framework as a whole in achieving its objectives. This is because we currently assume that ABS and the Nagoya Protocol contribute to biodiversity conservation, yet, is the Nagoya Protocol actually designed to conserve biodiversity? In a recent study (Sirakaya, 2022) which subjects the text of the Protocol to a legal review and analyses all of the negotiations that led to the adoption of the Nagoya Protocol, we came to the conclusion that there are no legally binding obligations under the Nagoya Protocol that obliges Parties to channel benefits into biodiversity conservation, except for Article 10 on Global Multilateral Benefit-sharing Mechanism. The modalities of Global Multilateral Benefit-sharing Mechanism are still under the consideration of the Parties, and it is thus yet to be activated. Thereby the benefit-sharing as such we foresee under the Global Biodiversity Framework is that of bilateral benefit-sharing. Consequently, there exists no direct mechanism in a bilateral ABS relationship that obliges parties to channel benefits into conservation. The ABS system as it is currently designed, merely refers to biodiversity conservation and sustainable use in its bilateral form. However, the design of the bilateral ABS system does not inherently lead to biodiversity conservation.

Nevertheless, not all hope is lost for ABS. The paper addresses the statements made during the negotiations of the Nagoya Protocol, with regard to the actors who are inherently involved in conservation of biodiversity such as the Indigenous People and Local Communities as well as scientific research directed towards the conservation and restoration of biodiversity. If the Nagoya Protocol is to remain our available solace for fair and equitable sharing of benefits, then enabling the language of the Post-2020 Global

Biodiversity Framework to reflect the need to distribute the benefits to those who are evidently involved in conservation is of crucial importance.

A Post-2020 Framework on biodiversity conservation must take into account the disconnect between benefits and conservation which relates to the inherent design of the Nagoya Protocol and the ABS system as a whole. Consequently, the Global Biodiversity Framework needs to take into account the interconnectedness of Indigenous People and Local Communities with conservation as well as research directed towards conservation. There already exist a plethora of methods to address the concerns of a multitude of stakeholders. In the field of ABS, Multi-Criteria Analysis from a multi-stakeholder perspective has been suggested in order to enable solutions related to ABS would result in informed and mutually-supportive regulatory and policy options that have the highest chances to attain international ABS goals, which includes the Post-2020 Framework (Sirakaya and De Brucker 2020). Multi-Criteria Analysis has also been referred to as a viable solution for digital sequence information, during the on-going negotiations of the 15th Conference of the Parties to the Convention on Biological Diversity (CBD/WG2020/3/L.3). Multi-Criteria Analysis is a method which aims to visualise different stakeholder opinions on a regulatory mechanism based on to what extent such a regulatory mechanism is seen as a solution to attain a certain policy objective or a legal purpose. It does not constitute a silver bullet, but nonetheless allows for stakeholders to visibly inspect the opinions of one another with the aim of reaching a level of consensus in decision-making. Multi-Criteria Analysis can serve as a starting point for involving the actors visibly involved in conservation in decision-making regarding ABS and benefit-sharing. Multi-Criteria Analysis can further tell us whether certain regulatory options actually result in the consequences we aim for, such as conservation and sustainable use.

The international community further possesses inclusive and distributive methods of enabling the actors inherently involved in biodiversity conservation (i.e., Indigenous People and Local Communities) in providing their own aspirations and modalities related to benefit-sharing (Liggins et al, 2021; Hudson et al 2020). These examples and many more need to be integrated into the Global Biodiversity Framework, if it aims to be a full-fledged inclusive instrument practicing the theory of change. Targets and indicators consisting of percentages and ambitious language make up for a good start, but are not enough for Post-2020 Global Biodiversity Framework to reach its targets on benefit-sharing leading to conservation. Such goals and targets need to embrace the solutions that palpably work. If we truly aim to be living in harmony with nature, as the theory of change suggests, then the benefits should be directed towards communities who already live in harmony with nature and have been doing so for centuries.

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