



International Agreements and Processes Affecting an International Regime on ABS under the CBD:

Implications for its Scope and Possibilities of a Sectoral Approach

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Relationship with other international instruments (current draft):

1. For the purposes of this protocol, art 22 of the Convention shall apply.
2. This Protocol is the *comprehensive* international instrument for the effective implementation for the abs provision of the Convention.
3. This *protocol does not* prejudice the implementation and development of other specialized international instruments that are in harmony with this Protocol.
4. When taking part in the *implementation* and development of other international instruments of ABS, the Parties shall give due consideration to para two above.

Interface with the Plant Treaty

Relevance for an international ABS regime:

- The only sectoral approach to ABS so far, thus lessons for the discussion of a sectoral approach to ABS under the CBD
- Covers a substantial part of the material relevant for an ABS regime:
 - How to deal with this material in an international regime on ABS
 - How to deal with the crops that fall outside the scope of the MLS



MLS interface with CBD

- The MLS applies to a group of genetic resources
 - The MLS applies to material in the domain and under the control of the parties
 - The MLS applies for specific uses.
 - The MLS applies in a group of countries.
- ⇒ Specific regime
⇒ Specific needs
⇒ Need for space for future dynamic



The FAO-CGRFA and ABS

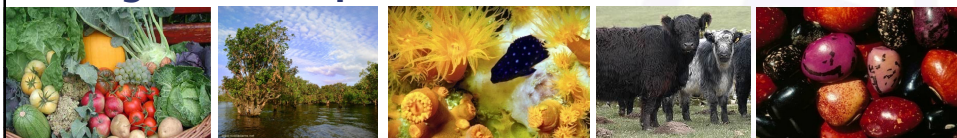
- Animal genetic resources:
 - Exchanged in the South, in the North, and from the North to the South.
 - Most resources in the private domain.
 - GR can often be controlled by possession of the biological resources
 - Different challenges: GR Impact assesement,
 - No demand for an ABS or MLS approach

Sources: Hiemstra et al 2006:



The FAO-CGRFA and ABS

- Forest genetic resources:
 - Exchange takes place within and among countries
 - Exchange is becoming increasingly difficult due to legislation particularly on **phytosanitary issues**
 - The regulations make responses to environmental stresses difficult
- **Is forest genetic resources a food and agriculture question?**



The FAO-CGRFA and ABS

Aquatic genetic resources:

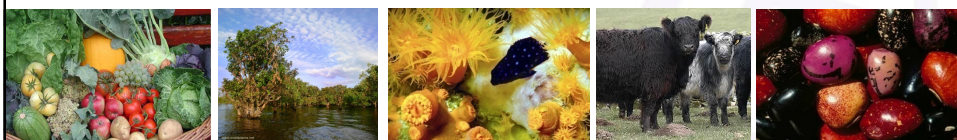
- Farmed forms have similarities with wild forms
- Wild forms decreasing while farmed forms increase
- South-South exchange important, how to deal with ABS?
- Exchange regulated with private law contracts, contractually determined BS



The FAO-CGRFA and ABS

Microorganisms relevant for food and agriculture:

- Majority of recipients from public institutions
- Micro-organisms Sustainable Use and Access Regulation International Code of Conduct of the World Federation for Culture Collections (MOSAICC Guidelines)
- To what extent is this a GR issue?
- Benefit from general regulations



The FAO-CGRFA and ABS

Invertebrates relevant for food and agriculture:

- Access directly from *in situ* conditions, considered to be in the public domain
- Provider countries are normally countries of origin, but there are often more than one country of origin
- Is this a GR or ABS question?
- Or is this a biodiversity concern?



Interface with UNCLOS

- The United Nations Convention on the Law of the Sea (UNCLOS)
- Adopted 1982, entered into force in 1994
- Provisions concerning rights and obligations of states in the marine environment
 - Within territorial sea (12 nautical miles)
 - In exclusive economic zones (up to 200 n. miles)
 - On the continental shelves (to continental margins)
 - On the high seas
 - On the seabed outside the continental shelves



Interface with UNCLOS

Legal situation for areas beyond the jurisdiction of coastal states (high sea and outside continental shelves):



- All states have freedom to explore and exploit natural resources, including research.
- Genetic resources – not explicitly mentioned
- An Open-ended Informal Working Group has been established under the UN General Assembly to study issues of conservation and sustainable use.
- Deep disagreements on ABS.
- Until agreement: IPR is the only applicable regime

Interface with Antarctic Treaty

- In force since 1961 and based on three principles:
 - Freedom of scientific investigation and cooperation
 - The dedication of Antarctica for peaceful purposes
 - The preservation of the Antarctic environment
- Does not regulate rights to genetic resources, but bioprospecting has been on the agenda for 10 years.
- As territorial status is disputed, difficult to identify countries to provide access (PIC & MAT).



Interface with pathogen regimes

- A pathogen (infectious organism) is a biological agent causing disease in its host.
- Common pathogens are viruses, bacteria and fungi.
- Pathogens are easily spread across borders and change rapidly.
- Main international bodies:
 - World Health Organization (WHO)
 - World Organization for Animal Health (OIE)
 - International Plant Protection Convention (IPPC)



Interface with pathogen regimes

- As the CBD is aimed at conserving and sustainably using genetic resources, and pathogens are to be eradicated, some (International Chambers of Commerce) argues that it is inappropriate to include them in an ABS regime.
- However, they are used in economically valuable ways.
- Patents are used to secure economic return
- Huge potential values involved in pathogens

Nothing in the def. GR which indicates falling outside of scope



Interface on traditional knowledge

- Art. 8.j of the CBD and Art. 9 of the Plant Treaty provide for the recognition and rights of the custodians of biodiversity
- They have support in two international frameworks:
 - United Nations' Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007
 - Convention 169 of the ILO on Indigenous and Tribal Peoples (ILO 169), 1989
- All four address participation, rights to resources/knowledge and benefit sharing



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Interface on traditional knowledge

- The Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore of WIPO (WIPO-IGC) takes up TK issues from an IPR point of view, with a view to the protection of TK.

Options for ABS negotiations:

- Take these frameworks into account in defining PIC & MAT
- Develop linkages between the definition of subject matter and related TK with clarity.



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Interface with IPR regimes

- The interface of GR and the patent system depends on the practice in national or regional patent systems
 - International standardisation of these practices globally
 - The establishment of a Worldwide Global Patent will have effects for ABS
- (see Tvedt, A Worldwide Patent System – What's in it for developing countries? Third World Quarterly 2010 pp. 272–290)
- Disclosure requirement is only one brick in the wall – and cannot carry the weight of the ABS-IPR interface alone

Interface with IPR regimes

Items of patent law of relevance to ABS:

- the narrowing down of the legal exemption from patent protection;
- the definition of what is recognized as *prior art* (already known before the patent application);
- the practice of the novelty criterion;
- the practice of the inventiveness criterion; and
- the acceptance of the deposit of biological material replacing the complete written disclosure.

The user country side of ABS becomes important as the patent system does not respond to the ABS-needs.

Where are we? (Conclusions on Interfaces)

- **There is one existing sectoral approach: MLS**
There are four limitations:
 - Annex I species
 - In the public domain
 - To 'food and agriculture'
 - Membership – 70 countries non-parties to the IT
- **There are separate needs for sectors, however no existing ABS-regulations – yet**
- **Is there really a need for excepting areas outside national jurisdiction?**
- **Any one exception leaves the patent system in charge**

- Documents available:
www.cbd.int/wgrabs9/docs:
UNEP/CBD/WG-ABS/9/INF/1

www.fni.no/abs/publication-41.html

Thank you for your attention!