

CONVENTION ON BIOLOGICAL DIVERSITY 


The Treatment of Marine Genetic Resources within the Convention on Biological Diversity and the UN Convention on the Law of the Sea

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 Achieving the 2010 Biodiversity Target

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 **Outline**

1. CBD ABS provisions
2. Progress and trends over the last 15 years
3. Interface between CBD and UNCLOS for ABS

 **CBD Provisions**

Three objectives:

- Conservation of biological diversity
- Sustainable use of its components
- Fair and equitable sharing of the benefits from use of genetic resources


 **CBD Innovation**

"New" Equity Relationship:

Access to genetic resources in exchange for sharing of benefits derived from their use









 **Provisions of the CBD**

Four fundamental access-related concepts:


- Sovereign rights over genetic resources
- Facilitate access to genetic resources
- Prior informed consent (PIC)
- Mutually agreed terms (MATs)

 **Provisions of the CBD**

Five fundamental benefit-sharing obligations:

- Research and development results (article 15(7))
- Commercial or other benefits derived from use (article 15(7))
- Access to and transfer of technology using genetic resources (article 16(3))
- Participation in biotechnological research on the genetic resources (article 19(1))
- Priority access to results and benefits arising from biotechnological use (article 19(2))





Over the last 15 years...

- Near universal CBD membership
- Global level processes
 - ✓ WTO: TRIPS Agreement (1995)
 - ✓ CBD: WG-Art. 8(j) (1998)
 - ✓ ATS: Bioprospecting in Antarctica (1999)
 - ✓ WIPO: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2001)
 - ✓ FAO: International Treaty on PGRFA (Rome, 2001)
 - ✓ UNGA: UNICPOLOS (2001 & 2007) and Ad Hoc Working Group on Biodiversity Beyond the Limits of Any National Jurisdiction (2004)
 - ✓ WSSD/CBD: International Regime on ABS (2002 - present)
 - ✓ UN: Declaration on the Rights of Indigenous Peoples (2007)



Over the last 15 years...

- Other processes
 - ✓ Regional initiatives
 - ✓ National initiatives
 - ✓ Capacity building projects
 - ✓ Countless publications and studies
- Actual bioprospecting deals (Terrestrial and marine)



Over the last 15 years...

- At national and regional level: Primary focus has been on the provider side of ABS
 - ✓ +/- 60 countries: have actually established an ABS regime or are working towards one
 - ✓ 12 of 17 "like-minded mega-diverse countries" have created an ABS regime
 - ✓ 4 of [4] Permanent Commission for the South Pacific members have created an ABS regime or are working towards one (status of Chile?)
- At global level: Primary focus has been on compliance and enforcement on the user side of ABS (Int'l ABS Regime)



ABS and MGRs: Indicative Issues for South Pacific Commission Members

- Issue 1: Is there awareness of the potential value of MGRs?
- Issue 2: Have national ABS laws taken MGRs into consideration? (Scope and legal certainty) (CBD/UNCLOS Interface)
- Issue 3: What is the relationship between the ABS process and the marine scientific research consent process? (CBD/UNCLOS Interface)
 - ✓ Sub-issue: Have competent authorities been designated with clear responsibilities and procedures to oversee the consent process(es)?



Issue 1: Value of MGRs

Source: CBD Technical Series 38 (Laird and Wynberg, 2008)

- Marine genetic resources are potentially very valuable
 - ✓ Invertebrates
 - ✓ Micro-organisms
- Pharmaceuticals
 - ✓ Natural products continue to play dominant role in drug discovery
 - ✓ Renewed interest
 - ✓ Chemical diversity and lead generation
 - ✓ Natural products and combinatorial chemistry now seen as complementary
 - ✓ Genomics and proteomics



Issue 1: Value of MGRs...

Source: CBD Technical Series 38 (Laird and Wynberg, 2008)

- Biotech: Pharma, Agriculture & Industrial Processes
 - ✓ Demand for high biochemical diversity (e.g., micro-organisms)
 - ✓ Metagenomics: Microbial DNA direct from environmental samples (i.e., Access 99% of microbial diversity w/o culturing)
 - ✓ Genomic science: Allows the re-exploration of existing materials
 - ✓ Publicly accessible microbial and other genomes
 - ✓ Laboratory and computer based generation of artificial diversity



Issue 2: ABS Laws and MGRs

- UNCLOS does not explicitly apply to MGRs
- CBD does not explicitly apply to the marine environment
- ABS legislation needs to clearly apply to marine areas *and* their MGRs (Scope and legal certainty)
 - ✓ Territorial sea (Sovereignty over MGRs)
 - ✓ EEZ (Sovereign rights over MGRs)
 - ✓ Continental shelf (Sovereign rights over MGRs)
- Key user concern: Legal certainty



Issue 3: ABS/MSR Processes

- CBD Article 15 ABS Process:
 - ✓ Sovereign Rights
 - ✓ Prior informed consent
 - ✓ Mutually Agreed Terms
 - ✓ Facilitate access



Issue 3: ABS/MSR Processes...

- UNCLOS Part XIII: Marine Scientific Research Consent Process
 - ✓ UNCLOS: Balances the needs of Coastal States and Researching States
 - ✓ Coastal State:
 - Has jurisdiction to regulate, authorise and conduct MSR in EEZ and on continental shelf (UNCLOS art 246(1))
 - To establish rules and procedures to minimise delays and create a uniform process for communication through « appropriate channels » (UNCLOS art 250)
 - To grant consent in « normal » circumstances (MSR projects that increase scientific knowledge of the marine environment for the « benefit of humankind as a whole ») (UNCLOS art 246(3))



Issue 3: ABS/MSR Processes...

- Has discretion to withhold consent when:
 - Project is of direct significance to [commercial] exploration or exploitation of natural resources whether living or non-living (UNCLOS art. 246(5)(a))
 - Inaccurate information provided (UNCLOS art 246(5)(d))
 - Outstanding/unfilled obligations from the same or a different institution from the same country (UNCLOS art 246(5)(d))
- ✓ Researching State or Int'l Organisation:
 - Initiates consent process at least 6 months before (UNCLOS art 248)
 - Submits full description of the nature/objectives of the activity (at minimum) (UNCLOS art 248)
 - Responsible for ensuring MSR undertaken by itself or on their behalf is according to UNCLOS (UNCLOS art 263(1))



Issue 3: ABS/MSR Processes...

- CBD Article 15 ABS Conditions (MATs)
 - ✓ Limited only by what the negotiating parties can mutually agree (reasonableness)
- UNCLOS Part XIII: Marine Scientific Research Consent Conditions
 - ✓ Sovereign rights over marine genetic resources in EEZ and on Continental Shelf are *qualified* when access is via non-commercial marine scientific research activities
 - ✓ Consent can be express or implied (if no response within 4 months) (UNCLOS art 252)



Issue 3: ABS/MSR Processes...

- ✓ Short exhaustive list of conditions imposed on Researching State (UNCLOS art 249)
 - Ensure participation or representation of Coastal State without costs (UNCLOS art 249)
 - Provide preliminary reports and final results upon request (UNCLOS art 249(1)(b))
 - Undertake to provide access to samples and data collected (+/- provide duplicates) (UNCLOS art 249(1)(c))
 - Provide sample and data assessment and research results or assist in their interpretation (UNCLOS art 249(d)(1))
 - Ensure international availability of research results
- ✓ If no duty to grant consent: Coastal State may impose *any* conditions (UNCLOS art 249(2))



CBD, UNCLOS and ABS: Considerations for South Pacific Commission Members

- Possible conflict between CBD and UNCLOS?
 - ✓ UNCLOS MSR provisions set the standard
 - ✓ CBD to be implemented consistent with the law of the sea (CBD art 22)
 - ✓ Stricter conditions on pure MSR involving biological resources to ensure benefit sharing could be interpreted as inconsistent with UNCLOS



CBD, UNCLOS and ABS: Considerations for South Pacific Commission Members

- Legally: Coastal states could simply consider all biologically-oriented MSR as commercially-oriented and withhold consent until MATs negotiated/confirmed
 - ✓ +/- Impacts on science and development
 - ✓ Key user and other concerns:
 - ☐ Lack of competent national authorities (or unclear responsibilities)
 - ☐ Regulatory confusion, complexity and shifting goal posts
 - ☐ Legal certainty concerns
 - ✓ +/- Minimise barriers by creating two regulatory tracks: simplified track (for research) and comprehensive (for commercial bioprospecting)



CBD, UNCLOS and ABS: Considerations for South Pacific Commission Members

- At minimum: Avoid a disconnect between Coastal State's ABS laws/institutions and MSR laws/institutions
 - ✓ What is the present practice in your country?
 - ☐ Does MSR consent include conditions related to marine genetic resources/benefit sharing?
 - ✓ Are there good lines of communication between institutions?



Outlook

COP 10, Nagoya, Japan, October 2010
International ABS Regime



Achieving the
2 0 1 0
 Biodiversity
 Target



Thank you for your attention!