

Different ABS Systems and Scope

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Professor Daniel Robinson (UNSW)
Pacific Regional Coordinator
ABS Capacity Development Initiative

‘ABS Triggers’ and Temporal Scope:



- The Protocol remains silent on whether it would apply to GRs and aTK accessed before its entry into force but utilized after. Most developing countries supported this approach citing the vast amount of GRs available in gene banks or other ex situ collections, while developed countries argued this would conflict with the principle of non-retroactivity in international law.
- As no compromise language could be found, the Protocol left it up to member states to clarify this ambiguity through their implementing legislation.
- Is the ‘trigger for ABS’ the accessing of the resource, or the new ‘utilisations’ of the resource (and aTK)?

Associated Traditional Knowledge:

- Procedures relating to access to GRs, aTK and related prior informed consent (PIC) are another important area of the Nagoya Protocol where interpretations are emerging to differ.
- For example, Articles 6 and 7 use the phrase “in accordance with domestic law” to frame the access procedures for GRs held by IPLCs as well as aTK respectively. \
- While this provides some flexibility for how parties implement these aspects, the Protocol is clear that “each Party *shall* take measures” for the prior informed consent or approval and involvement of IPLCs in relation to GRs and aTK.



The European Union

- The EU Regulations put forward a very narrow interpretation of temporal scope. Access is defined as “the acquisition of genetic resources or of traditional knowledge associated with genetic resources in a Party to the Nagoya Protocol.”
- Accordingly, only the physical access to a genetic resource or aTK in the country of origin can trigger ABS obligations within the EU, and this only if such resources have been accessed in a country of origin of a party to the Nagoya Protocol after the Protocol has entered into force in both countries.
- Article 4 of the EU Regulation clearly sets out that no due diligence obligations (user measures) of users are required if such resource was acquired before such time, even if new research and development was taking place on such resource after it came into force.



South Africa:

- South Africa ratified the Nagoya Protocol in 2011 and in 2015 amended its 2008 Regulations on Bio-Prospecting, Access and Benefit-Sharing in relation to the “National Environmental Management: Biodiversity Act, 2004.” The Regulations clearly take a “utilization approach” to temporal scope as they do not refer to “access permits” but to bioprospecting permits, with bioprospecting in turn defined as:
 - any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation...
- In South African law, bioprospecting is split into two separate phases, a discovery phase and commercial phase with different obligations.



Namibia:

- In April 2017, the Namibian National Assembly passed the Access to Biological and Genetic Resources and Associated Traditional Knowledge Bill and sent it to the other chamber of Parliament, the National Council, for review. The Namibian Bill specifies:
- 8. (1): A person who intends to **access** biological and genetic resources in Namibia, found in both **in situ or ex situ** conditions or parts of such biological and genetic resources, their derivatives, products, including synthetic products, and wherever applicable, intangible components, **including genetic information or gene sequences**, and associated traditional knowledge, must apply for an access permit in the prescribed form and manner prior to carrying out any... [research or export].
- The PIC of rights-holders is also required for access to GRs and aTK (Article 9), and benefit-sharing for both access *and* utilization:
- 10. (1) A fair and equitable share of benefits from access and utilisation of biological and genetic resources and associated traditional knowledge must accrue to the concerned right holders.



Switzerland

- The Swiss Federal Act on the Protection of Nature and Cultural Heritage (1966 as amended to 2017), and Ordinance on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (Nagoya Ordinance, 2015) is established in mutual supportiveness of the EU Regulation No 511/2014, providing for recognition of due diligence compliance requirements of users in the EU (Article 4 Nagoya Ordinance), as well as registered collections in the EU (Article 7 Nagoya Ordinance).
- However, the law differs somewhat from the EU Regulations, given that Switzerland is not an EU member state. The Swiss approach differs from the EU interpretation with respect to temporal scope.
- Its Nagoya Ordinance from 2015 “encourages users to voluntarily share the benefits arising from the utilisation of genetic resources or associated traditional knowledge in a fair and equitable way even when there is no legal obligation to do so. It aims to ensure that the benefits are used to conserve biological diversity and the sustainable use of their components.” This seems an attempt to encourage best practice and voluntary benefit-sharing where GRs and aTK may have been shared in the past (prior to the Nagoya Protocol entering into force and countries developing national ABS systems).

Traditional Knowledge:

- The EU takes a different approach to the protection of aTK. Because the Nagoya Protocol does not provide a definition of aTK the EU limits its protection by defining it as “traditional knowledge held by an indigenous or local community that is relevant for the utilisation of GRs and that is as such described in the mutually agreed terms applying to the utilisation of genetic resources.”
- Compare this to South Africa:
- “traditional use or knowledge” refers to the customary utilisation or knowledge of indigenous genetic and biological resources by an indigenous community or specific individual, in accordance with written or unwritten rules, usages, customs or practices traditionally observed, accepted and recognised by them, and include discoveries about the relevant indigenous genetic and biological resources by that community or individual.
- There are PIC and benefit-sharing requirements for aTK broadly speaking.



Links:

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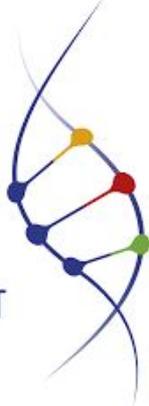
- Natural Justice on Triggers for ABS:
<https://naturaljustice.org/publication/access-or-utilisation-what-triggers-user-obligations/>
- ABS Initiative on DSI: <http://www.abs-initiative.info/topics/dsi/>
- ABS Initiative, Namibia law:
<http://www.abs-initiative.info/countries-and-regions/africa/namibia/>
- Swiss Nagoya Protocol/ABS website:
<https://www.bafu.admin.ch/bafu/en/home/topics/biotechnology/info-specialists/nagoya-protocol.html#-476169515>
- EU Regulations website:
https://ec.europa.eu/environment/nature/biodiversity/international/abs/legislation_en.htm



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