

Fixing the Loose Ends

Traditional Knowledge and Genetic Resources in the ABS-Context: A Tandem Approach

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Thread 1 – Extending Human Rights to Traditional Knowledge and Associated Genetic Resources

Since the CBD started its discussions on implementing its ABS provisions and finally its negotiation on an International Regime (IR) on ABS - which in our understanding has to be an ABS Protocol to the CBD - the question if and how traditional knowledge should be covered by such a treaty is a core matter of the debate.

With the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, the CBD discussion on traditional knowledge (TK) in the context of ABS has been given a solid foundation. After long and hard negotiations, the UN Member States agreed that indigenous peoples have certain rights which must be recognized and supported by governments. The section of UNDRIP that lays the foundation for the discussion on TK in the CBD and the ABS negotiations is Art. 31. It states:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

An overwhelming majority of UN Member States voted in favour of the UNDRIP, only 3 states remain unwilling to support the international recognition of the rights of indigenous peoples under the UN Declaration.

The importance of the UNDRIP for the ABS negotiations cannot be overstated. At ABSWG-6 in January 2008, many government supported the UNDRIP rhetorically, but they were not yet willing to recognize the new realities in the context of the ABS negotiations. Finally, it was the delegate from Haiti who supported the IIFB demand and thus rescued the text. During ABSWG-7 in April 2009, this situation has reversed. The draft text on TK and UNDRIP in the scope of the IR was supported by a large majority of CBD Member States.

This understanding of the linkages between ABS and TK has slowly evolved during the last 10 years of discussion in the CBD. The CBD itself does not refer to TK as such in its ABS-Art. 15. It is Art. 8j that links TK and benefit sharing. It requires approval of indigenous and local communities for the use of their traditional knowledge, innovations and practices, but Art. 8j does not set any international standards leaving its implementation to the CBD Member States. Not only on the legal but also on the conceptual level, the CBD does not link TK and ABS properly. While Art. 8j refers to TK in the context of biological resources, Art. 15 links the ABS provisions to genetic resources. The exact nature and the real differences between BR and GR remain rather unclear and have caused intensive debates in recent years.

When establishing the mandate to negotiate the IR at COP-7 in 2004, the Member States agreed in Decision VII/19 that TK must be covered by the IR:

Decides to [...] to elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article

15 and Article 8(j) of the Convention and the three objectives of the Convention;

The UNDRIP now provides a solid legal concept on which basis the CBD can advance its negotiations on how to link TK and ABS.

Thread 2 - Interpretation of Genetic Resources in the ABS Context

The second major step forward was made by the CBD Group of Technical and Legal Experts on Concepts, Terms, Working Definitions and Sectoral Approaches in December 2008. It provided an interpretation of the CBD definition of biological and genetic resources and the implications for the IR. This Group of Experts agreed that in practice there is a broad overlap between biological and genetic resources. Genetic resources in the context of the IR should be separated from biological resources on the basis of its "typical uses", which according to the group includes:

- 1) *Genetic modification*
Development of new variations within non-human species (micro-organism, plant, animal, and other organisms) through genetic modification techniques
- 2) *Biosynthesis*
Use of genetic material as a "factory" to produce organic compounds
- 3) *Breeding and selection*

Creating new varieties, breeds, or strains of non-human species with particular characteristics through sexual or asexual reproduction

- 4) *Propagation and cultivation of the genetic resource in the form received*
Production of non-human organisms through sexual and asexual reproduction
- 5) *Conservation*
Preservation of non-human organisms for conservation of genetic diversity, genetic resources or reintroduction purposes
- 6) *Characterization and evaluation*
- 7) *Production of compounds naturally occurring in genetic material*

This approach implies that biological material that is accessed in order to be used directly as food or construction material does not qualify as genetic resources in the context of an IR and are not subject to international ABS rules.

Thread 3 - Linking Traditional Knowledge and Genetic Resources in the ABS Context

The third step forward was undertaken by the CBD Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources which met in June 2009 to discuss amongst other items the relation between genetic resources and TK in the context of the IR. Its name - given by ABSWG-7 - already shows that CBD Members in fact have merged Art. 8j and 15. Consequently, the group agreed that:

For the purposes of the discussion, traditional knowledge (TK) is interpreted within the context of Article 8(j) and Article 15, as knowledge, innovations and practices associated with genetic resources.

The group clarified that:

in most cases genetic resources seem to have associated traditional knowledge,[but] it was also recognized that not all genetic resources have associated traditional knowledge.

The group underlines the broad scope of TK associated to genetic resources concluding that:

the history of co-evolution (of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources. Furthermore, co-evolution suggests that there is traditional knowledge which is highly specific, and traditional knowledge which is of a more general nature as the result of co-evolved, bio-cultural systems.

The Tandem Approach

Having participated in the above mentioned meetings we are of the opinion that the task of this and the following ABS negotiation rounds is to combine the results of the different meetings and fora and put the loose strings of the discussion together. We participate at WGABS-8 to work towards a comprehensive ABS protocol that covers the access to genetic resources as well as the access to traditional knowledge associated with genetic resources. We would like to call this concept the Tandem Approach. The Tandem Approach comprises the following elements:

- the provisions and spirit of both the CBD and UNDRIP are the basis of the IR which must be an internationally legally binding Protocol to the CBD
- the rights of indigenous peoples and local communities over their traditional knowledge and its manifestation specifically in genetic resources as well as their intellectual rights of this traditional knowledge must be recognized and supported
- access to genetic resources and access to traditional knowledge associated to genetic resources must be given a comparable legal status
- whenever applicable, the wording "access to genetic resources or to traditional knowledge associated with genetic resources" has to be used
- the type of intended utilization of a genetic resource as trigger of the PIC procedure has to be defined through the minimum list of typical uses of genetic resource
- institutions that hold ex-situ collections of genetic resources and/or document traditional knowledge associated with genetic resources must adhere to the provisions of the ABS Protocol when allowing access to these
- establishment of a basic level of fairness and justice in bilateral ABS-negotiations which in most cases will be characterised by unequal distribution of economic and political power, the concept of "prior informed consent" of CBD Art. 15 must be developed into a concept of "free, prior and informed consent"
- the concept of "free, prior and informed consent" includes the right to say "No"
- a legal aid body, such as an ombudsperson, that addresses the various power imbalances between indigenous peoples and local communities as providers and the potential users must be established in order to create a level playing field.