

DISCUSSION PAPER

“Genetic Resources” and “Utilisation of Genetic Resources”: A Legislative View

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In numerous workshops and other meetings with legislative specialists around the world, *The ABS Project*² has identified one central important shared obstacle to the adoption of ABS implementing legislation - the need for clarification about the nature of ‘genetic resources.’ This need is increasingly recognised in discussions about the international regime.

The Objective

To create a functional ABS system, it must be clear what that system covers. Without legislative clarity,³ a law faces two primary risks:

- the courts, officials, etc. may not be legally able to implement/enforce the law; and/or
- to avoid nullifying a law, courts and agencies may create ‘loopholes’ (special exceptions and interpretations).

So the first implementation question in law, policy or contract is “What resources and uses are covered by ABS requirements?” This question has not been answered yet. Only a few components of this answer are agreed, specifically:

- There is a difference between ‘genetic resources’ (GR) and ‘biological resources’
- ABS applies to GR while the rest of the CBD applies to ‘biological resources.’
- There are two operative elements/activities of ABS:
 - reasonable⁴ ‘access’ to GR; and

¹ This paper presents the views and ‘expert input’ of the author only. It does not, in any way, represent the views or policy of IUCN, its members, commissions, or secretariat.

² “The ABS Project” is a 3-year initiative of IUCN’s ELC and funded by the Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (BMZ), undertaking detailed professional research into legal issues and impediments that have slowed and stopped ABS progress. It works with eminent legal experts and partners, including FAO, the Fritjof Nansen Institute, ICIPE, INE, INRENA, IPGRI, IUCN ROSA, SPDA, UNEP, UNDP, UC Davis, and others. The work of the researchers, including the author, do not necessarily represent the opinion or policy of any of these entities.

³ This paper uses the term ‘legal regime’ to refer to a system that can be legally enforced and interpreted. If a system merely *allows* ABS compliance as a voluntary or charitable act, these discussions do not apply.

- sharing benefits where there has been 'utilisation of GR'.

Clearly, to create an implementable ABS system, one must know if GR are involved, and what constitutes 'utilisation of GR.'

The Problem⁵

On the face of it, CBD definitions of *genetic resources* and *biological resources* are functionally identical. A 'genetic resource' ("any material of plant, animal, microbial or other origin containing functional units of heredity [that is] of actual or potential value") essentially means "any living thing". An analyst looking for distinctions may not find any example of a *biological resource* that is not also a *genetic resource*.⁶

Options

The primary triggering actions of ABS are 'access to GR' and 'utilisation of GR'. These are linked concepts - a very broad definition of GR can be clarified and limited by careful delimitation of the actions that constitute 'utilisation of genetic resources.'

This indicative table describes possible relationships between GR and 'utilisation of GR'

'Genetic Resource'	Issues/Comments	Utilisation of Genetic Resource ⁷
Option 1: GR and 'biological resources' mean the same thing.	(i) Will an 'ABS arrangement' be required for all transactions involving any specimens ⁸ of any biological resource?	If 'yes', then any utilisation of any living resource is a 'utilisation of genetic resources,' including purchase and sale of agricultural produce, domesticated animals, seeds, cuttings, veterinary or research samples, samples taken as evidence of conservation or other criminal or civil violation, etc. By law, this would mean that the benefits of these uses (proceeds of their sale) must be shared under an ABS regime. To make this manageable some kind of expedited process would be needed to ensure that conventional transactions (conventional utilisation of GR) are not affected.

⁴ Without using the term 'reasonable,' the CBD imposes reasonability requirements by (i) allowing a Party to limit access to "environmentally sound uses"; and (ii) (classic 'reasonability') forbidding the Parties from imposing restrictions that run counter to the objectives of the CBD.' Art. 15.2.

⁵ Recalling that "papers should not be introductory in nature, since participants to the workshop are experts on these issues," this is included because the author was recently called to explain this issue to one she considered an expert.

⁶ In theory, an 'ecosystem,' which does not have its own DNA but is included in the definition of 'biological resource' might be one. Legal principle of statutory interpretation provide many bases for concluding that GR is not simply 'biological resources minus ecosystems'. These issues are discussed in a forthcoming legal analysis by The ABS Project.

⁷ Arguably, Article 15 was not intended to revise all aspects of commercial transactions in biological materials, including some or all conventional animal and plant breeding. It might be useful to identify the gaps\inequalities Art. 15 addresses.

⁸ In the context of ABS, every specimen might be important, since most genetic/biochemical development is based on particular subspecies or varieties, which are sometimes not separately recorded in taxonomic systems.

III. Specific Issues for consideration in the elaboration of the IR:
Limits to rights over genetic resources, the issue of derivatives

	(ii) If application of ABS is limited, what standard will be used to decide when an ABS arrangement is required?	'Utilisation of genetic resources' could become a new defined term. It could state that only certain uses or types of uses of biological resources are included in ABS. Uses not included (existing conventional contractual and commercial systems) would be addressed under existing legal rules (it might be necessary to define 'conventional contractual and commercial systems', see below).
Option 2: GR refers to genetic material (as a tangible commodity)	Given that physical genetic material (DNA and/or other proteins) are present in all life forms, how are GR transactions distinguished from other trade in biological resources?	<i>Possibility 1:</i> ABS compliance only required for movement of prepared samples (for example, specimens in test tubes, or "preserved, dried or embedded museum specimens, and live plant material which carry a label issued or approved by" appropriate government authority ⁹). Under this option, most GR would not be ABS.
		<i>Possibility 2:</i> GR includes DNA movement in any form (including whole animals, plants, seeds, etc.). In this case, we again need a definition of 'utilisation of GR' limiting application to particular uses (see Option 3, below).
Option 3: GR refers to 'genetic information' - <i>i.e.</i> , characteristics and conditions that can be expressed on paper, as they exist in specimens	Under this definition, even one who did not take any physical material from the source country would still be a user of GR, if he obtained or extracted: <ul style="list-style-type: none"> - DNA sequences (formulas describing DNA scientifically), or - chemical formulas describing the biochemical properties of the variety/subspecies for purposes of replication. <p>Under this approach, obtaining specimens would also be obtaining 'genetic information,' however, only if one 'utilises [or intends to utilise] GR' would he need to comply with ABS.</p>	It may be that in this case, no special definition of 'utilisation of GR' would be needed. The normal meaning of 'utilisation', although very broad, might be sufficient when coupled with a definition of GR derived under Option 3. <p>It could be useful, however, to give some guidance on what kinds of uses are 'conventional uses of biological resources' and therefore not covered by ABS. For example, which of the following are 'uses of genetic resources,' and which are 'uses of biological resources'?</p> <p style="text-align: right;">BR GR</p> <ul style="list-style-type: none"> specimen collection analysis/ inventory removal from country transfer to/sharing with others (individuals, entities, agencies, etc.) testing/laboratory use (domestic) testing/laboratory use (int'l) inclusion in public database, taxonomic listing, etc. product development (domestic) product development (international) sale of products using or created with use of GR
Option 4: GR refers to 'the right to use genetic information'	Defining GR as a 'right of use' helps clarify Art. 15.1's express restatement of national sovereignty over GR.	If GR is a 'right of use' then the utilisation of this right could be inherently clear. Guidance (Option 3) would still be useful. One who needs 'access' to this right must negotiate under ABS law. However, one who intends only to use the resource in a conventional way, covered by other law, will not need to obtain ABS provisions.

⁹ The quoted language is from CITES, Art. VII. 6, under which such samples are excluded from CITES requirements.

Post script: Why address this Issue in the International Regime?

Normally, when legislative draftsmen are called to develop laws that implement policy statements,¹⁰ they find ways of 'translating' the policy language into legislative (operative) language. The policy-makers ask for controls on the use of 'genetic resources' and the legislators determine how that term can be realised in practical principles and regulated.

This process also usually occurs in the implementation of international agreements to which the country has adhered. When this happens, a true 'international regime' develops - that is, by analysing the various national laws implementing the objective, international tribunals and international law experts can begin to discern common practices and understandings that can be applied across the entire global range of the concept.

Up to now, this process has not happened in the context of ABS, however. Fewer than 10% of CBD parties have adopted functional provisions for ABS, and nearly all have either used the Convention's definition of genetic resources, without explanation, or have modified it to increase its breadth and ambiguity (by extending it to all 'biological resources' for example.)

This difference may arise out of several facts:

- the full meaning and coverage of 'genetic resources' under the CBD is unclear. Parties avoid adopting national definitions, fearing to unintentionally narrow or limit their rights;
- ABS, as an international issue, may be interpreted by courts in other countries, who might misinterpret any unique provisions that are included in ABS law; and
- as an international system, ABS seems to need some trans-border consistency in these basic definitional matters. If one country's ABS system uses one approach to coverage questions, but the system in another country or an area outside of national jurisdiction uses another, it is possible that ABS arrangements will suffer.

Consequently, it would be very useful, for purposes of implementation, if the negotiations provide some guidance in how these issues should be applied consistently.

¹⁰ By nature, all international environmental agreements are policy statements that must be implemented by the adoption of national law.