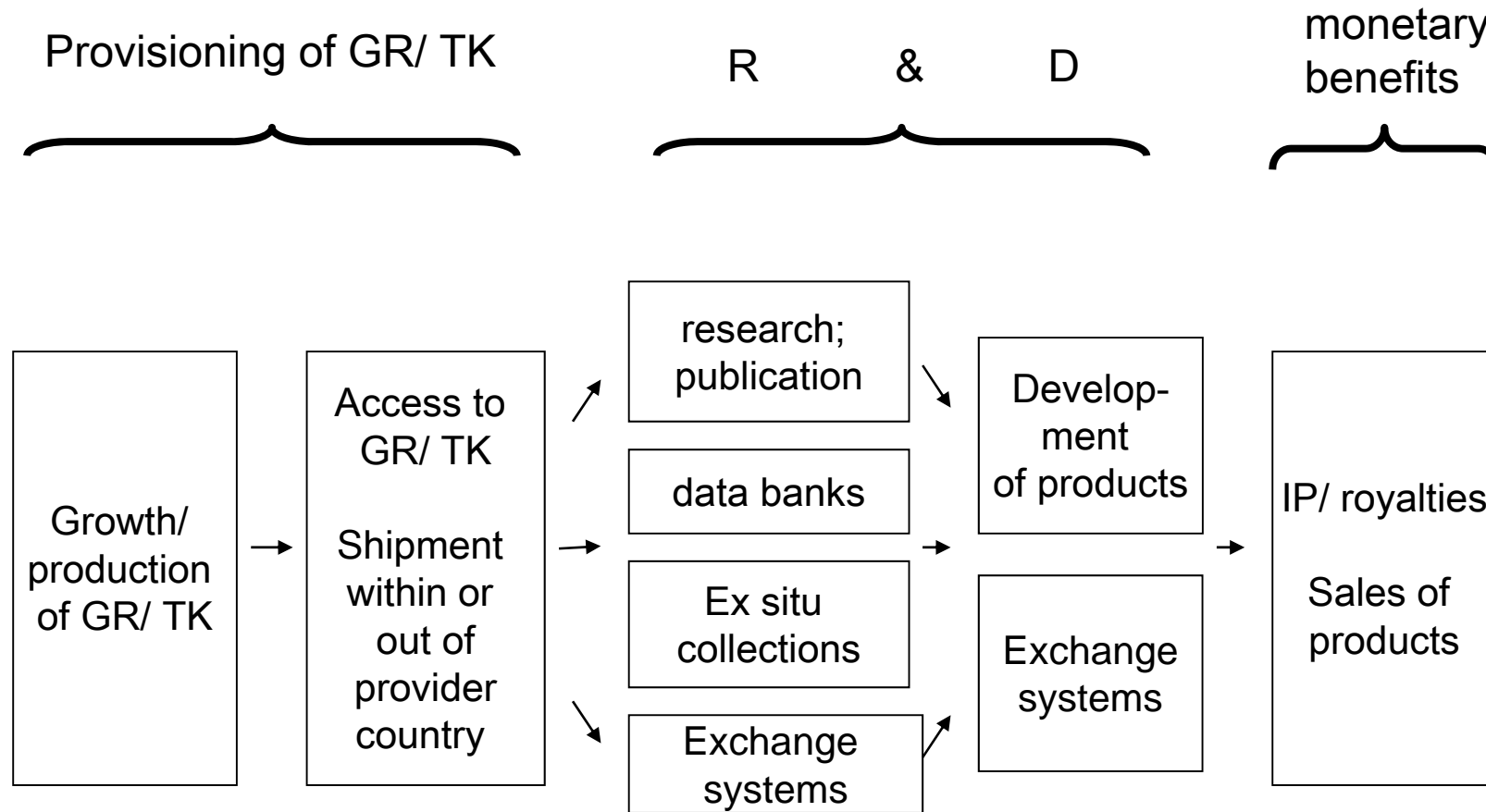


# Access and benefit sharing for genetic resources: history, rationale, objectives and instruments

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# Valorization stream of GRs/TK



# Overview

- Terminology, legal instruments, legal basics
- Access
- Benefit sharing
  - Trade-off systems
  - Joint venture systems
- Multilateral approaches
- Implications for exchange systems in FA area

# Terminology

- ABS – Access to Genetic Resources and Benefit Sharing
- BS – Benefit Sharing
- PIC – prior informed consent
- MAT – mutually agreed terms
- MTA – material transfer agreement
- CBD – Convention on biological diversity
- Resource/ provider state vs user state
  - not identical with South vs North (see Norwegian legislation)
  - One state can internally have users and providers

## Legal instruments

- Convention on Biological Diversity (CBD) of 1992, in force end of 1993, esp. Article 15 on ABS
- Nagoya Protocol: concluded October 2010. Ratification by 50 states needed for entering into force. Specifying ABS
- International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) of 2001, in force 2004

# Legal basics

## Levels of law

- Domestic law
  - rights and duties between individuals, internally and transnationally
  - between individuals and government
- International law = rights and duties between states, concerning
  - Relations between states (eg war and peace; sovereign rights over GR)
  - Relations within domestic sphere (eg human rights)
    - Obligation of states => state must legislate (eg human rights; PIC of local communities)
    - Empowering states = state may opt not to make use of powers (eg declaration of EEZ and regulation of EEZ use; introducing ABS system)

# Objectives of ABS

- 3 Objectives of CBD
  - Preservation of biodiversity
  - Sustainable use of components of biodiversity
  - Sharing of benefits from utilization of GR
- Objectives of ABS
  - In theory all three
  - In practice BS and use more than biodiversity protection

# Means of ABS

- Determination of access by resource states
- Determination of benefit sharing by resource and user states or resource owners and users
  - Trade off-systems
  - Joint venture systems



# Determination of Access

- Sovereign rights of provider state
  - Art. 15.1 CBD: “Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”
  - Previously trend towards common good; for PGRFA: International Undertaking of 1983

# Determination of access

- Instruments
  - Permits (administrative law) and agreements (MAT, MTA)
    - State
    - Indigenous and local communities:
      - PIC on GR
      - PIC and MTA on TK
  - Coming in addition to regulation concerned with sanitary and environmental regulation, or regulation on research
  - Legal certainty, clarity, transparency (Art. 6.3 Nagoya)

# Determination of access

- Scope
  - GR wild and domesticated/bred
  - GR including biochemical compounds („derivatives“) (Nagoya)
  - „their“ resources => territorial occurrence
  - Traditional knowledge associated with GR
- Content (laid down in conditions to permit and ABS agreements)
  - Exploration and taking
  - Transfer
  - Utilisation (only R, not D, come back clauses)
  - Powers confined by Art. 15.2 CBD
    - „not to impose restrictions that run counter to the objectives of this Convention“ = sustainable use and BS

# Determination of benefit sharing

## Rights of provider state

- Art. 5 Nagoya: “Benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources”
- Utilization of GR
  - (Montreal draft: modification, biosynthesis, breeding and selection, propagation and cultivation, conservation, characterization and evaluation)
- Subsequent applications, commercialization
- Benefits (Annex)
  - non-monetary, e.g. research results
  - Monetary (e.g. licence fees from IPRs)

# Determination of benefit sharing

## Duties of user states

- Duty to ensure compliance with access regulation by provider state (Art. 15, 16 Nagoya)
- Duty to monitor PIC, sources, MAT and utilization of GR through checkpoints (Art. 17 Nagoya)
- Certificate of compliance as proof of compliance with access regulation

# 1st theoretical interjection

- Two ways of reaching sustainable use and benefit sharing (P.-T. Stoll)
  - Iustitia commutativa (trade-off) => redistribution of knowledge and wealth from North to South (narrative: the blockbuster drug)
  - Iustitia distributiva (joint ventures) => self-development of the South with Northern assistance
- Nagoya stresses joint ventures, and thus providing two models for national legislation: trade-off and joint venture

# Joint ventures

- Cooperation rights and duties of provider and user states
  - 4th recital Nagoya: “Recognizing the important contribution to sustainable development made by technology transfer and cooperation to build research and innovation capacities for adding value to genetic resources in developing countries, in accordance with Articles 16 and 19 of the Convention”
  - Art. 22 Nagoya: “The Parties shall cooperate in the capacity-building, ...”
  - Art. 23 Nagoya: “Parties shall collaborate and cooperate in technical and scientific research and development programmes, including biotechnological research activities ...” “...in order to enable the development and strengthening of a sound and viable technological and scientific base ...” “such collaborative activities shall take place in and with a Party...”
  - Annex Nagoya: Definition of benefits => not only quid pro quo but including research funding, joint ventures, collaboration in research and product development

# Joint ventures

- National legislation
  - May push towards joint ventures when deciding on access
  - Cooperation agreements, besides permit and ABS agreement
- Substance
  - Capacity building: inviting students and staff
  - Research activities in labs of provider state
  - Product development in provider states
  - Division of labour between provider and user state
  - Joint authoring of reports and publications
  - Joint ownership in IPRs
  - Sharing monetary benefits, if ensuing



## 2nd theoretical interjection

- Construction of trade-off and joint venture = bilateral between provider and user state
- Alternative: multilateral systems
- Involving several resource and user states/ actors
- Nagoya Protocol encourages multilateral systems

# Multilateral systems

- Art. 11.1 Nagoya: „In instances where the same genetic resources are found in situ within the territory of more than one Party, those Parties shall endeavour to cooperate ...” Art. 11.2: the same for TK
- Art. 10 Nagoya: Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge ... that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally.
- Art. 4.4 Nagoya: Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.

## Multilateral systems

- Cooperation of several provider states for their own benefit; transnational occurrence of GR and TK (Art. 11 Nagoya)
- Cooperation of provider and user states for the global public benefit; transboundary situation (e.g. tuna) or impossibility of PIC (ex situ collections, disseminated TK, multiple contributions) (Art. 10 Nagoya)
- Cooperation outside realm of ABS regime; specific GR (model ITPGR MS) (Art. 4.4 Nagoya)
- Cooperation of several providers and users without international agreement, enabled by national legislation: Not mentioned in Nagoya Protocol, but not excluded

## Arguments in favour of multilateral systems

- Justice: transboundary occurrence of GR and TK
- Effectiveness: better ensuring BS because users involved
- Allowing for free R&D, if end product traceable to region of origin

# Impact of ABS (Nagoya style) on GRFA exchange systems

- Access regime
  - Provider states can leave exchange systems as they are
  - They can opt for ABS regime => access regulation (as an addition to sanitary and environmental regulation)
  - They are obliged to ensure PIC by indigenous and local communities
- BS regime
  - Trade-off cases
    - Provider states can opt for leaving BS to exchange systems as they are
    - They can regulate the sharing of benefits
    - They are obliged to ensure BS with indigenous and local communities
  - Joint venture cases
    - Provider states can leave exchange systems as they are
    - They can opt for requiring joint efforts
    - They „should“ involve indigenous and local communities
- Duty of user side to ensure compliance and monitor R&D: depending on option provider states choose
- Wide possibility of constructing multilateral systems outside ABS systems: eg concerning animals, aquaculture

Suggested reading:

- Evanson Chege Kamau, Gerd Winter (eds.) Genetic Resources, Traditional Knowledge and the Law. Solutions for Access and Benefit Sharing, Earthscan 2010
- Evanson Chege Kamau, Bevis Fedder, Gerd Winter, The Nagoya protocol on access to genetic resources and benefit sharing: what is new and what are the implications for provider and user countries and the scientific community? In: 6 (3) Law, Environment and Development Journal (LEAD) 2010, 250-262; freely accessible at [http://www.lead-journal.org/current\\_issue.htm](http://www.lead-journal.org/current_issue.htm).

## List of characteristics of ABS important for GRFA exchange systems

- Trade-off and joint ventures regimes
- Bilateral, but multilateral possible
- Discretion of provider states to introduce or not ABS regime

## GRFA exchange systems

- Multilateral, no IPR (animals and plants in local communities)
- Bilateral, indirect IPR (animals, forest)
- Bilateral, IPR (certain trees, plants outside multilateral system)
- Multilateral, IPR (microorganism)
- Multilateral, public domain (BCA)



