



ABSAs

Access and Benefit Sharing Alliance

Issues in Biodiversity Industry's Stake in the ABS IR

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Key Points

- CBD Members will negotiate operative text for Access and Benefit Sharing (ABS) International Regime (IR) in 2009 - 2010.
- Industry seeks pro-active engagement to ensure a transparent, predictable, and reality-tested ABS IR.
- Success in building a workable ABS IR will be critical to reaching a soft landing in the WTO TRIPS Council.

What is the Access and Benefit Sharing Alliance? (ABSAs)

- *Focus on Access and Benefit Sharing:* Founded in 2005 to engage pro-actively on biodiversity patent issues
 - *Website:* Industry source on enabling environment for biotechnology & Genetic Resources (GR)/Traditional Knowledge (TK)
 - Engagement in key bilateral and multilateral fora
 - Development of forward-thinking ABS positions
 - Working with ICC, Other Industry Groups
- *Survey of Developing Country Delegates*
Important, reliable information source that “provides a counter-view on disclosure of origin for genetic resources.”
NGOs, Intellectual Property Rights and Multilateral Institutions, Duncan Matthews, December 2006, pp. 14 and 28

The Access and Benefit Sharing (ABS) International Regime (IR)

- Access and Benefit Sharing (ABS):
 - International Regime to regulate access to genetic resources (GR)/traditional knowledge (TK) and compensation for their use
 - Includes plants (so-called “green gold”), animals, possibly human genetic resources (MDG position)
 - Continuing Concerns of Industry in ABS IR
 - High degree of scrutiny of provenance of the genetic resources/traditional knowledge chills use
 - Mandatory disclosure does not work in practice
 - No certified “best practices” for companies
- ➔ *Pro-active engagement essential for industry in development of ABS IR*

Legally Binding Elements; Compliance

- CBD Members divided over whether the ABS IR will combine legally binding and non-legally binding instruments
 - MDG and G77 insist on legally binding, mandatory nature of the regime as condition of negotiations
 - Canada, EU, Japan do not (yet) accept legally binding regime as only possible outcome
- “Compliance” tops ABS/IR agenda: Mandatory patent disclosure as key element, w/Certificates
 - Disclosure creates uncertainty with additional formalities, different rules in over 150 legal jurisdictions, ie local markets
 - Open window to challenge patent validity before, after grant
 - New grounds for revocation

Patent Disclosure Multiplies Uncertainty & Accusations

- Everything is on the table; no safe harbors
 - Reaching back (pre-'92)
 - Seeking coverage for ex situ genetic resources
 - Seeking deep pockets in value chain
 - Affecting (future) in-licensed products
 - Including human GR and so-called “products, derivatives”
- ABS debate is not science or fact-based:
 - NO common definitions/understanding of issues
 - NO consistent domestic implementation of CBD principles thus far: POOR track-record from existing laws
 - NO boundaries on biopiracy charges by so-called civil society groups

Continuing Need for Dialogue

- ABS talks in Bonn (COP 9) continuing suspicion of industry; out-sized expectations for ABS IR:
 - Resistance on non-discriminatory access, exclusion of human GR; so-called “products, derivatives,” other key issues
 - ABSA Members accept need for Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT)
 - ABS IR should be prospective; cannot solve all problems of the past, cannot create value by devaluing patents
 - Without accepted “best practices” even the best deals come undone; come under fire from NGOs
- ➔ *ABSA in the room*

ABS Negotiating Principles

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ABS NEGOTIATING PRINCIPLES

INTRODUCTION:

As a core stakeholder in development of any International Regime (IR) relating to Access and Benefit Sharing (ABS), Members of the Access and Benefit Sharing Alliance (ABSA) are committed to identifying practical ABS approaches with demonstrated real-world benefits at the Convention on Biological Diversity's (CBD) Ninth meeting of the Conference of the Parties (COP 9) in Bonn, Germany.

In this practical approach, we note that a number of prior ABS approaches have fallen short of expected benefits, including policies relating to mandatory disclosure of source, origin and proof of benefit sharing. Equally important, negotiation of the ABS IR should be based on organizational principles that ensure a transparent, equitable, consistent and predictable ABS negotiating process and outcomes.

In that spirit, ABSA Members provide the following principles.

PREAMBLE:

ABSA Members:

- Reaffirm their commitment to respect the sovereign rights of CBD members over their *in situ* genetic resources (GR) and to the equitable sharing of the commercialization of GR and any related relevant traditional knowledge (TK) derived from indigenous and local communities, assuming a clear, internationally accepted definition of TK.
- Underscore industry's established track record of compliance with the Bonn Guidelines, including Prior Informed Consent (PIC), Mutually Agreed Terms (MAT) and equitable benefit sharing.

Bottom Line: ABS IR is Coming

- Little Clarity on Objective, Scope, Nature of ABS IR
 - whether ABS IR will be primarily composed of legally binding or non-binding elements
 - whether ABS IR will be composed of other existing international treaties and obligations or represent a novel protocol to be adopted by CBD Members
- No Agreement on Key Terms, Benchmarks for Misappropriation/Misuse of GR/TK
- ABS IR should Do What Works:
 - Heavy Bureaucratic Approach Fails (Brazil, India, S.Africa)
 - Contract Based Approach Works (Costa Rica, Japan, and Namibia).

Access and Benefit Sharing (ABS) and Patent Disclosure (CBD/TRIPS)

- Genesis of Access and Benefit Sharing (ABS) in Convention on Biological Diversity (CBD)
 - Fair and equitable sharing of benefits from commercialization of GR/TK is “Third Pillar” of CBD
- Conventional Wisdom: Enforcement through Amendment of WTO TRIPS patent provisions
 - Basic argument: CBD is Voluntary and not enforceable, WTO needs to incorporate mandatory disclosure with binding dispute settlement processes to prevent misappropriation.
 - Undeniable linkage between CBD negotiations of ABS International Regime (IR) and WTO TRIPS talks.

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