

The role of international conventions

with a focus on the Convention of Biological Diversity

Check ABS ppt as well for next lecture and
previsous versions of this lecture

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Do we require international law for biodiversity conservation?

If yes, why??



What can be done about this?

- Legislations
 - National
 - International

...environment, biodiversity, conservation are also very often cross border issues



Sources of international environment law

As listed in Article 38 of the Statute of the International Court of Justice refer to :

- (a) international conventions
- (b) international custom
- (c) general principles of law
- (d) judicial decisions and doctrine, as subsidiary persuasive sources.

Statute of the ICJ, Article 38



Let's understand a few terms..

Treaties

Article 2(1)(a) of the Vienna Convention on the Law of Treaties defines a treaty as

‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’

Treaties can be referred to by a number of different names: international conventions, international agreements, covenants, final acts, charters, memorandums of understandings (MOUs), protocols, pacts, accords, and constitutions for international organizations.



Let's understand a few terms..

International Agreement

- The term 'international agreement' in its generic sense consequently embraces the widest range of international instruments.
- 'Agreements' are usually less formal and deal with a narrower range of subject-matter than "treaties". There is a general tendency to apply the term 'agreement' to bilateral or restricted multilateral treaties.
 - instruments of a technical or administrative character,
 - signed by the representatives of government departments,
 - are not subject to ratification
 - deal with matters of economic, cultural, scientific and technical cooperation



Let's understand a few terms..

Convention

- The generic term 'convention' is synonymous with the generic term 'treaty'.
- Whereas in the last century the term 'convention' was regularly employed for bilateral agreements, it now is generally used for formal multilateral treaties with a broad number of parties.



Let's understand a few terms..

Declaration

Declarations are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. An example is the 1992 Rio Declaration.

So its dependent on the parties intention to accept the obligation (!)

But they are still powerful.....



Let's understand a few terms..

Protocol

'A Protocol of Signature' is an instrument subsidiary to a treaty, and drawn up by the same parties. It deals with ancillary matters.

Protocols need to be ratified separately.

A Protocol based on a Framework Convention is an instrument with specific substantive obligations that implements the general objectives of a previous framework or umbrella convention Ex: Kyoto Protocol



- What are the international conventions that you are aware of??
- How do you think is the Convention of Biological Diversity different from other international conventions on conservation of biological diversity?



- CBD addresses sustainable utilisation of resources..... making it different!!!
- It address the basic conflicts between wildlife and habitat preservation vs utilisation of biodiversity (property rights to genetic resources)
- Uses a comprehensive rather than sectoral approach



How did this come to be?

- The story begins with the principle of common heritage and lets see where it ends



What is the principle of common heritage?

- Non-rivalry and non-exclusiveness....
- Meaning...all of mankind has the right to benefit from the exploitation of resources
eg; air, gene banks
- Moral grounds ensured support for this practice



However things started changing.....

- 1930s...with the introduction of hybridization in 1930s
- 1970s.. Monsanto..exclusive right to superior breeds!!!
- Introduction of IPR for organic material
- Till 1980s...focus of both national and international conservation work was still on wild species of plants and animals



How did patent laws change??

Natural products / industrial products

Discoveries / inventions

Excluded from patents as they could not meet the patent criteria...



What are the patent criteria??

- Invention must be novel..
- Must display non-obviousness (the inventive step)
- Must have an industrial application
- Must demonstrate replicability



In comes biotechnology.....

-changing the whole scenario
- Mainly dominated by US, Japanese, West European biotechnology industries who argue for royalties



The Red Dove Case

- Principal ruling on the patentability of biological material {Ex parte Schreiner (Red Dove/" Rote Taube ")", BGHZ 52 (F.R.G. 1969)}
- Supreme Court of the Federal Republic of Germany held a judgement in the Red Dove case in 1969 that even if an invention is related to a living thing it can become the subject of a patent.



First patent to living organisms

- Controversially awarded on 31 March 1981, to Ananda Chakrabarty, an Indian-American microbiologist, for a genetically engineered bacterium that digests oil spills.
- It established legally the idea that information about genes could be privately owned and so allowed people to patent biological material.



So what happens to traditional breeders??

- IPR on plant varieties are granted through the 'plant breeders rights' of the 1961 UPOV Convention (the Union for the Protection of New Varieties of Plants) on the condition that:
 - A plant variety is 'uniform, stable and distinct from existing varieties'
 - There is a systematic breeding process
- Do breeders from the developing countries have this??



...Also applies to medicinal plants

- Wealth of traditional knowledge exists in indigenous communities which is not recognised
- The Rosy Periwinkle case, 1950s



Access to Genetic resources from Developing Countries

Protected flow into the reverse direction in the form of patented materials

Unprotected flow of genetic information from developing countries



The tables turn..

- Governments of developing countries tried to reason that as genetic material was obtained from the south it must be seen as part of common heritage.
- Strong resistance from developed countries citing non compatibility with breeders rights and patent legislation.
- What did the developing countries do??



The tables turn..

- Abandoned all claim for common heritage
- Claimed national sovereignty their genetic heritage and considered it as a national asset.
- Is oil or natural gas a common heritage??
- But what about non-rivalry/non-exclusiveness/species without borders??



The tables turn...

- Heated discussions at the FAO in 1983 led by Mexico questioning the one way flow
- This resulted in the 'FAO International Undertaking on plant genetic resources..' (non-binding)
- Represented the most comprehensive agreement in terms of linking genetic resources conservation to social and economic concerns



The tables turn

- Considering biotechnological advances in 1989 there was an agreed reinterpretation which said that the material will be made available on mutually agreed terms (implying payment)
- First time recognition of ‘farmers rights’ vs ‘breeders rights’ who just apply finishing touches... (UPOV, 1991)



Enter the CBD

- Suggestions for a convention were proposed in the year 1971.
- In November 1971 the report "Limits to Growth" was submitted by the OECD (Organisation for Economic Co-operation and Development) Industrial States.
- The inventory of the world-economic situation of the OECD report sketched a disaster scenario of scarcity of raw materials, environmental pollution and recession.
- Important: Report not by environmentalists, but by experts of the OECD Industrial States.



General principle of CBD

- Both the preamble and article 3 of the Convention affirm the sovereign right of states over their own biological resources.
- States are under an obligation to protect
- Biological diversity is a common concern of mankind
- Emphasized sustainable use (inter-generational equity)



General principle of CBD

- Precautionary principle
 - Article 15: ‘...where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.



The CBD focus is on...

- Measures for conservation and sustainable use (Art 2, 6, 7, 8, 9)
- Access to benefit sharing
 - Defined roles and responsibilities
 - Guidelines for prior informed consent
 - Benefit sharing guidelines
- Access to transfer of technology
- Role of indigenous communities



New support mechanisms

- The Cartagena Protocol on Biosafety to the Convention on Biological Diversity
- The Nagoya Protocol on Access to Benefit Sharing to the Convention of Biological Diversity



The Cartagena Protocol on Biosafety

- Ratified by 168 countries.
- Why was it needed??
- How do genetic engineering and selective breeding differ??



What does the Cartagena Protocol do?

- The Protocol is an international legally binding treaty which sets procedures and mechanisms to be applied in the transboundary movements of Living Modified Organisms (LMOs).
- The Protocol does not apply to other products of biotechnology nor is it a moratorium on biotechnology
- Principle 15 of the Rio Declaration on Environment and Development: the precautionary approach “...where there is a threat... lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”



The Cartagena Protocol

- Opened for signature on May 2000
- Came into force in September 2003 after 103 ratifications



Why do we need the Protocol?

- Rapid development and commercialisation of biotechnology including LMOs.
- Recognition of potential contribution of biotechnology
- Uncertainties regarding potential risks of LMOs on biodiversity and human health
- Lack/limited capacities of many countries to make enlightened decisions concerning imports of LMOs



What does this mean??

- National legislation
- Databases of genetic material
- Guideline for compensation mechanisms



Mechanisms for implementation

- **Art 6: General measures for conservation and sustainable**

This requires contracting parties to develop an NBSAP (National Biodiversity Strategy and Action Plan) or equivalent instruments and to integrate biodiversity into sectoral and cross sectoral activities.

- **Art 26: Obligation to submit periodic national reports on implementation**

This mandates submission of periodic National Reports on implementation



What is an NBSAP?

- NBSAP is a process to plan for mitigating threats.
- Principal instruments for the implementation of the Convention both at the national and global level.
- May be a single document or a basket of elements
- Must be cross sectoral and a living process
- Should be used to facilitate more coherent and effective implementation of biodiversity related conventions



Status of NBSAPs

- 178 Parties have submitted NBSAPs
- At least 48 Parties have revised NBSAPs or are in the process of doing so.
- Recently developed and updated NBSAPs are more strategic than the first generation of NBSAPs.
- There is progress in emphasizing biodiversity mainstreaming

<http://www.cbd.int/nbsap>



Nagoya Protocol on Access to Benefit Sharing to the CBD

- **One of the main objectives of CBD** is fair and equitable sharing of benefits arising out of the use of genetic resources.
- **Article (8j)** of the CBD obligates the State Parties to protect and recognize the traditional knowledge of local communities and provide for equitable sharing of benefits.
- **Article 15** of the CBD recognizes the sovereign rights of the States over their genetic resources and provides that the authority to determine access to genetic resources will be within the control of national governments and is subject to domestic legislation.



Nagoya Protocol on Access to Benefit Sharing to the CBD

- Nagoya Protocol by definition of “utilization of genetic resources” provides an expansive interpretation of the scope of access and benefit sharing.
- The definitions “utilization of genetic resources” and “derivatives” provided in Article 2(c) and 2(e) respectively are very broad in their scope.
- But Article 3 provides that it shall apply to genetic resources within the scope of Article 15 of the Convention.



But disputes exist...

- However, the developing and developed countries always disagreed on the point whether Article 15 of the Convention includes derivatives or not.
- It is argued by many experts that 90 percent of the all bio piracy is related to “derivatives”. Thus not mentioning the “derivatives” in the scope explicitly will give different interpretation by the different countries.



India leads the bio-piracy war..

- Case of turmeric

In May, 1995 the US Patent Office granted to the University of Mississippi Medical Center a patent [#5,401,504] for "Use of Turmeric in Wound Healing."



CSIR, 2005



India leads the bio-piracy war..

- Case of neem

Patent was granted by the European Patent Office to the United States Department of Agriculture and the chemical multinational, W.R. Grace, in 1995. of Neem



New developments

- Strategic Plan for Biodiversity 2011-2020 and Aichi Biodiversity Targets adopted after COP-10 (why??)
- In spite of its fundamental importance and irrefutable role in our lives biodiversity still continues to be lost.



What are they??

- The Strategic Plan comprises of a shared vision, a mission, five strategic goals and 20 ambitious yet achievable targets, collectively known as the Aichi Targets.
- Serves as a flexible framework for the establishment of national and regional targets



So where will the story end??

Patents.....



How has India implemented the CBD?

- National Biodiversity Authority established
- National Biological Diversity Act 2002
- Integration into local grassroots systems
'Panchayati Raj'
- Deeper interpretation of CBD



Where was the source of legislation?

Some constitutions specify that ratified treaties are automatically the law of the land and must be applied by judges in cases where an issue concerning them arises.

Some other require that a treaty be incorporated by legislation before the judiciary may apply the agreement

In India: Article 253 of the Constitution permits enactment of a legislation for giving effect to international agreement and Sec (3) and (5) of the Environment Protection Act gives power to the Central Government to enact rules, regulations, notifications...



Has CBD initiated the development of national legislation in your own countries? If so, under what provisions?



We will look at the development in India in the next class...

Thank you.....

