

Understanding the Nagoya Protocol

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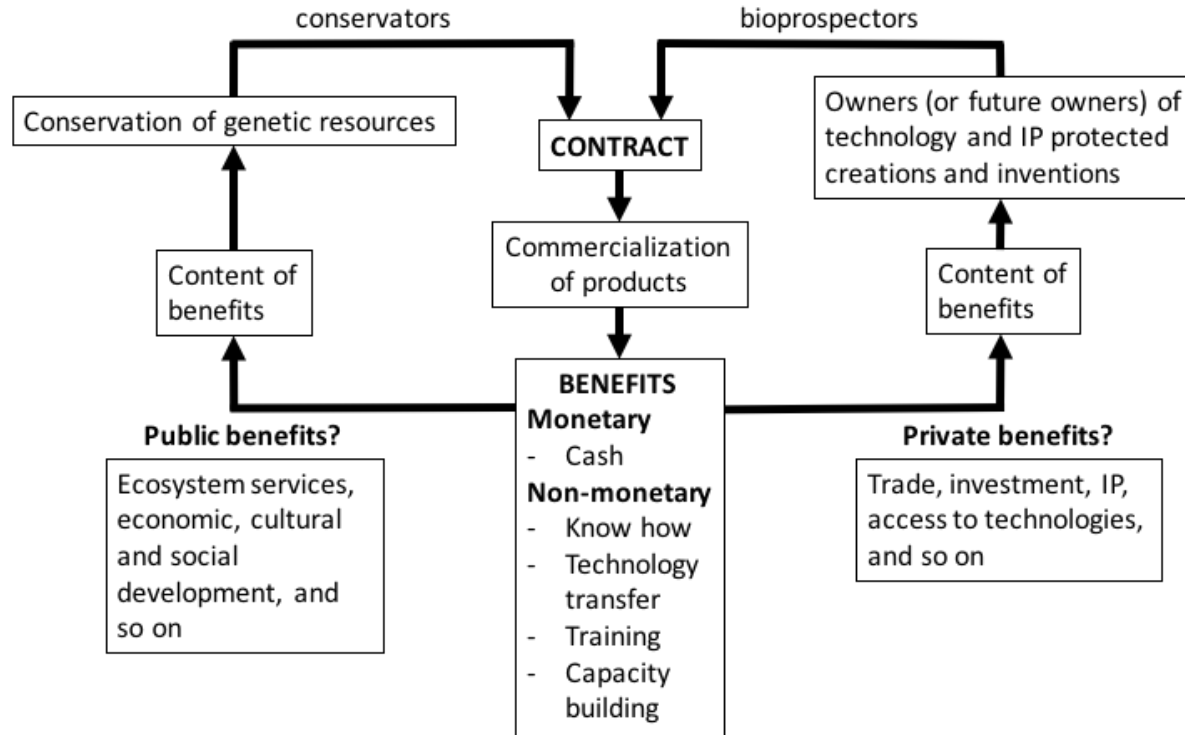
1 and 3 November 2022
WOAH meeting, Geelong



Overview

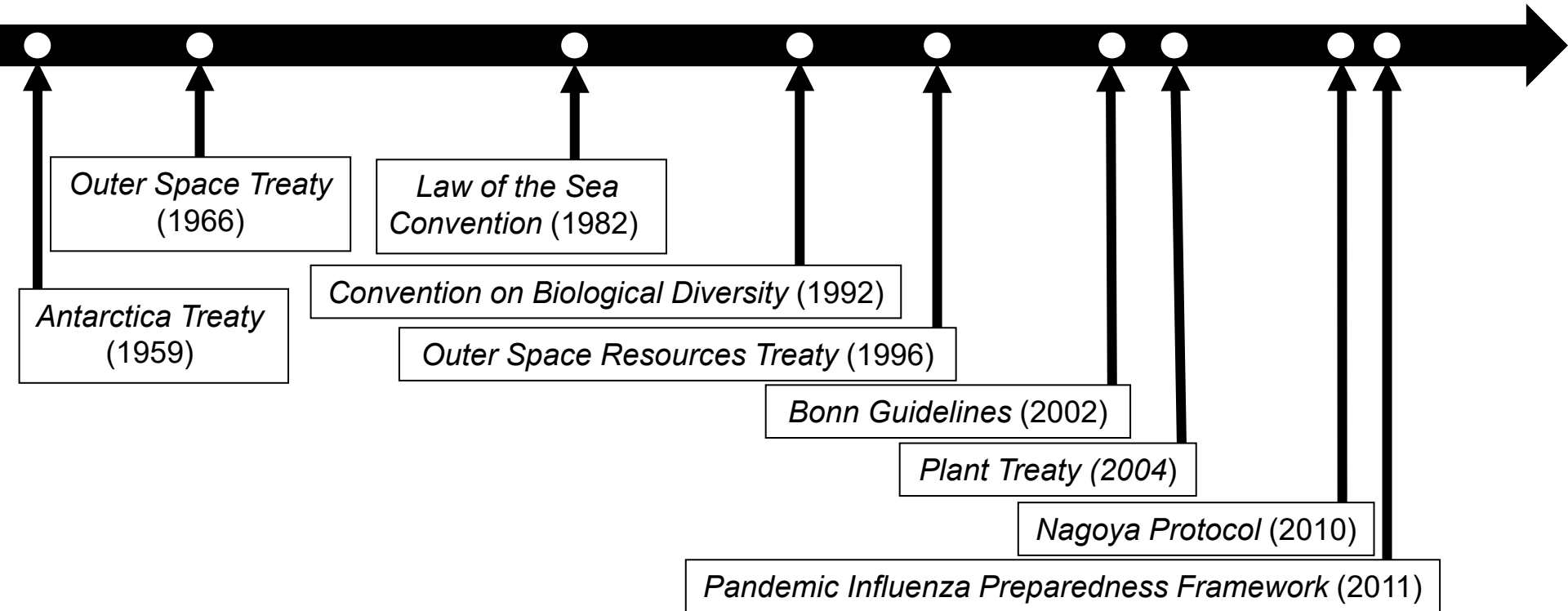
- Access and benefit sharing theory
- Lots of new international law leading to the Nagoya Protocol and beyond
- The very, very complicated implementing domestic laws
- The political moment
- The near future and the DSI/GSD issues
- ... so, what do we do?

What is access and benefit sharing (ABS)?



Bioprospector + Resource holder → Access + Benefit sharing

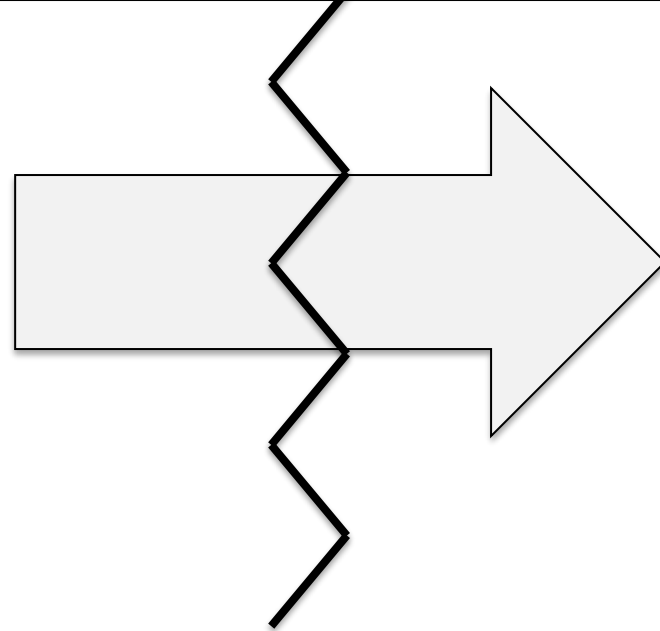
The ABS regulation timeline



The resources sovereignty “schism”

Heritage
of human
kind

Free and
available to
first takers



Nation
State
sovereignty

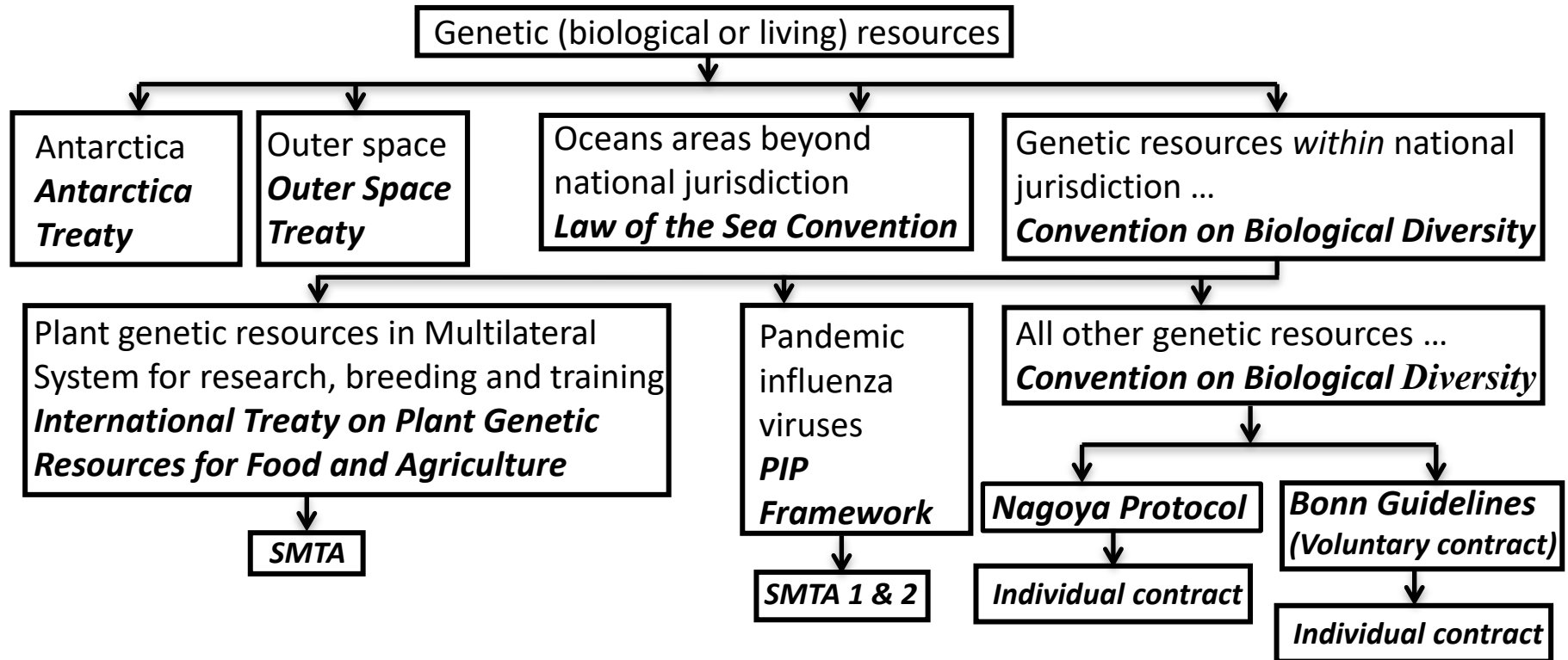
Controlled by
nation state
regulation

Around 1991/1992

The ABS schemes

- CBD
 - United Nations' *Convention of Biological Diversity*
 - *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*
- Plant Treaty
 - Food and Agriculture Organisation of the United Nations' (FAO) *International Treaty on Plant Genetic Resources for Food and Agriculture*
- PIP Framework
 - World Health Organisation of the United Nations' (WHO) *Pandemic Influenza Preparedness Framework*
- [Marine Genetic Resources (MGR) as Biodiversity Beyond National Jurisdiction (BBNJ) under the United Nations *Convention on the Law of the Sea* (UNCLOS)]
- [*Pandemic Treaty* as an international instrument on pandemic prevention, preparedness and response under the World Health Organisation of the United Nations]

Schemes for accessing and benefit sharing genetic resources



The Nagoya Protocol ... in a nutshell

| | CBD | CBD + Nagoya | Neither |
|------------|--|--|-------------------|
| Parties | 196 | 138 | 1 (United States) |
| Materials | Anything biological: (+ Derivatives) (+ Information) | Anything biological: + Derivatives + Traditional Knowledge (+ Information) | - |
| Conditions | Access: + Prior informed consent + Mutually agreed terms | Access: + Prior informed consent + Mutually agreed terms + TK holder consent/agreement + Country of origin + Provenance (internationally recognized certificates) | - |
| Benefits | Whatever parties agree | Whatever parties agree (+ utilization) | - |

The Australian implementation ...

| Jurisdiction | ABS specific legislation | | ABS specific policy | ABS specific administration (permitting agency) | Reach of ABS specific legislation | | | | Reach of related non-ABS legislation | | Focus of ABS specific legislation and policy | | Includes mention of DSI in ABS legislation | Could include DSI derived from accessed materials |
|------------------------------|--------------------------|------|---------------------|---|-----------------------------------|--------------------------------|--|--------------------------------|--------------------------------------|------|--|-------------------------------|--|---|
| | Lands (including waters) | Seas | | | Public lands and waters | Private lands, waters and seas | Overlap with Indigenous lands, waters and seas | Overlapping with other schemes | Lands and waters | Seas | Tenures (eg. area of land, water or sea) | Resources (eg. native plants) | | |
| Commonwealth | ✓ | ✓ | ✓ | ✓ | ✓ | - | ✓ | ✓ | ✓ | ✓ | ✓ | - | - | ✓ |
| Australian Capital Territory | ✓ | - | - | ✓ | ✓ | - | ✓ | ✓ | ✓ | - | ✓ | - | - | ✓ |
| New South Wales | - | - | - | ✓ | - | - | - | - | ✓ | ✓ | - | - | - | ✓ |
| Northern Territory | ✓ | ✓ | - | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | - | - | ✓ |
| Queensland | ✓ | ✓ | ✓ | ✓ | ✓ | - | ✓ | ✓ | ✓ | ✓ | ✓ | - | ✓ | ✓ |
| South Australia | - | - | - | ✓ | - | - | - | - | ✓ | ✓ | - | - | - | ✓ |
| Tasmania | - | - | ✓ | ✓ | - | - | - | - | ✓ | ✓ | ✓ | - | - | ✓ |
| Victoria | - | - | ✓ | ✓ | - | - | - | - | ✓ | ✓ | ✓ | - | - | ✓ |
| Western Australia | ✓ | ✓ | - | ✓ | ✓ | - | ✓ | ✓ | ✓ | ✓ | ✓ | - | - | ✓ |

Where we're up too ...

- 1992 schism in the ways we deal with biological materials
- Lots of new international law
 - Applies to different places, at different times and to different groups
 - Potentially a very broad reach of materials covered
 - Many different ways of implementing domestic laws
- And very, very complicated implementing domestic laws
 - Especially complicated if moving across jurisdictions

... so, what do we do?

A political moment?

- Despite the Nagoya Protocol's attempts to increase monetary benefits, ABS hasn't delivered the expected finances (or technology) to developing countries
- There are some well publicized and egregious examples of "biopiracy"
- An opportunity to again re-negotiate ABS now talking "information"
- Need to deliver on the SGDs
- [... but United States is not a party]

... latest site of conflict is DSI/GSD

The sequence information problem

- “Digital sequence information” (DSI) in the CBD, Nagoya Protocol and Plant Treaty and “genetic sequence data” (GSD) in the PIP Framework
- This is a significant issue and likely to have a broader impact
 - Increasingly the physical materials of “genetic resources” are substituted by information
 - This is where there is sufficient knowledge about the physical materials that further knowledge derived from the physical material is not required (dematerialization)
- Developed country science and technology has assumed free access to information, with very few and limited exceptions
 - Trade secrets, copyright and test data

Timeline of DSI debates

- **2010** – First mentions of potential ABS problems (at the time of Nagoya Protocol negotiations)
- **2016** – Formally recorded concerns in CBD and Nagoya Protocol forums
- **2018** – *Ad Hoc* Technical Expert Group on Digital Sequence Information on Genetic Resources compiled and synthesised views and commissioned fact-finding and scoping studies
- **2019-2022** – Open-ended Working Group on the Post-2020 Global Biodiversity Framework (WG2020-1, 2 and 3) considered outcomes
- **11 to 15 October 2021 and 25 April to 8 May 2022 (but postponed to the “third quarter of 2022”)** – COP15 for the CBD and Nagoya Protocol at Montreal, Canada (7-19 December 2022)
- Other forums have essentially postponed their considerations until after COP15
 - FAO Plant Treaty and Commission (DSI on PGRFA)
 - WHO Pandemic Treaty and PIP Framework (GSD)
 - UNCLOS ABNJ ILBI negotiations (MGRs)

What the delegates said after WG2020-3?

- Pierre du Plessis, Namibian negotiator speaking for Africa:
 - “From an African point of view, we will not accept the adoption of the global biodiversity framework [without agreement on DSI]. It’s just an outcome too horrible to contemplate but if that’s what we need to do then that’s what we will do”
 - Africa has proposed a 1% biodiversity levy (tax) on the retail price of all products based on genetic resources and DSI going to a Multilateral Fund to be distributed for biodiversity conservation and sustainable development
- Leonardo de Athayde, Head of Brazil’s negotiating team:
 - “We’re open to considering different options as long as it generates money and provides an incentive also for sustainable use of biodiversity”

Patrick Greenfield, ‘Biopiracy row at UN talks in Geneva threatens global deal to save nature’, *Guardian*, 30 March 2022 at <<https://www.theguardian.com/environment/2022/mar/30/cop15-faces-copenhagen-moment-genetic-data-dispute-aoe>>



... so, what do we do?

- Be aware of where you are getting your:
 - Physical materials
 - Information
- Lawyers say ... Make sure you have formal exchange agreements with:
 - (Free) prior informed consent from the provider (and any TK holders); and
 - Mutually agreed terms about benefit sharing
- There are no accepted best practices, although lots of institutions have policies particularly on commercialisation and materials registers
- Talk through your institutional ideas about protecting your reputations against allegations of “biopiracy”
- ... watch this space as we’re going through a global reckoning!

Research team:

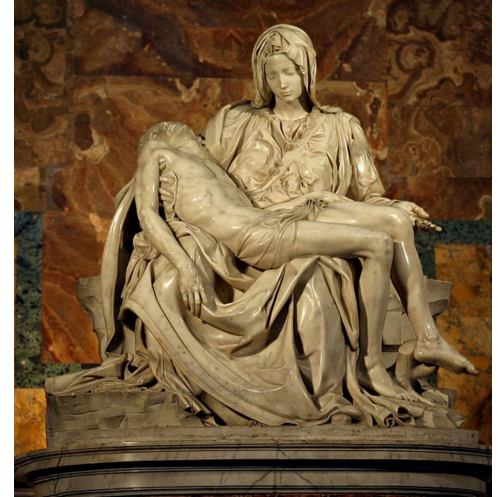
Dr Michelle Rourke, GU

Dr Fran Humphries, QUT



Thank you

Who owns or should own the unrevealed?



Was the form and meaning of Pietà always there just waiting for the excess marble to be removed?

Information *in* things?



Information in a sink?

- Intentional (or semantic) information – A repository of meaning, aboutness and content
- Causative information – The order as opposed to disorder/entropy (and not meaning) within a physical system

Washing dishes – The sink causes me to wash the dishes in ways predicated by its form and shape (lots of information)

Filling the bucket and mopping the floor – The sink has nothing to do with how the floor gets mopped although the water for the bucket comes from the sink tap (very little information)