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Access
and
Benefit
Sharing

ABS Capacity Development
Initiative for Africa

Report from the reflection meeting on the global multilateral benefit sharing mechanism

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Side-event at ICNP-1, the 6. June 2011, Montreal

FNI's ABS Project Team

FNI's role in ABS: research in political science and law

- Studied biological diversity policy and law for almost 20 years
- Private independent Norwegian research institute
- Competence centre on biodiversity policy and law
- Capacity building and implementation consultations for countries: latest Bhutan 2011
- Looking at international law in a high number of areas: Patent law, IPR, WIPO, FAO, ITPGRFA, CGR etc
- Team of 7 researchers:

Peter Johan Schei, Regine Andersen, Kristin Rosendal, Ole Kristian Fauchald, Morten Walløe Tvedt, Tone Winge, Ane Jørem



Overview of topics discussed:

- Context and objective - Introduction to the text of Art 10
- History, background and context
- Searching to identify 'needs for' a global multilateral benefit-sharing mechanism (GMBSM)
- Trigger points for benefit sharing with the mechanism
- Recipients of benefits from the GMBSM
- Learning from other mechanisms
- Including the orphan genetic resources into ABS
- Governance of a mechanism
- A business look at GMBSM
- One ILC observation
- Final observations



My Background: *Law and Genetic Resources*

Bioprospecting and the Convention on Biological Diversity:

- First study in the Initiative project: Balancing Building Blocks of a Functional ABS System (2009 w. Tomme Young)
- Beyond Access – Options for implementing CBD in User Countries (2007 with Tomme R. Young)
- Elements for Legislation in User Countries to Meet the Fair and Equitable Benefit-Sharing Commitment (The Journal of World Intellectual Property (2006) Vol. 9, no. 2, pp. 189–212)

International Patent Law and Genetic Resources:

- A World Wide Universal Patent System: what is in it for developing countries (Third World Quarterly 2010)
- A Path to One Universal Patent (Journal of Environmental Policy and Law 2008)
- How will the new WIPO draft Substantive Patent Law Treaty affect Genetic Resources? (Journal of World Intellectual Property 2005 no 3 May)

Forest Trees and Law:

- Ongoing project: Nordic Council of Ministers: How to ensure an open-access model for Forest Trees?
- A Nordic Approach to Access and Rights to Genetic Resources

Marine and Fish Genetic Resource:

- Ongoing projects on Aquatic Genetic Resources (Marine Biobank, Norway and India)
- Patent Law and Bioprospecting in Antarctica (accepted for publication in Polar Record, forthcoming 2009)
- Access to and Property Rights of Aquaculture Genetic Resources – Norwegian Perspectives (The Journal of World Intellectual Property (2006) Vol. 9, no. 4, pp. 392–412)

Animal Genetic Resources:

- Process Patent Protection in the Field of Animal Breeding and Farm Animal Genetic Resources (with Magnus Finckenhagen)
- FAO project about AnGR: Animal Genetic Resources – Exchange, Conservation and Sustainable Use – Policy and Regulatory Options (January 2007);
- Patenting in the Field of Animal Breeding and Animal Genetic Resources



Short about the process:

- The Fridtjof Nansen Institute and ABS Capacity Development Initiative for Africa were approached by African delegations calling for a reflection meeting
- Decided to support: ABS Initiative and Norwegian Ministry of Environment/ Foreign Affairs and NORAD
- Host and facilitator: Fridtjof Nansen Institute
- Co-shares: Sem Shikongo and Peter Johan Schei
- Chatham house rules: everyone in their personal capacity no reference to names, countries or affiliations
- Participants chosen of personal capacity: not easy to choose
- Two days deliberations at Polhøgda outside Oslo, Norway
- The discussions were in no way meant to lead to any agreement or, pre-determine and pre-empt the official deliberations on this issue which are scheduled to take place during the second ICNP-2 in 2012.



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egian Ministry of Environment/



Scheduled to take place on



ARTICLE 10 GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM

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 utilisation of genetic resources and traditional knowledge associated with genetic resources 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.



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History, background and context:

The whole of CBD was meant to be a GMBSM, as a ‘grand global bargain’: Conservation obligations in exchange for benefit sharing obligations

Making funds available from the Utilization of GR to conservation of biological diversity and sustainable use

The Global Multilateral Benefit-sharing Mechanism (GMBSM) came into the NP text at a late stage

The idea, however is older than the text

The text on its own – intentions and context

Not anticipating the outcome of the forthcoming discussions at ICNP II

Mechanism – not necessarily merely a fund



Are there any 'needs for' a GMB-SM? I

Make funding available from those who utilise and draw benefits from GR to contribute to conservation of biological diversity and its sustainable use

Help companies to do the 'right thing' under CBD-ABS (moral obligation where the origin is not known)

Close a blind-spot in the ABS-system to diminish the race to the bottom regards B.Sh

Regulate two arch-situation where the general bilateral contractual ABS situation cannot easily apply



Are there any 'needs for' a GMB-SM? II

Create an incentive for users of GR to enter into PIC/MAT

What are the needs for a GMB-SM? Needs to re-discuss after the detailed discussion of the modalities for a Mechanism

Link to resolving the outstanding and difficult questions in the negotiation

- Needs for the transboundary situation
- Needs for the without PIC situation



Trigger points for when benefits shall be shared I

Mandatory – Voluntary

Voluntary Mechanism: to function there is a need for **incentives** for companies to contribute

Mandatory Mechanism: there is a need for creating clear, certain and enforceable **trigger-points** for when sharing/ contribution is required

Triggers in the wording is the Utilization of

- a) Genetic resources
- b) Traditional Knowledge associated with GR



Trigger points for when benefits shall be shared II

First issue to clarify more in detail: when is GR being utilized in a manner triggering obligation to contribute to the Mechanism?

Point of departure NP Art 2 c-e

Second issue to clarify more in detail: when is TK associated with GR being utilized in a manner triggering obligation to contribute to the Mechanism?

Reflexive: needs for mechanism when there is some idea of the modalities



Trigger points for when benefits shall be shared III

- ‘that occur in transboundary situations’ –
(not taken from or found in a transboundary situation)
will often be the case for PGR as they have been moved but *in situ* wise and *ex situ* wise
- the transboundary situation: where the GR now exists transboundary (develop there and/or moved there) or only achieved its characteristics in a transboundary situation?
- Species may be transboundary – more specific GR can more difficulty be transboundary

Evidence: how to establish situations to clarify the transboundary?

Challenge I: not undermine the sovereign rights of countries

Challenge II: ...

Trigger points for when benefits shall be shared IV

- 'it is not possible to grant or obtain prior informed consent'

how can this be made operational?

Absolute not possible?

The cases where the user cannot document PIC/MAT or document that the GR have been found outside ABS (outside national jurisdiction, in a country not requiring PIC/MAT, or outside ABS of other reasons)

Last resolution – after having sought all possibilities

Challenge I: evidence

Challenge II: not undermine the sovereign rights of countries

Challenge III: ...



Recipients of benefits from the GMB-SM

System for deciding on beneficiaries

What are the types of projects that could be supported under the mechanism?

Link to the ecosystem where the GR was found

Implement (achieve) the great bargain of the CBD

Independent scientific assessment for the project and conservation

Earmark a percentage back to certain objects

Build capacity both on the provider and user side

Projects allowed: should address the three pillars of the CBD

Could a country state that a percentage of use of its GR shall be shared into the Mechanism?



Learning from other Funds

ITPGRFA:

The trigger-point of private payments and the definition of that:

‘recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism referred to in Article 19.3f, an equitable share of the benefits arising from the **commercialization** of that product, **except** whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.’

Time problem: long time from access to benefit sharing

Evidence problem: linking back

Till now – limited payments from the private sector



Learning from other Funds

A close look at the details and find similarities and differences

State to State vs private to private/state



Governance of the Fund/ Mechanism

Mechanism is something else than a traditional Fund (innovation)

There is an important link to the CHM; institutional connection

Different institutional affiliation was discussed:

- GEF
- S-CBD
- UNEP
- International Finance Cooperation (IFC)

How can the Mechanism become a driver for the Green Economy?

Biodiversity sound activities which are connected to sound business in the long term

One business look

- Practical approaches: what is there to be done from a company
- Legal certainty:
 - Mandatory: legal certainty, eg utilization of GR and TK
 - Voluntary: clear legal effect from complying with Mechanism
- Level playing field: other companies are acting without recognising ABS.
- Recognition: certificate or market.

Challenges:

- Time
- Exposure

Creating incentives – undermining national sovereign rights

The perfect well-organised nuclear family with clear rules (enforcement of sovereign rights)

Orphans where it is completely impossible to find the family; you cannot assume that a kid in the street is an orphan

Several un-organised families where the rules of PIC/MAT are not that clear – the Art 10 should create incentives to search for the PIC

How can the Mechanism contribute to companies to search for the family (work harder to enter into PIC/MAT)



Separate round of ratification?

Mechanism introduce new obligations

Modifications in the existing obligations

Participation in the mechanism:

- All CBD parties?
- Only NP parties?

To what extent will a mechanism require a separate round of negotiations and ratification?

Needs to be taken into account in the discussions



Observations

One overall issue was highlighted at the meeting: Users and providers outside the bilateral ABS system could be encouraged to contribute to conservation and sustainable use. How this might be done requires further discussion.

One approach could be to search for areas of agreement amongst states to build on. This could include to identify small steps of convergence where the ground is cleared for establishing a first attempt to resolve these benefit-sharing challenges, and then later build on such small-step experiences in establishing a more consistent, broader system.





The completed report: INF.DOC ICNP-2
Thank you for the attention!

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