

Fair and equitable benefit-sharing within the International Treaty on Plant Genetic Resources for Food and Agriculture:

The View of the Berne Declaration Presentation by Bernhard Herold

IPRs).¹ The points we made were taken up by a number of other NGOs and political parties but it remains to be seen if they will be taken into consideration by the Swiss Government and its representatives in the future Governing Body of the IT. It is no secret that we have had many disagreements with the Swiss Government and in particular its Federal Institute of Intellectual Property on these topics.

We have been particularly disappointed by the fact that while the Swiss Delegation has often worked constructively in many areas in the negotiations concerning the CBD (and the Bonn Guidelines) as well as the IT, at the end of the day IMPs (IPRs) always became crucial and the Swiss Delegation fought for provisions which boiled down to emptying the agreements of their original goals. To give you a typical example: The day the IT was adopted at the 31st FAO Conference (3 November 2001) the Swiss Delegation made an extremely problematic declaration with respect to Article 12.3d, the famous article of the IT which says that "Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System". The Swiss Delegation stated in its declaration that this Article does not aim at reducing the protection through patents at the international level.

Does Benefit-sharing depend on the Granting of Patents ?

The main point I want to make here today – and I can't stress it enough – is that it is erroneous to link benefit-sharing to patents, be it in the framework of the CBD or the IT. This is an argument which is put forward constantly by the pharmaceutical, agrochemical and seed industry (including Syngenta). They always say that without patents there are no profits and thus no benefits to be shared. I've heard this again and again. The industry actually uses – I would even go further by saying misuses – both the CBD's and the IT's benefit-sharing provisions to advocate patents

on plants or parts thereof. If these agreements are used to push further the industry's patenting-of-life-agenda, then we are really on the wrong track and must reflect if these agreements will not turn out to be counterproductive.

At a meeting in Hyderabad, India last June a number of civil society organisations and NGOs from Africa, Asia, Europe and Latin America adopted a declaration which says: "We have come to the conclusion that the concept of access and benefit-sharing must be understood in its own right without a linkage to patents." (for the entire declaration see Annex) When speaking of benefit-sharing the IT actually shows clearly, that one may not limit oneself to a monetary concept. The first point the Contracting Parties make in Article 13 of the IT is that they "recognize that facilitated access to plant genetic resources for food and agriculture which are included in the Multilateral System constitutes itself a major benefit of the Multilateral System and agree that benefits accruing therefrom shall be shared fairly and equitably in accordance with the provisions of this Article."

They then go on in listing four specific mechanisms through which the benefits arising from the use of PGRFA under the Multilateral System shall be shared fairly and equitably: - exchange of information, - access to and transfer of technology, - capacity-building, - and the sharing of monetary and other benefits arising from commercialisation. So, the benefit-sharing option in form of a payment into the trust account foreseen in Article 19.3f is only one of the options, and in my opinion definitely not the most important form of benefit-sharing in the framework of the IT.

And even this option isn't necessarily linked to patents. In a comment Susan Bragdon from the IPGRI, recently made in "Bridges" the publication of the ICTSD, she wrote that "Benefitsharing in the form of a payment into an international fund at FAO will be mandatory when genetic material from the MLS is used to produce a "product that is a PGRFA" (e.g., a line or cultivar) that is commercialised, unless this product is made available

without restriction for 2 The exact wording of the Swiss declaration is: „Notre délégation tient à préciser que, selon son interprétation, l'article 12.3 (d) du traité n'impose pas de nouvelles obligations qui seraient contraires aux engagements internationaux que notre pays a contractés. Nous considérons que cet article ne vise pas à réduire la protection par brevet au plan international.”

While this is legally speaking not a reservation (Article 30 prohibits Parties from making any reservations) it is clearly politically a very questionable act which raises many doubts on whether the Swiss Government is really willing to apply the IT in the right spirit. Other industrial countries unfortunately made similar declarations. The Swiss further research and development. In effect, patenting will likely trigger the benefit-sharing mechanism, plant breeders' rights probably will not.”

If we look at the Article in question – Article 13.2d(ii) – it says that “a recipient who commercialises 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 commercialisation 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 commercialises shall be encouraged to make such payment.”

Now, a patent clearly restricts the availability so it triggers the paying mechanism, as Susan Bragdon pointed out in the paper cited above. But in many cases plant variety protection schemes also restrict the availability to others for further research and breeding. I only need to refer to Article 14 of the 1991 version of UPOV, which extends breeders' rights to “varieties which are essentially derived”. So, in many cases breeders' rights should, in my view, also trigger off the payment mechanism, not only patents. And then there is the reference in Article 13.2d (ii) that in cases in which the product is available without

restriction, the recipient is “encouraged to make such a payment”. Now, this sounds like a totally voluntary requirement, and as such one might have just as well left it out all together.

But further down the IT goes on to say that the Governing Body “may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialised products are available without restriction to others for further research and breeding.” I interpret this as a sort of Damocles sword hanging over the recipients: If they refuse to make the (voluntary) payments, which they are “encouraged” to make in cases where the commercialised products are available without restrictions, the Governing Body will come under pressure to make payments also mandatory under such cases. So, to sum up, the point I made is that patents are not necessary – or in fact desirable – for the triggering of benefit-sharing because a) the IT foresees non-monetary forms of benefitsharing and b) even the monetary option does not depend on patents, it can also be triggered off by plant breeders’ rights.

3. Practical Application of the IT’s Benefit-sharing Provisions

The benefit-sharing provisions of the IT have already been presented by Alwin Kopse from the Swiss Federal Office for Agriculture. Obviously the practical application of the IT’s benefit-sharing provisions will depend on the exact wording in the standard material transfer agreement (MTA), which shall be adopted by the Governing Body and contain the provisions of Articles 12.3a, d and g, as well as the benefit-sharing provisions set forth in the before mentioned Article 13.2d(ii) and other relevant provisions of the Treaty.

Now, Article 12.3d contains, as many of you know, one of the most controversial passages of the Treaty. It says that “recipients shall not claim any intellectual property or other rights that limit the facilitated

access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System.” How will this be interpreted in the MTA? Obviously the term “in the form received” can not refer only to plant genetic material received as such, but also to parts of the form the material was received in.

The material as such, be it entire PGRFA or parts thereof, can in any case not be patented, as it doesn’t fulfil the basic criteria for patentability, since it is no invention. So this can not have been meant. The term only makes sense if it refers also to parts of the form the material was received in, e.g. genes or gene sequences of PGRFA received from the system. If these are not modified in a substantial way, they are obviously still “in the form received”. Isolating and purifying them does not change them. And discovering the function of a gene or gene sequence is, obviously, a discovery and not an invention and can therefore not contribute to patentability.

Whether the benefit-sharing provisions of the IT are applied in a “fair and equitable” manner will, in my view, depend among other on how the Contracting Parties will interpret this term. Because if it is interpreted in a way, which actually allows receiving PGRFA from the multilateral system, isolating a gene and/or discovering its function and then patenting it, then this could not be considered as “fair and equitable” because it would constitute nothing less than an act of “biopiracy”.

With respect to the practical application of the IT’s benefit-sharing provisions there are further points which are difficult to interpret. I would only mention Article 13.2b(iii) where reference is made to the transfer of technology, including that protected by IMPs to developing countries, which shall be provided and/or facilitated under fair and most favourable terms. The last sentence of the Article reads: “Such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights.” What do the words “adequate and effective” mean here We have made some bad

experience with the word “effective”. In the case of Article 27.3b of the TRIPS Agreement for example many industrialised countries interpret the reference to a “effective sui generis system” as practically calling for an adoption of the UPOV convention. From our point of view it is absolutely central, that the interpretation of this sentence does not undermine farmers rights. Otherwise this option of benefit-sharing can not be considered as “fair and equitable”.

4. Main Ingredients for the Determination of the Term “Fair and Equitable”

The term “fair and equitable benefit-sharing” has been central in all discussions since the CBD was negotiated. The term is also used in the IT and in the Bonn guidelines. There are very many papers which refer to the term (e.g. the numerous official contributions made in the context of the review of Article 27.3b of the TRIPS-Agreement), but I haven’t seen many papers which actually tried to interpret the term.

In a study commissioned by the Swedish Scientific Council on Biological Diversity and published in 19994, the three authors Marie Byström, Peter Einarsson and Gunnel Axelsson Nycander tried to interpret the term “fair and equitable”, as it is used in the CBD. The two words are usually used together and it can be assumed that “fair” refers more to the distribution process, while “equitable” focuses on the outcome of the distribution process. Interestingly, in the IT the two words are not always consequently used together. For example in Article 13.2d(ii) the term “equitable” is used alone. But this makes sense as there obviously the outcome is meant, since the process is practically given by the Material Transfer Agreement (MTA). So it is important, that the process through which the MTA is negotiated is fair.

“Fair and Equitable: Sharing the benefits from use of genetic resources and traditional knowledge” by Marie Byström, Peter Einarsson and Gunnel Axelsson Nycander, September 1999. It is obvious that what is “fair and equitable” will always be a question of individual ethic judgement. The

authors of the study mentioned above have drawn up a list of criteria for the assessment of benefit-sharing in the framework of the CBD. Adapted to the situation of the IT the criteria to assess whether the benefit-sharing mechanism envisaged (i.e. the mechanisms listed in Article 13 of the IT) can be considered as "fair and equitable" would be the following:

The mechanism envisaged should contribute to strengthening the situation of the less powerful party/parties at all levels in the sharing relation. So if we look at e.g. the commercial option in the IT we should evaluate whether this form of benefit-sharing contributes to the strengthening of the situation of the farmers who have initially provided PGRFA to the multilateral system.

The mechanism should contribute toward, or as a minimum not counteract, the other objectives of the IT, i.e. "the conservation and sustainable use of plant genetic resources for food and agriculture" (Article 1 of the IT). ?? The mechanism must respect basic human rights (e.g. the "right to adequate food" presently discussed within the FAO).

The mechanism must respect value and legal systems across cultural borders, including customary law. So, in the context of the IT the granting of an intellectually-based monopoly privilege (IMP or IPR if you prefer) on a plant which in the culture where the PGRFA originally comes from is viewed as unethical would not fulfil this criteria. With other words: No patents for such things as Basmati or Jasmine Rice (or any other rice for that sake), because this is considered as unethical by most of the population in the countries of origin.

The mechanism must allow democratic and meaningful participation in policy decisions and contract negotiation by all stakeholders, including stakeholders at the local level. This criteria should, in my opinion, be taken into account in particular with respect to the negotiation process for the IT's "Material Transfer Agreement". The mechanism must include provisions for independent third party review. The mechanism must make

information about agreed terms publicly available.