

Outstanding Issues on ABS under the Multilateral System of the International Treaty on PGRFA

Side-Event ICNP-1

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EV B

Erklärung von Bern

Dichiarazione di Berna

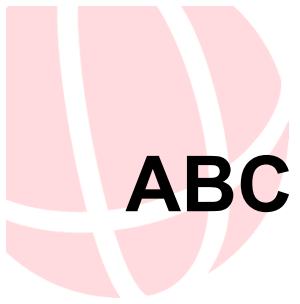
Déclaration de Berne



Relationship with international Agreements and Instruments

- NP, 4.4.

Where a specialized international access and benefit-sharing instrument applies ***that is consistent with, and does not run counter to the objectives of the Convention and this Protocol***, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.



ABC of ABS

 Access

 Benefit-Sharing

 Compliance



PGRFA included in the MLS: Parties

- Only 22 of the 127 contracting parties have notified their collections and give access to relevant information.
- Why?
- Legislative, structural Problems?
- No trust into the System / no Benefit Sharing?
- No added value?
- No capacities?



PGRFA included in the MLS: natural and legal Persons

- No Natural and legal person, which is not part of a national PGRFA systems, such as private plant breeding companies, have placed their collection into the MLS. (Nevertheless, an unknown amount of varieties has found it's way to the MLS through donations to National Seed Banks.) „Freerider“
- Why?
- Lack of clarity and understanding the legal and practical implications. (solved?)
- Why should they? An additional burden without added value?



Possible Action by the Governing Body

- Art. 11.4:

Within two years of the entry into force of the Treaty, the Governing Body shall assess the progress in including the plant genetic resources for food and agriculture referred to in paragraph 11.3 in the Multilateral System. Following this assessment, the Governing Body shall decide whether access shall continue to be facilitated to those natural and legal persons referred to in paragraph 11.3 that have not included these plant genetic resources for food and agriculture in the Multilateral System, or take such other measures as it deems appropriate.



How to implement 11.4?

- The radical option: Only those entities that share their own materials are entitled to benefit from facilitated access through the MLS – for other the access is denied. -> Not in the sense of the ITPGRFA, Difficult to implement, building loopholes, CGIAR?
- The payment option:
 1. Pay per accession (upfront) and subsequent Benefit Sharing
 2. Pay per Crop (SMTA 6.11 with a higher payment)



Access – the Sorghum example

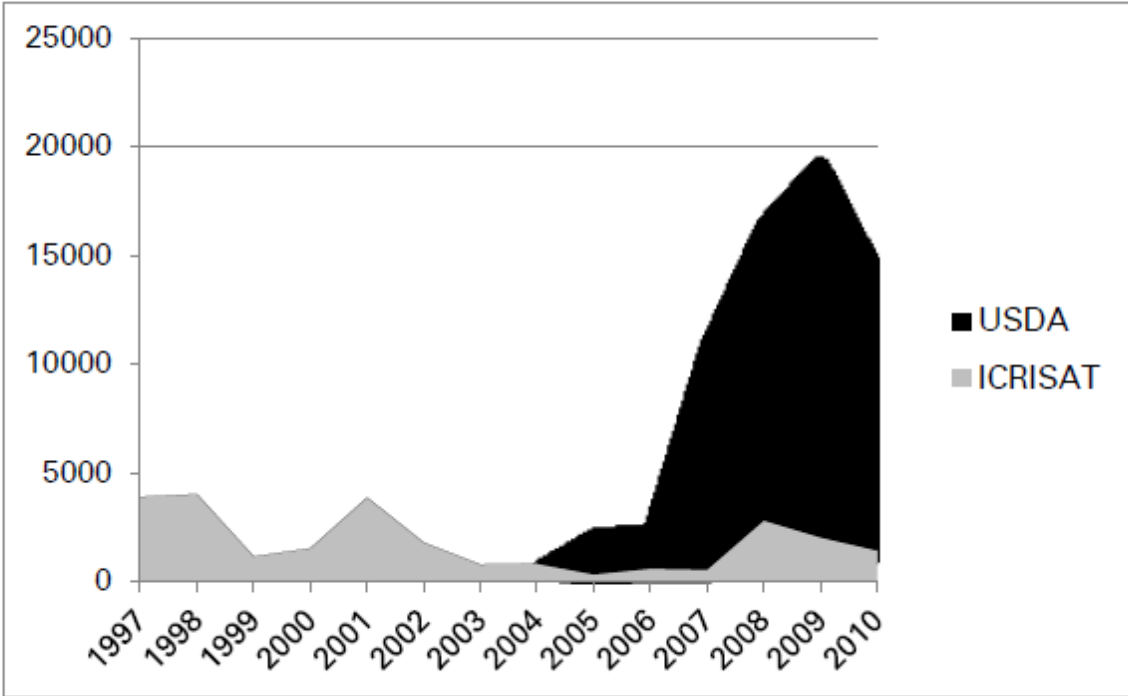
- Based on a representative sample of 2,655 (7.2%) of ICRISAT Sorghum accessions, it is conservatively estimated that at least half of the sorghum varieties declared in-trust by ICRISAT are being distributed without an SMTA by the US Department of Agriculture.
- An incentive to rather access varieties from USDA than ICRISAT – Undermining the Treaty
- Access to GR without signing an SMTA has been facilitated with the development of the Genesys Database (supported by the Treaty).



Sorghum Distributed 2005 - 2010

- USDA: 59'055
- ICRISAT: 7'719

ICRISAT Sorghum Genebank Distributions (1997-2010)
USDA Sorghum Distributions (2005-2010), Number per Year⁵





Utilization of US Sorghum Collection

Chart 4

Utilization of the USDA Sorghum Collection by Year and Requester Type⁸

Year	Academic	Companies	US Government	Other
2005	863	286	643	247
2006	568	235	884	301
2007	4302	3191	2872	174
2008	7825	2321	3255	488
2009	9648	4948	1862	1003
2010	5452	5328	1546	756
TOTAL	28658	16309	11062	2969



Access – remaining questions

- In-Situ (Standards?)
- Material held by local communities and farmers
- Agrofuels! – Subsequent use as food/feed?
- Marketed products.



Benefit Sharing under the MLS

- 13.1 The Contracting Parties 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.
- 13.2 The Contracting Parties agree that **benefits arising from the use, including commercial, of plant genetic resources** for food and agriculture under the Multilateral System **shall be shared fairly and equitably** through the following mechanisms: the exchange of information, access to and transfer of technology, capacity-building, **and the sharing of the benefits arising from commercialization, (...)**



Who should pay mandatory payments?

- „ if such a product is *not available without restriction* to others for further research and breeding”
- Available without restriction: -> “*when it is available for research and breeding without any legal or contractual obligations, or technological restriction, that would preclude using it in the manner specified in the Treaty.*”



What does this mean exactly?

- Patented products? Research Exemption?
- UPOV? -> essentially derived varieties? On-farm breeding and selection?
- Hybrids?; cytoplasmatic male sterile Hybrids?
- How will the recipient know that he has to pay? Interpretation?, Implementation?



Monetary Benefit Sharing under the MLS

- Donations – but no mandatory payments.
- Is a donation Benefit Sharing? MAT? Could it be fair and equitable without mutually agreed terms?
- Continuous and predictable?
- Are the donations additional funds – or just redirected from existing funds.
- Have redirected funds, which before went to projects directly and added value? (Or is money lost through the additional step – 20%)



Possible Action by the Governing Body

- Art. 13.2d

„The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it 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 commercialized products are available without restriction to others for further research and breeding.”



- 1. A coherent interpretation and implementation will lead to a substantially increased Benefit Sharing
- 2. Change the requirement for payments to all commercialized Products:
 - eliminating the problem of „available without restriction“
 - gaining more Benefit Sharing



Compliance with the SMTA

- Compliance was crucial in Nagoya:
Art. 15.1. *Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established*
- Nothing similar in the Treaty. (But maybe the national implementation of the Nagoya Protocol could include the Treaty?)



Compliance in the Treaty?

- Contract
 - Notification
 - Third Party Beneficiary – storage of information
 - Mediation – Arbitration
- > **But WHO will note if there is a breach of the SMTA? (No specific beneficiary)**
- > E.g. for the restriction to not patent acquired genetic resources and parts thereof in the form received? Or for the obligation to pay Benefit Sharing



Questions

- Will there be Benefit Sharing without monitoring, tracking and compliance.
- Is a Treaty without a fair and equitable Benefit Sharing in line with the CBD and the Nagoya Protocol?



Answers

- A requirement to disclose the Source of Origin (MLS) in Patent and PVP applications, as part of the SMTA.
- Tracking will always be difficult and big burden.
- Benefit-Sharing Agreements which does not require tracking are more efficient. E.g the alternative payment mechanism (Art. 6.11 of the SMTA) -> and this option would also lead to increased Benefit Sharing



Pessimistic Conclusion

- The MLS has a lot of loopholes, creates a lot of bureaucracy, is neither efficient nor effective and leads to zero additional Benefit Sharing. It's hopeless.



Optimistic Conclusion

- The MLS is an important initiative to implement the requirements of the CBD to plant genetic resources for food and agriculture. The existing mechanism is a starting point which could and have to be further developed.
- A growing awareness that with the current system it will not be possible that the Treaty achieves its objectives, will lead to a new momentum and willingness of the contracting parties to improve the MLS. (.. We are not there now ...)