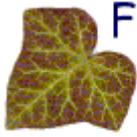




Universität Bremen



FEU

Forschungsstelle für Europäisches Umweltrecht

FINAL REPORT

THEME:

Law and practice in access to genetic resources and benefit sharing with the example of Kenya, Brazil and Germany

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1. Subject

Law and practice in access to genetic resources and benefit sharing with the example of Kenya, Brazil and Germany (*Recht und Praxis des Zugangs zu genetischen Ressourcen und des Vorteilsausgleichs, am Beispiel Kenias, Brasiliens und Deutschlands*)

2. Keyword

Access and benefit sharing

3. Discipline

Comparative administrative and contract law, legal sociology

4. Work and results report

The Convention on Biological Diversity (CBD) recognizes the sovereign rights of states over their natural resources, as well as their authority to determine access to genetic resources (GR) subject to their national legislations. It however requires that resource states facilitate access to genetic resources and do not impose restrictions that run counter to the objectives of the CBD and that, in return, user states share equitably with resource states the benefits derived from the utilization of genetic resources and associated traditional knowledge (TK). Whereas the CBD tries to engage both providers and users to collaborate in order to achieve mutual benefits for both parties, as well as for the environment, attempts to achieve this aim have repeatedly ended in a deadlock.

It is appreciated that the main causes of the deadlock are overenthusiastic ABS regimes of provider countries that aim to make quick benefits and lack of capacity in resource states, on one hand, and on the other, lack of legislative, administrative or policy measures in user countries for sharing in a fair and equitable way the results of research and development (R&D) and the benefits arising from the commercial and other utilization of genetic resources as well as associated TK with provider countries.

In a team of five persons*, the project aimed to analyse the legal frameworks and the actual practices in access to genetic resources and associated TK and benefit sharing in three exemplary countries – two megadiverse provider countries, Kenya and Brazil, and one user country, Germany. Considerable attention was to be paid to specific aspects of ABS, namely, the proportion or extent of administrative impediments on (R&D) activities as a result of the nature of the ABS regimes, the possibility of securing benefits from users of genetic resources, and the linking of access and compensation systems of resource States with the rules of the user States. In order to get a better illumination of different aspects of the core ABS problems, other countries from the two groups of providers and users were sketched. The results were meant to be a resource for improvement of the already existing

* Professor Dr. Gerd Winter (head of the project), Dr. Evanson C. Kamau (coordinator of the project and responsible for research in Kenya and partly in Germany (user countries), Professor Dr. Christine Godt (responsible for report on ABS legal practice in Germany), Professor Dr. John B. Kleba and Sandra A.S. Kishi (responsible for research in Brazil).

legislations, or creation of new laws in countries which had none in place, or be used in formation of mutually agreed regional – e.g. European – and national rules.

4.1 Methodology

Empirical study based on analytical secondary evaluation of surveys (where available) of contract texts and of existing grey-market literature. Besides, interviews with experts and actors in the field of ABS, in a number of organisations and also with a number of experts and personalities in other fields, e.g. intellectual property and forestry.

4.2 Output

4.2.1 Work progress

Six work packages were designed (literature review, empirical study, analysis of ABS regimes, analysis of current laws, elaboration of reform suggestions, and editorial work). At the end of literature review and initial empirical studies in Kenya and Brazil, the project team met in Bremen in June 2007 to review and exchange experiences made so far. From the results of the forerunner research, the team revised the initial structure in order to bring the research project into a more realistic and meaningful track.

Empirical studies were carried out in Kenya and Brazil through document analysis and qualitative and partly-structured interviews with local authorities, enterprises, scientists, representatives of indigenous communities, legal experts and non-governmental organisations.

Evanson C. Kamau carried out two field studies in Kenya between March – May 2007 and July – August 2008. During these studies he conducted numerous interviews with key stakeholders and government authorities in the area of ABS and the environment at large, ABS experts, natural scientists, industrialists, patenting officers, traditional medical practitioners, representatives of indigenous communities and anthropologists; gathered information on bioprospecting and biopiracy activities, organization of indigenous communities and their biodiversity-related activities, as well as the documentation of traditional knowledge and its protection locally; analysed existing legislations on ABS; and convinced the main stakeholders of the need to hold an expert meeting where the FEU-DFG project experience was to be transferred in order to help in resolving some of the complex ABS issues.

John B. Kleba conducted empirical studies analyzing extensive data files from the Federal Public Prosecutor's Office and the Genetic Patrimony Management Council, among others. He also conducted interviews with researchers in Brazil, as well as in Germany, with the Brazilian regulatory body and in addition, he carried out field researches in indigenous peoples' lands, e.g. in the Amazonian State Acre, as well as interviewed different stakeholders.

In order to further enrich the content of the project, existing (and published) results of empirical studies (see e.g. Holm-Müller, Richerzhagen and Täuber, 2005) and of workshops (see e.g. Feit and Wolff (eds), 2007) were analysed and used to complement own research. We also organized and hosted an international

interdisciplinary ABS workshop in Bremen in February 15/16 in order to accommodate broader views in the final publication, as well as to seek workable solutions to existing ABS “hiccups”. Gerd Winter and Evanson Chege Kamau in addition attended the November 2008 ABS workshop in Bonn on basic research and access and benefit sharing, which was an opportunity of participant observation of scientists’ views concerning the problems basic research faces in ABS and alternative ways of resolving them.

4.2.2 Findings

The main findings of the research, which have been published in the book titled ‘*Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing*’ edited by Evanson Chege Kamau and Gerd Winter, show that the implementation of ABS regimes faces specific problems some of which are listed below:

- most provider measures possess overbureaucratic hurdles, which are not only impeding to basic, but also to commercial research
- scarcely are any differentiation made between access requirements for basic research and commercial research
- most provider measures use a vague legal language
- many provider regimes suffer from legislative gaps and inconsistencies – resolutions on how to deal with specific questions, e.g. of benefit sharing for genetic resources found on private land, or TK shared among several communities. That is also true concerning authorization of access (PIC) to TK
- major gaps remain with respect to the interface between ABS legal frameworks and intellectual property rights
- the approach of ‘the provider takes it all’ is unjust
- for indigenous peoples, rights to life, food, health, culture, traditional territories, resources, work and development are all relevant to and variously dependent upon protection of TK
- both traditional and modern medicine should be married into hybrid forms which mutually further each other
- disseminated traditional knowledge presents a great challenge to the effective protection of TK
- prior consultation and capacity building are very decisive to a successful access process
- public law measures are not sufficient to ensure fair and equitable benefit-sharing: supplementary private law measures (IPR sui generis) are needed
- a claim for benefit sharing can be raised in a user country on the basis of a contract or tort
- most user countries have done little to implement the Art. 15.7 CBD obligation

Some earlier findings were published in journals in articles authored by Christine Godt and Valentine Nde Fru, Evanson Chege Kamau, Sandra Akemi Shimada Kishi and John Bernhard Kleba (see attached the list of publications).

4.2.3 Practical output

The findings of the research project were very instrumental in transferring knowledge into practice as follows:

- In May 22, 2009, we presented the results of the research project to date in a side event at the COP-9 in Bonn.
- Consultancy work was done in Japan by Gerd Winter during an informal legal expert workshop in Tokyo on ABS compliance issues (30 September – 1 October 2008).
- Consultancy work was done in Kenya by Gerd Winter and Evanson Chege Kamau at the Kenya Wildlife Service for the formulation of a bioprospecting policy
- Many of the proposals made during a national ABS workshop in Nairobi, Kenya (February 2009) have been taken up by the National Environmental Management Authority (NEMA) to assist in the revision of the current ABS Regulations.
- John B. Kleba and Sandra A. S. Kishi brought up ABS streamlining concerns in many public meetings on ABS and also initiated collaboration with Brazilian non-governmental organizations on the subject.
- Kleba and Kishi also lodged a claim through the Federal Prosecutor's Office to provide transparency obligations at the National Genetic Patrimony Council (CGEN) regarding administrative and technical files concerning ABS applications.
- In April 2009 (29 – 30), Kamau attended an experts meeting in Malaysia (Kuala Lumpur) to assist in reviewing a FAO study on food security and ABS.
- In September 17/18 Kleba and Kishi organised an ABS workshop in São Paulo, Brazil, where some of the results of our research project were presented.

4.2.4 Publications

In total the project produced two edited volumes and eight articles.

5. Summary and final conclusion

The Convention on Biological Diversity (CBD) acknowledges sovereign rights of states over their natural resources including genetic resources (GR). User states are obliged to share the benefits derived from the utilization of genetic resources with states providing the GRs. Thus, provider states and user states are expected to create bilateral exchange relationships.

Legal practice on international and national levels has proved that this individualistic approach lacks efficiency: while the scope and content of sovereign rights of provider states over their GRs are far-reaching, due to the territoriality principle they are hampered to control the downstream process of value creation. Attempt to enforce their legal powers effectively causes high transaction costs.

User states, on the other hand, could be asked to make leeway. While they are less hindered by the territoriality principle because R&D activities related to GR are largely under their jurisdiction, they also face substantial transaction costs if they use whatever powers they have in order to control the upstream process.

Even if the control by provider and user states is improved, questions of distributional justice arise. Many GRs have a geographical range shared by regions of states suggesting that benefits should be shared among all states in which the GR is endemic instead of the first provider state taking the entire share.

Therefore, both for reasons of effectiveness and justice, common pools of genetic resources were suggested so as to eliminate bureaucratic hurdles and at the same time promote distributional justice. These should not be designed to step out of the basic concept of sovereignty of resource states over their genetic resources but rather to understand the concept as enabling voluntary multilateral solutions. A thorough analysis of the proposed approach is aimed to be carried out in a follow-up project.