

Marine Genetic Resources in the BBNJ Process – Building Bridges

Workshop, 26-28 June, University of Aberdeen

Law briefing document - Issues/instrument identification

In context of UNCLOS UNGA A/72/L.7 15 November 2017 and forthcoming intergovernmental conference

Mare Geneticum goals

Enabling effective and fair scientific use of and inclusion innovation regarding MGR within the framework of UNCLOS, based on prior notice, capacity building, technology transfer and sharing, and benefit sharing with appropriate limits and periods of restriction

Issues

Access to MGR, through permitted use and control

Facilitating MGR through conservation and sustainable use and development instruments, taking global view on impact and benefits

Wider environmental impact, including cumulative impacts: e.g. Strategic Environmental Assessment

Reward for risk taking and addressing downstream activity and technical contribution, and subsequent transfer

Consistency with UNCLOS and building on/managing conflict with other legal regimes

Delivery

Internationally legally binding instrument under UNCLOS: limitations

Establish co-ordination joint reports, collaborative meetings, and representatives at others negotiations reflecting

- UNEP and WTO Trade and Climate Change

https://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf

Governance including policy / processes

Enforcement: international dispute resolution and private agreement

UNCLOS

Text http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

Freedom of High Seas - freedom of scientific research, regard activities other states and ABNJ (art 87 (f)), 256, 257

Common heritage of mankind for ABNJ - scientific research (arts 136, 140, 143), technology transfer and scientific knowledge (art 144), protection marine environment (art 145,7)

Information sharing (art 244) and International Seabed Authority re minerals, regulate deep sea mining, special emphasis on protecting marine environment (art 156)

Protect and Preserve Marine Areas (art 192-196, also customary international law)

Other points/models

Delivering Sustainable development

-Our Common Future <http://www.un-documents.net/our-common-future.pdf>

-2030 Agenda for Sustainable Development A/RES/71/312 and Sustainable Development Goals <https://www.un.org/sustainabledevelopment/blog/2017/07/pace-of-progress-must-accelerate-to-achieve-the-sdgs-finds-latest-un-progress-report/> (esp goals 4,6,7,8 9, 14)

Conservation, biodiversity, benefit sharing, technology transfer

International action

-Convention on Biological Diversity and Nagoya Protocol <https://www.cbd.int/>

- States right exploit own resources in own jurisdiction, not to damage environment of other states or areas beyond national jurisdiction - art 3
- Identification, sampling, monitoring - art 7, Annex 1; Nagoya 17
- Conservation systems and sustainable use – art 8, 9, 10
- Adopt economically and social sound incentive measures – art 11
- Training, capacity building, awareness raising– art 12, 13; Nagoya 21, 22
- Impact assessment - art 14
- Access to GR, handling of material and distribution of benefits (monetary and non monetary) - art 15, 19; Nagoya 1, 5, 6, 7, 9, 12, Annex
- Access to and transfer of technology, exchange of information, cooperation - art 16, 17, 18; Nagoya 23
- Mutually agreed terms, codes, prior informed consent - Nagoya 18, 19, 20
- Global Multilateral Benefit Sharing Mechanism, Clearing House and information sharing - Nagoya 10, 14
- Links with other international agreements - art 22; Nagoya 4
- CBD list partnership agreements <https://www.cbd.int/agreements/>

-Intergovernmental Oceanographic Commission Criteria and Guidelines on Transfer of Marine Technology

Fair and reasonable terms and conditions, all to benefit on equitable basis http://www.ioc-unesco.org/index.php?option=com_content&view=article&id=316&Itemid=100028

-FAO International Treaty on Plant Genetic Resources for Food and Agriculture 2001.

- Common resource for all and raw material necessary for genetic improvement – obligations on states regarding their laws. <http://www.fao.org/plant-treaty/en/>
- Works in harmony with CBD - art 1
- Integrated approach to PGR: survey, collect, support farmers - art 5 and Annex
- National cooperation and technical assistance - art 7 and 8
- Farmers rights, sharing in benefits, making decisions, not limiting rights to save, use exchange seeds - art 9
- Multilateral system of state sharing, facilitated access (part IV, sources in Annex 1, Standard Material Transfer Agreement): minimal cost, information provided, no IP over what is received, otherwise to be consistent with IP
- Global plan of action and special collections - arts 14, 15
- Funding - art 18

-World Health Organization Pandemic Influenza Preparedness Framework WHA70 10 state resolution <http://www.who.int/influenza/pip/en/>

Plans for open access to bio banks, virus sharing, information sharing platform (Genetic sequences data), material transfer agreement, partnership contributions. Milestone established, links with CBD

Regional agreements

-Andean Pact Common Regime on Access to Genetic Resources
http://www.wipo.int/wipolex/en/text.jsp?file_id=223611

-OSPAR Commission

Protecting and conserving North East Atlantic, work on biodiversity and ecosystems includes a role for MSP and the ecosystem approach

<https://www.ospar.org/work-areas/bdc>

-Sargasso Sea Hamilton Declaration - non binding political statement, aim to conserve ecosystem and pursue conservation through existing regional and international organisations with relevant competences. Areas BNJ remain e.g. with International Maritime Organisation (shipping), NorthWest Atlantic Fisheries Organisation (fishing)

<http://www.sargassoseacommission.org/about-the-commission/hamilton-declaration>

Intellectual Property and Inclusion Innovation

-WTO TRIPS https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm

Member states must have patent system – some possible exclusion morality/commercial exploitation, essential biological processes - art 27

Developed country members to provide on request and mutually agreed terms, technical and cooperation to developing countries - art 67

Member states can have limited exceptions, 3 step test and compulsory licensing including for national emergencies - art 31

WTO, WIPO, WHO Trilateral Cooperation Public Health, IP, Trade
http://www.wipo.int/policy/en/global_health/trilateral_cooperation.html

-WIPO and Genetic Resources

Long running negotiations, seeking reach agreement on international legal instrument to protect *inter alia* genetic resources <http://www.wipo.int/tk/en/igc/> collaboration with CBD.

18/19 mandate from Oct 2017 – Key issues patents lacking novelty, any need for disclosure of origin (re novelty and access and benefit sharing, PIC) and MAT (WIPO has database contractual practices).

IGC 35 (March 18) and 36 (June 18) on GR, General Assembly Oct 18. Seeks to complement CBD, FAO Plant Treaty.

Docs from IGC 35 WIPO/GRTKF/IC/35/10 Prov. Discusses country contributions, references to PIC, MAT, SDG, Mother Earth, human rights, Plant Treaty, CBD, mutual supportive across treaties, derivatives/biotechnology, intangible cultural heritage, novelty, declaration of origin, due diligence, database and defensive action, exceptions and limits, sanctions and enforcement. Refers to WIPO/GRTKF/IC/35/4 outline draft

-Licensing models

- Creative Commons <https://creativecommons.org/>
 - Provides a licensing model to enabling sharing of copyright works on viral basis, with different restrictions (e.g. none, commercial, acknowledgement).
- Apache Public License <https://www.apache.org/licenses/LICENSE-2.0>
 - copyright and patent (cl 3)
- Center for Application of Molecular Biology to International Agriculture (CAMBIA)
 - BiOs licence and common patent pool <http://www.bios.net/daisy/PELicense/751>

Achieving marine spatial planning through an ecosystem based approach

<http://msp.ioc-unesco.org/msp-guides/msp-step-by-step-approach/>

Including assessment and plan

- Environmental impact assessment
- Strategic environmental assessment
- Marine Protected Areas

Dispute Resolution

Between states

Varied approaches from discussion to trade sanctions:

CBD Disputes and progress, national action - art 26, 27, Annex II; Nagoya 15,16, 29, 30

Plant Treaty compliance and DR - art 21, 22, Annex 2

UNFCCC Paris Agreement non adversarial compliance system - art 15, 103, 104

TRIPS Compliance - art 64 and WTO DSU

Mixed

Investor state dispute provision in treaty – e.g. CETA, controversial but can enable disputes to be addressed side by side.

OGA removal of oil and gas drilling licence <https://www.ogauthority.co.uk/regulatory-framework/powers-sanctions-guidance/sanctions/>

Private

Private operators agree to arbitrate e.g. rules and tribunal of International Centre for Settlement of Investment disputes (ICSID), United Nations Commission on International Trade Law (UNCITRAL)

Models relevant to practical delivery

Competition law can require sharing on Fair Reasonable and nondiscriminatory basis. No international treaty but common themes across EU, US, BRICS law and movements to elision.

Applies to agreement between private undertakings

<http://www.internationalcompetitionnetwork.org>

UNFCCC Paris Agreement Technology Mechanism - art 10, 11, 13 <https://www.ctc-n.org>

NHS Scotland PBPP model <http://www.informationgovernance.scot.nhs.uk/pbpphsc/> means of delivering access to raw data for research purposes to deliver benefits to society.

Maximising economic recovery of UK petroleum <https://www.ogauthority.co.uk/news-publications/publications/2016/maximising-economic-recovery-of-uk-petroleum-the-mer-uk-strategy/>. Private licences granted to drill, after bidding process. State recovers through tax. Post MER, focus on sharing technology and information, for benefit of industry.