

Legal considerations



DSI-WG-1, report, annex: Possible elements of a multilateral mechanism

A. Contributions to the fund

Elements on which there is a need for further discussion, para. 9:

How obligations for sharing the benefits from the use of digital sequence information on genetic resources in the multilateral mechanism can be created; whether this would facilitate a predictable level of contributions and fairness among potential contributions; and whether this could be done through a legally binding instrument or a non-legally binding framework and the timelines associated with these options.



Legal considerations: COP decision



In and of itself, a COP decision is not legally binding

- Can still be highly influential in affecting behaviour, e.g.:
 - COP decision V/5 on agricultural biodiversity, s. III on genetic use restriction technologies included recommendation against approval of products containing such technologies
 - Decisions of the Consultative Meeting of the London Convention and CBD COP against ocean fertilization. Also referenced in UN General Assembly resolution
 - COP decision X/33 on biodiversity and climate change invited Parties and other Governments to ensure that no climate-related geo-engineering activities that may affect biodiversity take place
- Sometimes Parties can agree to more in a COP decision because it is not legally binding
- Relatively quick to develop and 'active' immediately after adoption (no ratification process)



Legal considerations: treaty



A treaty is legally binding on the States that consent to be bound by it.

- Timeline for negotiating a treaty is usually quite lengthy
 - E.g. Negotiation of an international regime on ABS (which culminated with the adoption of the Nagoya Protocol) took 7 years
- Even after a treaty text is concluded and adopted, it still requires time for ratification and implementation
 - It took 4 years for the Nagoya Protocol to receive the necessary ratifications to enter into force and this was considered quite fast
 - A lot of work on implementation of the Protocol remains to be done



Legal considerations: contract



Obligations can be created through a contract agreed to by 2 (or more) parties.

Contracts are legally-binding on the parties to the contract. Terms of contract can address dispute resolution procedures.

International requirements for benefit-sharing are often implemented through contracts

- Mutually agreed terms for access and benefit-sharing often take the form of a contract between the provider and the user.
- These contracts can be negotiated each time there is a request for access or they can be standardized where some or all terms of the contract are pre-defined and not subject to negotiation, e.g. SMTA of the ITPGRFA, SMTA1 and SMTA2 of PIP Framework

Clickwrap agreements where someone agrees to, e.g. the terms of use of a website, are also a form of contract.

