

The International ABS Regime - Suggestions to ensure the enforcement of provider rights -



ECOROPA



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The provisions on enforcement of the rights of the providers of genetic resources/biological resources, derivatives, products and associated traditional knowledge are key to ensure the effective implementation of the International Regime on Access and Benefit Sharing (IR-ABS). We would like to suggest operational text that would provide strong incentives for users of genetic resources/biological resources, derivatives, products and associated traditional knowledge to comply with the rules of the IR-ABS. Such provisions would also support the demand of developing country delegations to end the long period of misappropriation and misuse of genetic resources.

The following text reflects the position of the EU with regard to the enforcement of Intellectual Property Rights in the draft text of the EU-India Free Trade Agreement which is currently under negotiation. A symmetrical application of these enforcement mechanism against misappropriation and misuse of genetic resources/biological resources, derivatives and products and associated traditional knowledge could be instrumental for harmony and mutual supportiveness between the International Regime on Access and Benefit-Sharing and related Intellectual Property Rights regulations – on really equal footing. Some of the elements and mechanisms of such symmetrical application are listed below.

Proposal for Text on Compliance and Enforcement¹

General Obligations

(...)² Parties reaffirm their commitments under the *CBD*³ and shall provide for the following complementary measures, procedures and remedies necessary to ensure the enforcement of the *providers' rights, including the rights of Indigenous Peoples in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPS)*.⁴ Those measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Evidence

The parties shall take such measures as are necessary, in the case of infringement of *providers' rights, including the rights of Indigenous Peoples in accordance with the UNDRIPS*⁵ committed on an commercial scale to enable the competent judicial authorities to order, where appropriate and following an application, the communication of banking, financial or commercial documents under the control of the opposing entity, subject to the protection of confidential information.

Corrective Measures

The parties shall ensure that the competent judicial authorities may order, at the request of the *provider*⁶ and without prejudice to any damages due to the *holder of providers' rights*,

¹ Adapted text from the Draft EU-India FTA on Intellectual Property Rights reflecting the Positions of the EU on the Enforcement of IPR Provisions

² Original reads: Both Parties ...

³ Original: TRIPS Agreement and in particular of its Part III

⁴ Original: intellectual property rights

⁵ Original: intellectual property rights

⁶ Original: applicant

including the rights of Indigenous Peoples in accordance with the UNDRIPS⁷ by reason of the infringement, and without compensation of any sort, the recall, definitive removal from the channels of commerce or destruction of goods that they have found to be infringing a provider's right, including the rights of Indigenous Peoples in accordance with the UNDRIPS.⁸ If appropriate, the competent judicial authorities may also order destruction of materials and implements principally used in the creation or manufacture of those goods.

Injunctions

The parties shall ensure that, where a judicial decision is taken finding an infringement of a provider's right, including the rights of Indigenous Peoples in accordance with the UNDRIPS⁹ the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by domestic law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. The parties shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by (...) ¹⁰ to infringe a provider's right, including the rights of Indigenous Peoples in accordance with the UNDRIPS.¹¹

Damages

The parties shall ensure that when the judicial authorities set the damages:

- a) they shall take into account all appropriate aspects, such as negative economic consequences, including lost profits, which the injured party and affected indigenous peoples have¹² suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to

the holders of providers' rights, including the rights of Indigenous Peoples in accordance with the UNDRIPS¹³ by the infringement.

Border Measures

The Parties shall, unless otherwise provided for in this section, adopt procedures to enable a holder of providers' rights, including the rights of Indigenous Peoples in accordance with the UNDRIPS¹⁴ who has valid grounds for suspecting that the importation, exportation, re-exportation, entry or exit of the customs territory, placement under a suspensive procedure or placement under a free zone or a free warehouse of goods infringing a provider's right, including the rights of Indigenous Peoples in accordance with the UNDRIPS¹⁵ may take place, to lodge application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation or the retain of such goods.

⁷ Original: right holder

⁸ Original: an intellectual property right

⁹ Original: an intellectual property right

¹⁰ Original reads: by a third party

¹¹ Original: an intellectual property right

¹² Original reads as: which the injured party has suffered

¹³ Original: right holder

¹⁴ Original: right holder

¹⁵ Original: an intellectual property right