

RESEARCH ARTICLE

(Open Access)**Study and possible middle-term developments of the Albanian legislation relevant to Access and Benefit Sharing Related to Animal Genetic Resources**ANDON KUME*¹¹Lector, PhD, University "Aleksander Moisiu" Durrës, Albania**Abstract**

The analysis of the Albanian legislation shows that when addressing issues relevant to Conservation, Sustainable Economic Development and use of Farm Animal Genetic Resources, no attention is paid for issues related to access and benefit sharing. By signing the Nagoya Protocol on February, 28, 2013, Albania is obliged to draft legislation in accordance and pursuant to the requirements of this Protocol. The middle term process of legislation development should treat with priority issues related to (i) access to Animal Genetic Resources; (ii) sharing of benefits arising from the utilization of such resources; (iii) access to traditional knowledge associated with AnGR and (iv) sharing of benefits arising from utilization of such knowledge. Through the comparative analysis of EU and other countries legislation, this paper seeks to elaborate ideas and explicate ways of addressing these issues.

Key words: Access, benefit sharing, animal genetic resources, legislation

1. Introduction

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization was adopted by the Conference of the Parties to the Convention on Biological Diversity [1] at its tenth meeting on 29 October 2010 in Nagoya, Japan. Albania signed it on January, 29, 2013. This Protocol is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding, thereby contributing the conservation of biological diversity and the sustainable use of its components [1]. The fair and equitable sharing of the benefits arising out of the utilization of genetic resources is one of the three objectives of the Convention on Biological Diversity [2].

Pursuant to the constitutional provision (Article 122)¹[8], the Ratification of Convention on Biological

Diversity (January 5, 1994) and adherence to Nagoya Protocol (Law no. 113/2012), Albania should adapt legal provisions in order to fulfill conditions and requirements of these international documents and make them realistically applicable. In October 2012 the European Council and the European Parliament began to draft legislative proposals in order to implement the Nagoya Protocol. Obtaining the status of EU candidate country makes drafting legislation, which will create conditions for the implementation of the Nagoya Protocol in Albania, even more necessary. Different countries use different legislative practices in drafting legislation on Access and Benefits Sharing (ABS)[3]². The analysis of these

the Assembly, for the effect of ratifying an international agreement, is done with the same majority.

2. An international agreement that has been ratified by law has superiority over laws of the country that are not compatible with it".

²The nature of the national laws dealing with ABS

For many countries, provisions regulating access to genetic resources and benefit-sharing are spread over a plethora of laws, regulations and guidelines. These countries include: Guyana, India, Uganda, Costa Rica, Kenya, Philippines, South Africa, Australia, and Malawi. Other countries have adopted ABS national and sub-national measures in detail in a single specific act. Of these, some have enacted legislation dealing solely and directly with ABS: Brazil, state of Sabah (Malaysia), Queensland (Australia), Northern Territory (Australia), Ethiopia and Bolivia. Others have general biodiversity laws which contain detailed ABS measures: Vanuatu, Bhutan and Bangladesh.

¹ "1. Any international agreement that has been ratified constitutes part of the internal juridical system after it is published in the Official Journal of the Republic of Albania. It is implemented directly, except for cases when it is not self-executing and its implementation requires issuance of a law. The amendment, supplementing and repeal of laws approved by the majority of all members of

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(Accepted for publication September 25, 2014)

ISSN: 2218-2020, © Agricultural University of Tirana

practices shows that there was a whole range of objectives that countries included in their ABS legal provisions, such as³:

- ensure the fair and equitable distribution of benefits derived from genetic resources;
- ensure that biological resources are utilized in an effective and equitable manner in order to strengthen the food security of the nation;
- protect Traditional Knowledge associated with the resources, including the rights of local and indigenous communities;
- recognize and protect farmers' and/or breeder's rights;
- protect biodiversity;
- ensure the conservation and sustainable use of genetic resources or biodiversity;
- regulate access to genetic/biological resources;
- facilitate access to genetic/biological resources; *and*
- promote technology transfer and capacity building

Analyze and possible middle-term development of the Albanian legislation relevant to Access and Benefit Sharing Related to FAnGR

Objectives of Nagoya Protocol

The main objectives of Nagoya Protocol are the development of (i) institutional performances, (ii) administrative and legal infrastructure and, (iii) relation between different stakeholders. These objectives should provide for:

- (i) access to FAnGR,
- (ii) sharing of benefits arising from the utilization of such resources,
- (iii) access of traditional knowledge associated with FAnGR and
- (iv) sharing of benefits arising from utilization of such knowledge

Some countries have provided for ABS in general terms in a single piece of environment-related legislation: Gambia, Nigeria and Afghanistan. Some have developed draft ABS measures: Pakistan and the state of Hawaii.

Framework study on food security and access and benefit-sharing for genetic resources for food and agriculture. Background study paper no. 42.p.20-21. FAO (2009)

³Gurdial Singh Nijar et al. 2009. Framework study on food security and access and benefit-sharing for genetic resources for food and agriculture. *Background study paper no. 42.p.21-22FAO (2009)*

2. Albanian legislation

The Albanian legislation contains only a limited number of provisions that deal with issues converging with the Nagoya Protocol objectives and scopes. These provisions form a small group of legal elements part of the Act "On preservation of Biodiversity" No.9587, dated 20.07.2006[9]. The legal provisions regulating the use of genetic materials, animals, microorganisms and/or other biological plant molecules for scientific study or for business, predicts the obligation according to which this use is possible only by obtaining the corresponding environmental permit.

The instrument regulating the transfer of biological material from one party to another is the MTA (Material Transfer Agreement). This contract is required to be provided with restriction regarding the allocation of monetary or non-monetary benefits between the owner of the biological material and its users. The Act "On Preservation of Biodiversity" contains significant provisions related to issues of ownership, the right to use and share benefits from the use of knowledge, innovations and practices developed by local communities for biodiversity conservation and use of its components⁴. Referring to the Nagoya Protocol requirements and how they are transposed in the Albanian legislation we can easily reach the conclusion that further developments of this legislation are needed [7].

3. Possible middle-term developments

In order to develop, update and align the Albanian legislation with the requirements of Nagoya Protocol for Farm Animal Genetic Resources, it is necessary to work at the same time in different directions such as: (i) drafting the primary legislation and the secondary legal framework, (ii) decisions from Council of Ministers, (iii) orders, directives and regulations Ministers or other institutions. It is necessary to draft a legal framework that will create

⁴Act No.9587, dated 20.07.2006 "On preservation of Biodiversity" Article 45. Preservation and maintenance

1. Knowledge, innovations and practices of local communities for biodiversity conservation and sustainable use of its components are respected, preserved and promoted. They are used to fulfill practices for conservation and sustainable use of biological diversity components in the Republic of Albania.

2. Collection and documentation of knowledge and practices of local communities or individuals is performed only with their consent and when they know for what purposes shall be used.

3. Communities or individuals within the community have the right to benefit from commercial or noncommercial use of their knowledge and practices

the conditions for the operation of institutions and infrastructures, through which can be possible the practical and successful implementation of the above legal framework.

Specific legal provisions amending the Act "On Livestock Breeding" can be adopted in response to the obligations stemming from the requirements of Nagoya Protocol which affect the need and obligation for Access and Benefit Sharing Related to Animal Genetic Resources. If a new Act shall be drafted for Conservation and Sustainable use of Farm Animal Genetic Resources these provisions should be part of it. Provisions should be addressed in general terms in order to give a legal response to all requirements of Nagoya Protocol. It requires special provisions for each of the four action areas of Nagoya Protocol and these provisions should be binding. In any case, they should provide appropriate penalties in cases of breaching the provisions. These provisions should provide the obligation for the Ministry of Agriculture and Water Administration to draft the sublaw framework for their practical implementation. At this level of legal framework (regulations, directives, orders, etc..) shall be addressed in details the following issues:

Genetic resources: Access and benefit sharing.

The treatment of legislative issues relevant to access and benefit sharing to Animal Genetic Resources is an intensive process, currently taking place in EU countries, as well as in other countries of the world [3], [6], [12],[13].

One of the main options discussed now days is the drafting of legal documents to serve as the

permission to earn the right of accessing Genetic Resources. Livestock Keepers' Rights is one the key points that should be addressed in these documents [16]⁵.

⁵WalløeTvedt, M., Hiemstra, S.J., Drucker, A.G., Louwaars, N., Oldenbroek, K. 2007. "The right to use the animal in breeding is often specified in a (formal or informal) contract between the seller and the buyer of an animal. The main rule that ownership can be transferred also applies to animals. The contract or informal agreement determines the scope of what is transferred and which rights still belong to the seller (if any). As a contract is individually agreed, the seller may keep or reserve himself certain rights to the offspring of the animals. The contract then determines which rights are transferred to the contracting party. If no reservation is included in the terms for the sales, the assumption is that the buyer of the animal receives all the rights that the seller had, including taking advantage of the genetic resources. If an animal is sold to the slaughter house for the meat value, the interpretation of that contract will likely be that the buyer does not have a right to use the genetic resources, but only a right to use the meat and other products. Contracts imply a dynamic element in establishing (or transferring) rights from one owner to the other.

In **Australia** a permit is required for any access to "biological resources of native species for research and development of any genetic resources, or biochemical compounds, comprising or contained in the biological resource" in Commonwealth areas.

In **India** the National Biodiversity Authority acts as the competent authority for all access requests from foreign nationals, research organizations or companies. Foreign applicants must apply to be granted approval by the National Biodiversity Authority by completing a form and paying a fee.

In **Brazil** the access authorization and additional normative acts are issued by the Genetic Patrimony Management Council (CGEN). Access to genetic resources and traditional knowledge can only be granted following the previous consent by indigenous people, an environmental agency or the owner of private land [5].

The adoption of the permit application in Albania is an option to implement this requirement of the Nagoya Protocol for FAnGR. This permit should outline:

The local or foreign physical person, institution or NGO's interested in access to Farm Animal Genetic Resources (native / indigenous / autochthonous breeds) must apply for an accessory agreement and permission to the National Consultative Committee for Conservation and Sustainable use of FAnGR. The permit should describe the purpose of the request, the timeframe, the predicted product of the activity to be performed and the beneficiary. The permit shall be in writing and may include, *inter alia*, provisions on: (i) dispute settlement, (ii) benefit-sharing, including in relation to intellectual property rights, (iii) subsequent third-party use, if any, of the genetic resources and (iv) terms on changes of intent, where applicable. The permit must be supplemented with a CV of the applicant and other necessary data. The permit will have to be approved by a decision of the Minister of Agriculture and Water Administration. In case of ownership change as a result of transactions, middle-term Albanian legal regulations connected with benefit-sharing, should take into account the

The point of departure is that the owner can transfer what he has the right to, but he cannot transfer more than already is covered by his legal right. The contract determines the scope of what is transferred and which rights still belong to the seller. A contract is individually agreed, and is thus more specific than the general rules of ownership. The owner decides whether he or she wants to sell the animal or give access to the genetic material by selling e.g. semen, eggs or embryos". Legal Aspects of Exchange, Use and Conservation of Farm Animal Genetic Resources. FNI Report p. 10. 1/2007

requirements and trends of EU legislation. Referring to the FAO documents (2009) it is recommended to reflect in this legislative process issues related to:

- AnGR are privately owned
 - the owner determines to what extent and under which conditions breeding animals or their germplasm is made available to others
 - the price of animals in fact includes a benefit-sharing agreement: the owner/supplier gets money in exchange for providing access to the genetic material
- When selling animal genetic material (breeding animals, semen, embryos, ...)
 - the value of this material as a genetic resource is reflected in its price
 - the buyer usually is free to use it for further research and breeding
- In some case parties may agree on restrictions on the further use of breeding material and its transfer to third parties, either through contracts or through “gentlemen’s agreements”.
- The seller of genetic material may retain some rights to the next generation of animals [or germplasm] or rights to dictate how they are used

b. Traditional knowledge: Access and benefit – sharing.

The core obligation in regards to accessing traditional knowledge associated to genetic resources is contained in Art 7 Nagoya Protocol. It obliges each Party to take measures, as appropriate, with the aim of ensuring that traditional knowledge associated to genetic resources held by indigenous and local communities is accessed with the prior informed consent or approval and involvement of these communities where mutually agreed terms have been established.

The core obligation in regards to benefit-sharing for traditional knowledge associated to genetic resources is outlined in Art 5[5] Nagoya Protocol. It requires Parties to take legislative, administrative or policy measures in order that benefits arising from the utilization of traditional knowledge associated genetic resources are shared in a fair and equitable way, upon mutually agreed terms, with indigenous and local communities that hold such knowledge.

In **Uganda** Prior Informed Consent is mandatory for access to indigenous knowledge. Benefit-sharing arrangements must not negatively interfere with traditional knowledge systems and practices of indigenous peoples and local communities. Indigenous and local communities

have exclusive rights over their traditional knowledge[14]. Indigenous and local communities are guaranteed the right to:

- (i) have the origin of traditional knowledge access mentioned in all publications, uses, exploitation and disclosures;
- (ii) prevent unauthorized third parties from using or carrying out tests, research or investigations relating to traditional knowledge or disclosing, broadcasting, data or information that incorporate or constitute associated traditional knowledge and
- (iii) to derive profit from economic exploitation by third parties of associated traditional knowledge in which the community owns rights as provided for under Uganda laws and international legislation⁶.

In **Brazil** the rights regarding traditional knowledge related to genetic resources are considered collective or diffuse. Most importantly the Brazilian Constitution recognizes the right of indigenous people to the exclusive use of the natural resources located in their traditional lands and the right of standing, defending their rights and interests in courts[5].

In the **Philippines** access to genetic resources and to traditional knowledge related to the conservation, utilization and enhancement of these resources is to be allowed within ancestral lands and domains of the indigenous people only with a free and prior informed consent (FPIC) of such communities, obtained in accordance with customary laws of the concerned community. Access to genetic resources does not imply automatic access to associated traditional knowledge. Access to traditional knowledge must be explicitly set out in the FPIC application and reflected in the Prior Informed Consent Certificate²⁰².

Albania has no legal experiences and currently there is no legislative initiatives to design policies for the protection of traditional knowledge. Customary practices of the right of ownership and use of such knowledge related to the conservation and use of Farm Animal Genetic Resources - native / autochthonous / traditional breeds – is currently collapsing due to the low interest of farmers for farming this breeds. Lack of policies and instruments for their protection requires urgent interventions. The expected legislative developments should be preceded by the institutionalization of the right of ownership

⁶Study to analyse legal and economic aspects of implementing the Nagoya Protocol on ABS in the European Union. p.60-61. Service Contract ENV.E.2/2011/ETU/599073, August, 2012

over traditional knowledge and it should be recognized as a right of the community. In order to regulate relations between members of the community and for the exercise of this right it is necessary to draft rules. These rules should help creating a legal base where:

- a) The effective use of traditional knowledge
- b) Their preservation and development in accordance with developments in the traditional system of conservation and use of FAnGR
- c) Equal access for all community members
- d) Equal distribution of benefits among the members of the community

In order to preserve and use the traditional knowledge at the national level, as well as to regulate the relations of cooperation between communities owners of these traditional knowledge and other stakeholders, the Albanian legislation should be developed with an objective to establish a legal framework which will enable:

- (i) the establishment of a national system for the protection of traditional knowledge and practices related to conservation, use and development of FAnGR
- (ii) the construction of institutional mechanisms that will make possible the participation of traditional knowledge owners in the decisions on how to conserve, develop and use these assets.
- (iii) establishing the necessary regulatory instruments for formalizing relations between owners of traditional knowledge and those who seek to access and use it.

For the implementation of a system of rules, that will make possible to actually access and share the benefits related to traditional knowledge, it is necessary to provide by law an institution that will be in charge of the administration. This institution should consist of representatives from scientific research, academics and communities possessors of traditional knowledges.

4. Conclusions

-The adherence of Albania to Nagoya Protocol requires the development of a legal framework regarding Access and Benefit Sharing Related to Animal Genetic Resources. The current legislation contains only few elements dealing with such issues.

-The EU experience and those of different countries of the world shows that in order to have a successful legislative process, it should address simultaneously all four areas of action of Nagoya Protocol

-In order to enable access and benefit sharing related to Animal Genetic Resources and Traditional Knowledge the primary and secondary Albanian legislation must address issues related to: (i) the right of ownership over them, (ii) contractual relations between parties, owners and users, (iii) implementing and controlling institutions, (iv) rights and duties over conservation, development and sustainable use of animal Traditional Knowledge and Genetic Resources.

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