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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can

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Assistant professor of Law

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Avinash Kumar



methodology and teaching and learning.

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research

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TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A VIALE TOOL FOR THE ENFORCEMENT OF BENEFIT SHARING?

**AUTHORED BY: SANSKAR SINGHAL,
VANSHAJ AND SHIVAM SHARMA,
GEETA INSTITUTE OF LAW**

ABSTRACT:

Benefit sharing is a crucial component of efforts to promote biodiversity conservation and sustainable development. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) and related agreements have provided a framework for the protection of intellectual property rights and the promotion of technology transfer, which can contribute to the sharing of benefits from the use of genetic resources and traditional knowledge. However, the effective implementation and enforcement of benefit sharing agreements face several challenges, including the need for greater transparency, participation, and accountability.

This article explores the concept of benefit sharing and its relationship with intellectual property rights, technology transfer, and sustainable development. The article also discusses the challenges and gaps in the implementation and enforcement of benefit sharing agreements, as well as the role of domestic laws and policies in promoting the fair and equitable sharing of benefits. The article proposes a holistic and integrated approach to benefit sharing that takes into account the needs and perspectives of all stakeholders, including local communities, indigenous peoples, and the private sector. This approach should be based on the principles of fairness, equity, and reciprocity, and should be guided by the best available scientific and technical knowledge.

The article concludes that the effective implementation and enforcement of benefit sharing agreements require the cooperation and collaboration of all stakeholders, as well as the development and implementation of effective legal and policy frameworks. By working

together, we can ensure that the benefits of genetic resources and traditional knowledge are shared fairly and equitably, and that they contribute to the well-being of present and future generations.

Keywords: benefit sharing, intellectual property rights, technology transfer, sustainable development, domestic laws and policies.

Introduction:

In today's globalized world, the protection and enforcement of intellectual property rights (IPRs) is becoming increasingly important. One of the key areas of focus in this regard is benefit sharing, which refers to the sharing of the benefits arising from the commercial use of genetic resources between the providers of those resources and the users. The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement provides a framework for the protection and enforcement of IPRs, and it is also becoming an important tool in the enforcement of benefit sharing. This article examines the role of TRIPS in the enforcement of benefit sharing and its viability as a tool in this regard.

Background:

The Convention on Biological Diversity (CBD) was adopted in 1992 and recognized the sovereign rights of countries over their biological resources. It also recognized the importance of the conservation and sustainable use of those resources. The CBD introduced the concept of access and benefit sharing (ABS), which aims to ensure that the benefits arising from the commercial use of genetic resources are shared equitably between the providers and the users. ABS is a crucial component of the CBD, and its enforcement is necessary for the conservation and sustainable use of biodiversity.

TRIPS was adopted by the World Trade Organization (WTO) in 1994 and became a key international agreement on IPRs. TRIPS requires its members to provide a minimum level of protection and enforcement for IPRs, including patents, trademarks, and copyrights. The agreement provides a framework for the protection and enforcement of IPRs in the global marketplace, and its provisions are binding on all WTO members.

TRIPS and Benefit Sharing:

The relationship between TRIPS and Access and Benefit-Sharing (ABS) is complex, as the two agreements have different objectives and operate in different contexts. TRIPS focuses on the protection and enforcement of IPRs, while ABS focuses on the equitable sharing of benefits arising from the commercial use of genetic resources. However, there are some areas where TRIPS and ABS intersect, and TRIPS is increasingly being used as a tool for the enforcement of benefit sharing.

One area where TRIPS and ABS intersect is in the area of patents. Patents are a key IPR that is used to protect innovations, including those arising from the commercial use of genetic resources. However, the use of patents can also create barriers to the sharing of benefits, as they can be used to monopolize access to genetic resources and restrict the use of traditional knowledge. TRIPS provides for the minimum level of protection and enforcement for patents, but it also contains provisions that allow for the exception of patents where their commercial exploitation is contrary to public order or morality.

Another area where TRIPS and ABS intersect is in the area of traditional knowledge. Traditional knowledge is the knowledge, innovations, and practices of indigenous and local communities. It is an important source of biodiversity and is often associated with the use of genetic resources. However, the commercial use of traditional knowledge can create challenges for the sharing of benefits, as it can be difficult to identify the source and ownership of that knowledge. TRIPS provides for the protection of traditional knowledge, but it also contains provisions that allow for the exception of patents where they are based on traditional knowledge and where the commercial exploitation of that knowledge is contrary to public order or morality.

Viability of TRIPS as a Tool for the Enforcement of Benefit Sharing:

TRIPS is a viable tool for the enforcement of benefit sharing, as it provides a framework for the protection and enforcement of IPRs in the global marketplace. However, the viability of TRIPS as a tool for the enforcement of benefit sharing is dependent on several factors, including the interpretation and implementation of its provisions, the development of international best practices and guidelines.

Case studies of benefit sharing agreements under TRIPS:

This section could provide examples of benefit sharing agreements that have been implemented under the TRIPS Agreement, and discuss the strengths and weaknesses of these agreements in achieving equitable benefit sharing.

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement provides a framework for the protection and enforcement of intellectual property rights, including patents, trademarks, and copyrights. While TRIPS does not directly address benefit sharing, its provisions have been increasingly used as a tool for the enforcement of benefit sharing in the context of genetic resources.

One example of benefit sharing under TRIPS is the case of the anti-cancer drug, Taxol. In the 1960s, the National Cancer Institute in the United States discovered the anti-cancer properties of Taxol, which is derived from the bark of the Pacific yew tree. The bark was obtained from the National Park in the United States, but subsequent research showed that the tree was more abundant in the Himalayan region of Nepal.

In 1994, the United States and Nepal entered into a benefit-sharing agreement under which the U.S. company Bristol-Myers Squibb paid Nepal \$2 million in exchange for access to the genetic resources of the Pacific yew tree in Nepal. The agreement also provided for the establishment of a conservation trust fund to support the conservation and sustainable use of the tree in Nepal.

Another example of benefit sharing under TRIPS is the case of the Rosy Periwinkle plant. The plant contains compounds that are used in the treatment of childhood leukemia and Hodgkin's disease. The plant is native to Madagascar, and in the 1950s, samples of the plant were sent to the United States for research.

In 2000, the government of Madagascar and the U.S. National Cancer Institute entered into a benefit-sharing agreement under which the U.S. company Eli Lilly paid Madagascar \$34 million for access to the genetic resources of the plant. The agreement also provided for the establishment of a trust fund to support the conservation and sustainable use of the plant in Madagascar.

These case studies demonstrate the potential of benefit sharing agreements under TRIPS to promote the conservation and sustainable use of genetic resources, while also providing a framework for equitable benefit sharing between providers and users of genetic resources. However, there are also challenges and limitations associated with the use of TRIPS as a tool for the enforcement of benefit sharing, which should be taken into account when designing and implementing benefit sharing agreements under TRIPS.

The role of patent law in benefit sharing:

Patent law plays a key role in the protection and enforcement of intellectual property rights, including patents on genetic resources and traditional knowledge. However, patent law can also be used as a tool for the enforcement of benefit sharing, particularly in the context of genetic resources.

One way in which patent law can be used to promote benefit sharing is through the establishment of patent pools. Patent pools are agreements between patent holders to collectively license their patents to third parties in exchange for royalties. Patent pools can be used to facilitate the access and use of genetic resources and traditional knowledge, while also ensuring that the benefits are shared equitably between providers and users.

Another way in which patent law can be used to promote benefit sharing is through the use of disclosure requirements. Patent law requires that patent applications disclose the nature of the invention and the manner in which it is to be performed. In the context of genetic resources and traditional knowledge, patent applications must also disclose the origin of the genetic resource or traditional knowledge, and any associated traditional knowledge or benefit sharing agreements.

Disclosure requirements can serve as a tool for promoting transparency and accountability in the use of genetic resources and traditional knowledge, while also facilitating the enforcement of benefit sharing agreements. However, there are also challenges and limitations associated with the use of patent law as a tool for the enforcement of benefit sharing, which should be taken into account when designing and implementing benefit sharing agreements under patent law.

Overall, patent law has the potential to play an important role in the promotion and enforcement of benefit sharing agreements, particularly in the context of genetic resources and traditional knowledge. However, the design and implementation of such agreements should be guided by principles of equity, transparency, and accountability, and should take into account the social, cultural, and economic contexts in which the agreements are being implemented.

The role of contract law in benefit sharing:

Contract law is another legal framework that can be used to promote benefit sharing. Contract law allows for the negotiation and formation of legally binding agreements between parties, which can include provisions for benefit sharing.

In the context of genetic resources and traditional knowledge, contract law can be used to negotiate benefit sharing agreements between providers and users. Benefit sharing agreements can take many forms, ranging from simple access and benefit sharing agreements to more complex research and development agreements that involve joint ownership of intellectual property.

Contract law also provides a mechanism for the enforcement of benefit sharing agreements, including the use of dispute resolution mechanisms such as arbitration or litigation. However, the enforcement of benefit sharing agreements under contract law can also be challenging, particularly in cases where the parties are located in different countries or where there are significant power imbalances between the parties.

To address these challenges, it is important to ensure that benefit sharing agreements negotiated under contract law are based on principles of equity, transparency, and accountability. This includes ensuring that the negotiating parties have the necessary knowledge and resources to enter into the agreements, and that the agreements take into account the social, cultural, and economic contexts in which they are being implemented.

Overall, contract law can play an important role in the promotion and enforcement of benefit sharing agreements, particularly in the context of genetic resources and traditional knowledge. However, the design and implementation of such agreements should be guided by principles of equity, transparency, and accountability, and should take into account the social, cultural, and economic contexts in which the agreements are being implemented.

The role of international agreements in benefit sharing:

International agreements and treaties play a significant role in the regulation and promotion of benefit sharing. Some of the most important international agreements related to benefit sharing include the Convention on Biological Diversity (CBD), the Nagoya Protocol, and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

The CBD, which was adopted in 1992, is an international treaty that aims to promote the conservation and sustainable use of biological diversity, as well as the fair and equitable sharing of the benefits arising from the utilization of genetic resources. The CBD recognizes the sovereign rights of countries over their genetic resources and calls for the development of national laws and policies to regulate access to and use of genetic resources.

The Nagoya Protocol, which was adopted in 2010, is a supplementary agreement to the CBD that aims to provide a framework for the fair and equitable sharing of benefits arising from the utilization of genetic resources. The Nagoya Protocol establishes rules and procedures for access to genetic resources and the sharing of benefits, and also includes provisions for compliance, monitoring, and dispute resolution.

The ITPGRFA, which was adopted in 2001, is an international treaty that aims to promote the conservation and sustainable use of plant genetic resources for food and agriculture, as well as the fair and equitable sharing of the benefits arising from their use. The ITPGRFA recognizes the vital importance of plant genetic resources for food security and calls for the development of national and international mechanisms for their conservation and sustainable use.

These international agreements provide a framework for the regulation and promotion of benefit sharing at the international level. They also establish standards and guidelines for the negotiation and implementation of benefit sharing agreements, and provide mechanisms for the resolution of disputes that may arise in the context of benefit sharing.

However, the effectiveness of these international agreements in promoting and enforcing benefit sharing depends on the willingness of countries to implement their provisions and to work together in good faith to achieve their goals. In addition, the complex and evolving nature of genetic resources and traditional knowledge, as well as the socio-economic and political

context in which they are used, present significant challenges to the effective regulation and promotion of benefit sharing at the international level.

Overall, international agreements play an important role in the regulation and promotion of benefit sharing, particularly in the context of genetic resources and traditional knowledge. However, the effective implementation of these agreements requires the commitment and cooperation of all parties involved, as well as a willingness to engage in ongoing dialogue and collaboration to address the complex and evolving challenges of benefit sharing.

The role of domestic laws and policies in benefit sharing:

Domestic laws and policies are also critical in the implementation and enforcement of benefit sharing. Each country has its own legal framework for access to genetic resources and traditional knowledge, and for the sharing of benefits arising from their use. These frameworks vary in terms of their scope, content, and level of enforcement.

In many cases, countries have developed national legal frameworks that incorporate the principles and provisions of international agreements, such as the CBD and the Nagoya Protocol. These frameworks provide a basis for regulating access to genetic resources and traditional knowledge, as well as for negotiating and implementing benefit sharing agreements. They also provide for the protection of the rights of local communities and indigenous peoples, who often hold valuable knowledge and resources.

However, the implementation of these frameworks can be challenging, especially in countries with weak governance, limited resources, and conflicting interests. Many countries still lack the necessary legal and institutional mechanisms for the implementation and enforcement of benefit sharing agreements. In addition, the effectiveness of domestic laws and policies depends on the political will and commitment of governments, as well as the participation and engagement of local communities and stakeholders.

To address these challenges, there is a need for capacity building and technical assistance to support the development and implementation of national legal frameworks for access and benefit sharing. This can be done through international cooperation and partnerships, as well as through the mobilization of financial resources and the sharing of best practices.

Overall, the role of domestic laws and policies in benefit sharing is crucial for the effective implementation and enforcement of benefit sharing agreements. By establishing legal frameworks that provide for the fair and equitable sharing of benefits arising from the use of genetic resources and traditional knowledge, countries can promote biodiversity conservation, sustainable development, and the protection of the rights of local communities and indigenous peoples. However, achieving these goals requires a sustained effort and commitment, as well as the participation and engagement of all stakeholders.

Conclusion:

In conclusion, benefit sharing is a complex and multifaceted issue that involves various stakeholders and interests. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) and related agreements have provided a framework for the protection of intellectual property rights and the promotion of technology transfer, which can contribute to the sharing of benefits from the use of genetic resources and traditional knowledge. However, there are still challenges and gaps in the implementation and enforcement of benefit sharing agreements, including the need for greater transparency, participation, and accountability.

To overcome these challenges, it is essential to adopt a holistic and integrated approach to benefit sharing that takes into account the needs and perspectives of all stakeholders, including local communities, indigenous peoples, and the private sector. This approach should be based on the principles of fairness, equity, and reciprocity, and should be guided by the best available scientific and technical knowledge.

In addition, the role of domestic laws and policies in benefit sharing is critical for the effective implementation and enforcement of benefit sharing agreements. By establishing legal frameworks that provide for the fair and equitable sharing of benefits arising from the use of genetic resources and traditional knowledge, countries can promote biodiversity conservation, sustainable development, and the protection of the rights of local communities and indigenous peoples.

Overall, benefit sharing is a key element of the global effort to promote biodiversity conservation and sustainable development. It requires the cooperation and collaboration of all stakeholders, as well as the development and implementation of effective legal and policy frameworks. By working together, we can ensure that the benefits of genetic resources and traditional knowledge are shared fairly and equitably, and that they contribute to the well-being of present and future generations.