



International Chamber of Commerce

The world business organization



Prepared by the Task Force on
CBD Access and Benefit Sharing

Business views on a Global Multilateral Benefit-Sharing Mechanism (Article 10, Nagoya Protocol)

Highlights

- Transboundary situations
- Where granting PIC is not possible
- Where obtaining PIC is not possible
- Need for a GMBSM not shown

Business views on a Global Multilateral Benefit-Sharing Mechanism

(Article 10, Nagoya Protocol)

Introduction

Article 10 of the Nagoya Protocol (hereinafter referred to as the Protocol) calls on Contracting Parties to consider the need for and modalities of a Global Multilateral Benefit-Sharing Mechanism (hereinafter referred to as “GMBSM”). The GMBSM is meant to possibly address the sharing of benefits in three situations:

1. where the genetic resources and traditional knowledge associated with genetic resources occur in transboundary situations; or
2. where it is not possible to grant prior informed consent in respect of the genetic resources and traditional knowledge associated with genetic resources; or
3. where it is not possible to obtain prior informed consent in respect of the genetic resources and traditional knowledge associated with genetic resources.

ICC contends that there is no need for a GMBSM. This assessment is based largely on two considerations:

- transboundary cooperation is already covered under Article 11 of the Protocol; and
- in cases of both in situ and ex situ collections, prior informed consent from a legitimate provider should always be possible for genetic resources and traditional knowledge associated with genetic resources that fall under the scope of the Protocol (i.e., those genetic resources acquired after the entry-into-force of the Protocol).

Furthermore, given that the Protocol recognizes other international instruments like the International Treaty on Plant Genetic Resources for Food and Agriculture (IT) (see Article 4(4)), care must be taken that any mechanisms considered in relation to the implementation of the Protocol in no way interfere with, or run counter to, the Multilateral System in place under the IT.

Views on the need for a GMBSM

1. Where genetic resources and traditional knowledge associated with genetic resources occur in transboundary situations

Article 11 of the Protocol already sets out provisions dealing with cases of transboundary situations. That provision refers to in situ genetic resources. Article 10 of the Protocol on the GMBSM does not specify whether it only covers in situ resources, or if ex situ genetic resources are also covered. However, understanding of the term “transboundary situations” as used during the negotiations of the Protocol would exclude in our mind ex situ genetic resources from the application of Article 10. “Transboundary situations” address a territory which is unique with respect to its ecological characteristics but extends over at least two neighbouring countries. Accordingly, there is no need to address this issue also under Article 10 by creating a GMBSM for this specific purpose.

2. Where it is not possible to grant PIC in respect of the genetic resources and traditional knowledge associated with genetic resources

ICC cannot foresee a situation where legally binding PIC could not be granted for access in compliance with the Protocol once it is ratified.

- **Where the genetic resource and/or traditional knowledge associated with genetic resources was accessed prior to 1993 (i.e., prior to the CBD) or otherwise prior to the effective date of the Protocol for a particular jurisdiction**

Setting up a benefit-sharing mechanism in cases involving pre-CBD or pre-Protocol transfers implies that the GMBSM would provide for obligations retroactively. However, neither the CBD nor the Protocol provide for implementing ABS retroactively. In addition, Article 28 (concerning “non-retroactivity of treaties”) of the Vienna Convention on the Law of Treaties confirms that:

“[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

Thus, consideration of a mechanism that would provide for retroactive application of the obligations would be inconsistent with the scope of the Protocol. Furthermore, legislation defining obligations retroactively is contrary to the basic principle of legal certainty and should be avoided.

- **Where the genetic resource and/or traditional knowledge associated with genetic resources is accessed from a country with no ABS legislation in place**

This can happen where a country has not yet implemented the requirements of the CBD into their national law. In such a case, where the country at issue might need assistance in setting up a national framework for ensuring benefit-sharing, this should be done via capacity building measures and not via an international “back-up” mechanism.

CBD Parties also have the discretion to decide not to set up any ABS obligations for genetic resources under their sovereignty. Such decisions should be respected by other Parties, and this discretionary power should not be undermined by a “back-up” benefit-sharing mechanism.

- **Where the genetic resource and/or traditional knowledge associated with genetic resources was accessed without PIC or MAT and reside in an *ex situ* collection**

National laws often address the issue of ABS for ex-situ collections, and a GMBSM would only interfere with the principle of national sovereignty (Article 15 of the CBD).

On the other hand, it is also important to keep in mind that for plant genetic resources for food and agriculture a Multilateral System already exists as provided for in the IT (see above).

3. Where it is not possible to obtain PIC in respect of the genetic resources and traditional knowledge associated with genetic resources

One situation in which ICC foresees that it may not be possible to obtain PIC is the situation where the genetic resources and traditional knowledge associated with genetic resources lie outside the jurisdiction of a Contracting Party (international areas like Antarctica or international waters).

According to Article 3 of the Protocol, the provisions of the Protocol apply to genetic resources within the scope of Article 15 of the CBD, which reads: “*Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation*”. Bearing this in mind, it is understood that the aim of the GMBSM is, in a way, to extend the scope of a harmonized benefit-sharing regime beyond Article 15 CBD, potentially compromising the sovereign rights of States over their natural resources.

Article 3 of the CBD (Principle) suggests that States have the sovereign right to exploit their own resources and carry responsibility for activities within their jurisdictions. Also Article 4 of the CBD (Jurisdictional Scope) states that in the case of components of biodiversity, the CBD applies to the States in areas within the limits of their national jurisdiction. Therefore, Contracting Parties should not set up rules on genetic resources which lie outside their jurisdictions via a GMBSM. If such rules are to be set up it should happen via other specialized international instruments. However, negotiation of such a benefit-sharing system for genetic resources obtained in international areas would be exceedingly complex, challenging to administer and require that all nations of the world become signatories.

Conclusion

Having considered all the above possible scenarios, we conclude that none of the identified situations indicate a need for a GMBSM and, accordingly, any further consideration of its modalities. Further consideration of remedies that would contribute to the alleviation of the concerns underlying proposals for such a mechanism (e.g., capacity building to assist those countries that intend to, but have not yet been able to, implement prospective ABS regulations) may be warranted, but should be fully consistent with the scope of the Protocol and the principles of legal certainty and transparency.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.



International Chamber of Commerce

The world business organization

Policy and Business Practices

38 Cours Albert 1er, 75008 Paris, France

Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 28 59

E-mail icc@iccwbo.org Website www.iccwbo.org