GLOBAL MULTILATERAL BENEFIT-SHARING MECHANISM

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Introduction

Article 10 of the Nagoya 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: (i) where the genetic resources occur in transboundary situations; (ii) where it is not possible to grant prior informed consent in respect of the genetic resources; (iii) where it is not possible to obtain prior informed consent in respect of the genetic resources.

According to Article 10 of the Nagoya Protocol Contracting Parties are therefore given two tasks: (1) consider the need for a GMBSM and (2) consider the modalities of a GMBSM. Logically the second step – to consider modalities - only has to be carried out if a need has been identified. Therefore the present paper focuses exclusively on the question of a need for a GMBSM and not its modalities.

Position of ESA regarding a need for a GMBSM

1. Where genetic resources occur in transboundary situations

Article 11 of the Nagoya Protocol sets out provisions specifically with the aim of dealing with cases of transboundary situations. That provision refers to in situ genetic resources in transboundary situations whereas Article 10 of the Nagoya Protocol on the GMBSM seems to cover both in situ and ex situ genetic materials. It is clear that for in situ genetic resources found in transboundary situations a specific provision of the Nagoya Protocol already provides a solution and the same solution could easily be applied for ex situ genetic materials in transboundary situations. Having that provision already in Article 11 of the Protocol there is no need to set up yet another, additional benefit-sharing mechanism.

2. Where it is not possible to grant PIC in respect of the genetic resources

The following situations can be identified:

- Where the material was accessed pre-CBD: the idea of setting up a benefit-sharing mechanism in such cases would imply that the GMBSM would provide for obligations retroactively. In this context it has to be underlined that neither the CBD nor the Nagoya

Protocol allow retroactivity not to mention that any kind of legislation defining obligations retroactively is contrary to the basic principle of legal certainty and should be avoided.

- Where the origin of the material is not known to the accessing / utilizing party: In practice this scenario cannot happen in respect of plant genetic material as the source the user received the material from will always be considered as the origin. Such situations are already dealt with in the Nagoya Protocol as in such a case benefit-sharing will be provided to the country providing the genetic resources in line with the provisions of Article 5(1) of the Protocol.
- Where the material is accessed form a country where there is no ABS legislation in place: this can happen where a country has not yet adopted ABS legislation which should be remedied by the country concerned by fulfilling its obligation under the Nagoya Protocol (Article 5) and not by an additional, back-up mechanism. Since under the CBD Contracting Parties have the discretion to decide on ABS rules applicable to genetic resources under their sovereignty a country can also decide not to set any ABS obligations. When a Contracting Party takes such a decision it is because the country is convinced that benefit-sharing will take place through the results of R&D on genetic resources. Such decisions should be respected by other Contracting Parties and the discretionary power of Contracting Parties should not be practically nullified by a back-up benefit-sharing mechanism.

3. Where it is not possible to obtain PIC in respect of the genetic resources

Situations where it is not possible to obtain PIC refer to cases where the genetic material lies outside the jurisdiction of Contracting Parties. According to Article 3 of the Nagoya Protocol the provisions of the Nagoya Protocol apply to genetic resources within the scope of Article 15 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 Article 10 of the Nagoya Protocol is, in a way, to extend the scope of a harmonized benefit-sharing regime beyond Article 15 CBD. Article 3 of the CDB (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 convention 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 very specialized international instruments.

Conclusion

Having considered all the above possible scenarios, we conclude that in none of the identified situations is there a need for a GMBSM.

As regards plant genetic resources for food and agriculture it has to be underlined that a multilateral system for access and benefit-sharing already exists as set up by the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (PGRFA). That multilateral system covers all PGRFA listed in Annex I to the International Treaty and which is under the control of the Parties to the International Treaty. Article 4(4) of the Nagoya Protocol specifically provides that the Protocol does not apply where specific international ABS mechanisms apply which is the case for PGRFA. Therefore, plant genetic resources and all plant breeding activities should in any case be kept out of any other benefit-sharing mechanism and related negotiations.