Information Brief

Compliance with Mutually Agreed Terms

Article 18 of the Nagoya Protocol on Access and Benefit-Sharing

Introduction

Article 18 of the Nagoya Protocol, together with Articles 15, 16 and 17, completes the set of provisions covering user compliance measures in the Protocol. However, Article 18 refers to a different issue of compliance than Articles 15-17. It specifically aims to promote the enforcement of mutually agreed terms (MAT) between individual users and providers of genetic resources and/or traditional knowledge associated with such resources (i.e. contractual obligations), but does not address the enforcement of domestic access and benefit-sharing (ABS) legislation or regulatory requirements. Its focus is therefore situations of "misuse" and not "misappropriation" of genetic resources and/or associated traditional knowledge.

Article 18 reflects that relationships of contractual nature where private parties are involved fall in the domain of private international law when one party resides in a foreign country. Such relationships are usually not dealt with through a public international law instrument, such as the Nagoya Protocol, as they aim to rule relationships between States.

Understanding Article 18

According to Article 18(1) of the Nagoya Protocol, each Party is obliged to encourage users and providers to determine the way a dispute would be resolved in case it arises in relation to the implementation of MAT. Paragraph 1 contains a list of issues related to dispute resolution to be included in MAT as a whole or separately.

- Jurisdiction to which a dispute resolution process should be subjected (Subparagraph (a)): This refers to the authority of a particular country and court to administer the dispute resolution process. In the case of contractual disputes, a general rule is that the defendant shall be prosecuted in the courts of its place of residence. Furthermore, it should be noted that parties to the agreement may wish to bring an action for breach of the contract in the jurisdiction of the user, in order to avoid the issue of recognition and enforcement of judgments.
- Applicable law (Subparagraph (b)): This refers to the law of a particular country that will govern the dispute. It should be recognized that where the parties of an agreement have not selected a governing law and it cannot be inferred from the circumstances, common law courts will apply the system of law with which the transaction has its closest and most real connection or "the proper law of the contract".
- Options for alternative dispute resolution, such as mediation or arbitration (Subparagraph (c)): This refers to processes and techniques for resolving disputes outside of the judicial process which can be less costly and time-consuming than a formal litigation. One option is arbitration where the two disputing parties select an impartial arbitrator, and agree to comply

with the arbitrator's decision, which is usually not re-examined by courts. Another option is mediation where the conflicting parties select a mediator whose role is to identify points of agreement that help the disputing parties agree on a fair result.

It should be recognized that Parties are only obliged to "encourage" users and providers to address the issue of dispute resolution in MAT, as "forcing" them to do so would contradict the principle of contractual freedom which applies in MAT negotiations. At the same time, it should be noted that it is already common practice for contractual arrangements to regulate the way in which a dispute should be settled, and thus to include appropriate dispute settlement clauses agreed by the contracting parties.

Article 18(2) establishes an obligation for each Party to ensure at the domestic level that if a dispute arises from MAT, recourse is available under its legal system. In practice, the availability of recourse to courts will depend on the chosen jurisdiction and applicable law, as established in MAT and accepted by the named court. In the absence of such contractual clauses, the opportunities to seek recourse will be determined by private international law rules of the country where the legal action shall be taken. In this context, it is important to note that Paragraph 2 does not require a Party to run counter its national legislation in order to comply with this obligation. At the same time, the provision can be understood as establishing a duty for Parties to provide for judicial remedies, including access to their courts and tribunals to nationals of other Parties.

Article 18(3) establishes an obligation for each Party to adopt measures that are related to:

- Access to justice (Subparagraph (a)): The term "access to justice" is not defined in the Nagoya Protocol, which raises the question whether to interpret it in a narrow sense (limited to procedural matters), or in a broad sense (for example considering also legal aid). A number of international instruments pertaining to access to justice can be useful in the interpretation of the term, such as the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters; the 1980 Hague Convention on International Access to Justice; the 1992 Rio Declaration on Environment and Development; the 2002 New Delhi Declaration of Principles of International Law relating to Sustainable Development; or the 2010 UNEP Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters.
- Use of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards (Subparagraph (b)): This refers to the general reluctance of States to accept (i.e. recognize and enforce) judgments by courts of other States. One mechanism that may be used to implement this provision is the 2005 Convention on Choice of Court Agreements adopted in the framework of The Hague Conference on Private International Law which provides for the recognition and enforcement of judgments, with an option for States to agree on a reciprocal basis to recognize judgments.

Finally Article 18(4) provides a review clause which previews Article 31 of the Nagoya Protocol. It states that the effectiveness of Article 18 has to be reviewed when the Conference of the Parties serving as the meeting of the Parties evaluates the overall effectiveness of the Protocol four years after its entry into force. The provision therefore does not contain a specific obligation for individual

Parties.

For more information, please contact:

Thomas Greiber
Senior Legal Officer
Environmental Law Programme
IUCN Environmental Law Centre
thomas.greiber@iucn.org

IUCN Environmental Law Centre
Godesberger Allee 108-112
D-53175 Bonn, Germany
www.iucn.org/law

Sonia Peña Moreno
Senior Policy Officer- Biodiversity
Global Policy Unit
IUCN HQ
sonia.pena-moreno@iucn.org

IUCN World Headquarters
Rue Mauverney 28
1196 Gland, Switzerland
Tel: +41 22 999 0000
www.iucn.org

The information contained in this Information Brief is based on Greiber, T. and Peña Moreno, S. et al. 2012. *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing*. IUCN, Gland, Switzerland.

This Paper has been prepared in the framework of the IUCN-UNEP/GEF Regional Project "Strengthening the implementation of ABS regimes in Latin America and the Caribbean" executed by IUCN-Sur and implemented by UNEP and is available at: www.adb.portalces.org

---