

The critical role of governments in benefit sharing

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Dominic Muyldermans and Frank Michiels outline the key role governments can play in making a new multilateral mechanism for benefit sharing a success

The fair and equitable sharing of benefits from using biodiversity is one of the key objectives of the Convention on Biological Diversity (CBD, 1992).⁽¹⁾ In 2010, a supplementary agreement to the CBD was adopted, the 'Nagoya Protocol on Access and Benefit-sharing',⁽²⁾ which aimed to establish more concrete guidelines for access to genetic resources and the sharing of benefits. Due to a continued lack of meaningful benefit sharing and the shifting nature of biological research and innovation, moving away from access to physical genetic resources towards DNA sequences accessed in public, open-access databases or generated on the computer, there have been increasing calls for benefit sharing from the use of 'Digital Sequence Information' (DSI). As a result, at COP15 at the end of 2022, the Parties decided to establish, as part of the Kunming-Montreal Global Biodiversity Framework,⁽³⁾ a multilateral mechanism for benefit-sharing from the use of DSI, including a global fund.⁽⁴⁾ How this mechanism will function and be implemented has yet to be determined. This article aims to emphasise the key role governments can play in making this new mechanism a success.

Mandatory or voluntary?

One unresolved issue in the international debate is whether the new mechanism should be mandatory or voluntary for companies or users of biodiversity in general. A voluntary system requires a compelling incentive to ensure broad participation and substantive contributions. However, not all companies depend, and/or depend to the same extent, on DSI (or biodiversity), which will restrict the base of possible contributors. In addition, for most companies, climate change obligations are deemed more relevant, pressing, and actionable, reducing the perceived need to act on biodiversity and likely impacting the willingness to contribute to a voluntary scheme. Finally, value chains are complex and may involve entities participating or not in a voluntary scheme – but what would this mean in terms of legal certainty for all players along the value chain?

If, on the other hand, governments implement the multilateral benefit-sharing mechanism, this offers the promise of legal certainty, a level-playing field for all commercial sectors and entities, and the ability for governments to define a broad base of contributors and a predictable stream of benefits to be shared. In addition, governments have the institutional capacity to make participation mandatory for everyone in scope and to monitor and enforce compliance through their national laws, all factors that should contribute to the success of the new mechanism.

The role of governments in leveraging synergies and safeguarding a comprehensive approach

The CBD and the fair and equitable sharing of benefits arising from the utilisation of biodiversity are not stand-alone issues but are closely intertwined with a multitude of other matters. By playing an active part and ensuring a comprehensive approach considering all relevant elements, governments can make sure that:

- (i) The new multilateral benefit-sharing mechanism best supports all three objectives of the CBD. It is of paramount importance that any mechanism not only addresses benefit sharing as such but also reinforces sustainable use, which is essential for value creation and biodiversity conservation;
- (ii) The new multilateral benefit-sharing mechanism fully complies with all design criteria as listed in the COP15 decision; ⁽⁴⁾
- (iii) The synergies between different international treaties are secured optimally. This is especially relevant for the CBD and the UN Framework Convention on Climate Change (UNFCCC) because of the nexus between climate change and biodiversity loss;
- (iv) Consistency is safeguarded between the CBD and specialized benefit-sharing instruments such as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the Pandemic Influenza Preparedness (PIP) framework, the forthcoming Pandemic Accord, and the UN Convention on the Law of the Sea;
- (v) The new multilateral benefit-sharing mechanism supports innovation both domestically and internationally to address the global socioeconomic challenges while keeping the administrative burden proportionate;
- (vi) The new multilateral benefit-sharing mechanism is fully compatible with open access to data in public repositories such as the global DNA sequence databases; open-access policies are seen as powerful accelerators of innovation;
- (vii) Benefit sharing on the use of DSI and genetic resources is optimally aligned and/or harmonized, ideally by a voluntary opt-in for countries to include genetic resources in the scope of the multilateral benefit-sharing mechanism. Such harmonization would offer opportunities for addressing some of the shortcomings of the current implementation of the Nagoya Protocol. It would reduce administrative burden and increase legal certainty for both providers and users of biodiversity.

Speed and simplicity are key

Without a clear commitment and timely action, national laws on Access and Benefit Sharing (ABS) will continue to proliferate and increasingly include DSI in the scope of benefit-sharing obligations – which would further increase complexity and legal uncertainty. To prevent such a course of action and to achieve more effective benefit-sharing, we believe governments play an essential role – both on the international and national level – in the timely implementation and enforcement of a multilateral benefit-sharing mechanism that generates a meaningful stream of funding and thereby helps to build trust. One of the current proposals ⁽⁵⁾ is that governments would commit to making

contributions to the multilateral benefit-sharing fund on behalf of their domestic entities to kick-start the new mechanism as quickly as possible and with the option to reclaim the funds from entities active on their national territory.

In addition, to reach a timely agreement, we feel that governments need to strive for simplicity in the design of the new multilateral benefit-sharing mechanism: simple to negotiate, simple to understand, simple to implement, and simple to monitor and enforce.

... as is legal certainty!

Experience with the Nagoya Protocol and with national ABS laws has shown that legal uncertainty and disproportionate administrative burdens discourage users from accessing biodiversity, which undermines the creation of value and, in turn, compromises the sharing of benefits. ⁽⁶⁾ We thus encourage governments to use their rule-making powers to create legal certainty and a level-playing field for all commercial sectors and entities through a multilateral benefit-sharing mechanism that promotes the conservation and sustainable use of biodiversity as well as innovation.

Get started

Countries have sovereign rights over their genetic resources and a right to make DSI subject to benefit sharing. They have a choice between (a) creating additional requirements and thereby increasing complexity and (b) replacing existing rights with a multilateral mechanism that covers all ABS requirements. This choice applies to DSI, physical genetic resources, and biodiversity in general. Governments can also align among themselves to create a first-mover group – a so-called coalition of the willing, which can be a nucleus with a proven workable model. It would represent a de facto pilot system that attracts additional countries and can snowball to eventually include most countries.

1. Convention on Biological Diversity (1992):
<https://www.cbd.int/doc/legal/cbd-en.pdf>
2. Nagoya Protocol (2011):
<https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>
3. Kunming-Montreal Global Biodiversity Framework:
<https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>
4. Decision 15/9 on digital sequence information on genetic resources:
<https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-09-en.pdf>
5. CGIAR position paper on digital sequence information:
<https://alliancebioversityciat.org/publications-data/digital-sequence-information-changing-way-genetic-resources-are-used-agricultural>
6. Michiels et al. (2022) Facing the harsh reality of Access and Benefit Sharing (ABS) legislation: An industry perspective.
<https://doi.org/10.3390/su14010277>

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