



ASEAN CENTRE
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POLICY BRIEF

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Understanding the Key Elements of Access and Benefit Sharing Legal Framework

Background

Currently, there are several international legal instruments that promote access and benefit sharing¹ (ABS). The main instruments are the Convention on Biological Diversity (CBD, 1992), Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization (2004), and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010).

Access and benefit sharing, being one of the objectives of the CBD, is important to the ASEAN region as it houses most of the world's biological diversity. However, there is a general feeling that the ASEAN Member States do not get a fair share of the benefits derived from the use of their resources for the development of products such as high yielding crop varieties, pharmaceuticals, and cosmetics, among others. This system reduces the incentive for the world's biologically richer but economically poorer countries to conserve and sustainably use their resources for the ultimate benefit of mankind².

To promote ABS, countries need to have their own national legal instruments focusing on concerns that directly affect sources and users of genetic resources. These include bioprospecting, biopiracy and biotechnology; valuation and ownership issues; intellectual property rights; the principles of prior informed consent (PIC)³, mutually agreed terms (MAT)⁴, traditional knowledge (TK)⁵, indigenous and local communities (ILCs), technology transfer, non-commercial research, and in-situ/ex-situ collections, among others.



What is the problem?

Continuing advances in science and technology has brought into focus the value of biodiversity as an economic resource. A major problem related to the use of biodiversity products is biopiracy, which refers to the unauthorized removal of genetic resources from a source country and the exploitation of indigenous knowledge for a commercially viable purpose where providers are given inappropriate or no compensation. To address biopiracy, both providers and users must be aware of the nature and scope of the problem, including the causes. The scientific community and the policy makers must work together in each step of the process until both genetic resource providers and users fully understand their roles and responsibilities on curbing biopiracy. In the process of making stakeholders understand ABS, it should be emphasized that equitable sharing of benefits does not end in providing monetary compensation to resource providers. Other mechanisms should be put in place.

Capacity building efforts should be directed at strengthening and facilitating the abilities of ILCs to conserve and sustainably use their genetic resources in accord with the protection provided by law. Part of the capacity that needs to be built among ILCs is the establishment of databases to catalogue traditional knowledge. Efforts must also be made to make sure that industries – the principal stakeholder for the commercial development of genetic resources – fully understand their roles and responsibilities on ABS.

Ensuring participation of all relevant sectors will contribute to effective implementation of national regulatory legal frameworks on ABS.

¹ Process of accessing genetic resources found in biodiversity and obtaining a fair and equitable sharing of benefits arising out of their utilization under the CBD. This process is also intended to enable some of the benefits obtained from the use of genetic resources to contribute to the conservation and sustainable use of biodiversity.

² Lal Kurukulasuriya and Nicholas A. Robinson, UNEP International Environmental Law Manual United Nations Environment Programme http://www.unep.org/law/PDF/law_training_Manual.pdf at 187.

³ Permission obtained by the user of a genetic resource from the government or other providers after fully disclosing all the required information that permits access to their genetic resources, and associated traditional knowledge, under mutually agreed terms.

⁴ Conditions and provisions of access and benefit-sharing, among others, negotiated between the user and the provider and involving other relevant stakeholders.

⁵ Content of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices, and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.

What has been done?

The ASEAN Centre for Biodiversity (ACB), through the United Nations Environment Programme-Global Environment Fund-assisted regional project on “Building Capacity for Regionally Harmonized National Processes for Implementing CBD Provisions on Access to Genetic Resources and Sharing of Benefits”, exerts its best efforts to see to it that (1) key stakeholders are equipped with the primary tools in implementing ABS; (2) countries are provided with methods to assist them in implementing their national ABS activities; and (3) capacities of stakeholders developed from previous regional workshops are further boosted. The project guided countries in developing their national roadmaps towards establishing ABS legal frameworks.

Worth noting is the draft ASEAN Framework Agreement on Access and Benefit Sharing (2005) which still needs signature and ratification by the ASEAN Member States. Its complementary nature vis-à-vis the Nagoya Protocol is highlighted in relation to Article 10 (Global Multilateral Benefit Sharing Mechanism) and Article 11 (Transboundary Cooperation). The Framework's other salient provisions include the need for legislative requirements for PIC and MAT; adoption of new technologies and technology transfer; capacity building; establishment of effective and participatory measures for grant of PIC; and establishment of a regional Clearing-House Mechanism (CHM) for ABS information sharing.

Studies have been conducted to determine the extent of application of ABS in the ASEAN region. The Philippines has substantial experience with ABS which resulted in a comprehensive set of measures that generally complies with the Nagoya Protocol. However, the current Philippine legislation needs to be updated in order to fully comply with the new obligations provided under the Nagoya Protocol. Malaysia, on the other hand, has a pending bill before Parliament which seeks to operationalize the Nagoya Protocol. The bill has a novel provision: to ensure that a user within Malaysia does not violate the ABS law of another country, the user is required to secure a permit from the source country of a genetic resource to be used within Malaysia.

What can be done?

For ABS policies to effectively serve their cause, the key elements of an ABS legal framework should be considered. The key elements are the principles of PIC and MAT, TK, and compliance.

In terms of PIC and MAT, governments must decide whether to require PIC for access and use of their genetic resources and of any TK associated with genetic resources. If so, they must establish domestic laws to provide for PIC from the relevant stakeholders, including indigenous and local communities where they are the holders, owners, managers, or custodians of genetic resources or TK associated with genetic resources. MATS must be established and administered by competent national authorities (CNAs).

As the protection of TK varies from country to country depending on national legislation, policy, and practices, it is important to consult with the CNAs when applying this standard⁶.

Compliance pertains to meeting the requirements and obligations of domestic legislative, administrative, or policy measures on access to genetic resources and TK associated with genetic resources. Similarly, compliance means meeting the requirements of domestic laws and administrative or policy measures in which genetic resources and associated TK are utilized. In both cases, compliance also means meeting the requirements and obligations documented in MATs⁷.

Much can be done particularly for countries that wish to control their genetic resources and to align recognition and protection to TK of indigenous peoples and local communities. General awareness on the value of biodiversity should be inculcated in the minds of the citizenry. Thus, mainstreaming of biodiversity is very important as it will develop appreciation of the link between conservation and ABS.

The capacity to implement the key elements of ABS in the legal framework is crucial to biodiversity conservation. There must be clear and in-depth understanding of the principles of PIC, MAT, compliance, and the fair and equitable sharing of benefits from TK associated with genetic resources by indigenous and local communities.

Call for Action

For effective ABS implementation, ASEAN Member States may want to do the following:

1. Pursue in earnest national and local capacity building activities emphasizing stakeholders' in-depth and common understanding of ABS, PIC, MAT, TK, compliance procedures, and inter-agency coordination.
2. Formulate a national ABS legislation preferably with an available ABS model legislation for reference and more specific guidelines on the details of the legislation. Towards the end, the use of roadmap steps would be useful. ABS regulatory regime includes the ABS law, its implementing rules and regulations, implementation guidelines, manuals (considering the technical nature of ABS, clearing-house mechanism, compliance monitoring, tracking, and sanctions).
3. Continue developing guidelines, i.s. “ABS Guidelines for Users”, focusing on the consultation process to inform business/industries, for instance, of their responsibilities on ABS.
4. Ensure an effective partnership and collaboration with the ABS institutional set-up and compliance mechanism adopting the principle of transparency in all steps of the process.
5. Heighten ABS awareness and education using all possible media including television and the Internet.

Sources:

ACB. ASEAN Biodiversity News Magazine. Vol. 10 No. 3. September-December 2011

ACB. Report of the Southeast Asia Training-Workshop on Building Institutional and Stakeholder Capacities on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. 20-23 August 2012, Bangkok, Thailand

ABS Management Tool: Best Practice Standard and Handbook for Implementing Genetic Resource Access and Benefit-Sharing Activities, May 2012

Lal Kurukulasuriya & Nicholas A. Robinson, UNEP International Environmental Law Manual United Nations Environment Programme http://www.unep.org/law/PDF/law_training_Manual.pdf

⁶ Burton, G. and Cabrera J. ABS Management Tool: Best Practice Standard and Handbook for Implementing Genetic Resource Access and Benefit-Sharing Activities, May 2012, p. I-25

⁷ Ibid., p I-24