Compliance: Ensuring effectiveness of the access and benefit sharing system

Setting up measures for compliance to domestic policies on access to genetic resources and associated traditional knowledge (TK) and benefit sharing from their utilization could channel technology and funds to the provider instead of a one-way flow of benefits to the user.

Access and Benefit Sharing (ABS) is seen as an incentive for both users and providers of genetic resources or associated TK that also contributes to the conservation of biological diversity and its sustainable use. The mechanisms that are stipulated in the Bonn Guidelines and enumerated in the articles of the Nagoya Protocol on ABS attempt to guarantee that genetic resources, including that of associated TK, are accessed and used appropriately and that benefits are shared in a fair and equitable manner. ABS is the third objective of the Convention on Biological Diversity (CBD).

The Bonn Guidelines, adopted in 2002, aimed to assist governments in putting in place measures to govern ABS in their countries. The Guidelines set out basic principles and elements of Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT). In 2010, the Nagoya Protocol on ABS was adopted by Parties to the CBD. The Protocol specifies obligations to support compliance with domestic legislative or regulatory requirements of the genetic resource provider, including those associated with TK, and contractual obligations reflected in MAT.

Compliance is one of the key elements of the Nagoya Protocol on ABS. In this context, compliance is meeting the requirements and obligations of domestic legislative, administrative, or policy measures in which genetic resources and associated TK are utilized. This Policy Brief will discuss the relevance of this element and suggest what ASEAN Member States can do.

Your resource, my profit

Inequities between genetic resource and associated TK providers and users led to the adoption of the CBD in 1992. Misappropriation and misuse of genetic resources have been issues of most biodiversity-rich countries against entities that had utilized genetic resources through unauthorized access of a country's resources or/and absence of benefit sharing agreement. Cases on misappropriation and misuse have been documented on the collection of genetic resources and developed as useful products from food and medicinal plants, and microbes.

A recent case in the ASEAN region was when an individual collected a fungus from an ASEAN Member State and sold it to a private company. The fungus was found to prevent a serious threat to oil palm and potentially to other cash crops. The strain and chemicals produced by the fungus have been applied for patent in 2010 by the assignee (patent owner). The case presents an absence of appropriate permission to access the genetic resource, lack of established agreement to share benefits with the country where the fungus was collected, and non-notification in change of intent (from basic plant description to potential commercial application). Such misappropriation and misuse can be prevented by ensuring compliance measures are established in countries.

Even in a country with domestic law on ABS, some research activities on biological resources for potential commercial use have been conducted without PIC or MAT. This presents a lack of knowledge or appreciation and implementation of the do-

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3 Lim Li Ching. 2012. Biodiversity and the importance of ABS laws. Presentation during the 3rd Southeast Asia Regional Workshop on ABS, 10-13 December 2012, Malaysia.
In line with the prevention of non-compliance of industry in their territory, the European parliament is debating on a draft biopiracy law. It obliges its industry to compensate indigenous and local communities, and thus ensure the effective utilization of TK associated with genetic resources within a country. 

Institute of Advanced Studies and the ASEAN Secretariat, and funded by UNEP-GEF through the regional project “Building Capacity for Regionally Harmonized National Processes for Implementing CBD Provisions on Access to Genetic Resources and Sharing of Benefits.” Topics on Compliance were discussed with participants from the 10 ASEAN Member States and Timor-Leste during the regional workshop for participants. Participants were ABS National Focal Points and representatives of Competent National Authorities, NGOs, indigenous and local communities, and industry. Similarly, Compliance topics were presented during national ABS consultations in Lao PDR, Viet Nam, Myanmar and Timor-Leste.

Countries in the ASEAN region can ensure the effective implementation of ABS by putting in place necessary compliance measures. The Nagoya Protocol on ABS details obligations of Parties to Compliance. These obligations can be summarized as compliance to national ABS legislation, MAT, and national legislation on TK. Some of the compliance obligations are:

- Put in domestic measures to ensure that genetic resources and TK associated with genetic resources utilized within a party's territory have been accessed in fulfillment of PIC or approval and involvement of indigenous and local communities (ILCs), and that MAT should be formed as required by domestic ABS legislation or regulatory requirements of the other party where ILCs are located.
- Establish mechanisms to inform potential users of TK associated with genetic resources about their obligations.
- Support the development of ILCs of community protocols; minimum requirements for MATs; and model contractual clauses for benefit-sharing arising from the utilization of TK associated with genetic resources.
- Take measures, cooperate and address situations of non-compliance of domestic ABS legislation or regulatory requirements.
- Encourage inclusion in MAT of provisions on dispute resolution and guarantee that legal remedy is available under each party’s legal systems.
- Take measures regarding access to justice including use of mechanisms on mutual recognition and enforcement of foreign judgments and arbitral awards.
- Designate checkpoints for collection of information at any stage of research, development, innovation, pre-commercialization or commercialization.

Initiating capacity on compliance

The ASEAN Member States and Timor-Leste have been provided information on Compliance and other key elements of ABS during national and regional consultations on ABS. These consultations were implemented by the ASEAN Centre for Biodiversity, in partnership with the United Nations University.

References and Suggested Readings


STRATOS. 2012. ABS Management Tool.