

Overview of national and regional measures on ABS: challenges and opportunities in implementing the Nagoya Protocol

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Agenda

- ▶ Current status of ABS Measures and their implementation in around 45 countries and regions
- ▶ Challenges and opportunities in implementing the NP

Objectives of the study

- ▶ 1. Facilitate the sharing of experiences useful for the process of putting in place legal, administrative or policy measures
- ▶ 2. Identify current status of ABS measures and their level of implementation
- ▶ 3. Identify challenges and opportunities in implementing the Nagoya Protocol

Current status of ABS laws

America:

- ▶ Andean Community
- ▶ Brazil
- ▶ Costa Rica
- ▶ Mexico
- ▶ Peru
- ▶ Panama
- ▶ Venezuela

Other measures in place in Ecuador, Argentina (provincial level); Cuba; El Salvador, Guatemala, Nicaragua, Cuba; Guyana (sometimes enabling or general provisions only).

Several ABS drafts.

Current status of ABS laws

Asia-Pacific:

- ▶ Asean (regional)
- ▶ Bhutan
- ▶ China
- ▶ India
- ▶ Malaysia
- ▶ The Philippines

Draft measures in several countries: Indonesia, etc

Current status of ABS laws

Western Asia and North Africa (Arab Region):

- ▶ Egypt
- ▶ Iraq
- ▶ Jordan
- ▶ Syria
- ▶ Morocco

Current status of ABS laws

Oceania:

- ▶ Australia
- ▶ New Zealand

Current status of ABS laws

Africa:

- ▶ OAU
- ▶ COMIFAC
- ▶ Ethiopia
- ▶ Kenya
- ▶ South Africa
- ▶ Malawi
- ▶ Uganda

- ▶ Other countries with measures: Namibia, etc.

Current status of ABS laws

- ▶ **Europe: (disclosure requirements and general ABS measures)**
- ▶ Nordic Strategy
- ▶ Belgium
- ▶ Denmark
- ▶ Germany
- ▶ Sweden
- ▶ Switzerland
- ▶ Bulgaria
- ▶ Croatia
- ▶ Malta
- ▶ Norway
- ▶ Spain
- ▶ UK

Current status of ABS laws

North America

- ▶ Canada
- ▶ USA

Current status: some conclusions

- ▶ Growing level of legislative action in the different regions: ABS measures were developed early in countries such as: Andean Community (1996); Costa Rica (1998); Philippines (1995)
- ▶ Implementation is also growing in some countries : No. of ABS contracts/permits granted especially for basic research and for nationals. However it remains low in others
- ▶ Many ABS draft laws: (in some cases “old” drafts), most of them pre-Nagoya. Opportunity to up date them
- ▶ Many ongoing activities (GEF capacity building projects, others).

Current status: some conclusions

- ▶ Relevant experience drafting ABS measures and with their implementation (some countries), useful lessons learnt (also a growing amount of analysis, studies, etc)
- ▶ Still lack of capacity to negotiate ABS agreements and difficulties with PIC-MAT with other stakeholders (including ILC)

NP : challenges and opportunities

Countries are in the process of analyzing their current legislation and the NP: challenges; loopholes; opportunities; new issues?, etc

Implementation challenges

Comparison of Pre-Existing Legislation with Core Obligations of the NP

Access

The Protocol obliges provider countries, if they decide to establish PIC measures at the national level, to follow basic criteria such as:

- ▶ legal certainty, clarity and transparency
- ▶ fair and non-arbitrary rules and procedures
- ▶ clear rules and procedures for PIC and MAT

Implementation challenges

Legal Certainty, Clarity and Transparency of Domestic Requirements

- ▶ Most of ABS regulations provide for legal certainty, clarity and transparency of domestic requirements. But the system is sometimes complex
- ▶ However, in some cases there are difficulties related to the institutional arrangements and capacity in place in the country to handle the ABS applications and established MAT (contract negotiation).
- ▶ The procedure for obtaining a permit is generally precisely described as well as the criteria the applicant must fulfill, including the potential restrictions and limitations on obtaining genetic resources.

Implementation challenges

Fair and on-Arbitrary Rules and Procedures on Access

- ▶ It appears that most of countries provide for non-arbitrary rules and procedures for accessing to genetic resources.
- ▶ In most countries, the applicant can either be a local or a foreigner person, but natural persons are often required to be affiliated to an institution/legal person.

Implementation challenges

Fair and on-Arbitrary Rules and Procedures on Access

- ▶ Moreover, most of ABS regulations point out that the access should be approved or refused by a decision in writing of the CNA.
- ▶ In some cases, 2 CNA can exist, one granting access to genetic resources for commercial purpose (or when TK is involved) and the other dealing with access for non-commercial purpose or with export permits or for different types of genetic resources (marine, located in protected areas, etc).

Implementation challenges

Fair and on-Arbitrary Rules and Procedures on Access

- ▶ Finally, few measures addresses the issue of transboundary GR or associated TK.

Implementation challenges

Clear Rules and Procedures for PIC and MAT

- ▶ Most of ABS regulations provides for PIC and benefit-sharing agreement between the applicant and the provider.
- ▶ Other countries have similar provisions requiring the applicant to sign a contract (sometime called accessory contract) with the provider of the genetic resources or associated TK
- ▶ If the procedure to obtain a permit is generally precisely described, the procedures to obtain PIC and MAT are not, especially when PIC and MAT are also required from other stakeholders (such as indigenous peoples and local communities).

Implementation challenges

Clear Rules and Procedures for PIC and MAT

- ▶ Some regulations also describe what the MAT should contain and provides for the elaboration of a model contract.

Implementation challenges

Fair and Equitable Benefit Sharing

- ▶ Most of ABS regulations provide for the establishment of a benefit-sharing agreement between the applicant and one or several provider or proof that benefit sharing has been established with relevant providers
- ▶ The applicant can enter into this agreement with a state agency, ILCs or other owners.
- ▶ Benefit sharing mechanisms also exist when TK is accessed as well as in the case of genetic resources located in indigenous and local communities land or territories
- ▶ Few countries also provided – using different legal language) that some of the benefits should be directed to conservation but almost all the measures include conservation as an objective.

Implementation challenges

Traditional_Knowledge_Associated_with_Genetic_Resources

- ▶ Safeguarding or protecting interests of ILCs and their knowledge and practices is often one of the objectives of ABS legislations.
- ▶ Some measures also recognize and protect the rights of the indigenous peoples to decide about their innovations, practices and knowledge associated with genetic resources.
- ▶ In some countries specific legislation exist– in addition to the ABS measure– to guarantee the right of Indigenous peoples over their TK or GR located in their lands
- ▶ Most of ABS legislations require the applicant to obtain PIC of local communities if this latter intends to access to genetic resources on a land that is owned or managed by these local communities (which have the established rights to grant access to those resources).
Also HRC Jurisprudence

Implementation challenges

Traditional Knowledge Associated with Genetic Resources

- ▶ Very few ABS regulations set out processes for obtaining PIC of indigenous and local communities.
- ▶ According to most ABS legislations, affected ILCs are also to be involved in the negotiation of benefit-sharing, including by entering into a benefit-sharing agreement with the applicant.
- ▶ Specific recognition of customary law or community protocols is provided indirectly in some ABS systems (and in Constitutions), but there is a lack of detailed guidance on these issues

Implementations challenges

▶ Compliance

- ▶ Some ABS regulations create a monitoring mechanism in order to ensure the fair and equitable distribution of benefits.
- ▶ Almost all of the regulations provide for enforcement mechanisms and sanctions in case of non-compliance with their provisions.
- ▶ Bioprospecting or exporting biological resources without a permit is generally considered as an offence, which can be subjected to a fine or even imprisonment. Administrative sanctions and cancellation or revocation of the permit and the seizure of the samples are also often

Implementation challenges

Compliance

- ▶ Furthermore, some regulations established monitoring mechanisms (inspections in-situ, registers, co-operation mechanisms between authorities and the applicant), and an obligation for the user to submit periodical progress reports.
- ▶ Not all the ABS measures includes an specific provision recognizing the right to access to justice in cases of breach of the contractual obligations (between the applicant and the provider), but this legal recourse is usually found in other kind of legislation in force in the country (civil codes, etc).
- ▶ However, no (or very few) legislation provide for co-operation in cases of alleged violation of another contracting party's requirements or encourage the adoption of contractual provisions on dispute settlement in MAT (except in some model contracts).

▶

Implementation challenges

Compliance

- ▶ Some countries require (IP offices, including plant varieties) a contract or a certificate of legal provenance (then in practice requiring PIC and MAT) others more general information on the source and origin of the GR or the associated TK which could be seen as a collection of information regarding the utilization of GR (through an innovation for which a patent is sought)
- ▶ but just for GR accessed in the country (or the region) not in foreign jurisdictions (therefore these measures are not sufficient in the light of the Protocol).

Implementation challenges

Compliance

- ▶ Almost no specific measures to provide that the GR or associated TK used in their jurisdictions comply with the national ABS legislation of other countries have been developed,

Implementation challenges

Designation of ABS focal point and competent national authorities

- ▶ Almost all CBD Parties have an ABS Focal Point and then comply with the institutional obligation of the Protocol (even if very few regulations provide for the creation or designation of a NFP.)
- ▶ Several CNAs can also intervene depending on the nature of genetic resources the applicant wants to access to .
- ▶ The functions of the CNA and the ABS NFP can be performed by the same authority.

Implementation challenges

Conclusions

- ▶ Few of the national and regional ABS measures contain clear compliance related provisions.
- ▶ Ownership of genetic resources will have to be fleshed out in order to meet the Protocol's obligation related to genetic resources owned by indigenous and local communities.
- ▶ The Protocol indeed contains a somewhat broad definition of utilization of genetic resources, which essentially captures major types of utilization of genetic resources. Some countries also regulate “derivatives” or biochemicals
- ▶ Community protocols and customary law: growing attention but still a lot of work to be done to fully understand and develop these instruments.

Implementations challenges

- ▶ Implementing the provisions of article 8 (Special Considerations) will require legal and institutional work (taken also into account the Protocol language).
- ▶ Not all the countries differentiate between commercial and non commercial research and if they do, to determine whether an application is for basic research or for commercial research has proven to be difficult.

Implementations challenges

- ▶ Regarding access and utilization of all the genetic resources for food and agriculture very few countries provide specific procedures or have created different conditions, except in the situations where they are members of the FAO International Treaty and this particular consideration is expressly addressed in the ABS measures
- ▶ User measures to support ABS legislation/measures of other countries are lacking

Implementations challenges

Opportunities:

- ▶ NCA strengthening, including the use of Information technologies (relevant for the notification of the permit/ international certificate)
- ▶ New terms: Utilization/derivatives: impact on the clarity of scope (in-out)
- ▶ Treatment of basic research (mostly nationals)
- ▶ More clarity on PIC-MAT, especially in the case of ILC and potential for the recognition and development of community protocols/customary law.
- ▶ Strengthening of negotiating capacities: GEF projects
- ▶ Cooperation between NCA and countries in developing the new measures.

http://cisdl.org/biodiversity-biosafety/public/CISDL_Overview_of_ABS_Measures_2nd_Ed.pdf

Thanks and gracias