

Nagoya Protocol is in force since 12 October 2014: South Asia, are we ready for new ABS regime?

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits (ABS) Arising from their Utilization to the Convention on Biological Diversity (CBD) is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way. It entered into force on 12 October 2014, 90 days after the date of deposit of the fiftieth instrument of ratification. Since then, after nearly one and half years, 71 countries have ratified the protocol became parties to it. The Convention on Biological Diversity and Cartagena Protocol on Biosafety have 196 parties and 170 parties respectively. So far, three out of 8 South Asian countries (Bhutan, India and Pakistan) have ratified the Nagoya Protocol.

The objective of the Nagoya Protocol is the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity. It is well known fact that most of the world's most biodiverse regions are in developing countries, dubbed "providers," while "users" are more traditionally situated in richer economies. All South Asian countries are developing countries having rich biodiversity and people living there consider it as their natural wealth. Fair and equitable ABS should in theory safeguard against the plundering and misappropriation of genetic resources and also ensures that communities benefit from profits derived from their biodiversity heritage.

The evolution of modern bio-sciences has led to the rapid growth of scientific research on genes and chemical substances found in living organisms for use in different sectors, including agriculture, medicine, cosmetics and energy. In the field of medicine alone, terrestrial plants and microorganisms are important natural sources used in the development of new medicines. Bioprospecting – the search for plants and animals from which commercially valuable compounds can be obtained, is often a transnational activity: it involves situations where genetic resources are found in one State but are used in another. Furthermore, use of the intellectual property rights system has resulted in a series of famous biopiracy cases involving the misappropriation of traditional knowledge, including those related to turmeric, neem, ayahuasca and hoodia.

Both the CBD and the Nagoya Protocol are based on a perception that it is the providing countries that have the primary responsibility for regulating ABS at the point of time of access. To this end, it is the responsibility of the party countries to enact suitable national legislations in implementing the Nagoya Protocol.

The Nagoya Protocol sets out core obligations for its contracting Parties to take measures in relation to access to genetic resources, benefit-sharing and compliance.

Access obligations

Domestic-level access measures are to:

- Create legal certainty, clarity and transparency
- Provide fair and non-arbitrary rules and procedures
- Establish clear rules and procedures for prior informed consent and mutually agreed terms
- Provide for issuance of a permit or equivalent when access is granted
- Create conditions to promote and encourage research contributing to biodiversity conservation and sustainable use
- Pay due regard to cases of present or imminent emergencies that threaten human, animal or plant health
- Consider the importance of genetic resources for food and agriculture for food security

Benefit-sharing obligations

Domestic-level benefit-sharing measures are to provide for the fair and equitable sharing of benefits arising from the utilization of genetic resources with the contracting party providing genetic resources. Utilization includes research and development on the genetic or biochemical composition of genetic resources, as well as subsequent applications and commercialization. Sharing is subject to mutually agreed terms. Benefits may be monetary or non-monetary such as royalties and the sharing of research results.

The Nagoya Protocol itself foresees two important mechanisms for handling ABS in relation to special branches of genetic resources. Article 19 outlines the need to develop and update information on model contracts. The second mechanism foreseen in the Nagoya Protocol is the possible Global Multilateral Benefit-Sharing Mechanism outlined in Article 10. Under the Nagoya Protocol, Parties are to issue a permit or its equivalent at the time of access as evidence that access to genetic resources was based on prior informed consent and that mutually agreed terms were established. Parties are required by the Nagoya Protocol to make information on the permit or its equivalent, available to the ABS Clearing-House for the constitution of the internationally recognized certificate of compliance. The internationally recognized certificate of compliance is one of the major innovations of the Nagoya Protocol and one of the cornerstones of the access and benefit-sharing system.

In the context of South Asia, India has issued the first internationally recognized certificate of compliance published in the ABS Clearing-House. The permit was issued by India's National Biodiversity Authority, the competent national authority under the Nagoya Protocol. The certificate then constituted through the ABS Clearing-House serves as evidence of the decision by India to grant access to ethno-medicinal knowledge of the Siddi community from Gujarat to a researcher affiliated with the University of Kent in the United Kingdom. But the question is whether the other South Asian countries have the required capacity to implement the Nagoya Protocol effectively. Did they enact the required domestic legislation to cope with Nagoya Protocol or are they in the process of enacting them? If not, what are the options for them?

To bring the benefit to the people and governments of South Asia arising from the Nagoya Protocol, we need to find answers to the above questions effectively. In this context, we believe that South Asia Co-operative Environment Programme (SACEP) as an intergovernmental regional organization has a key role to play in assisting its member countries in developing necessary capacities to cope with Nagoya Protocol.