

The Ten Questions to be Addressed While Developing National ABS Frameworks



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Introduction

With the entry into force of the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising from their Utilization (ABS) to the Convention on Biological Diversity (the Nagoya Protocol, NP) in October 2014, countries are gearing up for developing national access and benefit sharing (ABS) frameworks considering a range of administrative and regulatory provisions.

Using funds from the Global Environment Facility (GEF) dozens of countries are currently gearing up to draft and finalize the national ABS policies and regulatory mechanisms supported by agencies such as UNEP and UNDP.

Implementation experiences of national ABS frameworks in countries such as India, South Africa, Kenya, Australia and others indicate that countries need to ensure national ABS frameworks offer options for realizing the potential of ABS for enhancing conservation and sustainable use rather than merely promoting heavy regulatory burdens.

This paper attempts to provide guidance to countries currently developing national ABS frameworks, based on specific implementation experiences, using a set of questions that need to be addressed at national level.

Key Questions that need to be answered while developing the National ABS framework

There is significant guidance available to countries on how to deal with national ABS frameworks. However, a lot of it is based on desk studies and assessments rather than understanding issues and situations relevant to implementing the obligations under the NP. Specific experiences from countries such as India that seem to attract increasing interest to secure ABS principles through contracts come handy to assess and understand implementation challenges. A lot of time, such understanding can be used to suggest countries on what not to do when developing the ABS frameworks, setting up institutional mechanisms and dealing with sectors and stakeholders on issues of compliance.

Based on this, the following are a set of questions countries need to address while developing national ABS frameworks. Addressing the issues identified and developing responsive mechanisms and alternates will certainly help countries to avoid having a framework that adds to the administrative burden than facilitate appropriate use of genetic resources and associated traditional knowledge.



What does ABS Cover and not Cover

01

It is critically important for countries to clearly define what the national ABS framework cover and what it exempts. The Nagoya Protocol leaves the mandate of defining the coverage of genetic resources to individual countries. While some countries like India have adopted legislations covering biological resources, questions are constantly raised whether this is appropriate since the Convention on Biological Diversity (CBD) and the Nagoya Protocol (NP) deal with genetic resources that are a subset of biological resources.

Some of the key issues that should be addressed while answering the question include, nature, type and access by who and for what purpose; access by nationals for research and development purposes; clarifying the difference between commercial and non-commercial research and development; detailing traditional uses with unambiguous definitions to support the same; traditional practices and uses of genetic resources; research collaborations; access to resources during emergency purposes and precise definitions that does not leave room for differential interpretations.

For example, leaving the interpretation of what is covered with ambiguous definition of genetic resource, access, traditional uses, commercial utilization, exemptions could cost heavily in implementing the national ABS framework. Examples of such definitions include the following:

Commercial Utilization: Use of xxx resources for commercial utilization such as drugs, extracts, and genes but does not include conventional practices and traditional breeding.

Here the inclusion of words such as extracts could be wrongly interpreted as any extract, including oils, juices and the related attracting ABS provisions making the interpretation of ABS cover components of biotrade as well.



**Does ABS have an Impact
on trade in bioresources**

02

One of the potential areas of conflicts that could arise in implementing the ABS provisions at national level is the impacts on trade in general and commodity trade using genetic resources in particular. Neither the Nagoya Protocol nor the guidance that is currently being provided to countries focuses on this issue.

The national ABS framework must take into account economics and trade in genetic resources as a key component while defining the ABS principle¹.

For example, normally traded commodities are exempted from the Biological Diversity Act in India with limited clarity on defining a commodity, rationale for classifying certain genetic resource as a commodity, links to trade policy and the related. Because of this, the provision of exemption is being legally challenged now.

The biggest challenge to deal with commodity trade and trace movement of genetic resources involved in commercial utilization is the lack of coordination between the Ministries of Environment and Ministries of Trade in many countries. Except for a few countries like the United States, majority of the countries have no scope to trace the nature of genetic resources that is being traded using the international customs nomenclature, the HSC (Harmonized System of Classification). Globally, Countries use a 6 or 8 digit classification under the International Customs Code that does not provide information on the detail of the resource, part traded, form in which the part is traded and the like. Putting in place an expanded HSC is possible at national level. However, for this to happen, the ABS focal point need to work closely with the Ministry of Trade and Commerce to come with expanded HSC to track and trace trade in genetic resources that are ongoing worth billions of dollars annually.

1 Prakash Nelliya and Balakrishna Pisupati (2014) Economic valuation of bioresources for access and benefit sharing, National Biodiversity Authority, Chennai, India.

Currently, for example, all biological resources traded from India are classified using three customs codes, using the category 'miscellaneous' making it impossible to track the resource trade. Countries that are currently developing the national ABS frameworks should consider the following.

- ▶ Whether commodity trade (that explicitly includes commercial use of genetic resources) is excluded from the ABS framework or not?
- ▶ If excluded, what is excluded and what is not and why?
- ▶ How to design compliance and monitoring framework for trade in genetic resources and its links to ABS?
- ▶ What kind of inputs shall ABS framework provide for national trade policies and why?
- ▶ How to link trade, commercial use and IPRs within the ABS context?

It has to be noted that 'utilization of genetic resources' under the NP is different from commodity trade. In the absence of this distinction, implementation of ABS in countries like India are running into difficulties where elements of commodity trade are interpreted as 'utilization' under an ABS context creating both legal and administrative problems while deciding on applications for access and benefit sharing.

All biological resources contain genetic resources. But what makes a transaction eligible under ABS and not commodity trade is whether genetic resources are being utilized with the understanding of utilization being the way it is defined under the NP (high end uses for research and development as distinguished from conventional uses for direct consumption). So the key to defining the scope of a national ABS legislation is to have a clear understanding of what kinds of activities constitute 'utilization of genetic resources' and avoid confusions with commodity trade that contain biological/genetic resources.



How to link provisions under the ITPGRFA

03

With almost all the countries who are Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) being Parties to the CBD and several of them are in the process of acceding to the NP, it is important to consider the following issues related to mutually supportive implementation of the CBD, NP and the ITPGRFA.

- a) Ensuring the national ABS framework duly recognizes the need for complimentary provisions on access to genetic resources for food and agriculture as needed under the Treaty.
- b) Duly notifying the germplasm the country would place under the Treaty obligations
- c) Developing guidelines for implementing the Treaty and ensuring the Guidelines link with the ABS framework
- d) Providing explanatory notes on how the ABS mechanism under the NP would work considering the Treaty provisions, and
- e) Ensuring the national focal point for the Treaty is actively engaged in the implementation of the national ABS framework.

Bioversity International has recently brought out a report on mutually supportive implementation of the NP and the ITPGRFA that provides some interesting scenario based question and answers². National ABS focal points and Treaty focal points could benefit from this report while designing the national ABS frameworks.

² Halewood, M. (editor). 2015. Mutually supportive implementation of the Plant Treaty and the Nagoya Protocol: A primer for National Focal Points and other stakeholders. Discussion Paper. Bioversity International, Rome, Italy.



What is role of local and indigenous communities in implementing the ABS framework

04

The role of indigenous and local communities (ILCs) in developing national ABS frameworks and subsequent implementation cannot be overstated. Articles 7, 12 and 16 of the NP call for appropriate participation of ILCs in dealing with ABS issues.

However, the key challenge has been to identify when and how to involve the ILCs in ABS related processes and decision making. Though current actions to develop the national ABS frameworks, including those proposed through the Global Environment Facility (GEF) explicitly require identification of actions to involve ILCs, there is limited guidance on how to make an ABS framework that mainstreams the interests of ILCs and identify their role appropriately.

One of the key elements to consider dealing with ILC participation is the difference between ‘consulting’ them and seeking ‘consent’. In the absence of clarity on having rights over the resources, the confusion between making consultation with the communities *versus* seeking consent from them would continue. This is precisely the reason why Article 12 of the NP calls for development of biocultural protocols that provides the ILCs with rights based framework not only to use the genetic resources but also to provide consent for access.

While several existing ABS frameworks identify the role and importance of ILCs both in providing access and sharing of benefits³, many country frameworks still are in need of effective compliance both by the competent authorities and users citing the reason that creating capacities and awareness are time consuming and complex.

While care should be taken not to unnecessarily raise the expectation of ILCs on the flow of benefits once access to resources has been provided, a realistic mechanism to ensure better understanding and use of ABS frameworks would be needed.

3 Suneetha Subramanian and Balakrishna Pisupati 2007 Access and Benefit Sharing: Lessons from Enterprising Communities. UNEP-UNU-IAS, Yokohama, Japan and Nairobi, Kenya.

Access Fee and ABS

The Biological Diversity Act (2002) in India offers the option for local Biodiversity Management Committees (BMCs) to charge access fee and levies while providing access. However, this provision has been hardly used since the BMCs are still to be capacitated to deal with charging access fee.

In its effort to enhance compliance to provisions of the Act and Rules, the National Biodiversity Authority entered into a dialogue with Ayurvedic Drug Manufacturers Association (ADMA) in 2012 to come up with access fee option as a means to support local action on conservation and livelihood management. Under this arrangement, ADMA came up with a way of calculating the access fee based on the nature and volumes of medicinal plants they access and agreed to provide an annual contribution of up to Indian Rupees 12 crores per year (equivalent to 1,950,000 USD). Since the traditional drug manufacturing sector is in need continuous supply of genetic resources, this amount will be annual inflow into the national biodiversity fund.

The State Biodiversity Boards are currently exploring the options of engaging with those stakeholders commercially using the resources to secure a negotiated access fee.



What kind of institutional mechanism will be needed for effective implementation of the national ABS framework

05

In the absence of putting in place an institutional mechanism, even the perfect ABS framework would not be able to deliver. Countries that already have established such institutions are considering a range of options to make them work with appropriate mandate, responsibility, authority and support.

The following are few of the issues that confront putting in place an effective institutional mechanism for ABS regulations:

- a) Institutions with weak or unclear mandates
- b) Institutions that have a mandate to deliver on ABS but are neither the designated competent authority nor the focal point for ABS
- c) Institutions that do not have appropriate authority to interpret ABS issues and deliver
- d) Lack of suitable capacities and funding to deal with capacity building, awareness rising and implement the regulatory and legal components under ABS.

It is important for countries to establish institutions with the following criteria to deliver effectively on ABS.

- i) Clear mandate over ABS issues under the CBD, NP and ITPGRFA
- ii) Ability to function independently in delivering the mandates since these institutions have a mandate to deal with ABS that are beyond the mandates of Ministries of Environment.
- iii) Clarity on how the institutions will deal with inter and cross-sectoral interests and ministerial mandates such as national intellectual property (IP) policy, trade, agriculture, science and technology, rural development, women's development, research, law and finance, and
- iv) Having of requisite finances, capacities and authority to deliver the mandate.



How can ABS be mainstreamed across programmes and projects in the country

06

There is a general tendency amongst experts and stakeholders to view and consider ABS as an independent issue with approaches that do not need mainstreaming and linking to current and emerging issues of using ABS frameworks as a basis for better governance of genetic resources.

The National Biodiversity Authority (NBA), India in 2012 published an interesting analysis on how traditional activities on resource management where the providers of resource are both compensated and rewarded when the users make a benefit⁴. The following table highlights some of the key issues and links between various sectors and ministries at national level and the links to ABS related actions across various ministries.

Agriculture

Implementation of ITPGRFA, exchange of genetic resources for food and agriculture (other than those covered under the ITPGRFA), research and development as well as commercialization of genetic resources (seeds and germinating material), improvements to germplasm. The Ministry can act as a checkpoint under the NP. Implementation of the national ABS framework and its links to functions of international organizations including the CGIAR with specific reference to access and commercialization of genetic resources using the collections.

Science and Technology

Research and development using genetic resources and associated traditional knowledge, collaborative research that results in commercialization of genetic resources, transfer of research results and technologies, intellectual property protection based on use of genetic resources, biodiscovery and investments in prospecting and related benefit sharing using genetic resources.

4 Seema Bhat, Kabir S Bavikatte and Suneetha Subramanian 2012 Access and Benefit Sharing: Lessons from Communities making it Possible. National Biodiversity Authority, Chennai, India.

Rural Development

Access to genetic resources and associated traditional knowledge, rights based approaches to access, development of procedures for prior informed consent and agreeing terms of access and benefit sharing with local communities, establishment and management of local level committees/groups to implement ABS provisions, designing knowledge and information registers to help share benefits by identifying providers of genetic resources, linking local livelihoods and development with ABS initiatives that are sustainable and innovative.

Human Resource Development/Skill Development

Skill development for researchers, scholars and students to understand issues related to ABS, establishing training cum orientation programmes for institutions involved in research, development and commercialization of genetic resources, creating knowledge platforms on value of genetic resources and their management.

Finance and Planning

Using ABS as an option for innovative financing⁵, allocate resources for building institutions and capacities to implement national ABS provisions, support actions to realize the potential of ABS for local and national development.

5 Balakrishna Pisupati and Sanjay Bavikatte 2014 Access and Benefit Sharing as an Innovative Financing Mechanism. *Asian Biotechnology and Development Review* 16 (2): 27-44.

Trade, Commerce and Investment

Provide appropriate links between commodity and non-commodity trade related to genetic resources, support development of expanded HSC coding systems for customs to track and trace movement of genetic resources outside the country through export routes, support enhancing skills for customs and excise officials on ABS issues, provide options to link ABS in developing national trade policies, identify and establish preferential investment platforms for research, development and commercialization of genetic resources, link with Chambers of Commerce to popularize the uniqueness of genetic resources available in the country and develop options to attract investments in biodiscovery and value addition actions to genetic resources that result in positive ABS related actions and contracts.

Foreign Affairs

Use the wealth of genetic resources available as basis for environmental diplomacy, establish programmes to enhance the skills of negotiators to look at ABS as a tool for development using natural resources (genetic resources) as a base of development and support realization of ABS principles and framework at bilateral and multilateral levels using options including trade, economics, collaboration and investments.

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Can ABS frameworks qualify as an innovative financing mechanism

07

Balakrishna and Kabir (2014)⁶ have elaborated a range of options to make ABS frameworks deliver as innovating financing mechanism. However, there have been limited attempts to recognize the potential of ABS as a source of financing that is predictable, sustainable and long-term besides being managed from community perspectives. The exception to this is the EU Biodiversity Strategy 2020⁷ that recognizes the option of using ABS as an innovative financing mechanism.

In the interest to ensure the Nagoya Protocol comes into force soon, several initiatives and activities seem to focus on reiterating the obvious, i.e., it is important to achieve the ABS objectives of the CBD and implementation of Nagoya Protocol which needs both capacities and funding. There have been limited efforts to re-visit the ABS agenda from the experiences of communities and practitioners. In a report titled, “Learning from Practitioners: ABS Experiences from Enterprising Communities”, Subramanian and Pisupati (2009) demonstrate the on-going local actions to translate the potential of ABS to empower and enable communities deal with biodiversity conservation through innovative approaches⁸. Continuing this, the National Biodiversity Authority (NBA) in India compiled a set of case studies on how communities are able to implement the ABS provisions at local level in a manner the contributes to economic well-being and raising sustainable and long-term financing for conservation action⁹

While there have been a few significant examples of ABS agreements highlighting the market potential, these examples are a long way from the initial expectations of large benefits that would fuel the conservation. One significant reason for this has been the lack of practical strategies for ABS implementation from the perspective of ABS as an innovative financing mechanism for biodiversity conservation. The practicality of these strategies is based on three foundational principles, which are:

⁶ ibid

⁷ Our life insurance, our natural capital: an EU biodiversity strategy to 2020 (2011) European Commission, Brussels.

⁸ ibid

⁹ ibid

- 1) The monetary and non-monetary benefits from ABS must significantly exceed the costs of setting up and implementing an ABS regulatory framework;
- 2) Innovative models for benefit sharing should be developed;
- 3) ABS must necessarily lead to conservation and sustainable use of biodiversity through an effective combination of rights and incentives.

Innovation around ABS models could occur in three possible ways. They are-

- a) Prioritizing modest but steady revenues from ABS over infrequent but big pay offs;
- b) Prioritizing the cooperation over competition when it comes to shared genetic resources and associated traditional knowledge;
- c) Prioritizing incentives over penalties to motivate compliance with ABS laws.

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**What kind of legal and policy capacities
will be needed to implement the
ABS framework**

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Effective implementation of national ABS frameworks need targeted capacities to deal with legal and policy issues. Unfortunately, there has been limited focus in enhancing legal capacities at national and local levels on ABS issues. With almost no case law available on ABS issues, the judiciary would be at a loss to comprehend issues of misappropriation, access and benefit sharing issues that are not the mainstream problems they deal with under environmental law.

In the absence of structured and ABS specific legal training cum orientation programmes that link issues of environment, biodiversity, contracts, IPRs, equity, fairness and other sectoral issues such as impacts on trade, agriculture, innovation, commercial gain, implementing ABS frameworks could prove a challenge. Legal capacity building need to move beyond mere assessments of country legal frameworks that comment on elements of the provisions and at the most provide links to the NP.

National and regional judicial academies, schools that train legal counsels, district magistrates, judges of high courts and supreme courts, judicial members sitting on environmental tribunals all need specific and structured training cum orientation programmes on ABS law in addition to biodiversity policy and law.

Likewise, the policy implications of ABS across various sectors and ministries as detailed in the table above are immense and often overlooked while developing and implementing the ABS frameworks. Though such linkages are explicitly and elaborately discussed during the negotiations of Nagoya Protocol, limited literature and 'do how' manuals are available to make policy makers, researchers working on policy implementation, local and non-governmental organizations understand the importance of ABS in environmental management (issues such as management of rare and threatened species used in prospecting to addressing farm-level innovations) and development practice (use of benefits, local development programmes aimed at conservation and use etc.).



How to avoid making ABS a punitive framework that curtails research and development

09

While several country ABS policy and legal framework development processes seem to consider the need to ensure ABS frameworks do not become a stumbling block for research and development as well as collaborations, experiences from countries such as the Philippines (Executive Order 247 that was later replaced with a more facilitative framework), India (the Biological Diversity Act and Rules) indicate that in the absence of absolute clarity on what is covered and who are covered under the ABS the frameworks are bound to stifle research – both by citizens of the country and non-nationals.

The national ABS policy and framework need to clarify as well as emphasize the point that being rich in genetic resource mean little until resources are appropriately used, benefits accrued are subsequently shared.

The spirit of CBD as well as NP should be preserved while developing and implementing national ABS frameworks.

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What are the 'Don't's that countries need to be aware while developing ABS frameworks

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▶ **Do not bundle access and benefit sharing provisions**

Bundling access and benefit sharing into a single component and providing a single window clearance could be an approach countries take. Doing so would reduce the effectiveness of frameworks. It may be prudent to deal with access separately and benefit sharing subsequently that could potentially reduce the time taken to deal with approvals. In the absence of this, potential users of resources could be discouraged to negotiate benefit sharing with limited assessment of possible benefit accrual.

Experiences from countries such as India and Bhutan¹⁰ could be used to further discuss the usefulness of this approach.

▶ **Do not create institutional structures that are not supported by administrative, technical, legal and support capacities**

One of the common issues confronting countries is to ensure that the ABS frameworks get implemented with effectiveness and minimal costs. Countries developing ABS frameworks need to ensure that institutions established to implement the national ABS frameworks are provided with adequate finances, administrative clarity and authority and techno-legal capacities.

Enthusiasm to create structures that are ‘tops heavy’ and regulatory oversight with minimal competence will only jeopardize the implementation of ABS frameworks at national level¹¹

▶ **Do not design approval process that is complex with multiple steps with cascading recommendations and approval processes**

ABS approvals require skills that are many times beyond the scope of Ministry of Environment or the National Competent Authorities. For example, robust decision making on volume and type of benefits require skills related to economics and sociology.

10 Kabir Sanjay Bavikatte and Morten Walløe Tvedt 2015, Beyond the Thumbrule Approach: Regulatory Innovations for Bioprospecting in India’. Law, Environment and Development Journal 11/1.

11 Balakrishna Pisupati 2014 Options and approaches for realizing Target 16 of Aichi Biodiversity Targets. Fridtjof Nansen Institute Report 3/2014.

Dealing with community based actions on ABS requires expertise on communication, anthropology and ecology.

Given this, it is critical to seek expert advice and guidance on issues before decisions are made on ABS applications. However, this should not impede the possibility of decision making that is simple and effective. Putting in place cascading processes on seeking guidance, recommendations and approvals could provide cumbersome and costly since the time and complexities involved in decision making could undermine the confidence of applicants in seeking approvals and enhancing costs of implementation.

- ▶ **Do not include compliance provisions that are difficult to execute and monitor**

One common mistake made in effective delivery of ABS mechanism is to design compliance provisions that are complex, multi-layered and confusing. The ability to monitor compliance and oversee implementation, including dealing with securing and disbursing benefits, should be simpler, predictable and flexible.



Conclusions

Considering the existing experiences in implementing national ABS frameworks as countries are preparing the national ABS frameworks will help minimize problems and conflicts in designing the frameworks. While lot of guidance is available for designing and developing ABS frameworks there is limited literature on what is that countries should avoid while designing the frameworks and establishing mechanisms for ABS.

This paper is an attempt to provide a range of issues that could potentially undermine developing and implementing an effective ABS mechanism at national level based on implementation experiences from countries that are already struggling with implementation since the design of the mechanism and the institutional issues associated with implementation are not carefully thought of.

In summary, if countries need to ensure ABS and the NP delivers on the mandates, it need a framework that is responsive, innovative, implementable and effective.



About FLEDGE

FLEDGE (Forum for Law, Environment, Development and Governance) is a non-profit trust established in November 2014 to work on a array of issues pertaining to law, environment, development and governance. The core focus of FLEDGE would be fostering sustainable environment and development laws and policies within a larger framework of good governance.

In particular, FLEDGE focuses on human resource development, capacity building and awareness raising using research and analysis as the basic tools combined with field analyses, as needed.

It will also work towards creating networks and communities of practice to tap uncommon opportunities and to train the next generation of environment and development practitioners, using knowledge platforms.



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