

Developing and Implementing ABS Regulations in the Pacific Rim Region: Issues and Challenges

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Introduction

In 1992, the Convention on Biological Diversity (CBD) provided a mandate for countries to develop national access and benefit-sharing (ABS) policies. In the last 12 years, however, countries have been burdened by the development process of these policies, encountering multiple obstacles and problems. To date only a limited number of countries have developed and implemented ABS policies. Pacific Rim countries, such as the Philippines, Costa Rica, Colombia, Ecuador, and Peru, have been pioneers in the development of such policies. These nations have had difficulties and successes trying to design and implement ABS regulations and they offer valuable lessons to other biodiversity-rich countries that are still planning to develop these regulations. Results of difficulty in implementation of these policies include the slowing of the flow of genetic resources between countries and reciprocal benefits.

These countries have also faced two contradictory issues in drafting national ABS policies to regulate access and exchange of genetic resources. First, restricting access is seen as a means to avoid domestic controversy and promote conservation by limiting overexploitation and by increasing the future value of genetic resources. On the other hand, providing access is necessary to generate a flow of benefits derived from biodiversity, including both commercial and scientific benefits. Given the importance of maintaining the flow of biological resources, benefit sharing, and conservation, a large scale and comparative analysis of different national experiences is warranted.

To this end, four scholars at the Davis and Berkeley campuses of the University of California launched a study of ABS policies and their implementation among 41 countries on the Pacific Rim. The study began in January 2002 and concluded in July 2004 and it involved the participation of over 60 ABS experts from the region (Carrizosa et al. 2004). The key objectives were to describe the main components of the access and benefit-sharing policies, the processes of drafting these policies and the experience of implementation. This paper presents a brief synthesis of the main results of the study and it focuses on some of the issues and challenges that have interfered with the development and implementation of ABS policies.

Main Results

The main results indicate that from the signing of the CBD until mid-2004, only nine Pacific Rim countries (22%) had developed some sort of national ABS regulation, 26 of them (63%) were working on their ABS frameworks, and 6 (15%) were not actively involved in a process working towards the development of ABS regulations. Countries have selected a wide variety of policy options that address ABS issues. For example, while countries such as Mexico decided to incorporate ABS provisions into existing environmental law, other countries such as Costa Rica decided to develop a specific Biodiversity Law that addresses not only ABS issues

but also other objectives of the CBD. The following four main categories of policy options that address ABS goals were identified:

- Regional and national stand-alone ABS laws and policies (Andean Community of Nations, Malaysia, and the Philippines);
- Biodiversity and/or sustainable development laws, or environment acts that include biodiversity conservation and sustainable use provisions and ABS guidelines usually designed to implement the CBD as a whole (Costa Rica, Cook Islands, Honduras, Indonesia, and Nicaragua);
- Existing environmental, sustainable development or ecological laws that have been amended to include ABS provisions (Australia and Mexico); and
- ABS policies that may be developed further into more comprehensive ABS laws (El Salvador, Samoa, and Panama).

The analysis of selected ABS policies revealed several issues and challenges that have interfered with the development and implementation of these policies.

ABS Policy Issues and Challenges

More than any other natural resource policy, ABS policies have been the target of misconceptions, politics, and negative publicity. Biopiracy claims, poorly defined ownership rights over genetic resources, the patenting of life, the protection of traditional knowledge, and equity issues have thwarted access initiatives and have also contributed to the cancellation of bioprospecting projects in countries such as Mexico. Bioprospecting projects also remain the focus of fierce and intensive criticism by advocate groups that have great influence among indigenous organizations, government actors, and environmental groups worldwide.

The fact that most of these policies and projects will indulge or deprive specific stakeholders tends to mobilize them to shape policies in their interests. Taking into account the importance of this debate we examined the following eight key issues: ownership, scope, access procedure, prior informed consent (PIC), benefit-sharing and compensation mechanisms, intellectual property rights (IPRs) and the protection of traditional knowledge, in situ biodiversity conservation and sustainable use, and the monitoring and enforcement of selected national ABS policies. These are a few of the issues and challenges that can be identified from such analysis:

- The scope of most ABS policies covers nonhuman genetic, biological, and biochemical resources found in in situ and ex situ conditions. This broad scope has caused confusion among the users and providers of genetic resources about the type of activities that should be regulated by these policies. Since the main implication of Article 15(3) of the CBD is that ex situ genetic resources collected before the CBD entered into force are not covered by it, pre-CBD ex situ collections should not be covered by the scope of ABS policies. However, in practice, most ABS policies cover these collections.
- Access to pre or post-CBD ex situ collections has not been clearly defined by the ABS policies presented in this report. Ownership of these collections is still controversial.
- Monitoring bioprospecting activities is one of the most difficult, expensive, and resource consuming tasks. No Pacific Rim country has in place either a national or an international monitoring system. Once samples leave the country it is very difficult to

follow their use and the exchange of information about them. Some countries might require bioprospectors to pay for monitoring and evaluation procedures or to purchase a compliance or ecological bond.

- PIC should be obtained from both national authorities and the providers of genetic resources and traditional knowledge. According to ABS policies, PIC from the government can be obtained through collecting permits or access agreements and PIC from the providers of genetic resources or traditional knowledge (local communities) can be obtained through agreements or certificates that are usually the result of a consultation process. In any case, PIC procedures must be clearly outlined in a way that reduces time and transaction costs for bioprospectors and these procedures must also be simplified for noncommercial bioprospectors.
- It is interesting to note that Costa Rica's Biodiversity Law initially excluded plants, animals, and gene sequences from patenting. This exclusion, however, was repealed years later by an amendment to the national patent law. This is just one example of the conflicting views about the patenting of life that we found in many Pacific Rim countries.

ABS Policy Development Process: Complex Policymaking and Implementation Scenarios

How do policymakers deal with the complexity of ABS issues? Motivations are as complicated and multiple as are the policy objectives. Some policymakers complain about the complexity of the issues and users they face. The inability to face this complexity may be responsible for the failure to uphold appropriate standards of equity, respect for traditional knowledge, and biodiversity conservation. In any case, few things are more difficult for policymakers to do than to pursue the development of ABS objectives in complex policymaking and implementation scenarios.

The demands of interest groups, self-interest of specialized government and nongovernmental organizations, the complexity of the interactions within the system, and the possibility for unexpected and perverse side effects are ingredients certainly present in any policymaking and implementation processes carried out in countries such as Colombia, Australia, Malaysia and the Philippines. Furthermore, other countries have had to face social and economic crisis (Solomon Islands), severe shortages of trained personnel (Samoa, Cook Islands, Nicaragua), limited fiscal and technical capacity (Vietnam), fragile political relationships (Cook Islands), and weak institutions (Laos). In addition to these and other economic, political, or social conflicts, these and many other countries have had to address ABS policymaking and implementation processes in the context of different forms and levels of centralized and decentralized government structures that influence and determine opportunities for success or failure.

In most, if not all, of the countries examined, ABS policymaking and implementation was often regarded as synonymous with centralized top-down initiatives and decision-making was usually monopolized by national governmental organizations. This is the heritage of government regimes, where the source of all power is usually found in the nation's capital. Centralization of authority has been used in all societies as a way to improve both information flows and the ability to design and implement policies. A major and well-known problem of centralization is that technical expertise becomes increasingly scarce as one moves from the center to the periphery of a society and this is certainly the case in most of the countries

examined in this report. This issue is compounded by the fact that ABS concepts are particularly complex and complexity implies the need for good information. The uneven quality of information among stakeholders influences the focus of attention.

Centralized expertise also fails to understand and respond to specific local conditions. In other words, the least powerful members of society may be exploited by local elites, they are literally invisible to centralized planners, and national elites always find ways of dominating policymaking. These least powerful members of society, particularly in developing countries, include unionized workers, bureaucracies, and farmer and indigenous communities. Another circumstance is that centralized agencies usually deal with local notables partly because the local elite is generally more articulate and better informed than the rest of the population.

Decentralization by itself, however, does not translate automatically into local people's participation in the policymaking and implementation process of ABS. Decentralization also requires incentives such as strong local capacity and effective participation channels. Our findings indicate that village cooperatives, labor unions, peasant organizations, and NGOs have become increasingly important channels for the activism of indigenous, peasant, and university-educated people. These participatory scenarios facilitate the articulation of a valid counterpoint to centralized governmental input that enriches the debate and contributes to more balanced ABS policies. Besides, common sense dictates that locally originated proposals can be aggregated and shaped to ensure that they are compatible with top-down policymaking approaches such as the CBD requirements.

In addition, in every participatory process, it is important to be aware of the subtleties of different stakeholders that are likely to determine the outcome of the development and implementation process of ABS policies. These include:

- Public authorities are not always responsive to public opinion. This is especially true when government organizations assume that they have sufficient technical capacity and expertise as illustrated by the development process of Decision 391; and
- On most ABS issues, many policymakers and other stakeholders do not have an opinion in the sense of having thought about the issue or having a consistent body of information about it. Instead most people are prepared to take a party line or position rather than invest time and effort analyzing a specific issue as exemplified by the development process of the Law of Biodiversity of Costa Rica.

ABS Policy Implementation

Implementation of ABS policies in the Pacific Rim region has been limited to a few cases. Between 1991 and mid-2004 most of the countries that have ABS policies invoked these frameworks to grant access to 22 bioprospecting projects. In the Philippines, only two out of 25 bioprospecting groups have been granted access to the country's biological genetic resources. Some of the problems experienced by Executive Order 247 were related to the scope of the law, the lengthy application procedure, prior informed consent issues, and biodiversity conservation issues. In 2001 the ABS policy of Samoa was invoked to negotiate a benefit-sharing agreement between the government of Samoa and the AIDS Research Alliance for the use of a compound derived from a local plant.

Implementation of Decision 391 in the Andean region has also been poor. In 1997 Colombia failed to negotiate a commercial access agreement under Decision 391 due to technical and political factors. Other access applications are on hold in Colombia until rules regarding the implementation of Decision 391 are clarified. Ecuador and Peru have also access applications on hold until national policies for Decision 391 are adopted. In Costa Rica, until now all access requests have been granted under the 1992 Wildlife Conservation Act and its 1997 regulation. Between 1991 and 2004, the National Biodiversity Institute and its partners in Costa Rica have implemented 15 bioprospecting projects. In Mexico, the Ecological Equilibrium Act granted access to three bioprospecting projects that were cancelled due to legal conflict and social protest. In the USA, the Federal Technology Transfer Act and National Park Service (NPS) policy was invoked to facilitate ABS goals for the Diversa/National Park Service project that is currently suspended until the NPS completes an environmental impact study.

The Costa Rican experience indicates that the chances of implementing effective national ABS policies are likely to increase in a decentralized context where the common denominator is strong local capacity and participatory mechanisms coupled with strong local government and nongovernment organizations. Furthermore, successful implementation of ABS policies will be facilitated when agreement and negotiation of projects take place between a minimum number of parties that share a common goal and with minimum intervention of bureaucracy and centralized government agencies. In contrast, and as demonstrated by the Colombian experience, an extensive and centralized bureaucratic process results in delays in the negotiation of projects that damage the morale and trust of implementers and recipients, thereby hampering successful implementation of ABS policy.

Conclusions

Only 22% of the countries analyzed in this study have developed some national ABS policy. This does not necessarily mean that countries have been inefficient, but rather cautious and inexperienced. Before the CBD came into force, most, if not all, of these countries had a permit system to regulate the extraction and management of biological resources. The transition from these permit systems to more comprehensive ABS frameworks has proven to be difficult as many countries struggle to find the economic means to develop such frameworks, the technical expertise or the much-needed consensus about new and controversial issues raised by the CBD. The political framework for access to genetic resources that any country will only be as good as the process through which it is developed. To actually work once established, the political framework must have the broad support of all relevant sectors of government and society, it must fit within the country's larger strategy for conserving and sustainably using biodiversity, and must be supported by decentralized institutional processes and capabilities sufficient to implement it. Building local capacity to improve policy development and implementation is a priority for all the countries reviewed in this study.

Finally, the 2002 Bonn Guidelines on ABS have provided guidance for the countries embarked on the development of ABS frameworks. However, governments and bioprospecting groups will continue facing controversial issues such as the patenting of life, access to traditional knowledge, and the perception that benefit-sharing agreements are not equitable. These are also some of the key issues that must be carefully addressed in order to facilitate both the development of national ABS policies and future efforts to negotiate an international regime on ABS.

Reference

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