Webinar report

"ABS Monitoring and Compliance – Nagoya provisions, practical experiences and potential solutions"

Thursday, 6 May 2021

Introduction

Two main presentations were delivered during the Webinar. A question-and-answer session was held after each presentation.

The key issues raised during the presentation and the outcomes of the discussions that followed are summarized below.

Presentations and discussion

Presentation on the Nagoya Protocol on Monitoring and Compliance and Shortcomings (by Pierre du Plessis):

The presentation provided an overview of the provisions of the Nagoya Protocol with a focus on how national systems feed into the international framework and the specific role of permits, checkpoints and Mutually Agreed Terms in the monitoring and compliance system.

The following provides an overview of the different questions raised and answers provided in their regard

How can we ensure that private practitioners / researchers will be incorporated in order to regulate them?

- Important to rely on your national law and the implementation of the national law. The key is to ascertain if these researchers have permits to do what they are doing? If not, request the government to clarify the legal situation. You can refuse to collaborate with them if they want to use your genetic resource or traditional knowledge without your consent. It is not something that the Nagoya Protocol (NP) compliance system can sort out. If the national law does not prohibit this, unfortunately the NP compliance provisions will not help you.

Regarding the checkpoint communiqué, if there is no information provided on compliance with permit conditions or Mutually Agreed Terms, how can this gap be filled?

- A national permit becomes an internationally recognized certificate of compliance (IRCC) when it is registered on the ABS Clearing House. The checkpoint communiqué reports information from the internationally recognized certificate of compliance (IRCC), which might not include all information on the national permit (e.g. because it is confidential).
- When the checkpoint communiqué is generated, it says: "Your IRCC number 123 has been detected at the following checkpoint, presented by the user XYZ for the following purposes". Then the provider must get back at its information on that number and check the information provided in the checkpoint communiqué against the permit information.
- The checkpoint communiqué will not provide information as to whether it corresponds to the specific permit conditions. This verification must be made by the provider.

What happens to misappropriation on access that occurred before the NP?

- There can be retroactive measures in your system, depending on your law, although this is not very useful and could not be enforced in countries that do not use retroactivity in their laws.
- The interpretation of the NP has been that it is applicable only for access that occurred after the entry into force of the NP and only for Parties to the NP.

Are MAT required with PIC for scientific research or is PIC enough for that purpose?

- This depends on the national legal system. Some countries only require parties to accept a standard set of permit conditions for basic research. Other countries require parties to sign a contract for basic research that covers all eventualities should such research becomes commercial or have commercial application. It's a good idea to make sure MAT for research is legally enforceable.

How can indigenous communities prevent government institutions from collecting materials from the community without permit?

- It depends on the national legal system, that is if government institutions are exempt from those permits or not.

Is there no recourse for provider countries in case of non-compliance with contractual provisions in MAT?

- You can use the dispute resolution measures in the contract and/or sue for breach of contract in a relevant court. If you get a positive outcome you can go to court somewhere the user has assets and try to enforce your arbitral award. Thus, in cases of non-compliance with contractual MAT provisions, one needs to rely on contract law in the country where the user is based to enforce the contract. So, it is important to know if your contract can be enforced in the user country's legal system.

Research Permits and Monitoring Access and Benefit Sharing (by Paul Oldham & Olivier Rukundo):

The presentation provided an overview of how the online permitting system functions and how it has been set up in some countries with a specific focus on the example of the Bahamas. The presentation highlighted the legal challenges and considerations involved in bringing together different permitting systems and integrating ABS contract aspects within the online permitting system.

How to make the permit (system) practical and secure?

- Exchanges with users must be treated with a certain degree of confidentiality that needs to be guaranteed and protected
- It is important to reflect on who has access to the information of the users and on how the permitting authority should treat this information.

What triggers benefit-sharing?

- The trigger for benefit-sharing appears first in the PIC process. In the permit application there is a section on the type of benefits that will be granted.
- However, the MAT really goes into details regarding the benefits to be shared, the *type* of benefits, the *way* they will be allocated, what are the *modalities*, the *periodicity* of getting benefits, and so on. The MAT is the only place where you have actual provisions in relation modalities in case of breach of obligations. Consequences and terms of damages in case of breach must be the MAT.

The ABS permit for commercial purposes is easy to track. What about basic research?

- important be careful who you give authority to conduct basic research to. You can hold that person responsible through their institution. How do you track it? You have to rely on the fact that they report to you and need to put that in the permit conditions. In these conditions you must stipulate clear provision the prohibition against commercial use. You do need a contract, it can be a simpler contract, but it still needs to be legally enforceable. Ideally, you only deal with people who you know from reputable institutions and you make them sign a basic agreement.
- The proposed approach on the issue of non-commercial research that could get commercial: The MAT provisions should provide for *all* scenarios, including the commercial application. Even if it is for non-commercial application, you should provide for the "commercial" scenario. These provisions should contain information on what the user can do (non-commercial) and what happens (i.e., the consequences) if they use the material, sample and information or data etc. related to that material for commercial purposes.

In relation to different capacities of communities in terms of access to the internet and so on, what can be done in terms of permit systems?

- Countries should be assisted with electronic systems but there are issues that need to be addressed, such as the maintenance of online systems. One of the important innovations in the Bahamas system is that users must provide details on their research budget and to quantify what they will spend money on in the Bahamas. This moves us away from non-quantified benefit-sharing. It is important to get to the quantification of these things that are typically not quantified. This is registered in non-commercial agreements and, of course, in detail in commercial agreements.
- Every single application to the Bahamas has to quantify what the benefits are however small they may be, proportional to the capabilities of the applicant. That is an important innovation that hasn't been thought of before.

Data ownership for scientific publications

- This is one of the main problems around DSI. The journals and research funders make it a condition that you put data in an open database where it is available for others without terms and conditions and without ownership being acknowledged. Like everywhere, African researchers need to "publish" or "perish", which means you need to publish in order to proceed in your research career. It is about acknowledging the sharing of data coming from Africa and that there is currently no benefit-sharing attached to it. Even if you were to negotiate bilateral agreements around the data, the current data-based system doesn't have a way for those conditions to bind subsequent users. This is one of the fundamental questions that need to be addressed on DSI.

- One possible solution for benefit-sharing is that the data is shared with the provider but in most cases, this is already available and is of no interest. What really needs to be solved is the subsequent use of such data.

- The database recognises that rights may exist on data, but it is not taken into account at all, and it should all be committed to the public domain. Who has the right to submit something collected somewhere else to the public domain? This aspect needs to be problematised.