
CHUNG, Myung-Hyun *

(1) Preparation for Implementation of the Nagoya Protocol

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (hereinafter ‘Nagoya Protocol’) was adopted on October 29, 2010 in Nagoya, Japan at the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity and entered into force on October 12, 2014. Ninety-two countries, including Korea, have signed the Nagoya Protocol during the period that the Protocol was opened for signature from February 2, 2011 to February 1, 2012 at the United Nations Headquarters in New York.

Since Korea signed the Nagoya Protocol on September 20, 2011, Korean government launched Cooperative Action Plan among relevant government authorities on November 8, 2011. The Action Plan was organized by participation of twelve government authorities: Ministry of Foreign Affairs; Ministry of Science and ICT; Ministry of Environment; Ministry of Justice; Ministry of Agriculture, Food & Rural Affairs; Ministry of Trade, Industry & Energy; Ministry of Health & Welfare; Ministry of Oceans & Fisheries; Ministry of Food & Drug Safety; Rural Development Administration; Korea Forest Service; Korean Intellectual Property Office. Cooperative Action Plan in 2011 carried out several tasks in response to implement the Nagoya Protocol.

<table>
<thead>
<tr>
<th>Cooperative Action Plan in 2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Survey &amp; Discovery of Genetic Resources in Korea</td>
</tr>
<tr>
<td>Survey &amp; Discovery of Traditional Knowledge in Korea</td>
</tr>
<tr>
<td>Survey of Current State in Export of Biological Resources originated in Korea (~ 2020)</td>
</tr>
<tr>
<td>Establishment of Total Management System on the National Biological Resources</td>
</tr>
<tr>
<td>Revision of National Legislation System</td>
</tr>
</tbody>
</table>

* Research Professor, Legal Research Institute, Korea University
(2) Enactment of Act on Access, Utilization, and Benefit Sharing of Genetic Resources

After two years of operation of Cooperative Action Plan, Korean government announced Notice of Legislation ‘Act on Access, Utilization, and Benefit Sharing of Genetic Resources’ (hereinafter ‘ABS Act’) on December 19, 2013 to implement the Nagoya Protocol and to establish national policy on access to and utilization of genetic resources. This Act also aimed to contribute conservation and sustainable use of biological resources, to improve the quality of life of citizens, and to enhance international cooperation in transaction of genetic resources. However, it took more than three years to be enacted as the ABS Act, Law No 14533 on January 17, 2017, since Korean government, as a user country of genetic resources, took a careful approach to ratify the Nagoya Protocol in concerned with economic effect in relevant industries once the Nagoya Protocol was in full effect. The government needed to coordinate various and differing demands as well as review other countries’ examples. In this line, the government engaged researchers on various occasions to examine other countries’ examples and establish a Korea-specific benefit-sharing model based such research.

The government also started to operate the ‘Korea ABS Research Center’ and ‘ABS Information and Service Center’ to promote support and raise awareness of the Nagoya Protocol in related research institutes and industries.


<table>
<thead>
<tr>
<th>Structure of the ABS Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter</td>
</tr>
<tr>
<td>Chapter I General Provisions</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Chapter II Access, utilization, and benefit sharing on domestic GR</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
As required by the Nagoya Protocol, the ABS Act provides national authority and ministries to manage ABS measures for those concerned genetic resources.

i. National Focal Point

Ministry of Foreign Affairs and Ministry of Environment are responsible for the national focal point. 1) Although the enforcement decree may determine other tasks, Ministry of Foreign Affairs will mainly work as a contact point with CBD secretariat and Ministry of Environment will carry out to provide information with regard to ABS matters.

ii. National Competent Authority

The ABS Act also designated five national competent authorities that have managed concerned resources with their competency: Ministry of Science and ICT (Biological research resources); Ministry of Agriculture, Food and Rural Affairs (Agro bio resources); Ministry for Health and Welfare (Pathogenic resources); Ministry of Environment

(3) Authority & Ministries Concerned
(Biological resources); Ministry of Ocean and Fisheries (Marine-fishery bio resources). National Competent Authority will carry out i) processing of report or modified report on domestic genetic resources (Art.9), ii) prohibition of access to and utilization of domestic genetic resources (Art.12), iii) supporting fair and equitable benefit sharing on domestic genetic resources, iv) other matters determined by enforcement decree regarding ABS.

iii. National Check Point

National check point are also provided in article 13 of the ABS Act to carry out i) processing of report on compliance with procedures (Art.15), ii) investigation and advice on compliance with procedures (Art.16), iii) supporting domestic users of overseas genetic resources. Also the enforcement decree may determine other tasks of check point regarding ABS. Above five national competent authorities and Ministry of Trade, Industry and Energy will be responsible for national check point. Ministry of Trade, Industry and Energy is included in concern of economic effect of ABS rules to those relevant industries.

<table>
<thead>
<tr>
<th>ABS Act</th>
<th>Authority</th>
<th>Ministries and concerned resources</th>
</tr>
</thead>
</table>
| Art.7   | National Focal Point | Ministry of Foreign Affairs  
Ministry of Environment |
| Art.8   | National Competent Authority | Ministry of Science and ICT (Biological research resources)  
Ministry of Agriculture, Food and Rural Affairs (Agro bio resources)  
Ministry for Health and Welfare (Pathogenic resources)  
Ministry of Environment (Biological resources)  
Ministry of Ocean and Fisheries (Marine-fishery bio resources) |
| Art.13  | National Check Point | Ministry of Science and ICT  
Ministry of Agriculture, Food and Rural Affairs  
Ministry of Trade, Industry and Energy  
Ministry for Health and Welfare  
Ministry of Environment  
Ministry of Ocean and Fisheries |
| Art.17  | Information Sharing | Ministry of Environment  
Information Management Center for Genetic Resources |
i. Definitions

The ABS Act defines some key terminologies for their clear meaning in this Act.  Some important definitions are following:

1) ‘Genetic resource’ means materials which have practical or potential value, among plants, animals and microorganisms or other genetic material which becomes genetic origins including a genetic functional unit (As of the definition in Article 2.4 of Act on the Conservation and Use of Biological Diversity);

2) ‘Traditional Knowledge’ means knowledge, technology and practice, etc. of individuals or local communities which have maintained a traditional life style suitable to the conservation of genetic resources and sustainable use of genetic resources;

3) ‘Access’ means to acquire samples or actual materials of genetic resource or to collect information about genetic resources and associated traditional knowledge;

4) ‘Utilization’ means to conduct research and development, including the application of biotechnology, on the genetic or biochemical composition by utilization of genetic resources;

5) ‘Benefit’ means monetary benefits including fees or revenue and non-monetary benefits including technology transfer or sharing the outcome of research, arising from utilization of genetic resources.

ii. Scope of application

The ABS Act excludes following genetic resources from the scope of application:

1) Human genetic resources;

2) Genetic resources in the area beyond state jurisdiction including Antarctic;

3) Genetic resources accessed for purposes other than utilization;

4) Genetic resources subject to other international agreement with regard to access and benefit sharing of genetic resources;

5) Genetic resources registered as the grant of patent subject to Article 87.1 of Patent Act.

iii. Duty of report for access on domestic genetic resources

Foreigners, overseas Koreans, foreign institutions, international organizations, etc. who access the domestic genetic resources for the purpose of utilization shall report to national competent authority subject to the procedures of enforcement decree. However, when the approval or report has been made in accordance with other ABS legal framework, the duty
of report under the ABS Act will be exempted.\(^6\)

Nationals who access to domestic genetic resources for the purpose of utilization may report to national competent authority subject to the procedures of enforcement decree including when it is necessary to confirm that the provider country of the genetic resource is Republic of Korea. According to the Nagoya Protocol, provider can be either a country of origin of genetic resources or a country that has acquired the genetic resources in accordance with the Convention of Biological Diversity.

iv. Exception of report for access on domestic genetic resources

There are some exceptions to the duty of report for access on domestic resources. In case national competent authority recognizes the need for expeditious access to or utilization of genetic resources for developing treatment or food security due to threat or damage to human, animal or plant life or health, or in case of access for the purpose of non-commercial research, the report procedure may be simplified or exempted. However, when the purpose of non-commercial research is changed, the user shall report without delay.\(^7\)

v. Benefit sharing of domestic genetic resources

The user and provider of genetic resources shall agree to share the benefits of domestic genetic resources with fair and equitable way.\(^8\)

vi. Prohibition of access to and utilization of domestic genetic resources

National competent authority may prohibit or limit the access and utilization in case of threat or likely to threat to conservation and sustainable use of biodiversity, or social and economical adverse effect to the value of biodiversity.\(^9\)

vii. Compliance with procedures for access to and utilization of overseas genetic resources

When the user accesses to the overseas genetic resources and utilizes them in the territory of Korea, he/she shall comply with the provider country measures. In this case, the user should endeavor to share the benefit arising from utilization of genetic resources with the provider fair and equitable manner.\(^10\)

The user in Article 14 shall report to the national check point that he/she complied with the provider country measures. The report under this provision is limited to the provider country that is a party of Nagoya Protocol and prepared procedures for access and utilization.\(^11\)
viii. Investigation on compliance with procedures

National check point may investigate whether the user of Article 14 complied with provider country measures in following cases:

1) In case the provider country raises an objection with the user’s compliance;
2) In case the third party provides information regarding violation of the provider country measures;
3) In case reasonable doubt is raised that the user is not complied with the provider country measures.

National check point may advise the user of Article 14 to comply with procedures if necessary, and the content and method of investigation shall be determined by the enforcement decree.

(5) Other ABS Legal Framework

In addition to the ABS Act, concerned Ministries operate several ABS legislation under their competency over the relevant genetic resources. Most of them are recently revised in response to the Nagoya Protocol. Also these concerned Ministries are provided as the national competent authority and the national check point under the ABS Act.

<table>
<thead>
<tr>
<th>Ministry</th>
<th>Act</th>
<th>Amendment (Enforcement)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministry of Science and ICT</td>
<td>Act on the Acquisition, Management, and Utilization of Biological Research Resources</td>
<td>2016.3.22</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2016.9.23(E)</td>
</tr>
<tr>
<td>Ministry of Agriculture, Food and Rural Affairs</td>
<td>Act on the Preservation, Management and Use of Agro Bioresources</td>
<td>2016.12.27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2017.6.28(E)</td>
</tr>
<tr>
<td>Ministry for Health and Welfare</td>
<td>Act on the Collection, Management, and Utilization of Pathogenic Resources</td>
<td>2016.12.27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2017.6.28(E)</td>
</tr>
<tr>
<td>Ministry of Environment</td>
<td>Act on the Conservation and Use of Biological Diversity</td>
<td>2016.12.27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2017.6.28(E)</td>
</tr>
<tr>
<td>Ministry of Ocean and Fisheries</td>
<td>Act on the Acquisition, Management, and Utilization of Marine(Marine-fishery) Bioresources</td>
<td>2016.12.27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2017.6.28(E)</td>
</tr>
</tbody>
</table>

(6) Issues & Challenges

Since Korea became a Party to the Protocol from August 17, 2017, the ABS Act is also effective on August 17, 2017. With this regards, the task ahead of us is to promote awareness and understanding of the Nagoya Protocol among industries and researchers
who utilize the genetic resource. We also need to provide and share information of ABS measures provided by main genetic resources provider countries and develop the case studies, to prepare Korea to comply with applicable laws and regulations and deal with legal disputes. It is necessary to discover domestic genetic resources and associated traditional knowledge by survey and research and to keep them in the database system or registries so that they are not to be used in abusing manner.

We should take note that the Nagoya Protocol contains many phrases having obscure meaning as it was created by coordinating differing interests and views of various countries. Even the laws enacted in Korea as well as in other countries in response to the Nagoya Protocol include phrases having vague meaning. Competent authorities and ABS Help desks should consult with experts and competent authorities in the provider country so that try to clarify these uncertainties.

Note

1) ABS Act Art. 7.
2) ABS Act Art. 8.
3) ABS Act Art. 2.
4) ABS Act Art. 3.
5) Article 87.1 of Patent Act provides ‘A patent shall take effect when the grant of the patent is registered.’
6) ABS Act Art. 9.
7) ABS Act Art. 10.
8) ABS Act Art. 11.
9) ABS Act Art. 12.
11) ABS Act Art. 15.
12) ABS Act Art. 16.