

Vietnam's Legislation on Access to Genetic Resources and Benefit Sharing (ABS): Achievements, Remained Weakness And Solutions*

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Abstract

"Being a member of the Convention on Biological Diversity (CBD) since 1994, being 31st member of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (NP) since 2014, Vietnam is making its efforts to improve ABS legislation and policy to implement the NP. A master scheme on capacity building on ABS adopted by Prime Minister Nguyen Xuan Phuc was issued in 2016 to implement ABS was promulgated. Decree No. 59/2017/ND-CP, dated May 12, 2017, on the management of access to Genetic Resources (GRs) and the sharing of benefits arising from their utilization (Decree 59) made an important remark in development of ABS law and policy in Vietnam. This Decree covers all basic issues of ABS, detailing the Law on Biodiversity, which was promulgated in 2008 and internalizing the NP in ABS national law. These include essential elements: determining scope definitions, main actors: providers, users, national focal points (NFP), national competent agencies (NCA), benefit sharing, compliance. In spite of important achievements in ABS law development and implementation to date, there remain some weaknesses and shortcomings within the legal system, institutions to facilitate ABS law being implemented well in practice. There are not only the gaps between laws, unclear demarcation of inter-ministerial assigned issues, but also limitation in terms of capacity and awareness of involved actors on ABS issues. This article aims to analyze all these above mentioned points, recommends improving ABS law and policy as well as provides suggestion to overcome limitation."

KEY WORDS: Vietnam ABS, Regulatory Framework

* This research was supported by a grant from the Marine Biotechnology Program (170488) funded by the Ministry of Oceans and Fisheries, Korea.

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Manuscript received: May 19, 2018; review completed: November 12, 2018; accepted: November 28, 2018.

I. Overview of ABS legislation of Vietnam

Being a country rich in biodiversity in South East Asia, recognizing the importance of biodiversity to socio-economic development, Vietnam adhered to the Convention on Biological Diversity since 1994.

As Vietnamese legislation is characterized by “dualist system” of which international law and national law are two separate systems of law, the rules of international law can operate in a national law only if they are deliberately transformed into national law,¹⁾ the provisions of the CBD were transformed into national legislations to comply the responsibilities of country’s member by various biodiversity related laws: Law on Fisheries, 2003, Law on Forest Protection and Development, 2004, Law on Environmental Protection, 2005, Ordinance on Plant Varieties and livestock breeds, 2004, ... However, until 2008, the Law on Biodiversity was promulgated to perform fully the CBD and others biodiversity related international treaties in Vietnam. This was also the first time which ABS issue was named and provided under the law. The Biodiversity Law 2008 devotes Section 1, Chapter V, from Article 55 to Article 61, for ABS provisions. The Biodiversity Law covers all the fundamental elements of ABS: Definition “access,” “TK”; Ownership of Genetic Resources (GRs), Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) requirements; ABS contracts, Key steps procedure, benefit sharing. These provisions are consistent with basic principles of the CBD and the NP, but they are very general like declarations of principles. Thus, it requires by-law documents to guide implementing in detail to put these principles in practice. Decree No. 65/2010/ND-CP of the Government, dated June 11, 2010, on detailing and guiding the implementation of the Biodiversity Law, was promulgated with three (3) articles 18, 19 and 20 on ABS issue.

1) Hamid. A. G., Sein. K. M., *Judicial Application of International Law in Malaysia: An Analysis*, Second Asian Law Institute Conference, Faculty of Law, Chulalongkorn University, Thailand (2005).

However, three articles of this Decree failed to make ABS regulation work out in practice because they were too general and unrealistic. During validity of the Decree 65/2010/ND-CP, there was no case of ABS going to the NCA, no ABS activities were reported.²⁾

Having an effective and applicable national ABS legislation has become crucial for Vietnam's biodiversity conservation and sustainable development. This is the sole mean to realize the idea and approach of the NP "Selling nature to save it."³⁾ Accordingly, 'selling nature' to have "fair and equitable sharing of the benefits arising from the utilization of genetic resources" for "contributing to the conservation of biological diversity and the sustainable use of its components" or 'saving nature' – is the objective of the NP and the CBD. It is confirmed that "*potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability and thereby contributing to achieving the Millennium Development Goals.*"⁴⁾

Therefore, after adhering to the NP, a new decree was developed to transform the provisions of the NP into national law, and at the same time, to further detail the Biodiversity Law, 2008. As a result, Decree 59 was issued and officially replaces ABS-relevant provisions (Article 18, 19 and 20) of Decree 65/2010/ND-CP. Decree 59 consists of 28 articles in 5 chapters: detailing orders and procedures; concretizes rights and obligations of actors, designates a NFP, national competent agency, to grant license, regulation of benefit sharing, compliance.

Decree 59 came into effect on July 1, 2017. It is considered as a landmark in ABS legislation's development in Vietnam. The Decree provides feasible orders and procedures for the ABS process: from registration to access to GR, negotiation of an ABS contract to application for license of access to GRs and benefit sharing, to monitoring of compliance through a reporting

2) Biodiversity Conservation Agency [hereinafter BCA], Ministry of Natural Resources and Environment [hereinafter MONRE], *Report on Identification of National ABS Priorities and Proposal for Enhancement of ABS Management in Vietnam*, 2013 (internally used and unpublished document)

3) Kathleen McAfee, *Selling Nature to Save It? Biodiversity and the Rise of Green Developmentalism*, 17 ENV. AND PLANNING D: SOCIETY AND SPACE, 133, 133-154 (1999)

4) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, October 12, 2014, at Preamble

mechanism. Rights and obligations of the involved actors have also been concretized, including the state management responsibilities of the designated NFP, NCA, the rights and obligations of assigned providers of GRs and users. Nine (9) sample forms are introduced in annexes, which provide templates for registration, ABS model contracts and application forms. Since date of its effect until today, there are twenty-six (26) licenses allowing national science-technology organizations to transfer genetic resources abroad for study/research for non-commercial purposes by Ministry of Natural Resources and Environment (MONRE), four (04) dossiers obtaining notification to confirm registration for access to genetic resources for both commercial and non-commercial research purposes (by), two (2) dossiers for non-commercial research purpose, one (1) dossiers for commercial purpose by Ministry of Agriculture and Rural Development (MARD).⁵⁾ Beside a quite completed ABS legislation, with the number of above licenses issued and dossier being handled, they are clear evidences of the first achievements of ABS law's development and implementation in Vietnam up to now. However, there still remain some weaknesses and shortcomings which need to be resolved in the future. Analysis below may be useful for relevant ABS involved actors in Vietnam to understand the situation, look at recommendations to have their own solutions and plan to follow up with ABS activities in Vietnam to comply with laws. Noticeably, the number of GR's users from South Korea and Japan accounts for a large proportion of the dossiers appraised by MONRE.⁶⁾ It is within common trends of boosting and deepening bilateral trade relationship between Korea and Vietnam due to new policy of South Korea that Vietnam is set as a major trading partner to supersede China in the future.⁷⁾

5) BCA, *supra* note 2, at updates on November 2018.

6) MONRE, *supra* note 2, at updates on October 2018

7) Vietnam, South Korea agree to do \$100 billion in bilateral trade by..., REUTERS (2018), <https://www.reuters.com/article/us-vietnam-southkorea-moon/vietnam-south-korea-agree-to-do-100-billion-in-bilateral-trade-by-2020-idUSKBN1GZ0GX> (last visited Dec 18, 2018).

II. Genetic resources ownership: providers' matters

The concept of 'provider' relates to the issue of ownership of GR that also depends on the national law.⁸⁾ In some countries, GR may belong to the State in accordance with the Constitution which provides indirectly or directly to the legal status of GR; for example in the Philippine,⁹⁾ while in the others countries like the Australia, the State governments and individuals own the GR found on their respective lands in accordance to common law principles.¹⁰⁾

Not like other countries with clear private and/or public ownership of GR, Vietnam has special regime of ownership of GR which is not always easy to understand for foreign users. Following Article 53 of the Constitution, 2013: *"The land, water resources, mineral resources, resources in the sea and airspace, other natural resources and properly invested and managed by the State are public properties, coming under ownership of the entire people represented and uniformly managed by the State."* Therefore, GRs are of entire people ownership, represented by the State and uniformly managed by the State. Based on the Constitution, the Biodiversity Law affirms at Article 55.1: *"The State uniformly manages all GRs in the Vietnamese territory."* Then, the State assigns to four (4) groups of organizations and individuals to manage GRs, which includes: 1- Conservation area management units and organizations assigned to manage conservation areas; 2- Heads of biodiversity conservation facilities, scientific research and technological development institutions; 3- Organizations, households and individuals

8) 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, PROJECT RELATED PUBLICATIONS | INTERNATIONAL ENVIRONMENTAL AGREEMENTS (IEA) DATABASE PROJECT, <https://iea.uoregon.edu/treaty-text/2010-protocol-1992-biologicaldiversityentxt> (last visited Dec 18, 2018).<http://www.theses.fr/2012LIMO1009>

9) Fifth Meeting of the Ad Hoc Open Ended Working Group on Access and Benefit-Sharing [hereinafter UNEP/CBD/WG-ABS/5/5], *Report on the Legal Status of Genetic Resources in National Law, Including Property Law, Where Applicable, in a Selection of Countries*, U.N. Doc. UNEP/CBD/WG-ABS/5/5 (2007), at 17, "the EO 247 recognizes the clear framework for property rights to biological resources put forward in the Philippine constitution: the Philippine State owns all forests, wildlife, flora and fauna, and other natural resources

10) UNEP/CBD/WG-ABS/5/5, *supra* note 9, at 9.

assigned to manage or use land, forests or water surface; 4 -Commune-level People's Committees.¹¹⁾ These above organizations and individuals who assigned to manage GRs, are providers of the GRs following Decree 59.¹²⁾ Even though they are "providers" who can grant PIC and sign MAT, but the State maintains sovereign rights over GRs and regulation over GRs. The State regulates access to GRs by granting the licenses, defines the rights and responsibilities of providers,¹³⁾ including by authorizing the negotiation of an ABS contract and determining the minimum levels of benefit sharing. Even in some cases, without consents of the designated "providers", the State competent management agencies still can grant licenses of access to GR for interest of the country and community.¹⁴⁾

III. Scope of regulation for ABS activities: users' matters

The Biodiversity Law only provides a broad definition of genetic resources and access to genetic resources, but does not provide a definition of "utilization of genetic resources," to determine which activities are ABS activities that fall under the scope of its regulation. The law states that "GRs includes all species and genetic specimens in nature, conservation zones, biodiversity conservation facilities and scientific research and technological development institutions and in nature" and "access to genetic resources is the activity of investigation and collection of genetic resources for research and development, production of commercial products."¹⁵⁾ These definitions do not include basic elements of "genetic materials" and the "utilization" of such genetic material to clarify ABS activities. By it turns, the Decree 59, provides by re-writing the definitions of "Utilization of GRs," "Biotechnology," "Derivatives" of the NP, but it does not define which are activities of "research and development" (R&D) and biotechnology elements which are

11) Luật Đa dạng sinh học [Biodiversity Law] (2008) Art. 55.2 (Viet).

12) Decree on the Management of Access to Genetic Resources and the Sharing of Benefits Arising From Their Utilization art. 3.1, 2017 (Decree No. 59/2017/ND-CP)

13) Luật Đa dạng sinh học [Biodiversity Law] (2008) Art. 56 (Vietnam).

14) See *id.* Art. 59.5.

15) See *id.* Art. 3.29., Art. 3.22.

critical factors for determining whether activities fall within the scope of ABS requirements.

The Decree 59 does not give the list of activities within scope of ABS. To fill this gap and facilitate ABS procedures, by guiding document to implement the Decree 59, the MONRE develops the list of activities within scope of ABS are subject to registration and application for ABS licenses. These activities include: (i) conducting R&D on specific naturally existing compounds; (ii) research on different extraction processes for various potential compounds in plants; (iii) plant and livestock breeding using biotechnology, for creating new plant and livestock varieties using recombinant DNA technology, genetic engineering, and cell technology; (iv) biotechnology applications that use biological systems, living organisms or their derivatives to create or modify certain products or processes for certain uses (including antibiotic production); (v) biotechnology applications that use enzymes and protein technology to produce a natural conversion of vegetable oil components to other fatty acids, and to separate plant cells that allow the separation of hydrophilic and lipophilic fractions from kernels, leaves, seeds, etc.; (vi) reproduction of genetically modified insects to control diseases as malaria, etc.; and (vii) microorganism cultures to produce potential chemical compounds.

This list is built basing on its nature of using biotechnology and involving “research and development” (R&D). It is a result of referring experiences of other researches on ABS and consultation opinions of scientists.¹⁶⁾ However, this may raise the questions of stability of the above mentioned list of ABS activities for MONRE to issue the list.

In terms of users, by learning experiences of ABS law of India and Brazil, South Africa¹⁷⁾ Vietnam distinguishes between domestic and foreign

16) UNCTAD, *The Interface Between Access and Benefit-sharing Rules and Biotrade in Vietnam*, UNCTAD/WEB/DITC/TED/2016/9 (Nov. 28, 2016), https://unctad.org/en/PublicationsLibrary/webditcted2016d9_en.pdf; *Addressing the intersection between the Nagoya Protocol, access and benefit-sharing rules, and Biotrade* (May 27, 2016), <https://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1156>; UNCTAD, *Facilitating Biotrade in a Challenging Access and Benefit Sharing Environment*, UNCTAD/WEB/DITC/TED/2016/4 (May 31, 2016), https://unctad.org/en/PublicationsLibrary/webditcted2016d4_en.pdf.

17) Christian Prip & Kristin Rosensal, *Access to Genetic Resources and Benefit- Sharing from Their Use (ABS) – State of Implementation and Research Gaps*, 5 REP. to PBL NETH. EVN'T AGENCY

users in ABS procedures. It is explained to promote national scientific research development because Vietnam is still a developing country with limited scientific and technological capacity. It is easy to realize the different requirement applied for foreign users that is having cooperation with a Vietnamese science-technology organization during access to GR in Vietnam. And, foreign users are required to have license to access to GR for all purposes of utilization while domestic users only are required license to access to GR for commercial purposes or for the development of commercial products.¹⁸⁾

Defining what is meant by “commercial purposes” becomes important but the Decree 59 does not provide this definition. Thus, the guiding document defines that access to GRs for commercial purposes is the access for a certain benefit, by developing products, commercializing them to gain a profit. This definition is based on definition of Law on Commerce “*commercial activity is an open economy activity for purpose of gaining a profit.*”¹⁹⁾ Thus, the “gaining-a-profit” is a key element of commerce.

The Decree 59 also does not specify which organizations are competent to cooperation with foreign users in ABS process. It is not any research organization in Vietnam. The guiding document once again refers to the Law on Science and Technology. Vietnamese scientific and technological organizations are organizations that function in scientific research, technological development research, science and technology service activities, being established, certified with a registration certificate, and operated according to laws.²⁰⁾

It is recognized that scientific institutions, research institutes, research centers, universities are often engaged in non-commercial research activities, but there are research activities for commercial purposes and for the development of commercial products. Companies that have R&D or

& FNJ, 24 (2015), https://www.researchgate.net/publication/309385468_Access_to_genetic_resources_and_benefitsharing_from_their_use_ABS_-_state_of_implementation_and_research_gaps.

18) Decree on the Management of Access to Genetic Resources and the Sharing of Benefits Arising From Their Utilization art. 9.2, 2017 (Decree No. 59/2017/ND-CP)

19) Luật Thương mại [Commerce Law] (2005) Art. 3.1 (Vietnam)

20) Luật Khoa học và Công nghệ [Law on Science and Technology] (2013) Art. 3.4 and Art. 3.11 (Vietnam)

biotechnology for commercial purpose or commercial product development can still engage in non-commercial scientific research.

The Decree 59 also does not identify directly who are foreign users. The guiding document refers to the Investment Law, 2014, foreign individuals and organizations are defined as individuals with foreign nationality, organizations established under foreign laws. Domestic individuals and organizations are defined as individuals having Vietnamese nationality and organizations established under Vietnamese law.²¹⁾

IV. National focal points (NFP), national competent agencies

Following the Decree 59, the Ministry of Natural Resources and Environment (MONRE) is designated as the NFP on the Nagoya Protocol.²²⁾

MONRE and MARD are assigned as the authorities to grant, renew and withdraw licenses to access GRs²³⁾. The Decree specifies that: (i) MARD shall grant, renew and withdraw licenses to access GRs of agricultural crop varieties, livestock, aquatic species, and forest seedlings; (ii) MONRE shall grant, renew and withdraw licenses to access all other GRs. However, it is not always clear to determine the authority of MONRE or MARD in 'grey area.' There are lists of plant varieties, animal/aquatic breeds and forest seedlings issued by MARD can be used to determine. The lists include: (1) List of plant varieties permitted for trade and production; (2) List of animal breeds permitted for trade and production; (3) List of aquatic breeds permitted for trade and production; (4) List of forest plant varieties permitted for trade and production; (5) List of precious and rare plants and animals banned from export; (6) List of plant genetic resources, list of precious and rare livestock genetic sources to be preserved; (7) List of precious and rare plant varieties and livestock gene sources restricted

21) Luật Đầu tư [Investment Law] (2014) Art. 3.14 (Vietnam)

22) Union for Ethical Biotrade, Documents of Branding and Biodiversity Conference: Beauty of Sourcing with Respect (Jun. 19-20, 2018).

23) Decree on the Management of Access to Genetic Resources and the Sharing of Benefits Arising From Their Utilization art. 6, 2017 (Decree No. 59/2017/ND-CP).

international exchange; (8) List of precious and rare plant varieties and livestock gene sources for international exchange in special cases; (9) List of plants varieties, breeds, microorganisms and fungi under the list of species with priority of protection (under Article 15 of the Decree 160/2013/ND-CP); (10) List of wild plants and animals of the Annex of Convention on international trade in endangered species of wild fauna and flora (CITES).

MARD is the NCA receiving, appraising and granting license to access GRs of plant varieties and breeds. All other cases (wild animal, plant and microbial GRs) are within the scope of their competence to grant, renew and withdraw a license to access GRs of the MONRE. While MONRE has specified Environment Administration (particular the Biodiversity Conservation Agency) to be its technical body handling cases of access under the ministry's competence, MARD has also got internal arrangement with regard to handling specific cases under their competence: Forestry Administration is assigned to handle cases of access to forest seedlings, Fishery Administration is assigned to handle cases of access to aquatic species, Department of Crop Production is assigned to handle cases of access to plant varieties, Department of Livestock Production is assigned to handle cases of access of livestock breeds. Even though, there are some particular lists that help to define authority of MARD or MONRE in handling the application of license to access GR. It is still necessary for two NCAs cooperate to work closely to solve case with difficulty of defining the competence agencies in charge.

For example, there is a recent case that a foreign user would like to access rambutan (*Nephelium Lappaceum*) for utilization purpose other than its normal use as fruits for direct consumption. However, the case has been recently rejected since it has been recognized as a fruit variety under list of precious and rare plants restricted for international exchange (Decision 79/2005/QD-BNN). This list was issued for more than 10 years, the priority for protection of some varieties might have changed now, and there is a crucial need for regular update to adapt with the current situation. And, more importantly, it is needed to understand the purpose of use in different contexts.

V. Procedure for granting ABS License

To avoid a long process with heavy and complicated procedures that make difficult and discourage GR users to apply ABS, Vietnamese law makers tried to clarify and simplify maximum the ABS procedure for granting ABS license. Finally, the ABS procedures includes four basic steps that users should follow to obtain the license to access to GR: i -submit a registration; ii - negotiate and sign ABS contract; iii - request the Commune People's Committee to certify the ABS contract, iv - submit an application for license to access to GR.

After submitting application, dossier will be examined and assessed by an appraisal committee, composed of relevant ministries, local authorities and experts. For the non-commercial purposes, the time of appraisal will be 30 days. This simplified and shortened duration is for purposes of facilitating to promote scientific research as defined in Article 8.a, 8.b of the Nagoya Protocol.

The appraisal takes up to 90 days for access to GR with commercial purposes. The competent authority then decides on the ABS permit within 15 days. The time limit of 90 days is considered as a great effort of Vietnamese Government to shorten time of handling and appraising the dossier of application, especially in the context of ABS still being new issue, lacking of full understanding, knowledge and limited capacity of human resources. The difficulties may arise in the earlier time of implementation of Decree 59 for the NCA to meet the timeline of 90 days. Decree 59 includes separated regulations for Vietnamese students, doctoral students and Vietnamese scientific and technological organizations who wish to transfer genetic resources abroad. This is a simplified procedure to promote the scientific researches. Following this procedure, the dossier only handled within 15 days from the date of receiving a valid dossier. This is the reason to explain why there are large numbers of ABS cases which are handled and licensed under this procedure.

It is noted that the period of validity of an ABS license cannot exceed three years.²⁴⁾ Even though the period of three years is considered being

24) See *id.* Art. 16.3.

short in comparison with the long and heavy administrative procedures of applying the license to access to GR; the license can be renewed within 30 days from date of receiving a valid dossier following Article 17 of the Decree 59. In the view of law's makers, the license to access to GR is only for GR's collection/accession work only, and does not include R&D activity afterward. However, the Decree has taken into account this issue by linking the Access License and the ABS contract. The contract has been signed by both parties before submitting to the NCA, it will only be valid after having the Access License. The other way round, if the license is expired, the terms of benefit sharing in the contract will still be in effect.²⁵⁾ Also, if the actual collection work has been completed during the time of validity date stated in the license, the users do not need to apply for renewed license.

The license can be withdrawn if the users provide false information; the access and utilization of GRs causes harm to people, environment, security, national defense or national interests of Vietnam; other violations in accordance with the law.²⁶⁾ However, all these conditions are not defined clearly which levels and evidences required to be considered falling in to the case of Article 18 of the Decree 59, it seems to be very large and vague to define 'national interests of Vietnam or violations in accordance with the law' to be the basis for NCA to withdraw the license.

Therefore, it may be a question concerning requirement of the NP for national ABS legislation with "legal certainty, clarity and transparency" following Article 6.3.a of the NP. Therefore, it needs to have more detail guidance from NFP and NCA of Vietnam regarding the Article 18 of Decree 59.

VI. Benefit sharing

Being influenced by the NP's provision on sharing benefit, ABS law of Vietnam defines both types of benefits from utilization of GRs: monetary and non-monetary benefits.²⁷⁾

25) See *id.* Art. 15.2~3.

26) See *id.* Art. 18.

27) See *id.* Art. 21.

For monetary benefits, Decree No. 59 stipulates that the share of monetary benefits of the product generated from the utilization of GRs shall be not less than 1% of the total annual revenue of such product. The share of monetary benefits for the Provider when obtained by the transfer of GRs or derivatives thereof, or the utilization of intellectual property rights based on the GRs, shall be not less than 2% of such total transfer value or total revenue from the use of intellectual property rights.²⁸⁾ It is noted that "the total annual revenue of such product" means the revenue of the user from selling the products utilizing licenced accessed GRs.

This percentage of 1-2% of the total annual revenue of the product seems to be moderate in comparison with the rate of 2-5% of the total gross ex-factory sale of the product under ABS law of India²⁹⁾. This provision of the Decree 59 is to overcome difficulty of applying the Article 19 of Decree 65/2010/ND-CP on benefit sharing, that only defined requirements for benefit sharing under the MAT, with not less than 30% of the total benefits arising from utilization of genetic resources to be shared in cash with provider, but it did not define how the total benefits are derived, the time required to generate benefits, and the time it takes to reach end benefits in the benefit chain from research to business, benefits arising in the case of secondary use onwards.

However, the Decree 59 only sets up the above minimum ratio to be shared by the users and opens a discretion for parties of ABS contract to negotiate where, how and how much the benefit should be shared. As the Decree mentions both monetary and non monetary benefits, there is flexibility for the parties of ABS contract to negotiate and choose which benefit to be shared. Therefore, it is possible for an ABS contract agrees only for non-monetary benefits, but these kinds of non-monetary benefits should be convertible into certain monetary amount to satisfy the requirement the minimum ratio in specific cases.

In the amount not less than 1% or 2% above for the Provider, the total monetary benefit is shared as follows: When the Provider is Commune-level People's Committees, or Protected Area's Management Board, or

28) See *id.* Art. 22.

29) INDIA NATIONAL BIODIVERSITY AUTHORITY, ABS FACTSHEET, nbaindia.org/uploaded/pdf/ABS_Factsheets_1.pdf

state-managed facilities for storing or preserving GRs, or Biodiversity conservation facilities, or institutes for research and technology development assigned by the State: 30% of the shared money shall be paid to the GRs Provider as prescribed in Clauses 1 and 2 of Article 22, Decree 59; and the remaining 70% of the shared money shall be paid into the State Budget to be used for conservation and sustainable use of biodiversity;

When the Provider is an individual or a household or an organization assigned to manage GRs by the State: 50% of the shared money shall be paid to the GRs Provider as prescribed in Clauses 1 and 2 of Article 22, Decree 59; and 50% of the shared money shall be paid into the State Budget to be used for conservation and sustainable use of biodiversity.

This mechanism of sharing monetary benefit is built basing on fundamental ownership of GR, the final goal and meaning of ABS activities, as well as the contribution of each type of providers.

Non-monetary benefits arising from the utilization of GRs and the sharing of such non-monetary benefits will be agreed by the parties and specified in the contract. Beneficiaries of non-monetary benefits include: Domestic Providers, domestic partners of the foreign Accessor, and other involved organizations and individuals. The origin of the accessed GRs should be clearly stated when publishing any results of the scientific research or applying for intellectual property rights for any innovative results based on accessing and using such GRs.

VII. Compliance

The Nagoya Protocol has no specific and strict regulations on compliance. Therefore, the national law of each country needs to include more specific and clear regulations to support the maximum level of enforcement possible, in which the citation of foreign laws or mechanisms of bilateral judicial support and cooperation and measures of reciprocity should be noted. In the regard the value of regional cooperation needs to be reassessed. The Nagoya Protocol further requires a series of national institutions for monitoring and enforcement for setting up checking points, monitoring the use of GRs, establishing NFP on ABS and establishing one or more NCAs on ABS. In addition, the Nagoya Protocol encourages

providers and users of GRs and TK to take the specific dispute settlement provisions into account while negotiating MAT provisions. Such provisions should include the applicable settlement competence and resolution process, the applicable law as well as alternative resolution options such as a mediator and arbitrator. This provision is very practical and needs to be specified in the contract. The rights of the GRs suppliers in the country cannot be guaranteed merely by the reference to other general regulations.

By the Decree 59, there are several measures to enforce compliance, such as: information and reporting measures, contractual clauses, and conditions applied in the access license, administrative sanctions.

Decree 59 regulates the responsibility to set up and operate the electronic portal, registration and reporting systems via electronic information networks on GRs and ABS of MONRE. Within 15 working days from the date of granting, renewal or withdrawal of the license to access GRs, the MONRE shall be responsible for publishing information or cancelling the internationally recognized certificate of compliance for access to GRs and benefit-sharing, and other related issues on the ABS Clearing House of the CBD's Secretariat in accordance with the Nagoya Protocol³⁰). Within 05 working days from the date of granting, renewal or withdrawal of the license to access GRs, the MARD shall have the responsibility to send 01 original copy of such decision to the MONRE to update the national database. Today, an online public service portal is developed for MONRE at <https://dvcct.monre.gov.vn> or MARD at <https://dvc.mard.gov.vn>. The ABS clearing house is being underway by MONRE, will serve as a platform for information on ABS and addressing case of non-compliance.

For responsibilities of licenced users to access to GRs and transfer GRs to abroad for reporting in writing to the NCA follows:³¹) A report on activities of access to GRs stipulated in the license granted for access to GRs; Periodical reports on the status and result of utilization of GRs every two years; Irregularly reports upon request of the CNA; Vietnamese students, doctoral students, and Vietnamese scientific and technological organizations wishing to transfer GRs to abroad shall submit reports on

30) Decree on the Management of Access to Genetic Resources and the Sharing of Benefits Arising From Their Utilization art. 2, 2017 (Decree No. 59/2017/ND-CP).

31) See *id.* Art. 25.

their study or research results to the NCAs within 03 months of completion of the program or project. The sample reports are being developed by the MONRE.

For contractual clause: the ABS model's contract provides responsibilities of user of GRs on informing and reporting: they must to conduct reporting regime according to the above provisions of the Decree. Article 6 of the ABS model's contract specify on responsibility of reporting and accounting. The user shall be responsible for maintaining and accurately updating the full accounting records and reports related to the ABS Contract. The requirements for each kind of reports and activities are quite clear and concrete. The licensed users should comply with the provisions.

For license's conditions used, the users should submit report on access to and utilization of GRs by the time of requesting license renewal in accordance with granted license and signed contract between the parties. Therefore, if the users/accessors fail to report, they will scope with risk of refusal for renewal of the license. The decree 59 also provides measures of withdrawal of license to access GRs to enforce compliance,³²⁾ in which, "false information to obtain the license to access GRs" is considered for withdrawal of the license to access to GRs, and "Other violations in accordance with the law" opens very large power for NCA to consider to withdraw the license, including violation of reporting and accounting and other violation with ABS contract.

Not providing directly by the Decree 59, but supporting for implementation of the Decree 59, administrative sanctions for violation of ABS law is provided by Decree 155/2016/ND-CP of 18 November 2016 on sanctioning administrative violations in the field of environmental protection provides specific provisions applicable to ABS violations. Its article 44 establishes monetary penalties ranging from VND 5 million to VND 50 million.³³⁾ In this regard, parties may be fined depending on each circumstance.

32) See *id.* Art. 18.

33) Equivalent to around 215 US dollars to 2150 US dollars.

VIII. Conclusions

It has not been long since Vietnam adhered to the Nagoya Protocol and the Nagoya Protocol came into effect. Vietnam has made a relatively progressive development in terms of legislation and policy to implementation of the Nagoya Protocol. Decree 59 on ABS was issued and came into effect in July 2017 which meets the requirements of implementation of the Nagoya Protocol, and increasing demands on ABS in practice of Vietnam. The Decree 59 can be recognized as a “landmark” of ABS legislation development of Vietnam for implementation of the Nagoya Protocol.

However, the above analysis of ABS law also raise a number of issues needs to be improved for effective implementation national ABS law and Nagoya Protocol. In coming two years' time, Vietnamese's Government has a plan to revise its Biodiversity Law, 2008, which will be a good opportunity to amend the provisions on ABS to meet more effectively the requirements of the Nagoya Protocol and fill the gaps and overcome the weakness existing which cannot be solved by the Decree 59 itself, especially assignment demarcation of authorities, responsibilities between involved Ministries, their cooperation in inter-ministerial ABS issues, enhancing compliance and enforcement through checkpoints. Because, the Decree is a by-law document issued by the Government which has lower legal validity than Law on Biodiversity.

A sound and effective ABS national legal framework will facilitate the implementation of Nagoya Protocol and also promote GRs, biodiversity conservation and sustainable use in the country.

