THE ABS CAPACITY DEVELOPMENT INITIATIVE

L'INITIATIVE DE RENFORCEMENT DES CAPACITES POUR L'APA

The Negotiation of ABS agreements
Some Key Considerations

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The negotiation of ABS agreements

Supporting tools:

- Briefs on understanding sectoral differences and trends (e.g. Demand for GR, value of GR, advances in science and technology)
- Training on ABS contracts
    - Key elements of ABS agreements
    - The negotiation process
- How (Not) to Negotiate Access and Benefit-sharing Agreements
- The ABS Agreement: Key Elements and Commentary
- ABS Management Tool
- The Bonn Guidelines on ABS (2002)

ABS provisions – CBD

Article 15 of the CBD

- **Sovereignty of States** over their natural resources
- Authority to determine access to genetic resources rests with national governments and is subject to national legislation
- **Access is subject to prior informed consent (PIC)**
- **Benefit-sharing shall be on upon Mutually Agreed Terms (MAT)**
- Measures to be taken by States for the sharing of benefits arising from commercialization or other utilization of genetic resources.

Nagoya Protocol

Provisions related to Mutually Agreed Terms

- MAT: (art. 6.3 (g))
  - To be **set out in writing**
  - Rules and procedures may include:
    - A dispute settlement clause
    - Terms on benefit-sharing, including IPRs
    - Terms on subsequent third-party use
    - Terms on changes of intent
- **Benefit-sharing shall be on MAT** (art. 5)
- Benefits directed **towards conservation and sustainable use** (art. 9)
- **Reporting requirements** in MAT for monitoring (art. 17)
- **Compliance** with MAT (art. 18)

Key ABS concepts

Provider of GR (& associated TK): National Competent Authority

Prior Informed Consent (PIC)

User of GR (& associated TK): e.g. industry, research institutes, universities

Mutually Agreed Terms (MAT) between provider and user

- Non-commercial or commercial utilization of GR (& associated TK): e.g. basic research, research and development, development of new pharmaceuticals, biotechnological products

- Benefit-Sharing (non-monetary & monetary): e.g. training, technology transfer, royalties

ABS in practice

Different type of genetic resources

Animal, plant, microbial

Used for different purposes

Research and/or commercialization

Different types of users operating in different sectors

- ***pharmaceuticals***
- ***seed and crop protection***
- ***personal care and cosmetics***
- ***botanicals and horticulture***

A **large number of actors involved**, rarely one provider and one user (e.g. intermediaries)

ABS agreements – Challenges

- To create incentives for the user to share benefits and contribute to conservation
- The time-gap between access, utilisation and benefit sharing
- Cross-boarder relationship: sovereignty, jurisdiction, Parties to CBD/NP and private parties to the contract
- Difficulty to anticipate final use at the time of access
- No background law on GR and TK contracts

ABS agreements – challenges

- **The outcomes of R&D activities are uncertain:**
  - The object of the contract evolves
  - The properties of genetic resources and the product that will be developed are often unknown at the time of access – hence the object of the contract is unclear
- **High level of uncertainty – how to establish clear rules and procedures?**
- **How to establish mutual trust and a good collaboration between the parties to the contract?**

- **Importance of the negotiation process (How to negotiate)**
- **Importance of the content of the contract (elements of the contract)**

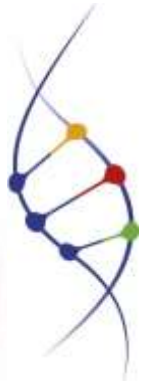
Key Elements of an ABS Agreement

- Parties to the agreement
- Object
- Purpose
- Benefit-sharing
- Subsequent third party use
- Change of intent
- Confidentiality
- Reporting
- Dispute settlement

Who is the user?

- Who is authorised to negotiate on behalf of the institution/company
- Who is authorised to sign the contract?
- In what sector(s) does the user operate?
- What is the structure of the company? Are there affiliates/subsidiaries? Under which jurisdiction is it registered?
- Is a research institute/university acting as an intermediary?

Who is the provider?



- Is there an ABS regulatory framework in the provider country?
- Who owns genetic resources?
- Who is the competent national authority entitled to grant prior informed consent?
- With who are mutually agreed terms to be negotiated?
  - The competent national authority?
  - The provider?

What is your agreement about?

- **What are you transferring?**
  - **The object?**
  - **For what purpose/type of utilisation?**
    - R&D by research institute
    - For the development of a product by a company? In what sector? What type of product (cream, medical treatment)?
      - Important to properly define the intended use

Sharing of Benefits

- **Type** (annex to Nagoya Protocol)
  - Non-monetary benefits:
    - Ex: Sharing the results of research, training, technology transfer, capacity building, contribution to local economy
  - Monetary benefits:
    - Ex: Access fees/fees for samples collected, joint ownership of intellectual property rights, sharing of royalties, special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity.
    - Trigger for monetary benefits (commercialisation)
- **Timing** (near-term, medium-term, long-term)
- **Distribution**
  - beneficiaries: ILCs, government, academic institutions
- **Mechanisms** (e.g. trust funds)

Third Party Use

- If transfer of genetic resource or derivative for the same utilisation – contract can provide that the same conditions will apply to new user.
- If transfer of GR, or derivative, to third party for a different utilization, the contract should require the PIC of the provider prior to the transfer to a third party, or that transfer can take place under certain conditions (reserving the rights of the initial provider).
  - Ex: If the first user identifies an interesting property and a subsequent user wants to commercialise a product based on this resource, consent is to be obtained from the provider regarding the conditions of utilization, including the sharing of benefits

Change of Intent

Examples:

- New/other utilisation:
  - A user obtains access to genetic resources to carry out R&D for the development of a particular type of product (e.g. cosmetics)
  - Discovery of properties that could lead to the development of another type of product not provided for in the initial contract (e.g. treatment of a medical condition)
  - The user must obtain the prior informed consent of the competent national authority for this new use and renegotiate the sharing of benefits.
- Non-commercial (scientific) to commercial
  - Either the initial contract addresses this situation
  - Or must be renegotiated once the commercial utilisation is clearly determined and potential benefits to be shared are better defined.
  - Trigger for commercialisation to be established (e.g. IPR application)

Confidentiality/Exclusivity

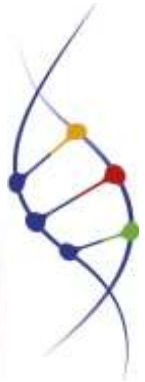
- **Confidentiality**
  - Existence of contract
  - Terms of contract
  - Certain elements of the partnership/agreement can be confidential – to be determined between parties.
    - The biological material, the research, the product
- **Exclusivity**
  - Exclusivity can be granted to a user for a specific period of time (resource to be specified – species, specimen)

Reporting

Reporting requirements

- Data sharing and regular reporting regarding activities to be carried out under the contract - will contribute to monitoring and compliance.
- Translation of documents, as needed, should be provided for in the contract.
- Planning of regular meetings (timing, location, frequency, costs)

Dispute Settlement



Dispute Settlement

- The contract should provide for the applicable law
- The jurisdiction to which parties will subject any dispute resolution processes
- In the event of a dispute, options for alternative dispute resolution, such as mediation and arbitration are to be considered

Contract negotiation

3 criteria to contribute to a successful contract negotiation:

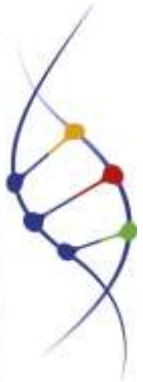
- It should produce a wise agreement;
- It should be efficient;
- It should create trust, improve collaboration or at least not damage the relationship between the parties.

Source: Kabir Bavikatte

Key elements for the negotiation process

- Separate PEOPLE from the problem;
  - Face-to-face meetings; take your time in responding to an email;
- Focus on INTERESTS, not positions;
  - What do you want to achieve by this contractual relationship?
- Invent OPTIONS for mutual gain;
  - Clarify what is in it for both
- Insist on using objective CRITERIA.
  - How to make your contract clear and reflect the mutual interest

Source: Kabir Bavikatte



Thank you for your attention!