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

Prior Informed Consent (PIC)

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

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

• 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!