Development of ABS permit and monitoring systems: key objectives and practical features

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The Nagoya Protocol

- **Article 17** Monitoring the Utilization of Genetic Resources

- **Article 18** Compliance with Mutually Agreed Terms

- **Article 14** The Access and Benefit-sharing Clearing-House and Information Sharing
Article 17. Monitoring the Utilization of Genetic Resources

An internationally recognized certificate of compliance shall serve as evidence.....

The internationally recognized certificate of compliance shall contain the following minimum information when it is not confidential:

(a) Issuing authority;
(b) Date of issuance;
(c) The provider;
(d) Unique identifier of the certificate;
(e) The person or entity to whom prior informed consent was granted;
(f) Subject-matter or genetic resources covered by the certificate;
(g) Confirmation that mutually agreed terms were established;
(h) Confirmation that prior informed consent was obtained; and
(i) Commercial and/or non-commercial use.

370 records from 15 governments
Article 18. Compliance with Mutually Agreed Terms – Key Gaps

3. Each Party shall take effective measures, as appropriate, regarding:
(a) Access to justice; and
(b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.
Article 14. The Access and Benefit-sharing Clearing-House and Information Sharing

1...shall serve as a means for sharing of information related to access and benefit-sharing. In particular, it shall provide access to information made available by each Party relevant to the implementation of this Protocol.

2. Without prejudice to the protection of confidential information, each Party shall make available to the Access and Benefit-sharing Clearing-House any information required by this Protocol, as well as information required pursuant to the decisions taken by the Conference of the Parties serving as the meeting of the Parties to this Protocol..
The Status & Trends
How much do we know about ABS permits under the NP?

• Little information on number and nature of permits

• Limited information of number of permissions granted and ABS agreements concluded.
General Trends!

• Very few contracts have been concluded because the implementation of national ABS laws by States Parties is incomplete or dissuading potential users to request access to GR.

• Only a small minority of States Parties to the Convention or Protocol have been able to put in place the corresponding national legislations. This is notably due to a lack of technical expertise, lack of sufficient budget, lacking strong enough government structures and political support, local social conflict, and conflict over ownership of GR.

• Among the few states that have succeeded in adopting ABS legislation, several have developed fragmented and ambiguous legal frameworks with poorly defining competencies, multiplying PIC to be obtained from different stakeholders and on the basis of different laws.

• Some existing legislations require long, cumbersome, and complicated procedures to establish MATs or obtain access.
Challenges

The adoption of restrictive legislations is explained by the expectations among provider countries that they will get money from the ABS mechanism and their will to put an end to the free and abusive utilization of “their” GR.

The lack of willingness by user countries to put measures into place to monitor compliance with the provisions of supplier countries is also mentioned as one of the factors that have made provider countries particularly cautious and pushed them to adopt restrictive access conditions to their GR.

Indeed, once the GR has left the provider’s territory, the latter has no way to monitor that the downstream process of R&D complies with the provisions of the corresponding ABS agreement. The insurance that user countries would monitor downstream process in that regard was therefore crucial for provider States.
Understanding a Permit, Agreement and Contract

• In some countries a statutory permit is used to address the issues, rights and duties that are in other situations addressed in contracts
• In few countries, the user would get a ‘permit’ if the dealing is with one agency or community but a ‘contract’ when dealing with another agency or community in the same country.
• Some countries prefer agreements that is often read like a contract
• Few prefer to have permits before making a contract (PIC and MAT for a permit)
• Permit process is set by a statute or legislation
• Contracts can be open-ended
• Permits are easier to be revoked
• At international level, enforcement of permits is quite difficult especially when it occurs outside the source country
• Foreign jurisdictions can deal with contracts but not permits

So, countries need to decide!!
Types of ABS Permits/Contracts/Agreements

- For scientific research (that does not involve taxonomy, epidemiology etc);
- For bioprospecting;
- For technological development;
- When the scientific, bioprospecting or TD has traditional knowledge (TK) associated;
- When traditional knowledge associated is used but without considering genetic resources
A Model for an Online Permit and Monitoring System to support the Nagoya Protocol

A single electronic permit system that makes it easy to apply for permits and for government authorities to review and approve applications, monitor compliance and report on the access, benefit sharing, compliance and reporting provisions of the Nagoya Protocol.
Preparing the Permit/Contract System

Preparing to Develop
Need for Coordination for ABS Permits

• Multiple government ministries may hold responsibility for issuing permits based on their respective institutional and legislative competences (e.g. Environment, Agriculture, Marine, Indigenous Affairs etc.). In the case of research involving external researchers, foreign ministries may be involved in facilitating research permit applications (e.g. through embassies). Non-governmental organisations/semi-autonomous organisations may be delegated with responsibility for issuing permits (e.g. national scientific bodies, National Trusts).
• Permits granted by different authorities may contain different (and potentially conflicting) provisions or may not be up to date with legislative developments (such as ratification and implementation of the Nagoya Protocol).
• Permit granting authorities commonly require the submission of reports and publications arising from research conducted under a permit. However, follow up may be limited and it is unclear.

• Permit granting authorities may have no knowledge of the final destination or uses made of biological or genetic materials collected under a permit.
The IDEAL !!

• Make Permits as an option for all non-commercial research, if needed
• Make contracts that are categorised
• Let the IRCC be simple and not a whole contract
• Make contracts that are easy to monitor
• If ABS is about negotiated benefit sharing, be true to the spirit
• Make the system light and predictable
To move ahead.....

What will be your choice?

How would you like to proceed?

What kind of support would you need?