



# ABS CONTRACTS

Workshop on the Negotiation of ABS Contracts

GEF ABS- LAC Regional Project

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# Layout



1. The contract as the key element for access and benefit-sharing conditions
2. Formal elements of a contract
3. Limits: Legal system and free will
4. Negotiation of a contract

# Main element for ABS



## 1. What is a contract?

- Meeting of the minds- legal agreement between two or several parties
- Contractual clauses create “the law” between the parties:
  - Boundaries: autonomy of the parties (meeting of the minds) in line with the legal system, moral and public order

# Main element for ABS



Why is it so important?

- It is going to specify in each concrete case the applicable ABS system
- It is going to articulate the transition/process between the potential and the real

# Essential elements in a contract



1. OBJECT: Offer and acceptance;
2. CONSIDERATION to be paid for the promise made;
3. CONSENT: free will and proper understanding of what each of the parties is doing;

# Personal element



**Legal capacity of the Parties**

# FORMAL ELEMENTS



1. In some cases the formal elements condition the validity of the contract (written form, registered, etc.)

# Contract negotiations



1. Meeting of the minds
2. Offer and acceptance
3. Limits: Legality



# Legality: intal level (CBD and NP)



NP art. 6.3.g) Each Party that requires PIC shall take measures to:

g) Establish clear rules and procedures for requiring and establishing mutually agreed terms. Such terms shall be set out in writing and may include, *inter alia*:

- i. A dispute settlement clause;
- ii. Terms on benefit-sharing, including in relation to intellectual property rights;
- iii. Terms on subsequent third-party use, if any; and
- iv. Terms on changes of intent, where applicable.

# Legality: intal level (CBD and NP)



NP art. 18.1: In the implementation of art. 6.3.g)  
each Party shall encourage to include  
provisions in MAT related to:

- a) The jurisdiction to which they will subject any dispute resolution processes;
- b) The applicable law; and/or
- c) Options for alternative dispute resolution, such as mediation or arbitration.

# Legality: intal level (CBD and NP)



NP art. 17.1.b): Each Party shall take measures to support compliance:

- Encouraging users and providers of genetic resources to include provisions in mutually agreed terms to share information on the implementation of such terms, including through reporting requirements

# Legality: intal level (ITPGRFA)



Standardised Material Transfer Agreement-  
reduces the negotiation and the transaction  
costs

# Legality: national level



Review national legislation to check whether there are compulsory provisions that must be included in the contract: The common ones:

- Dispute resolution and applicable law;
- Transfer to third parties
- No legal effects until has been reviewed by the national competent authorities

# Free will



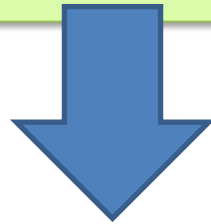
How is the free will of the Parties constructed?

- State
- Indigenous peoples
- Local communities
- Private owners

# Free Will: State



WORLD BIOLOGICAL DIVERSITY IS  
DISTRIBUTED IN INVERSE  
PROPORTION TO THE SCIENTIFIC  
AND TECHNOLOGICAL CAPACITY



REVERSE THAT SITUATION (CBD):  
INCENTIVE + FUNDS FOR CONSERVATION

# Free will: State



## ABS Strategy?

- Diagnose of our biodiversity
- Diagnose of our research and biotech sector
- Establishment of common priorities and objectives
- Monitoring and control (+review of its implementation)



# Contract negotiation



Different stages:

- use different instruments: confidentiality agreements

Initial/preparatory stages:

- Understand the project and its implications
- Generate a relationship based on trust and confidence

# Contract negotiation



## 1. The parties:

- Who is intervening?
- Double check the institutional and legal capacity of the institution and its representatives
- Place for notifications and communications

## 2. **Considerandos:** contextual framework (legal, project, parties, ...)

## 3. Objectives: project and collaboration

# Contract negotiation



## 1. The parties:

- Who is intervening?
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## 2. **Considerandos:** contextual framework (legal, project, parties, ...)

## 3. Objectives: project and collaboration

# Contract negotiation



4. Definitions: all the relevant terms of the contract must be properly defined: establish the extent of the obligations
5. Activities of the project (work plan)

# Contract negotiation



## 6. Property :

- Resources: State property (?)
  - User or owner rights: end of the project means the destruction of the material
  - Patents on isolated genetic sequences with utility (?)
- Of the results of the research/project:
  - Key information for the country: at research and conservation of biodiversity levels

# Contract negotiation



## 7. Exclusive rights:

- Collection of the material
- Research

## 8. Use

- Limitations to the type of use (pharmaceutical, industrial, etc. )
- Non commercial vs. commercial
- **Change of use or intent**

# Contract negotiation



## 9. Material Transfer

- Allowed (transactions generate benefits/ monitoring and follow up)
- Restricted (to the project activities/completely)

## 10. Reports and monitoring

- Relevance and difficulty of monitoring
- **Audits**

# Contract negotiation



## 11. Benefits:

- **Non monetary/ Monetary:**
  - Research budget
  - Fees per sample
  - Milestone payments
  - Royalties (over commercialization)
  - Technology transfer
  - Conservation funds



# Contract negotiation



## 12. Intellectual property rights:

- Property of the research
- Disclosure of origin
- Licenses
- Preferential rights
- Communication and management agreements

# Contract negotiation



13. Confidentiality (contract, reports, research)

14. Termination

15. Dispute resolution and applicable law

16. Other clauses:

- Product Liability waiver
- Warranties



Next: Country experiences in the negotiation of ABS contracts: The case of Costa Rica

**THANK FOR YOUR KIND ATTENTION**