

Tools to Support ABS Implementation

Articles 19 and 20 of the Nagoya Protocol on Access and Benefit-Sharing

Introduction

Articles 19 and 20 of the Nagoya Protocol are part of a number of tools that are established by the Protocol to support access and benefit-sharing (ABS) implementation at the national level. Both provisions reflect the significant difficulties and complexities of implementing ABS in practice, as well as the necessity to find practical solutions for all Parties to deal with them.

Article 19 recognizes a wide range of commercial and non-commercial actors that use genetic resources in different ways, while also collaborating sometimes. It further recognizes that a “one size fits all” ABS approach cannot work for different sectors. Therefore, specific guidance on best practices through the development of ABS model contractual clauses is requested.

Article 20 focuses on development and use of voluntary ABS codes of conduct, guidelines and standards. It thus recognizes that ABS laws and regulations are not necessarily sufficient to address the difficulties of ABS implementation, but may be supported by additional voluntary norms.

Understanding Article 19

Article 19(1) of the Nagoya Protocol obliges Parties to encourage the different sectors involved in ABS to develop, use, and update model clauses for the negotiation of mutually agreed terms (MAT) in ABS contracts.

Sectors that may need to be differentiated comprise, for instance,

- Diverse scientific communities (for example focusing on terrestrial vs. marine resources, taxonomy vs. metagenomics, micro- vs. macro-organisms, “pure” research vs. biodiscovery);
- Various industries (for example focusing on the development of novel biomedicines, nutraceuticals, cosmeceuticals);
- The public sector; or
- Indigenous and local communities.

Each sector may have different ABS approaches and require different elements to be considered in order to ensure clarity, traceability, and fair and equitable benefit-sharing.

Furthermore, it should be noted that different model contractual clauses can be necessary to address different ABS situations: for instance, when negotiating access and use of genetic

resources in non-commercial vs. commercial research activities; when ABS relates to genetic material vs. data; or in the negotiation of ABS amongst networks of users (third party transfer).

In contrast to Paragraph 1, Article 19(2) of the Nagoya Protocol is not addressed at each individual Party but at the Conference of the Parties serving as the meeting of the Parties (COP/MOP). Accordingly, the COP/MOP is obliged to take stock of the use of model contractual clauses by different sectors. This means that Parties will be invited on a periodical basis to submit examples of model contractual clauses to the COP/MOP which may then decide to make it available through the ABS Clearing-House.



Promoting the development, use, update, collection and availability of such diverse contractual model clauses, should lead to a set of low transaction cost and flexible material transfer agreements covering collection, utilization and distribution of materials and data. However, it should also be understood that it is impossible to develop model clauses for every eventuality and ABS constellation. Instead, new types of uses and users in the future will require the development and use of new model contractual clauses.

For further information on model contractual clauses see www.cbd.int/abs/resources/contracts.shtml.

Understanding Article 20

As with Article 19, Article 20(1) of the Nagoya Protocol obliges Parties to actively encourage the development, update, and use of voluntary ABS norms, while Article 20(2) establishes the role of the COP/MOP in overseeing and reviewing this activity. In contrast to Article 19(2), however, Paragraph 2 of Article 20 provides the COP/MOP also with a mandate to consider the adoption of specific voluntary norms.

In contrast to ABS laws and regulations, voluntary ABS norms are not established or required by governments. Instead, they represent expected patterns of behavior agreed upon by non-state actors (such as private companies, scientific associations, non-governmental organizations, or multi-stakeholder processes) that must comply with them. Implementation of such voluntary norms may be promoted through different mechanisms, from awareness raising and capacity-building to labeling and facilitated procedures for requests of organizations working on the basis of these norms.

The following voluntary norms are mentioned in Article 20:

- Codes of conduct: These are sets of rules outlining ABS responsibilities or best practices for members of an organization or association (see for example the codes of conduct developed by the International Plant Exchange Network).
- Guidelines and best practices: These generally aim to promote or facilitate particular ABS approaches in order to obtain their objectives (see for example the ABS guidelines developed by the German Research Foundation, or the Swiss Academy of Sciences).

- Standards: These provide rules, guidelines, or characteristics for products or processes related to genetic resources and/or traditional knowledge associated with such resources (see for example the 2002 Bonn Guidelines on ABS, or the Ethical BioTrade standard).

For further information on ABS instruments, guidelines, codes of conduct and tools see www.cbd.int/abs/resources/contracts.shtml .

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