

ABS in practice: Navigating access and benefit sharing procedures in Brazil - *Prof. Dr. Cristiane Derani*¹

ABS legislation in Brazil

Brazil established its rules on access and benefit sharing (ABS) in 2001, through Provisional Measure 2.186-16/01. This measure defines the rights, obligations and procedures linked to access and the sharing of benefits both in relation to genetic resources and traditional knowledge. The measure also establishes the Genetic Heritage Management Council (CGEN), a federal administrative body with legislative and deliberative functions composed of representatives of various government entities.

Beyond the Provisional Measure, another important milestone was Decree 5459, dated June 2005, which established the administrative offenses arising from lack of compliance with ABS procedures. It also charged a federal environmental enforcement agency, the Brazilian Institute for Environment and Natural Resources (IBAMA), with monitoring and sanctioning any activities contravening the rules established by the Provisional Measure.

CGEN - Authorizations for access and benefit sharing

CGEN was effectively established in June 2002, with the publication of its bylaws. It was then that CGEN began establishing guidelines on contracts for the use of genetic heritage and sharing of benefits. In addition, CGEN established criteria for authorizing access and sending of genetic resources, as well as other technical standards for the implementation of related obligations. CGEN began issuing access authorizations in 2003 and in July 2004 Extracta Moléculas Naturais became the first company to obtain an access permit for bioprospecting.

CGEN processes and requirements cover the activities of research institutions and companies, who are obliged to apply for access authorizations to conduct research on genetic information, as well as on genetic information obtained from others. In both these cases, companies must present an application to CGEN, along with agreements on prior informed consent and on access and benefit sharing, which should have been signed by the owner of the land where the genetic resources come from.

These requirements are not a problem when the company requesting access is collecting these resources itself. However, most companies obtain genetic resources, or expressions of genetic resources such as plant oil or extracts, from other companies or organizations. This situation often makes identifying the original provider more difficult. In addition, ingredients or species are often sourced from a range of suppliers, so that – even if the company is able to trace back to the original provider there may be several landowners involved. Does the company need to sign ABS agreements with all landowners? Who in the supply chain is directly responsible for ABS requirements? What kind of benefits would need to be shared, for example, with the owner of a cocoa farm? These questions are not easy to solve.

Even when a company overcomes these difficulties, it is left with the most serious challenge of all: time. ABS rules in Brazil establish that the administrative procedure for ABS should last no more than seven months, but two years is a more realistic estimation of the length of a successful ABS authorization process.

Since CGEN began its operations, there have been 99 applications from companies for access for bioprospecting and product development, as well as 135 applications for research from public institutions. Of the commercial applications, 69 come from a single company – Natura Cosméticos. Among other applicants, only companies such as Croda, Cognis, Solabia, Firmenich, IFF and Extracta have more than a single application.

The data highlights that few companies working with natural ingredients are in fact engaging in the CGEN process. This is due to various factors. Firstly, there is restricted awareness of ABS and its relevance. Additionally, even where there is awareness, companies may feel that the risks of complying with ABS regulations (seen as unclear and costly) may outweigh the risks of disregarding the legislation.

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Thus far, CGEN has only granted 19 access authorizations for companies and 75 authorizations for research institutions. Again, the low numbers demonstrate the difficulties involved in the process. A great deal of complex information is required from applicants, including anthropological reports, detailed descriptions of negotiations, and explanations of the process and products being researched. Often the process involves several requests for applicants to provide additional and complementary information. Indeed, the significant difference between the pace and timelines of commercial research and development and the CGEN bureaucracy has meant that companies were often still trying to meet CGEN requirements at the time of releasing the product to the market. Therefore, many applications were in an irregular status.

In August 2007, given the impossibility of legally addressing such pending applications, CGEN decided to stop its analysis of requests for access in cases of existing products. As a result, between 2007 and 2010, CGEN almost exclusively dealt with access requests from research institutions, with the exception of five requests granted for Natura Cosméticos and one request granted for the company Extracta.

IBAMA - Enforcement and sanctions

In November 2010, IBAMA engaged itself in all these processes suspended by CGEN and began issuing the applicants with fines. The logic was that companies requesting regularization for existing products were conducting activities in an irregular manner and should, therefore, be penalized. The fines were substantial and are currently undergoing administrative review.

In March 2011, following up on the initial set of fines, IBAMA began focusing on companies that had not requested access authorizations from CGEN, but that had been determined, through analysis of their labeling and advertising, to use species from Brazilian biodiversity. These companies received requests for information, which will undoubtedly result in fines. In addition, IBAMA requested information from these companies on their suppliers of ingredients and species derived from Brazilian biodiversity, possibly seeking to expand the focus of its inquiries.

The practical result of enforcement actions has been the renewed efforts within CGEN to develop a more efficient regulatory framework, while seeking to reduce pressure on companies attempting to regularize their activities. There is currently a draft decree that would regulate the regularization processes before CGEN, and a technical group has already been established to develop rules that would give more flexibility to authorization procedures. On the company side, there has been a move to try to follow CGEN rules and procedures. However, there is much concern about the ambiguity of the actions of the federal government, which chose to penalize companies at the forefront of compliance with ABS rules.

Conclusion

Indeed, a more coherent and efficient position on ABS on the part of the Brazilian federal government is urgent. ABS rules that were established to regulate the sharing of benefits with those who safeguard biodiversity are currently being used to impede the use of biodiversity in product development. ABS rules have already made it nearly impossible for companies to work with traditional communities for the sourcing of natural ingredients – such is the complexity of negotiation requirements.

Having been one of the great protagonists of the adoption of the Nagoya Protocol, Brazil now needs to do its homework. Government and business must work together towards a viable legal framework, with procedures that have the clarity and agility required by the market. Otherwise, there will be more and more companies opting to work with ingredients derived from oranges, apples and grapes, rather than passion fruit, pitanga and jaboticaba.

Contact UEBT

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