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# Balancing Building Blocks of a Functional ABS System-

*a legal study of functionality issues in ABS*

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## Objectives of the Paper

**Primary objective:** to provide information on legal elements of ABS, to promote development of a useful output from the WGABS.

**Assumptions:**

1. **All CBD member countries are already bound to comply with Article 15.**
2. **Non advocacy:** The “legal questions” (technical needs that must be met to create a “binding regime”
3. **Starting point:** The “Paris Annex” to (report of WGABS – 7)
4. The basic ABS approach is **contracts between user and provider**, perhaps through middleman.  
(This is agreed – its too late to develop a different approach)
5. Legal issues growing from the call for a “**binding**” (**mandatory**) regime.



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## What's the “Big Deal”?

- A legal issue does not become simple by
  - saying it is simple, or
  - keeping it short.
- Legal issues are only simplified by **certainty**.
  - “Legal certainty” means different things to different countries.
  - Users, collectors and/or researchers needs to know what they must do, so that they will not be a “biopirate”.

## What Makes an international regime “Functional” and “legally certain”?

1. Clarity
2. Implementability
3. Functional tools for Implementation
4. Full and active participation by all categories of stakeholders at all levels

## The Balancing Act: to address both access-side and user-side, emphasising functionality

### Legal certainty:

*the ability of each user, provider, national legislator, official, judge, arbitrator or other person to know with a relatively high degree of confidence whether the regime applies to a particular person or action, and if so what the regime will require of them.*

### A “two-edged sword”:

- User-side certainty:  
*What are the user's rights and obligations and how can he be certain that he is in compliance with ABS?*
- Provider-side certainty:  
*How can the provider know when its GR or TK are being utilised and ensure that utilisation complies with ABS laws, contracts and other provisions?*

## Key Challenge: Variability of National Laws :

1. **National system = Sovereignty**
2. “traditional” classifications (common law, civil law, etc.)
3. **more essential:**
  - “**strict rule of law**” (law as country’s primary organising force)
  - “**flexible**” legal systems (Law is a secondary force)
  - a. **Cross-border Implementation issues:**  
What user country allows vs. what provider country requires  
possible **enforcement vs. needed enforcement.**
  - b. **Contract validity – how does ABS fit?**
  - c. **Obligations under contract – creating a binding contract**

## Contract Law: The Seven Certainties

- Contracts are tools of “legal certainty”
- They function only in an environment of “certainty”.
- Seven essential certainties (in both user country and provider country):
  1. \* Who owns the GR?
  2. \* What are rights of user, provider, middleman, community, etc in GR?
  3. \* Which “property” law applies?
  4. \* When does an ABS permission become “final” (and what does “final” mean)?
  5. What prevents users from obtaining and utilising GR without ABS compliance?
  6. How will the providers know of user-side violations?
  7. How will the law ensure redress of harm to the provider, in case of ABS violation?

(Asterisk ( \* ) indicates decisions that can vary from country to country.)



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## Model Contracts and Default Clauses

### Model contract (or contract provision)

1. **Definition:**  
 A “standard” agreement to address a particular type of activity, which is designed to be used “as is” or amended to create an instrument that is --
  - legally acceptable,
  - legally implementable and/or
  - legally enforceable
2. **Challenges**
  - Enforceability in many countries
  - Every contract involves different parties and facts
  - Lack of incentives to use model
  - Challenges increase for shrink-/click-wrap
3. **Potential advantages**
  - May agree to consider model enforceable
  - Regime may create an incentive to use models

### Default clause

- **Definition**  
 An agreed provision that will apply whenever the parties or legislators have made no express provision to the contrary, in --
  - national law,
  - private contracts, or
  - other instruments.
 whichever is relevant
- 2. **Challenges**
  - Sovereignty (law) / mutual assent (contract)
  - Integration with other laws in the country may create difficulty
  - Possibility for abuses
- 3. **Potential advantages**
  - For users and researchers:
    - Enables access without long and difficult permit processes
    - Provides clear step-by-step instructions
  - For providers:
    - Eliminates the need for new legislative measures



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## A Theoretical Framework

(Prerequisite to legal enforcement in “rule of law” countries)

1. **The identification of “genetic resources”;**
2. **“The commercial and other utilisation” of GR (A key to ABS functionality)**
3. **The time for the sharing: “benefits arising” from the utilisation of genetic resources**
4. **Benefit-sharing (enforcement) in law:**
  - “sharing in a fair and equitable way
    - the results of research and development and
    - the benefits arising”.
  - “Such sharing shall be upon mutually agreed terms.”
5. **Incorporate the variety of ABS law, practices and expectations (see p. 22, Table 2)**

## Bringing a Legal ABS Case in User Country (1)

### Enforcement outside the court system:

- Arbitration
- Ombudsman (intersession in support of claimants)
- a. **With contract**
  - Binding in most countries.
  - Interpreted mostly under the law of the country in which case is filed
  - No previous cases provide experience about how countries handle GR-contracts. (point of uncertainty)
- b. **Without contract (Administrative decision or permit)**
  - National administrative decisions only binding in issuing country
  - Some courts may enforce as “equity”
  - Some countries have agreements of mutuality

## Bringing a Legal Claim or Case in User Country (2)

### Access to the justice system:

- Legal access by foreign persons: usually not a problem
- Some countries limit access to justice by foreign governments
- Practical access (knowledge and expense) very difficult

### a. Prerequisites to bringing a case to court

- Every "rule of law" country limits type of claims brought, *e.g.*
  - Norway: - only "legal claims"
    - Plaintiff must have a "close connection" to the case
  - USA: - claims must be "justiciable"
    - Plaintiff must have "standing to sue"

### b. Contract Claims: As above, a claim under contract is more likely to be allowed than an attempt to enforce another country's provider-side measures

### c. Past experience and Precedent: As above, no previous cases provide experience about how countries handle GR-contracts. (point of uncertainty)



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## Bringing a Legal Claim or Case in User Country (3)

### Other challenges:

- Legal expertise:** Many countries allow only national lawyer to try cases
- Interpretation and applicability of a foreign country law**
  - Languages
  - Legal system and individual variations
- Judges' specialized knowledge**
  - (ABS is not commonly understood, even by judges)
- Technical understanding**
  - (few judges or legislators understand gene and biotechnology issues)
- Politics**
  - (it is not easy to adopt laws enabling lawsuits against their major commercial sector)



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## Bringing a Legal Claim or Case in User Country (3)

Parts (1) and (2) above describe “**the easy part**”.  
Next, the claimant must

1. Prove that his rights against the user outweigh the users rights against him  
(*i.e.*, **win**)
2. Prove the amount and type of each remedy owed  
(what are the benefits and what is an “equitable share”?)
3. Collect that share, if the judge awards it

## Functionality and Incentive

1. **ABS is designed to rely on commercial systems**
2. **Two undiscussed factors**
  - a. Contracts and other commercial arrangements operate through **mutual desire and satisfaction**
  - b. According to many users: “Access and utilisation of GR was working fine before the CBD”
3. **Challenge: to encourage/motivate**
  - a. user countries to implement ABS legislation
  - b. private companies and other users to enter into agreements

## Conclusion I: Necessary “Building Blocks”

To function across borders as a legal regime, essential “building blocks”

### 1. Agreement (clarity) on -

- Coverage (terms)
- ABS functional system
- Tools and Mechanisms, (and how they benefit the regime) including --
  - model contracts and default clauses, and their contents,
  - mechanisms for cross-border oversight, implementation, enforcement
  - mechanisms for verification of various critical facts (e.g., certificates as enforcement tools
  - international mechanisms for facilitation of regime function (ombudsman)
- Full Participation: Incentives and motivations for compliance
  - What will motivate/maximise compliance by provider, user, national government, etc?

### 2. Promotion of bi-lateral, tri-lateral, etc negotiations to enable individual user/provider contracts...

### 3. Clarity about which matters require national/` community protocols and which must be internationally consistent



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## Conclusion II: What happens if the negotiations do not produce the “necessary building blocks”?

- Basic obstacles to ABS functionality will continue to exist
- Result
  - Limited implementation -- probably only provider-side measures
  - Limited participation – primarily by providers
  - Retention of the status quo
    - ABS is already binding on all CBD Parties
    - Integration on national approaches has not occurred (and likelihood may decrease)
  - Potential to develop normative solution may be lost in the near term as well.



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*Thank you for your attention*

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