

Compliance and enforcement

THE **ABS**
CAPACITY
DEVELOPMENT
INITIATIVE



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Training on Mutually Agreed Terms: Contracts for making ABS functional

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Programme Implementing
the Biodiversity Convention

Key element of the content of contracts:

- Parties – legal persons
- Subject of the contract – what is being transferred?
- Purpose
- Benefit sharing linked to specific utilisation or products (including IPR)
- Subsequent third party use
- Changes of intent
- Confidentiality
- **Compliance, enforcement and dispute settlement**



Compliance:

- The user should want to comply
- Clear obligations – no room for interpretation

Enforcement

- Should create incentives to comply
- Must hold in a court
- Depends on the user legislation, if not the contract **ONLY** and very limited degree on the provider legislation

Closely linked together – compliance is the best

Enforcement is only a tool to support compliance



Compliance:

Comprise of three elements:

- **the contract**
- **the law in the user country**
- **(the law in the provider country)
(helped by international law?)**

provider legislation

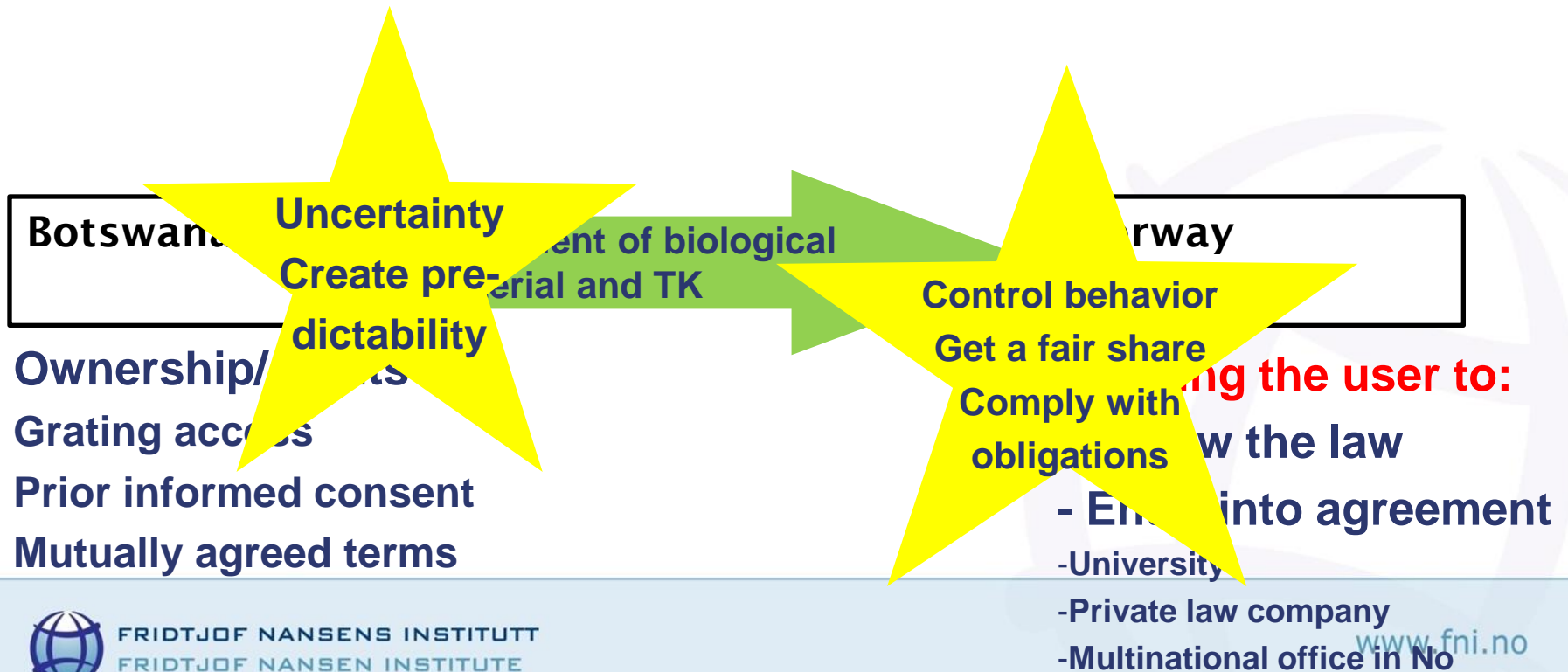


GR Law – regulating Access and Benefit Sharing

International law

Convention on Biological Diversity, Nagoya Protocol and International Treaty on Plant Genetic Resources for Food and Agriculture

Regional level



Compliance:

**Support from the Nagoya Protocol
(helped by international law?)**

provider legislation



NP ARTICLE 15

COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources **utilized within its jurisdiction** have been **accessed in accordance** with prior informed consent and that mutually agreed terms have been established, as **required by the domestic access** and benefit-sharing legislation or regulatory requirements of the other Party.

Observations:

- Oblige users under their jurisdiction; to what?
- 'Have been accessed' – time problem
- 'required by the domestic access and b.sh legislation'

➡ The legislation of providing country essential

NP ARTICLE 15

COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING

2. Parties shall take appropriate, effective and proportionate measures **to address situations of non-compliance** with measures adopted in accordance with paragraph 1.

3. Parties shall, as far as possible and as appropriate, cooperate in **cases of alleged violation** of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1.

Observations:

- **'address' is weak – no binding stuff here**
- **but to address is better than not address**
- **go after the 'cases of alleged violation'**
- **No single court-case yet – CBD in force since 1993!**

ARTICLE 18

COMPLIANCE WITH MUTUALLY AGREED TERMS

1. In the implementation of Article 6, paragraph 2 (f) (i) and Article 7, each Party shall **encourage** providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:

- (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.

2. Each Party shall **ensure that an opportunity to seek recourse** is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms.

Observations:

- **Access to the courts etc of the user country**



Compliance:

The core legal tool is the contract

provider legislation



6. Other conditions (Buthan)

6.1 **USER** shall submit in English a hard and soft copy of its scoping findings in the form of reports, publications, thesis or any other documents to the AA as soon as the scoping is completed or published or expiry of the term of the Agreement whichever is earlier. The AA will have full ownership of the results of the scoping phase if **USER** decides not to enter into an 'actualization phase' of the utilization of Bhutan's genetic resources.

6. Other conditions (Buthan)

6.3 **USER** shall pay such sum of US dollar 5000 (US dollar five thousand only) to the AA as a guarantee deposit returnable on the completion of the scoping phase by **USER** in compliance with the terms of this Agreement. The interest generated from the deposit will be injected into Bhutan ABS Fund for strengthening the sustainable conservation initiatives of biological resources.



Enforcement and compliance:

- **Dispute settlement**
- **Choice of law – a two edge sword**
- **Alternative dispute settlement mechanisms**
 - **Conciliation, arbitration**
- **Getting assets of the company under your legislation**

The **Company** shall pay such sum of US dollar XXX (US dollar XXX) to the AA as a guarantee deposit returnable on the completion of the scoping phase by **the Company** in compliance with the terms of this Agreement.

The interest generated from the deposit will be injected into ABS Fund for strengthening the sustainable conservation initiatives of biological resources.



Compliance:

Support by the law in the user country

provider legislation



Implementation in Norway: Nature Diversity Act (i)

§ 60 (*genetic material from other countries*)

1. “**Import** of genetic material for exploiting of genetic material to Norway, from a state which requires prior informed consent to use or export, **can only happen** in compliance with such consent. The one having genetic material **in hand is bound** by the conditions and limitations for the consent. The State/government can enforce the conditions and limitations, including by court-cases, pro-bono of the other country having established those criteria.”

The one having genetic material in hand is bound by the conditions and limitations for the consent.

The **State/government can enforce** the conditions and limitations, including by court-cases, pro-bono of the other country having established those criteria.



Implementation in Norway: Nature Diversity Act (ii)

§ 60 (*genetic material from other countries*)

2. When genetic material from another country is used in Norway for research purposes or from a commercial purpose, the material shall **be accompanied with information** about from which country the genetic material is received or collected (providing country). In the case that the providing country requires prior informed consent, also information about such consent shall follow the material.



Implementation in Norway: Nature Diversity Act (iii)

3. If the providing country is another than the country of origin for the genetic material, also the country of origin shall be named. 'Country of origin' means the country where the material was collected from its natural habitat. If the country of origin requires prior informed consent for access to genetic material, it shall be informed whether such consent is received. If there are no knowledge about such information, there shall be given information of the lack of information.



Let us take a practical attorney/ lawyer perspective and prepare a benefit-sharing case in Norway:

(First: information is not equal to benefits)

Therefore, needs a system to take use of the information

So, the Nature Diversity act, nor the patent act ensures enforcement

1. Enforcement outside the court system:

- Without any legal vehicle: no obligation in No law; obligation to comply with the ABS-laws of all other countries must be implemented
- An administrative decision of another country: not per se binding in Norway
- A written contract is binding. No experience with GR-contracts. Hard to survey breach: costly and difficult. Here the disclosure may have a role.



Taking the case to court:

Access to court by a plaintiff from another country:

- **Personal competence:** foreign entities, not clear-cut access for the government of other countries (§ 2-1)
- **Object of the dispute:** “only judicial claims can be brought before a court”. Prove a judicial need: easy where there is a contract; harder for administrative decision; and probably not possible if only violation of a law in another country

Paradox: it is easier to take the nice-guy (with a contract) to court than the worse-guy (without any legal vehicle)



Taking the case to court, more obstacles:

Access to court by a plaintiff from another country (cont.):

- The plaintiff must have a close connection to the case. This could stop a Norwegian NGO to take a case on behalf of an African country to court in No. The Norwegian Gov could do this (§60.1.3).

BUT I: Lack of a specific organ to look into this

BUT II: Lack of resources to investigate and take these cases to court

BUT III: The political cost of the government to bring a national company before a court – not behalf on itself. Would be a highly political question.



Taking the case to court, even more obstacles:

- **Attorney must have a license in Norway**
- **Substantive questions:**
 - Enforceability/validity: problem for the amd. decision; less problem for the contract; impossible for the non-vehicle.
 - Interpretation and applicability of a foreign country law
 - Common law/ civil law
 - Methodology of law
 - Prejudicial decision about another legal system
- **ABS is unknown to each and every judge**
- **Will involve gene- or biotechnology and GR-issues**
- **Language problem of the law of another country**

After this, then you only need to convince the judge that the citizens of Norway is infringing your right.

That is, that he finds it more likely that you have the right than the infringer.



Taking the case to court, even more obstacles:

- How much should the damage be?
- A fair and equitable part of what?
 - No support for this in the No law
 - No relevant practice; besides tort: thus the economic loss you have had. This is difficult to prove:
What is your loss from someone else gaining?
 - What is a fair share?

Conclusion: the Norwegian situation needs guidance (international clarification) from the Protocol on the following issues: - national rules regarding the mandatory-type of ABS; - assistance to the material understanding of when ABS is infringed/ the obligation of BS is triggered; - procedural issue for enforcing ABS outside courts or even by taking ABS to courts.



Initiative tools to be developed

- Check list
- Contract study book
- Sector briefs
- Templates
- Negotiating tool
- Contract training:
 - How and who? A group of persons that will be negotiating

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Thank you for your attention

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