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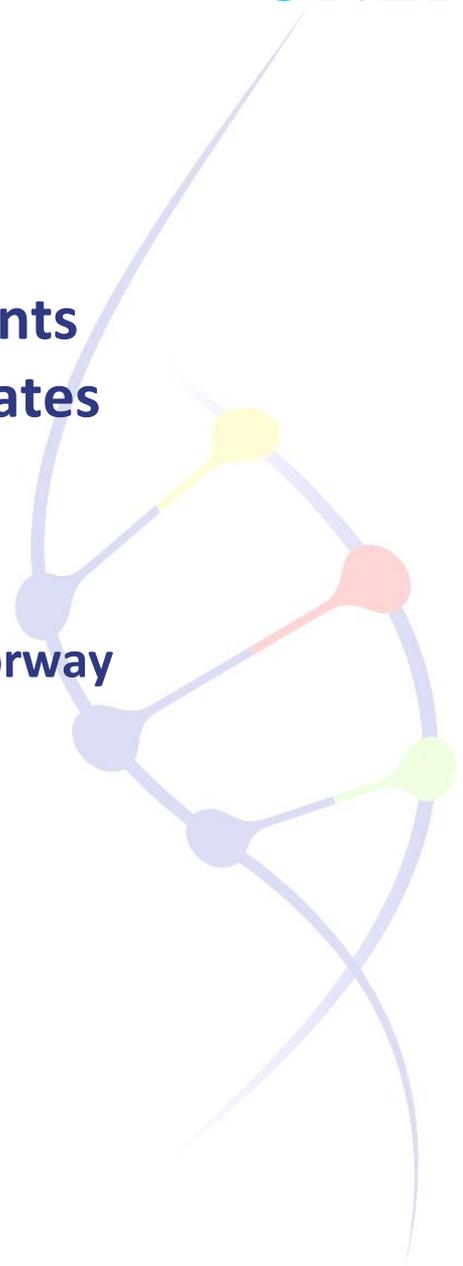
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# Studying Existing ABS Arrangements in Selected CARICOM Member States

Morten Walløe Tvedt  
Fridtjof Nansens Institutt (FNI), Oslo, Norway



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## About the author

The author of this study, Morten Walløe Tvedt, is senior research fellow at the Fridtjof Nansen Institute. Mr. Tvedt can be contacted by email at [mwt@fni.no](mailto:mwt@fni.no) or by post to the Fridtjof Nansen Institute, Postbox 326, 1326 Lysaker, Norway.

## About the publishers

### ABS Capacity Development Initiative

The ABS Capacity Development Initiative aims to contribute to poverty reduction, food security, technology transfer, social development including equity and rights, and biodiversity conservation through implementing the Nagoya Protocol (NP) on ABS and the third objective of the Convention on Biological Diversity (CBD) in its entirety. Established in 2006, the ABS Capacity Development Initiative is implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and funded by the governments of Germany, Norway and Denmark, the Institut de la Francophonie pour le développement durable (Afd), and the European Union (EU).

### Fridtjof Nansen Institute (FNI)

The FNI is a Norway-based independent foundation engaged in research on international environmental, energy and resource management politics and law.

Within this framework the institute's research is mainly grouped around seven focal points:

- Global environmental governance and law
- Climate change
- Law of the Sea and marine affairs
- Biodiversity and genetic resources
- Arctic and Russian politics
- European energy and environment
- Chinese energy and environment

Within the “Biodiversity and genetic resources” thematic area, FNI research mainly focuses on international efforts to ensure conservation and sustainable use of biodiversity and fair distribution of benefits from genetic resources. Interaction with trade agreements and intellectual property rights is central.



## 1. Introduction and questions discussed

The purpose of this report is to explore permits for the use of biological material or for research from a selection of Caribbean countries. The main question concerns the extent to which such permits serve the aims of the Access and Benefit Sharing (ABS) mechanism under the CBD and the Nagoya Protocol. Several factors are at play in this regard.

The purpose of this study as defined by CARICOM Secretariat:

2. As part of this capacity-building process, the CARICOM Secretariat is seeking to determine and assess the provisions and content of the permits being used by Member States to grant and regulate access to their genetic resources and traditional knowledge associated with genetic resources. Based on this assessment, recommendations can then be made to strengthen the permit provisions, including the incorporation of benefit-sharing clauses as a potential interim measure until comprehensive national access and benefit-sharing systems are in place.

This report seeks to explore such permits from three perspectives:

**Can research permits or existing systems be regarded as exercising sovereign rights to genetic resources?** Sovereign rights in international law imply that countries have competence to exercise legislative, administrative and judicial discretion or to manage certain natural resources. The first crucial question is thus whether the existing systems for granting research permits are sufficient to the exercise of sovereign rights over genetic resources. This is an important question because obligations on users in a number of countries are triggered by the exercise of the sovereign rights of the provider country. If a country does not exercise its sovereign rights to these natural resources it is more difficult to claim any rights to them and request benefits from their utilisation to be shared.

**Can existing permit systems be a basis for a Prior Informed Consent (PIC) and for the international certificate system set up in the Nagoya Protocol?** The Convention on Biological Diversity (CBD) envisages that countries shall enforce their sovereign rights over genetic resources by setting up a permit system for access to the resources. These permits will be assessed as to whether they are likely to be recognised as international certificates of compliance (IRCC) under the NP. The drawback of using permits as the only legal mechanism to enforce sovereign rights is that it is very difficult to enforce a public administrative decision or a permit from one country under the jurisdiction of another country.<sup>1</sup> There is level of tension between the NP specifically requiring the use of standard permits to act as IRCCs whereas permits being less enforceable in the jurisdiction of other countries. The reason for these enforcement challenges is the principle of sovereignty of each country whereby laws, court decisions or public administrative decisions of one provider country cannot be applied by a court of the user country. Thus, a permit system can enforce the sovereign rights of the provider country, but will not establish (as a main rule) binding obligations on the actual user. This leads us to the third question explored in this report.

**To what extent can the existing permits be regarded as contracts, and to what extent can contracts that are currently in use be expected to be enforceable?** One crucial question is whether existing

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<sup>1</sup> Tvedt and Fauchald. "Implementing the Nagoya Protocol on ABS: A Hypothetical Case Study on Enforcing Benefit Sharing in Norway" in *Journal of World Intellectual Property* 14 (2011) 5.

permits can work as ABS- contracts that can be enforced in courts abroad. The implementation of ABS – also as presupposed in the NP – expects parties to enter into a contract, often referred to as the Mutually Agreed Terms (MAT), which specifies the conditions of access and benefit sharing. It is not necessarily sufficient for a legal document to be binding that it calls itself Mutually Agreed Terms. It must also be regarded by the principles of contract law to fulfil the criteria of a binding contract. To assess whether a legal document is a contract, the criteria of the local contract law must be observed. The advantage of specifying the terms and criteria for access and utilisation of genetic resources in a contract is that it increases the chance that it will be binding for the user also after having left the providing country and utilising the genetic resources in his home jurisdiction. The question therefore is whether the existing permits can be regarded as contracts with binding effect on the user in his home jurisdiction.

Often in the discussions leading to the NP, the term legally binding was used to describe how the implementation framework should be designed. However in these discussions there were almost no discussions or clarifications of what was meant by legally binding. There is a level of confusion in the ABS discussion with legally binding on *countries* being mixed with legally binding on the *actual users* of genetic resources. A convention or a protocol is legally binding on the *countries* becoming parties to that international instrument. These sources of international law have, however, no direct binding effect on the actual users of genetic resources. For the users to become bound there must either be laws in their home jurisdiction specifying that they are under a benefit-sharing obligation. No countries have enacted a general obligation of benefit sharing in their laws. Therefore, the law of the provider is crucial to establish a binding obligation on the user. However, the principle of sovereignty in international law makes it impossible to enforce the law of the provider in the user's home jurisdiction.

For several of the countries submitting material to this study, insufficient material has been made available to conduct a thorough analysis. If material from these countries is made available, a second version of this report can be a possibility.

What this report does is to analyse the presented material for each of the countries submitting material in these three perspectives. A caveat must be made in respect of the material made available for this study and that is that the material presented by the CARICOM Secretariat has been analysed in depth.

## 2. Antigua and Barbuda

The material made available from Antigua and Barbuda are the following documents:

- Antigua and Barbuda Biomaterial Access Agreement Template

The CBD website has no ABS law or other policy documents on ABS from Antigua and Barbuda. Choosing the format of an agreement between the Ministry of Agriculture, Lands, Housing and the Environment and the user indicates that Antigua and Barbuda are enforcing their sovereign rights to genetic resources. To make it clear to the world of users, Antigua and Barbuda should consider implementing, or if implemented, sharing the regulations with the NP for posting on its website to inform potential users which public authority they should contact to enter into an agreement. Seemingly, there is no separate system for PIC. Thus, the emphasis here is on establishing a contract with the user.

The strategy of choosing a contract as the binding access-providing tool is a wise one since it increases the chances that any user will be bound by the terms and conditions agreed to between

the two parties. The model agreement, however, has room for improvement and there are several clauses that undermine its functionality. Some of them will be discussed here.

The model seems like a standardized contract without much room for individual negotiation with the individual user. This might make enforcement difficult in the countries where the criterion of non-coherence is strictly practised. If there is no general requirement in contract law, standard contracts can be accepted as binding despite the lack of negotiations on core issues.

Another formal challenge with core clause of the model agreement is recital 12:

*12. This agreement shall be governed by the laws of the State of Antigua and Barbuda and the Courts of Antigua and Barbuda shall have sole jurisdiction in determining issues, differences and disputes which may arise touching or concerning this agreement if not referred to or settled by arbitration as is considered appropriated under the laws of Antigua and Barbuda*

This clause seeks to resolve two difficult matters in ABS contracts: choice of law and jurisdictions of the court over the agreement. Choosing the laws of Antigua and Barbuda as those relevant for governing the agreement might appear as a secure legal solution. However, this choice of law hinders the enforcement of the agreement under the jurisdiction of another country. In reality, if the agreement needs to be enforced under the jurisdiction of another country, the agreement itself excludes the enforcement of contract law or any other useful law of the users' home country. This is a potential obstacle to the effective enforcement of this agreement since the agreement will become practically unenforceable in the home jurisdiction of the user. The second element, which states that only the courts of Antigua and Barbuda have sole jurisdiction over the agreement, also entails an enforcement problem because the agreement itself excludes the use of the court system of the user's country to enforce the provisions. The typical enforcement situation is where one of the parties to an agreement does not comply with its obligations. In this situation, the chance that the non-compliant party foreign to Antigua and Barbuda will travel back to Antigua and Barbuda to attend a court case is minimal. Thus, to enforce the agreement Antigua and Barbuda authorities might need to take legal action in the foreign country. When the agreement itself stipulates that no other courts than those of Antigua and Barbuda have any competence over it, this will be a good reason for the court to refuse to consider the case. Thus, combined with the fact that the agreement does not require a guarantee of compliance from the user, this effectively removes the legal remedies Antigua and Barbuda has in respect of the user. It virtually turns the agreement into a gentleman's agreement, not a binding instrument of contract law.

If the user chooses to comply with the agreement he might come back to Antigua and Barbuda to renegotiate a new contract as stipulated in recital 11, which reads:

*If the parties hereto decide to engage in a cooperation research and development project or program using **the Material** at some future date, a formal Cooperative Research and Development Agreement should be first negotiated, agreed and entered into between the parties. Such an Agreement shall supercede this Bio-Material Access Agreement.*

This makes this model agreement a very soft tool, non-binding in a factual manner since the provider will have no legal remedies for enforcing the user to actually coming back to conduct a new round of negotiations. It is virtually impossible for a judgement of a court to oblige a user to a new negotiation.

There is also a lack of specificity in the recitals of the agreement, especially number 1, which lacks a definition of what is meant by "research purposes" and the relationship to "commercial or profit making purposes" in recital 4, which reads:

*The Material shall not be used for commercial or profit making purposes without the appropriate license or permission from **the Provider**.*

The definition of which actions that are legal for the user and which are not is therefore blurred and open for judicial interpretation. Leaving the question of such core concerns open to interpretation will reduce the potential functionality of the agreement to be enforced by a court. It is necessary to decide exactly what can be conducted as research and where the line goes between research and an intention of making a profit. It is also not possible to establish well-functioning legal concepts that cannot be externally verifiable. Proving before a court the intentions of either a researcher or the objective of the company where these activities take place is not possible. Therefore, the manner to establish criteria for what can be done legally under the first agreement and which activities that require the user to return need to be set out in a verifiable manner otherwise the problems of enforcement will be almost impossible to resolve.

The model agreement does not stipulate the consequences of a breach of contract either. This is a problem throughout recital 1 to 10. A solution to this is to be more concrete in the specification of the legal consequences of any breach of these clauses. It would be a very open question even for a court in Antigua and Barbuda to determine the consequence of a breach of contract. The remedies that will be available need to be specified to prevent the model agreement being seen as little more than a non-binding gentleman's agreement the user may opt to follow or simply walk away from. From the perspective of the user, not regulating the consequences of a breach will also reduce the legal certainty provided by the agreement.

This is also not a complete and exhaustive list of what Antigua and Barbuda might want to think through regarding the manner in which the contract is formulated. The points made here are obvious candidates for improvement as a soon as possible.

The good initiative in Antigua and Barbuda is that there is must be a legal basis for entering into an ABS Contract. The recommendation is to improve the agreement as soon as possible, and it should be relatively easy to improve the system from its current state.

### 3. Barbados

The material made available from Barbados is the following:

- Email including the plant variety protection act.

According to the material from Barbados, there is no explicit legislation on ABS. There is an administrative measure requiring a research permit to use biological material. Here, four questions need to be clarified: stipulation of the time when the research will be going on; requiring reports from the activities that are undertaken; setting conditions that only the activities stipulated in the request for research are going to be carried out; and *“that the genetic material remains the property of the Government of Barbados.”* This gives the clear impression that the permit will be granted by a public administrative decision, not in the form of a contract. The fact that there is a permit requirement means that Barbados is enforcing its sovereign rights over genetic material.

Using a public permit system introduces challenges for the enforcement of the permit in the user country, since it is very dubious whether the court of another country will rule on a Barbadian administrative decision. The list of requirements also fails to specify what is meant by the property right remaining with the government of Barbados. Since the material is accessed and permission is granted to send it out of Barbados, there is a clear need to specify further what is meant by property

rights here. The contract between the user and the government of Barbados needs to specify in more detail what the user side can do with the material. The legal basis for requiring a permit could probably be used as a legal basis for requiring a contract. However, the recommendation from the look at the available papers is to work out a manner in which to use this legal basis to enter into contractual negotiations. The next steps for Barbados should be to develop a strategy for what the country wants to achieve with ABS, and develop the system for negotiating contracts with the users.

## 4. Belize

The material made available from Belize is the following:

- Scientific Research/ Collection Application form
- Template for Scientific Collection Research Permits
- Application form for Import/Export of Lumber
- Application form for Import/Export of other flora and fauna
- Template of Export Permit – The template for import and export permit are the same
- Copy of Wildlife Protection Act

Belize has three types of research permit in place, for marine resources, fisheries and the environment. The Fisheries Regulation has a general prohibition. *“No person shall engage in marine bio-diversity research for the use of bio-technology in Belize without a valid marine bio-research license issued under these Regulations.”* (Fisheries Act 2003: Part III, 39-1) The regulation is a clear example of Belize enforcing its sovereign rights to marine biological resources. Since genetic resources are inherent to biological resources one can argue that the sovereign rights over them are also enforced by these regulations. The Marine Bio-research License is legally binding and a user can be taken to court in Belize for violating the terms and conditions attached to the license when still being under the jurisdiction of Belize. The ‘Marine Scientific Research Permit’ condition number 2 specifies that it does not grant a right to use the resources for bioprospecting, which reads:

*Any sample or specimen collected is for scientific purpose only and may not be sold or used for bioprospecting.*

‘Marine scientific research’ is a term embedded in the UN Law of the Sea, and it is dubious whether this concept covers any use of genetic resources beyond purely scientific activities. This indicates that the permit system currently in place is not very well adapted to genetic resources or bioprospecting for useful natural components. Only prohibiting transfer to third parties or any use in bioprospecting is preventive manner to enforce the sovereign rights to genetic resources. It does not meet an objective of the country to receive benefits from their utilisation. From this perspective, a revision of the system to better regulate access to genetic resources needs to be done, or there is a need for negotiating a contract regulating the terms and conditions for bioprospecting and third party transfer. However, since the regulation clearly prohibits the use of biological resources for the purpose of bio-technology, it requires amendments to be of relevance to bioprospecting. The clear prohibition seems to imply a clear objective of prohibiting rather than opening for use.

Since Belize applies an administrative system rather than contract approach, the terms and conditions set out in the research permit will become difficult to enforce in the court system of the user country because of the territorial judicial sovereignty of the other country. It is very difficult for Belize to take legal action against the receiver of this permit to enforce this prohibition of sales and bioprospecting. Therefore, the contract should rather regulate the legal consequences of such sales or bioprospecting rather than seeking to prohibit it.

The regulations also require all bio-research to have concluded “*a transfer agreement*”. This transfer agreement could indicate that the system presupposes a private law contract on transfer and later utilisation. However, the legal basis for the contract would seemingly be under the same regulation, such that the same restrictions on utilisation would apply to use-based contracts. Since a draft contract was not made available for this analysis, the report cannot evaluate whether there are elements in such a contract that could be improved. The next steps for Belize should be to develop a strategy for what the country wants to achieve with ABS, and develop further the system for negotiating contracts with the users.

## 5. Guyana

The material made available from Guyana is the following:

- Guyana Application form
- Guyana Draft Regulations made under the Environmental Protection Act Cap 20:05
- Guyana Fee structure
- Guyana Guidelines for biodiversity research
- Guyana How to make Payments
- Guyana National Policy
- Guyana Sample Export Permit
- Guyana Sample Research Permit
- Guyana the Research Process

Guyana has had a comprehensive national policy since 2007. The policy enforces the sovereign rights of Guyana over its genetic resources, as several references in the policy make clear. There is also a draft policy from 2014. Both policies are comprehensive papers setting out the overall principles and details concerning access to and utilisation of genetic resources. The 2007 policy allows access on prior informed consent and mutually agreed terms. The access process flow chart uses the terms application and permit, but does not refer to or give a clear place to the contract. The draft 2014 policy includes a part on ‘research agreements’ (Part IV).

The permit standard is simple. It contains basic information, mainly about the specimens collected and accessed. It does not detail uses and legal consequences of different kinds of uses. The permit has to be accepted by the user, which makes it resemble a contract. However, from the perspective of the court of a user country, it is unlikely that the permit will be recognised as a contract. Also the content of the permit is not sufficiently comprehensive to be enforced as a contract under most contract laws of user countries. A permit from the administrative authorities of the source country is normally not enforceable under the jurisdiction of the user country. There is a discrepancy between the level of detail in the policy and the permit. This does not mean that the permit necessarily needs to be more comprehensive. But as the permit stands today, many elements are necessary to make it binding, functional and enforceable in the user country.

One clear recommendation to Guyana is therefore to include the ABS contract as a more prominent legal tool than was the situation under the 2007 policy. This could better bind the user to the legal position Guyana requires for making ABS meet the many policy objectives described in the policy. There is, for example, no clause about legal uses, benefit sharing, and restrictions of transfer to third parties, among others, in the permit. In a contract all the relevant questions need to be regulated in detail and in a manner that can be accepted by contract of the user country.

The draft 2014 policy details the topics it requires a research agreement to contain, in recital 10, it reads:

- (1) *Every Research Agreement shall include the following terms and conditions:*
  - (a) *the number of national or community counterparts in the research team;*
  - (b) *acknowledgement by the research team of national and community counterparts as co-collectors and co-authors in all publications of research to the extent of such counterparts' relevant contribution to the research findings, where applicable;*
  - (c) *acknowledgement by the research team of national and community counterparts who may associate in any capacity including as a co-collector, where relevant, with the research team to the extent of such counterparts' relevant contribution to the research findings;*
  - (d) *the number of copies and format of research reports to be sent to the Agency after the research has been completed;*
  - (e) *benefit sharing arrangements including recognition of and valuing of any traditional knowledge;*
  - (f) *transfer of technology and joint research and development;*
  - (g) *any bond amount to be paid by the researcher prior to the commencement of any commercial research; and*
  - (h) *any other terms or conditions that the Agency may deem necessary.*

More detail is provided in recitals 11 and 12:

11. (1) *A Research Agreement that is concluded pursuant to these Regulations may, on its expiration, be renewed by the Agency where :*
  - (a) *not later than three months, or such other period as may be determined by the Agency, prior to the expiration of the Research Agreement, an application in the prescribed form, accompanied by a prescribed fee is made to the Agency for the renewal of the Research Agreement; and*
  - (b) *the Agency is satisfied that there has been material change in the circumstances that existed at the time when the agreement was entered into, it may treat an application under sub-regulation (a) as a new application and the provisions under Part III shall apply to an application under this paragraph.*
12. (1) *The Agency may vary or modify a Research Agreement on grounds to be recorded in writing.*
- (2) *Upon the approval of the variation or modification of a Research Agreement, the party to that agreement shall pay to the Agency, such fee as may be indicated by the Agency for the variation and modification of the Research Agreement.*
- (3) *Any decision by the Agency under sub-regulation (1) shall be final.*

The level of detail gives clear directions for the development of research agreements. What distinguishes this research agreement from a contract are the options for suspension in recital 13 and to rescind in recital 14. These mechanisms for unilaterally suspending and rescinding a contract are not usual in a contract governed by private contract law. One example is recital 14(1)(e) referring to the case where the “Agency is of the opinion that the Research Agreement is not in the best interest

of Guyana".<sup>2</sup> This type of clause creates an impression that the contract has not really been negotiated but is influenced by statutory requirements. A general competence to revoke a contract unilaterally is problematic from a contract law perspective since it reduces the bilateral balance which is an assumption in contract law. Moreover, by leaving this competence on such a subject and undefined criterion that it is not in the interest of the country implies also that the criterion is far too vague to meet the review mechanisms for a contract. It will be problematic to accept such an agreement as something with the ambition of being legally binding.

The 2014 policy forms a fine basis for developing the details of the contract. The details in recitals 13 and 14 need to be reviewed to see whether they can be accepted as contractual clauses because of the onesided competence left with the providing country. More contract law references must be included in the contract to make it enforceable by the courts of any user country. It is, however, difficult to assess the contract in full detail since no contract model or draft has been made available for the analysis. The main recommendation is to make the contract more specific and amend the points where the contract can fail to be enforced by a court of the user country.

## 6. Jamaica

The material made available from Jamaica is the following:

- Jamaica Breeding Loan Agreement Template – updated December 2015
- Jamaica Example of a Commercial MTA
- Jamaica Material Transfer Agreement Animal – Amended August 2015
- Jamaica Material Transfer Agreement Plant – Amended August 2015
- Jamaica Example of a Commercial MTA

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<sup>2</sup> 13. (1) The Agency may at any time for a specified time, suspend a Research Agreement on any of the following grounds, that is to say,  
(a) breach of any provision of these regulations; or  
(b) upon a breach of a term or condition subject to which the Research Agreement was granted.  
(2) Where the Agency is considering the suspension of a Research Agreement, it shall:  
(a) notify in writing the party(ies) to the Research Agreement that the suspension of the Research Agreement is being considered, together with the reasons for the proposed suspension; and (b) afford the party(ies) to the Research Agreement a reasonable opportunity to submit representations regarding the proposed suspension;  
(3) The Agency, shall, on suspending an agreement notify the researcher in writing:  
(a) the breach which gave rise to the suspension;  
(b) requiring the researcher to remedy the breach;  
(c) stating the time within which the breach is to be remedied; and  
(d) stating whether the agreement is to be returned within a specified time to the Agency.  
(4) Where the Agency is satisfied that the breach has remedied, the agreement shall be deemed resumed.

*Grounds for Rescission of Research Agreement*

14. (1) The Agency may rescind a Research Agreement:  
(a) upon breach of a condition subject to which the agreement was entered into;  
(b) where the party to the agreement contravenes any of the provisions of the Act or these regulations or any other regulations made under the Act;  
(c) where the Agency is satisfied that misleading, false or deceptive information was submitted by the applicant;  
(d) that the continuance of the agreement shall impair the rights of traditional or local users of biological resources;  
(e) if the Agency is of the opinion that the Research Agreement is not in the best interest of Guyana; or  
(f) for any other reason to be recorded in writing, where the Agency finds it proper to do so.  
(2) Where the Agency is considering the rescission of a Research Agreement, it shall  
(a) notify in writing the party(ies) to the Research Agreement that the rescission of the Research Agreement is being considered, together with the reasons for the proposed rescission; and  
(b) afford the party(ies) to the Research Agreement a reasonable opportunity to submit representations regarding the proposed rescission.

- Jamaica Wildlife Research Application Form Revised – April 2015

Jamaica has the most detailed and specific system of the countries contributing to this study. The focus on using standard material transfer agreements is a core step towards making their ABS system functional also when material has left its borders.

The 'Breeding Loan Agreement' has a very specific objective in environmental education and for long term breeding programs. One core feature of this agreement is that the actions that are allowed for the Borrower are specific. The agreement specific states that there is no transfer of ownership but a lender-borrower relationship. Not only the allowed actions are specified, but also the prohibited actions are described in 5.9 of the agreement, which reads:

*Note that the specimen(s) (as well as all their offspring) are the subject(s) of this loan agreement and as such are not to be used for any purpose other than those prescribed by this Agreement, more specifically, the specimen(s) shall not be used for entertainment purposes, as game for hunting, or invasive research, or be disposed of by means of sale or otherwise at any animal auction, or be the subject of a transfer to any pet outlet or to a member of the general public.*

This makes the obligation more specific and more enforceable. In the termination clause, 7.1, focus on reasons for ending the contract. It reads:

#### *Termination for Breach*

*This contract may be terminated at the Lender's discretion:*

*If the Borrower shall be guilty of any serious misconduct or any serious breach or non-observance of any of the conditions of this Agreement or shall neglect or fail or refuse to carry out the duties assigned to him under it, the Lender shall be entitled to terminate this Contract without notice.*

*Should there be failure to provide reports consistent will the timeframe under this contract without the written consent of the Lender.*

*Should there be failure to provide reports consistent with the quality required by the Lender as outlined in Annex I, the Lender shall be entitled to terminate the Agreement without notice.*

*Should the Lender in its sole discretion elect to exercise its discretion under paragraphs (a), (b) and (c) above, then the Lender shall give notice of termination and request a time to remedy the breach. Failure to remedy the breach within the time specified by the Lender, the Lender shall be entitled to terminate this contract without notice.*

In a situation of infringement of the contractual terms, the lender could consider to specify more detailed and clear consequences from the breach. Stating that a contract as a whole should end because of breach is not the best manner to resolve this question. In a situation where the remedy is ending the contract the lender will find himself in a situation where there is then no binding rules that can guide the termination of the contractual relationship. Therefore, opting for specific actions and remedies in the contract and state that the rights according to the contract can be terminated is a better approach. The choice of law in section 16 which refers any conflict to Jamaican law and courts is also a potential obstacle for the enforcement of the contract in the home country of the borrower. It reads:

#### *Proper Law and Jurisdiction*

- 16.1 *This Agreement shall be governed by Jamaican law in every particular including formation and interpretation and shall be deemed to have been made in Jamaica.*
- 16.2 *Any proceedings arising out of or in connection with this contract may be brought in any Court of competent jurisdiction in Jamaica.*

If a contract is breached then the claimant will often need to seek legal remedies in the home jurisdiction of the user/ borrower. If the contract itself states that it cannot be interpreted by the court of that country, it is likely that the case will not be heard by those courts. The arbitration clause could be more detailed so it captures the relevant situations and procedures for a situation of breach of the contract.

The Material Transfer Agreements by the Natural Resources Conservation Authority (MTA) that have been made available for this study regulate the topics that often are regulated in MTA for research on 'genetic resources'. Section 6.0 establishes a prohibition for other uses than those specified it is stated in the Application. It reads:

*The Recipient shall not use the Biological Material for any purpose except as specified in the Application without the prior written consent of the Provider and subject to any further mutually agreed terms that the Provider may require.*

A clause prohibiting activities that would take place outside the jurisdiction of the providing country is very difficult to overview and stop by legal means. This would require a court in the user country to specifically give a judgement stating that certain ways of using the material are illegal and should be stopped. It is however not an easy task to get a court order to prohibit certain actions based on this vague wording.

The MTA section 5.0 establishes that the material can only be used for 'scientific research purposes', it reads:

*The Biological Material is provided to the Recipient for scientific research purposes only. The Biological Material is for use only by the Recipient and is not for use in humans. No specimens of the Biological Material are to be given or made available to any third party including but not limited to, any person, firm, or corporation, without the prior written consent of the Provider. The Biological Material is to remain under the Recipient's immediate and direct control. The obligations and rights contained in clauses herein shall survive the expiration or other termination of this Agreement.*

The contract does not specify the legal consequences of breaching these obligations by using the material for other purposes. This combined with the regulation of commercialisation in section 7.0 establishes a system requiring the user to renegotiate the terms for commercial use. It reads:

*The Recipient shall not commercialise the Biological Material or its genetic resources, their progeny or derivatives without having obtained the written permission of the Provider prior to such commercialization. Any such commercialization, to which the Provider agrees, will be subject to negotiating and executing a separate commercialization agreement with the Provider. The Provider is under no obligation to grant such an Agreement. This clause shall survive the terms of this Agreement. The obligations and rights contained in clauses herein shall survive the expiration or other termination of this Agreement.*

This gives the MTA a notion of letter of intent rather than a binding contract since its concrete and specific obligations are not set in the contract itself. The specification in section 7.0 that the provider has no obligation to grant a commercialisation contract also shifts the balance in the contractual

relationship at the point of time when a commercial lead is found. At this point of time the user will have invested in research on the material. Since the MTA does not establish any clear consequences from a commercial use without such a renegotiation it becomes an open question how a court would approach such a breach of contract. One proposal is therefore to develop the MTA in detailing the system also for commercial uses of the genetic or biological resources. During such exercise it will be important to be concrete and detailed in the way of specifying the different legal actions and the consequences. The aim would be to write the operative articles in the MTA in the clearest possible manner so little room for interpretation is left to the courts that are to enforce the contract. One very concrete manner to develop the contract is to include specific legal consequences attached to the different breaches. This would assist a judge in enforcing the contract and give it more of a binding style.

## 7. Montserrat

The material made available from Montserrat is the following:

- Application to Conduct Biodiversity Research on Montserrat

Montserrat has provided information about the “Application to Conduct Biodiversity Research on Montserrat”. This application form sets the elements a bioprospecting permit needs to include. By requiring a permit if one wants to conduct biodiversity research in Montserrat the sovereign rights are enforced.

The format in which this permit is granted is as a unilateral permit and is not in the form of a contract. This reduces its applicability as a legally binding and enforceable agreement in the courts of the user country. The permit’s format will also make it difficult to enforce its terms under the jurisdiction of another country.

Section 6 in particular provides a detailed description of the access activities that are planned. The requirement set out in section 6.1 is, however, one-sided in targeting the access side of the transaction. Not regulating the benefit parts of the ABS transaction will make benefit sharing completely voluntary and one can therefore not expect the company to return to Montserrat to share any benefits with the provider.

Section 6.3 includes a specification of opportunities for local input and capacity building. It reads:

- 6.3. Opportunities for local input and capacity building*
  - 6.3.1. Participatory components*
  - 6.3.2. Opportunities for local field support*
  - 6.3.3. Opportunities for students*

This concerns the participatory benefit sharing during the initial stage of access and use of the genetic resources. The permit does not require the company to come back and renegotiate any benefit-sharing contract. This reduces the chance of any long-term benefits to be shared with the provider. Neither does the permit contain any restrictions on the types of uses the users can undertake in respect of the material. Nor is there any restriction on the transfer to third parties to the contract. Altogether this permit regulates the very basic questions that must be regulated on the access side of ABS. It does not guarantee that any benefits will be shared with Montserrat in the event of a useful product arising from the findings based on the material. It is not clear from the permit system whether a contract is necessary, and since no contract has been made available it has not been possible to assess how the contract can be drafted. The recommendation is to develop a

contract mechanism based on the existing legal basis with a particular view its benefit sharing mechanisms.

## 8. Saint Lucia

The material made available from Saint Lucia is the following:

- Saint Lucia Forest Research MOU
- Saint Lucia Research Application
- Saint Lucia Research Contract Template

The material made available from Saint Lucia includes the research application, research agreement and one example of a short approval. The fact that Saint Lucia requires a both permit and an agreement indicates that its sovereign rights are exercised. The permit refers to biological collection and research, but does not specifically mention 'genetic resources' or 'bioprospecting' as an activity. Nevertheless, it can be regarded as a manner of exercising sovereign rights, since it concerns the use of biological material for research. This shows that enforcement of sovereign rights can be done through mechanisms that are not implemented and adapted specially for ABS. A clearer and more explicit system for managing genetic resources could have been an advantage. Using existing management systems has its advantage in that the system is already in place and needs only to be adapted to the new manner to formulate a certain use of the biological resource.

The content of the permit concerns mainly activities at the time of access to the resources while omitting the user's point of time. This leaves the permit system as more of an access regime than a benefit sharing scheme and weakens it by not making it explicit that the system is set up to deal with genetic resource issues. Thus, a clearer mentioning and references to these activities could increase the certainty of the system.

The agreement also targets quite comprehensively the access and research of ABS (recital 16–19).

16. *Upon completion of fieldwork, the researcher will provide a written and oral summary, presenting preliminary findings of the research to the Department, including a PowerPoint presentation, all of which shall become the property of the Department.*
17. *The researcher shall submit to the Department an electronic copy of his/her first draft of publication with preliminary findings **no later than, XXXX 20XX.***
18. *The researcher shall submit to the Department an electronic copy of his/her pre-publication outputs for review by the Department, **no later than, XXXX 20XX.***
19. *Upon completion of the thesis/research paper/graduate project or the like, the researcher will provide a complete electronic copy and no less than three hard copies of all the research outputs (i.e. inclusive of all appendices and attachments) to the Department **no later than, XXXX 20XX.***

The benefit maximum stipulated in the contract is linked to sharing scientific publications. This is only one type of benefit that can be shared according to the NP and Bonn Guidelines. However, there is a lack of mechanisms built into the agreement that would ensure the sharing of benefits at a later stage than the non-monetary benefits described above.

It can also be fruitful to point to other laws in the contract that the bioprospector must adhere to. On the other hand, these laws will be binding regardless of whether the contract stipulates whether they are binding or not. A general reference to other laws does not change the legal situation while activities are progressing in Saint Lucia but it can make them binding as part of the contract when the

user is outside the jurisdiction of Saint Lucia. For such a clause to bring more legal certainty to the user, it would be helpful if it contained explicit references to the laws that are most relevant to user compliance.

From a contract law point of view, section 10 is particularly difficult. It reads:

*Without any prior notice or liability, the Department may terminate the Agreement upon written notice to you. In the event of such notice, the researcher will stop all research activities being carried out by them in the waters of Saint Lucia. This Notice of Termination will also apply to any research assistants working in conjunction with the researcher.*

The wording “*the Department may terminate the Agreement upon written notice*” introduces unilateralism into the agreement which is normally not acceptable in commercial contract law. This one-sidedness is particularly troublesome since the agreement does not mention any legitimate reasons for ending a contract making the legal situation of the user very uncertain. Nor does it mention whether the legitimate rights of the user of the material in his home country could be altered, referring solely to collecting activities in Saint Lucia. The objective of such a clause is to ensure that jurisdiction over the ongoing activities remains with the authorities of Saint Lucia and that they are bound by a contractual limitation to monitor and withdraw the license to conduct the activities.

A last weakness of this contract applied to ABS cases is that it is not adapted to regulate special ways of utilizing genetic resources. The vagueness on the user side of this agreement will probably make the agreement practically unenforceable under the user’s home jurisdiction. The lack of enforceability in the home jurisdiction of the user reduces significantly the incentive for the user to meet the requirements of the agreement. The general formulations in the contract will make it dubious whether a judge would rule on whether a user has infringed the contract or not. The recommendation would therefore be to develop contracts that would be more of tailor-made to ABS situations.

## 9. Saint Kitts and Nevis

The material made available from Saint Kitts and Nevis is the following:

- Email response with a discussion of The National Conservation and Environmental Protection Act (NCEPA) of 1987
- Example of a permit

The documents made available by Saint Kitts and Nevis are an email and a very short approval of an application to take historical material for analysis, the latter of limited relevance for ABS.

As stated in the email to CARICOM, there are currently no legislative provisions or regulatory measures that address access and benefit sharing of genetic resources in Saint Kitts and Nevis. The 1987 National Conservation and Environmental Protection Act (NCEPA) does not contain any regulation of ABS. According to the same sources, there is no explicit regulation of ownership of biodiversity and genetic resources. Therefore, ownership of genetic material is currently enforced through ownership of the biological material where it is found. Thus, the owner of land has rights to the genetic material found there, whereas the crown is said to have ownership of all marine genetic resources. It is dubious whether this implies whether Saint Kitts and Nevis can be regarded as exercising its sovereign rights to genetic resources.

There is a research permit issuing system run by the Department of Physical Planning and Environment, but it lacks provisions on benefit sharing, monitoring and enforcement. One caveat here is that these permits have not been provided to this study. The first observation is that the permits will not necessarily be possible to enforce under the jurisdiction of a user country and references to the content of these permits do not sound like a system covering all relevant regulatory questions for an ABS contract to be functional.

Based on these general sources, three recommendations can be made. Clarify the legal foundation for requiring ABS contracts to be entered into for any taking of genetic resources. The second recommendation is for Saint Kitts and Nevis to develop a strategy setting the goals to be achieved by regulating ABS. Third, there is a need to develop the contractual approach to granting access and requiring benefit sharing from the utilization of genetic resources.

## 10. Suriname

The material made available from Suriname is the following:

- General Regulations for Nature Research on Species of Wild Fauna and Flora in Suriname (version 15<sup>th</sup> August 2006)
- Application for Nature Research in Suriname (version 15 August 2006)

The regulations that were made available are the internal rules from the Suriname Forest Service, whereas the legislation that are at the base of these regulations is the Nature Conservation Act of 1954 (Natuurbeschermingswet 1954). For Suriname there is a general regulation of research on species of wild fauna and flora; it is the main document to be considered with respect to ABS. The regulation applies to all kinds of research on fauna and flora. According to Surinamese comments, this regulation (Nature Conservation Act 1954) only regards scientific research within legally established nature reserves.<sup>3</sup> The regulation has no jurisdiction outside of the nature reserves. This means that access under the Nagoya Protocol applies only to the 13% of the land which is nature reserve. Suriname can be said to exercise its sovereign rights to genetic resources by this regulation to parts of its genetic resources based on from where they are accessed.

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<sup>3</sup> The most relevant articles of the Nature Conservation Act 1954 identified from Surinamese sources are as follows (unofficial translation):

*Article 4*

- 1. Head of the Forest Service may, on the advice of the Nature Conservation Committee, close nature reserve partly or wholly for the public.*
- 2. It is forbidden to enter the closed off area, pursuant to the preceding paragraph, except with the written authorization of the Head of the Forest Service and subject to the conditions specified therein.*

*Article 5*

*It is prohibited in a nature reserve:*

- a. to intentionally or by negligence inflict damage to the soil, the scenery, the wildlife, the flora or perform actions, thereby undermining the value of the nature reserve as such;*
- b. to camp, make fire, to cut or burn charcoal wood, except with a by the Head of the Forest Services written consent and subject to the conditions specified therein;*
- c. to hunt, fish, or to have with them, without permission of the Head of the Forest Services, a dog, a gun or any hunting or trapping tools.*

*Article 6*

*The prohibitions in Articles 4 and 5 do not apply to persons designated by the Head of the Forest Service, who have been granted a special permit or order, subject to the conditions laid down by the Head, to perform one or more the acts referred to in the said article for scientific, educational, cultural or other purposes.*

The regulation establishes a permit system for access to specimens, but being a permit, it makes it difficult for the court system in the user's home jurisdiction to ensure enforcement of the rules. It is unlikely that a breach of the rules in the regulation could be pursued on legal grounds in the courts of the user's country.

There are interesting solutions in the regulation to be implemented through the permit system. It is said in section 3A, the permit shall be regarded as non-transferable. The clause in itself does not establish any legal consequences in the case of such a transfer of the permit taking place. It is section 3A only make the permit itself non-transferable, it reads: "*A permit issued will be in the name of the Applicant and shall be non-transferable*". This means that if the permit was given to A, A cannot transfer his permit (thus his right to do the research) to B. The fact that the permit is non-transferable does not expand to the materials. Whether it is legal to transfer the material is not regulated by law, but will have to be regulated through a contract. This is a weakness since it will be difficult to monitor the transfer of the permit. The reaction to the transfer of the material would be that the person working under the transferred permit will be working illegally, because the permit cannot legally be transferred. In the sense of ABS this would mean that the GR was illegally obtained and cannot receive an international certificate of compliance. The fact that the third party transfer of the material is not explicitly regulated implies an indirect regulation. This creates a legal lacuna and a clearer rule for the permit that for the genetic resources. It is far from sure that the courts of the user will interpret the legality of the transfer of the material according to this. Moreover, it will be difficult to react to such a breach by legal remedies as the regulation only labels such conduct as illegal, without stipulating any concrete reactions.

Section 3C seeks to regulate one of the most difficult questions for an ABS contract, and reads:

*Any behaviour deemed unethical by the N.C.D. or any changes made in the conditions of the permit without explicit approval of the N.C.D. may cause immediate amendment or cancellation of the permit and confiscation of part or all of the collected material.*

Section 3C thus sets a rule for cancellation of the permit in a case for '*behavior deemed unethical*'. While this leaves the public authority with ample discretion, it leaves the user with a correspondingly narrow basis for legal certainty. Wide discretion to revoke a permit would be very difficult once the user is back under his home jurisdiction.

For a permit system, section 5A requiring a sample to be deposited in Suriname, is an important tool for domestic capacity building. This is especially important for research and development in the country and can later be used as a database for determining whether Surinamese genetic resources have been used illegitimately later in the course of research and development.

In section 7A there is a reference to all other regulations in Suriname. Again this is a way of establishing requirements that would follow from the general laws of the provider country. Adding such an obligation in the regulation makes it clear that the regulation does not replace all other legal requirements, but must be interpreted and applied in conjunction with them. From the perspective of the user, it would have provided more clarity and certainty if the other relevant rules had been listed.

In Section 8A there is a time limit to the permit. This is a well-founded point since the permit regulates only access to the resources. If the purpose of the permit is aiming at regulating the later use of the resources, then the permit's time limit needs to extend at least until the resources are used and can create benefits that could be shared. However, enforcing such a permit under the jurisdiction of another country is difficult. Also under sections 8C and 8D, there are prohibitions against bio-prospecting or commercial activities. This reduces the applicability of this kind of permit

to genetic resources. The exclusion can be interpreted either that such use is not allowed in Suriname or it is assumed that there is another permit-granting system for these resources. If such a system is not in place, Suriname could easily miss out on any benefit sharing from bio-prospecting or commercial use of the resources. If Suriname is proceeding to remedy this regulatory gap, such a system should be based on contracts rather than permits and officials should address how to make these contracts functional also after the resources they govern have left the Surinamese jurisdiction.

## 11. Trinidad and Tobago

The material made available from Trinidad and Tobago is the following:

- Email explaining the current relevant legislation
- Trinidad and Tobago FurnitureShopPermit
- Trinidad and Tobago LFVLSample

The legal material targeting ABS provided by Trinidad and Tobago is limited. The main impression is that Trinidad and Tobago regulates access indirectly by permits. Again using a permit will make it dubious whether such a permit will be at all possible enforce outside Trinidad and Tobago. The best advice for Trinidad and Tobago is to set priorities for how to develop a business model for the use of genetic resources, and develop a system for negotiating agreements that each can contribute to overall bioprospecting goals.

## 12. Observations and conclusions

The countries in this study all have a system in place for managing biological resources. In some cases, these general regulations can serve as a legal basis for regulating bioprospecting and ABS for genetic resources. Since genetic resources are biological resources, the system for managing biological resources in general will also cover genetic resources, at least in an indirect sense. For a country to be interpreted as waiving its sovereign rights to regulate access to and benefit sharing from genetic resources the system under the CBD and NP requires the country to explicitly state that these rights are not going to be enforced. In cases where there is no explicit regulation of genetic resources, a user must probably assume that the regulation of the use of natural resources applies to genetic resources as well.

A lot of emphasis in the debate on how to make ABS work as a tool for sustainable use and conservation of biological diversity, concerns the permit system. This is interesting enough from an access point of view, with a particular emphasis on the internal decision-making processes in the provider country. However, as has been noted by certain scholars, ABS will only become really functional and binding as a legal tool when it is translated into binding norms on the user in their home jurisdiction. Since almost no user country imposes a wide-reaching or standalone obligation on its users of genetic resources accessed in another country, the binding element of ABS must be developed in the contract between the user and the provider (country or other legal person). The examples of the agreements provided for this study generally illustrates a general tendency of ABS contracts: they do not relate to the core and difficult issues involved in turning them into functional commercial contracts that courts in any country could adhere to as commercial contracts. The lack of enforceability of agreements turns them into non-binding statements of intentions rather than concrete obligations that commercial actors in the bio-economy will be bound by in a manner they cannot escape.

There is, from this authors' point of view, a need to review all agreements in ABS with the view to making them enforceable in the country the benefits are generated in years (or months) after the material was accessed in the original provider country. There is a number of questions one must be aware of when negotiating contracts in ABS. Young and Tvedt (2016) have identified core elements and questions that is published by the ABS Capacity Building Initiative:

- Develop a strategy for the negotiation of a legally effective ABS contract.
- Ensure that every aspect of the contract is unambiguous and externally verifiable –use more precise terms than those used in international law.
- Be sure that the right parties are named in the contract, and that they are legal entities that can be bound by the contract.
- Draft certain key provisions of the contract so concretely that they are legally recognized as “enforceable”.
- Address with the possibility of third-party transfers –stipulate clear paths that ensure that the parties' contract obligations are not lost in these situations.
- Understand the concepts of contractual validity and enforceability and apply them in your contract – be aware of the requirements of and limitations contract law when drafting the contract.
- Include provision that help the contract to maximize the parties' legal remedies.
- Include guarantees and other provisions that make it easier for the parties to ensure that the contract will be performed.
- Do not base your contract on misunderstandings and misuse of concepts such as “governing law,” “private international law” and “international commercial law” – in most cases these concepts will not be able to help your contract as the contractual text must stand on its own.

Another recommendation is make the topic of ABS implementation an annual or biannual exercise where the countries are invited to submit relevant sources on ABS laws, and then provide a structured re-writing of the respective sections as in this report.

## 13. Contact

**Dr. Hartmut Meyer**

ABS Capacity Development Initiative  
Deutsche Gesellschaft für Internationale  
Zusammenarbeit (GIZ) GmbH  
Postfach 5180  
65726 Eschborn  
Germany  
E [hartmut.meyer@giz.de](mailto:hartmut.meyer@giz.de)  
I [www.abs-initiative.info](http://www.abs-initiative.info)

**First name, last name**

CARICOM  
E CARICOM  
I CARICOM

**For questions and comments on the ABS Capacity Development Initiative or the topic of Access and Benefit Sharing, please contact:**

ABS Capacity Development Initiative

Email: [abs-initiative@giz.de](mailto:abs-initiative@giz.de)

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