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Biopiracy and the Role of Private International Law under the Nagoya Protocol

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FILLING A GAP IN THE DEBATE ON ACCESS TO GENETIC RESOURCES AND THE EQUITABLE SHARING OF BENEFITS (ABS) UNDER THE NAGOYA PROTOCOL

Until the adoption of the Nagoya Protocol to the Convention on Biological Diversity there was no private international law of ABS. Whether and the extent to which the Nagoya Protocol enshrines obligations that would require Parties to establish or harmonise a private international law (PIL) framework for ABS is an open question. In particular, in relation to compliance issues, such question has vast implications for the way in which Parties, indigenous and local communities, and other stakeholders may (or may not) be afforded an opportunity to vindicate their rights in alleged cases of biopiracy.

PRIVATE INTERNATIONAL LAW AND BIOPIRACY

Private international law regulates private relationships of contractual as well as non-contractual nature across national borders when a legal dispute has a "foreign" element. Within the purview of what is generally termed as biopiracy, the two concepts of "misappropriation" and "misuse" of genetic resources have emerged. In practice, contractual disputes concerning cases of alleged misuse – i.e. where mutually agreed terms (MAT) have been established – may be distinguished from non-contractual disputes concerning misappropriation – i.e. where neither prior informed consent was granted nor MAT were established. The private international law provisions of the Protocol can play a critical role in defining the Parties' obligations to enforce compliance *vis-à-vis* these two sets of biopiracy cases.

NARROW AND EXTENSIVE INTERPRETATIONS OF THE PROTOCOL'S PIL PROVISIONS

The narrow interpretation of the Protocol's PIL provisions suggests that the latter should not play an important role in countering biopiracy, especially in cases of misappropriation (i.e. non-contractual disputes). On the contrary, the extensive interpretation indicates that PIL can play a prominent role in relation to all the compliance-related obligations under the Protocol. Consequently, the capacity development strategy for the Nagoya Protocol should provide for strengthening the institutional capacities that are necessary to resolve questions of jurisdiction, applicable law, and recognition and enforcement of foreign judgments and arbitral awards, both in the context of contractual as well as non-contractual ABS disputes.

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EXECUTIVE SUMMARY

Until the adoption of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* there was no private international law of ABS. Likewise, the literature on this topic is virtually non-existent. The objective of this paper is to analyse the role of private international law under the Nagoya Protocol. In particular, it will set forth possible options for implementing ABS measures concerning the Nagoya Protocol's provisions on: jurisdictional issues; the law applicable to ABS obligations of contractual as well as non-contractual nature; and the recognition and enforcement of foreign judgments and arbitral awards in the context of ABS disputes. This paper concludes by comparing the narrow interpretation of the Protocol's private international law provisions *vis-à-vis* their extensive interpretation. Such comparison will help clarifying the institutional capacities that may be required for implementing the relevant Protocol's obligations. In particular, the narrow interpretation of the Protocol's private international law provisions suggests that the latter should not be expected to play an important role in countering biopiracy and – more generally – in the implementation of the Protocol. However, private international law would still be accorded a certain prominence as a tool for resolving disputes that concern compliance with contractual ABS obligations. On the contrary, the extensive interpretation of such provisions indicates that private international law can play a prominent role in relation to all the compliance-related obligations *under* the Protocol. Consequently, the capacity development strategy for the Nagoya Protocol should provide for strengthening the institutional capacities that are necessary to resolve questions of jurisdiction, applicable law, and recognition and enforcement of foreign judgments and arbitral awards, both in the context of contractual as well as non-contractual ABS disputes.

1. INTRODUCTION

Until the adoption of the Nagoya Protocol, one may safely argue, there was no private international law of ABS.[1] Whether and the extent to which the Nagoya Protocol enshrines obligations that would require Parties to establish a private international law framework for ABS, in particular, in relation to compliance issues, is an open question. Such question *per se* was never openly considered before by scholars.[2] Besides, with the exception of a few submissions tabled at the meeting of the Group of Technical and Legal Experts on Compliance,[3] only incidentally – and not in a comprehensive manner – was the role of private international law (PIL) discussed during the ABS negotiations. In particular, the attention has focused on PIL in connection with the elaboration of Article 18 of the Protocol on "Compliance with mutually agreed terms." It is not surprisingly so, despite its overarching implications for the functioning and balance between the three pillars of the Protocol (*i.e.* access to genetic resources and TK, benefit sharing and compliance with domestic ABS requirements). In particular, it seems that Parties have preferred not to open this Pandora's Box in Nagoya, especially in light of the many other outstanding issues that had to be solved in the negotiations.[4] However, the current focus on early ratification and entry into force of the Nagoya Protocol and the consequent attentional shift from international negotiations to domestic implementation, an increased understanding of ABS issues among governments, stakeholders and the general public is required.

Therefore, the objective of this paper is to analyse the role of private international law under the Nagoya Protocol. In particular, it will set forth and consider possible options for implementing ABS measures concerning the Nagoya Protocol's requirements on: jurisdictional issues; the law applicable to ABS obligations of contractual as well as non-contractual nature; and the recognition and enforcement of foreign judgments and arbitral awards. Besides, this analysis will help clarifying the institutional capacities that may be required for implementing the above options.

For the purpose of this analysis, it is useful to define some basic concepts and expressions in a conventional manner. In accordance with the Convention on Biological Diversity (CBD), access and benefit sharing (ABS) generally refers to the following two issues: the way in which genetic resources and traditional knowledge may be

1. The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* (hereafter the Nagoya Protocol or the Protocol) was adopted on 29 October 2010 by the tenth meeting of Conference of the Parties (COP 10) to the Convention on Biological Diversity (CBD) in Nagoya, Japan. For an synthetic explanation of the background to the negotiations of the Nagoya Protocol see Claudio Chiarolla (2011), *Intellectual Property, Agriculture and Global Food Security: The Privatisation of Crop Diversity*, Cheltenham, UK • Northampton, MA, USA: Edward Elgar, at pp. 134-137.
2. However, on private international law-related questions see, for instance, Christine Godt, *Enforcement of Benefit-Sharing Duties in User Countries* and Hiroji Isozaki, *Enforcement of ABS Agreements in User States* in "Genetic Resources, Traditional Knowledge and the Law - Solutions for Access and Benefit Sharing," eds. Evanson C. Kamau and Gerd Winter, London: Earthscan (2009), at pp 419-54.
3. The Group of Technical and Legal Experts on Compliance in the context of the International Regime on Access and Benefit-sharing met from 27 to 30 January 2009, in Tokyo, Japan. See, for instance, the submissions from Canada (UNEP/CBD/ABS/GTLE/2/2, at pp. 5-9) and Japan (UNEP/CBD/ABS/GTLE/2/2/ADD1), available at: http://www.cbd.int/doc/?meeting=ABSGTLE-02
4. C. Chiarolla, L. Chabason and R. Billé (2010), "COP 10 in Nagoya: a success for global biodiversity governance?" IDDRI, *Synthèses*, n°6, 2010, and C. Chiarolla (2010), "Making Sense of the Draft Protocol on Access and Benefit Sharing for COP 10," Iddri, *Idées pour le débat*, n°07/2010.

accessed; and how the benefits that result from their use are shared between the people or countries using such resources and knowledge, on the one hand, and the people or countries that provide them, on the other hand.

In accordance with CBD Article 15, the Nagoya Protocol reiterates that, as a general rule, ABS shall be subject to the prior informed consent (PIC) of the provider country "*that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.*"[5] This formulation conveys the idea that the provider country shall be a "qualified" or "legitimate" provider. Therefore, the prior informed consent is the permission given by the competent national authority of a "legitimate" provider country to a user prior to accessing genetic resources, in accordance with the applicable national legal and institutional framework.

The Protocol also reiterates that the "*benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization*" shall be shared with the provider country "*upon mutually agreed terms.*"[6] Therefore, mutually agreed terms (MAT) are the agreement reached between the provider of genetic resources and the user of such resources on their conditions of access and use, and on the benefits to be shared between both parties. Besides, when it is not capitalized, the term "parties" refers to the parties of an ABS agreement. Therefore, between such parties there is a contractual relationship that is regulated by the mutually agreed terms. On the other hand, when the term "Parties" is capitalized, it refers to the state Parties to an international treaty, namely, the Nagoya Protocol and/or the Convention on Biological Diversity.

Dutfield explains that the term biopiracy is generally used to "describe the ways that corporations from the developed world claim ownership of, free ride on, or otherwise take unfair advantage of, the genetic resources and traditional knowledge and technologies of developing countries."[7] Claims of biopiracy against companies have focused on the lack of appropriate steps to ensure that:

- the prior informed consent is obtained from the country of origin of generic resources or from the legitimate holders of traditional knowledge (TK);
- benefits are shared from the commercialization of products derived from such resources or TK; and
- patents are not illegally granted for knowledge and over resources in violation of prior legal rights of sovereign countries and/or indigenous and local communities.

Within the purview of what is generally termed as biopiracy, the two more specific concepts of "misappropriation" and "misuse" of genetic resources and/or traditional knowledge have emerged. Neither the CBD nor the Protocol defines these concepts. However, it can be useful to distinguish them on the basis of working definitions.[8] On the one hand, "misuse" of genetic resources and traditional knowledge may be generally understood as a use that violates the mutually agreed terms between the user and the provider(s) or holder(s) of such resources and knowledge. Therefore, in cases of misuse, the assumption is that there is a contractual relationship between the parties. Thus, the responsibility that arises from the breach of the mutually agreed terms derives from a contractual obligation (*i.e.* non-compliance with MAT).[9]

5. Article 6.1 of the Nagoya Protocol.
6. Article 5.1 of the Nagoya Protocol.
7. Dutfield, G. (2004), *What is biopiracy?* Paper presented at the International Expert Workshop on Access to Genetic Resources and Benefit Sharing, Cuernavaca, Mexico, 24–27 October 2003.

8. As regards relevant national-level ABS legislation, for instance, the Norwegian Nature Diversity Act contains provisions on the enforcement by the Norwegian state of the prior informed consent requirements of provider countries. In particular, section 60(1) of the Nature Diversity Act states: "*The import for utilisation in Norway of genetic material from a state that requires consent for collection or export of such material may only take place in accordance with such consent. The person that has control of the material is bound by the conditions that have been set for consent. The state may enforce the conditions by bringing legal action on behalf of the person that set them.*" See Morten W. Tvedt and Ole K. Fauchald (2011), "Implementing the Nagoya Protocol on ABS: A Hypothetical Case Study on Enforcing Benefit Sharing in Norway", *The Journal of World Intellectual Property* (2011) Vol. 14, no. 5, pp. 383-402, at p. 386. Besides, M.W. Tvedt also distinguishes situations where genetic material is collected or exported without PIC from situations where PIC has been obtained in the form of a public act, but the terms of such consent are not complied with. See Morten Walløe Tvedt (2010), *Norsk Genressursrett. Rettslige betingelser for innovasjon innenfor bio- og genteknologi* (on Norwegian Genetic Resource Law), Cappelen. Akademisk Forlag, at pp. 148-149.
9. Non-compliance with MAT may occur, for instance, when PIC and MAT are initially obtained for non-commercial research purposes. Subsequently such research may lead to commercial R&D and the user, who is required to conclude a new commercial benefit-sharing agreement, refuses or abstains from negotiating such agreement. From the provider's point of view, ABS arrangements often include a public act (the prior informed consent) see Protocol Article 6(d) - *i.e.* a non-contractual act, which is not concerned by the rules of private international law. However, the ABS agreement that is subsequently established is a private law contract. Therefore, even if a party to the mutually agreed terms

On the other hand, "misappropriation" of genetic resources and traditional knowledge could be defined as the appropriation (and subsequent utilization) of such resources and knowledge, which occurs in violation of the applicable domestic ABS legislation or regulatory requirements of a Party to the Protocol.[10] In cases of misappropriation, the assumption is that there is no contractual relationship between the user(s) of genetic resources and TK and the Competent National Authority(ies) of the provider country and/or the legitimate provider(s) or holder(s) of such resources and knowledge. Therefore, the responsibility that arises from the breach of applicable domestic ABS legislation or regulatory requirements derives from non-contractual obligations (i.e. non-compliance with domestic ABS legislation or regulatory requirements).

The definition of misappropriation that is used in this paper reflects a narrow interpretation of such concept. This interpretation appears to be in line with the obligations to "*address situations of non-compliance*" under Articles 15 and 16 of the Protocol. However, it is fully acknowledged that some Parties have argued that in the absence of domestic ABS legislation, the question of the direct applicability of the Nagoya Protocol and the CBD at the national level should be answered in the positive. In the proponents view, such direct application would entail the *default* users' obligations to obtain PIC and establish MAT, even in the absence of a domestic ABS regulatory framework in the provider country. During the Protocol's negotiations (at the resumed ABS-9 session and thereafter), this proposition received the support of many developing countries, especially in the African Group, which could face important capacity constraints in the expeditious implementation of a fully functional ABS system.[11] The opposite view is that a Party would need to enact a domestic ABS regulatory framework in order to require prior informed consent and "activate" its right to benefit sharing. In light of the compliance provisions of Articles 15 and 16 of the Protocol, it appears that the narrow interpretation has eventually prevailed.

In the following sections, this paper analyses the key provisions of the Nagoya Protocol that relate to private international law (PIL). The employed methodology is to raise and consider key questions of private internal law with the view to clarifying its most important implications for implementing the Protocol. Section II outlines the nature and functions of private international law. Section III considers jurisdictional issues concerning ABS disputes and their relationship with the access to justice requirements of the Protocol. Section IV considers identifying the procedural rules that determine the law applicable to the responsibility that arises from *contractual* ABS obligations (non-compliance with MAT) as well as from *non-contractual* ABS obligations (non-compliance with domestic ABS legislation or regulatory requirements). Section V considers identifying the procedural rules that the Protocol Parties may apply in order to recognize and enforce foreign judgments and arbitral awards in ABS disputes. Finally, Section VI concludes by comparing the narrow interpretation of the private international law provisions of the Protocol *vis-à-vis* their extensive interpretation with the view to clarifying the institutional capacities that may be required for implementing them.

2. THE NATURE AND FUNCTIONS OF PRIVATE INTERNATIONAL LAW

Private international law regulates private relationships of contractual as well as non-contractual nature across national borders when a legal

is a public authority, which acts in accordance with its institutional mandate (with regard to the granting of PIC), when such authority concludes an ABS contract, it will act in its capacity as a private law party to the contract. In other words, the conclusion of an ABS contract may not be considered as *acta iure imperii*.

10. See, for instance: Submission by the European Union, UNEP/CBD/WG-ABS/8/6/Add.4, (8 November 2009), available at: http://www.cbd.int/doc/meetings/abs/abswg-08/official/abswg-08-06-add4-en.pdf, which states that "Misappropriating genetic resources means to acquire, either intentionally or negligently, genetic resources in violation of applicable domestic legislation of a Party that requires prior informed consent and mutually agreed terms for access to its genetic resources." See also: Submission by Switzerland for WG-ABS 9 regarding the need for definitions in the ABS-IR, available at: http://www.cbd.int/abs/submissions/abswg-09-switzerland-en.pdf, which defined "Misappropriation of genetic resources" as "access to genetic resources without prior informed consent and/or mutually agreed terms pursuant to the national access legislation of the country providing the genetic resources and the access provisions set out in the ABS-IR in force at the time of access." As regards the misappropriation of TK, WIPO submissions define it as "any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge." See WIPO/grtkf/IC_8_5[2], cited in Communication from Bolivia, Cuba, Ecuador, India, Sri Lanka and Thailand (2006), Submission in Response to the Communication from Switzerland (IP/C/W/446).

11. See, *ENB*, vol. 9, No. 527, p. 15.

dispute that concerns such relationships has a "foreign" element. In general, it is understood as a set of domestic procedural rules that determine the following three matters:

- Whether the forum court has the power to resolve the dispute (i.e. whether it has jurisdiction) and the conditions under which it may decline to exercise its jurisdiction;
- The substantive rules of law which are applicable to resolve the dispute (i.e. applicable law); and
- The ability to recognize and enforce a judgment from an external forum within the jurisdiction of the adjudicating forum (i.e. recognition and enforcement of foreign judgements and arbitral awards).

3. JURISDICTION AND ACCESS TO JUSTICE IN ABS DISPUTES

In general, rules of private international law are of domestic nature.[12] This means that the decision of whether the courts of a particular country have jurisdiction over a dispute is subject to domestic legislation. Therefore, the question of where to sue for the alleged "misappropriation" of genetic resources and traditional knowledge or for their "misuse" is of fundamental importance, particularly in light of expectations that the chosen forum might asset its jurisdiction over the dispute.[13]

In the case of contractual disputes, a general rule is that the defendant shall be sued in the courts of the place where such person is domiciled.[14] Besides, the parties of an ABS contract may include an express jurisdiction clause to specify where they wish to bring suit.[15] If a dispute arises on the performance of an ABS contract, the Nagoya Protocol sets out certain obligations for state Parties in accordance with the following terms: "*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. Each party shall take effective measures, as appropriate, regarding access to justice* […]".[16]

The above provisions do not seem to provide specific guidance on how the courts of the forum should decide whether they have jurisdiction over ABS disputes. However, they do establish the duty of state Parties to provide for judicial remedies, including access to their courts and tribunal, to nationals of other state Parties. Therefore, the ground rule established by the Protocol is that the forum courts, which are seized of a dispute arising from mutually agreed terms, should assert their jurisdiction unless the complaint is apparently based on dubious jurisdictional grounds (*e.g.* where none of the parties to the MAT have real connection with the forum.)[17]

12. Dan Jerker B. Svantesson (2005), *The Relation between Public International Law and Private International Law in the Internet Context*, Conference paper presented at Australasian Law Teachers Association Conference (July 2005), Hamilton New Zealand, at p. 1. However, States have adopted international or regional instruments for cooperating on jurisdictional matters. For instance, in Europe see: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Jurisdiction Regulation"), which entered into force on 1st March 2002 and repealed the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; and the Lugano Convention, which applies to Member States of the European Free Trade Association (EFTA), i.e. Norway, Iceland, Liechtenstein and Switzerland. See also: Emily M. Weitzenböck (2002), *Determining Applicable Law and Jurisdiction in contractual disputes regarding virtual enterprises,* in Pawar, K. S.; Weber, F.; Thoben, K.-D. (Eds.): ICE 2002. Proceedings of the 8th Int. Conference on Concurrent Enterprising: Ubiquitous Engineering in the Collaborative Economy. Rome, Italy, 17-19 June 2000, pp.27-34.
13. However, as explained in Section I of this paper, situations of 'misappropriation', which are subject to compliance measures under Articles 15 and 16 of the Protocol, are conceptually different from situations of 'misuse' relating to contracts under Article 18. Nonetheless, the above question of jurisdiction is relevant for both cases. See below for further explanations.
14. See, for instance, Article 2 of the Jurisdiction Regulation. Weitzenböck (2002), *ibid*., at p. 28.
15. For instance, Nijar notes that the "parties may wish to bring an action for breach of the contract in the jurisdiction of the user. This would especially avoid any problem relating to the recognition and enforcement of judgment if the action was brought in a jurisdiction foreign to the user." Gurdial Singh Nijar (2011), *The Nagoya Protocol on Access and Benefit Sharing of Genetic Resources: Analysis and Implementation Options for Developing Countries*, Research Paper 36, April 2011 at p 12.
16. See the provisions of Article 18(2) and (3) on "Compliance with Mutually Agreed Terms."
17. See, for instance, the submission from Canada (UNEP/CBD/ABS/GTLE/2/2, at p. 7), which states: "Common law courts in Canada have jurisdiction when the defendant is present in the forum. They also have jurisdiction where there is a *real and substantial connection between the contract and the forum*. Examples of real and substantial connection to the forum are found in the rules of court in the common law provinces permitting the service of defendants outside the territory of the forum and also in the jurisprudence. In addition, British Columbia and Saskatchewan adopted the Uniform Law Conference of Canada's *Court Jurisdiction and Proceedings Transfer Act* that provides a list of presumptive real and substantial connections to the forum." Emphasis added. Interestingly, the *Court Jurisdiction and Proceedings Transfer Act* [SBC 2003] provides that a real and substantial connection between British Columbia and the facts on which a proceeding is based is presumed to exist if the proceeding concerns, *inter alia*, "a claim for an injunction ordering a party to

Therefore, the expression "*consistent with applicable jurisdictional requirements*" can be understood as a safeguard clause, which merely suggests that the availability of recourse to courts will depend on the applicable rules on choice of jurisdiction, as established in contracts and accepted by the named court, or in the absence of a contractual clause, by non-contractual private international law rules of the seized forum.[18]

The issue of "access to justice" is conceptually distinct (and independent) from the question of jurisdiction, However, it is useful to consider the Protocol's "access to justice" requirements in parallel with the latter, since in practice both issues contribute to determine whether "*an opportunity to seek recourse is available"* under the legal systems of a Protocol Party.[19] Some authors have argued that since the Protocol's reference to "access to justice" is inspired by the Aarhus Convention,[20] it follows that the standards of the latter may need to be applied in order to facilitate such access, including access to legal aid in an inexpensive manner.[21] However, on the one hand, it should be stressed that a legal obligation to respect the "access to justice" standards of the Aarhus Convention may exist only in the context of the relationships between state Parties and the citizens of other state Parties. On the other hand, such obligation would only amount to a (rather strong) moral or ethical prescription in the context of the relationship between state Parties and non-parties or the citizens of non-parties. As the European Community and its Member States has noted, "the notion of 'access to justice' is underpinned by social equity issues, which look beyond purely procedural matters. This is to address the concerns of some Parties as to the high costs of litigating, especially in a developed country. In this regard the Hague Conference has adopted a Convention on International Access to Justice (24 Parties), which provides that nationals of any Contracting State shall be entitled to legal aid for court proceedings in civil or commercial matters on the same conditions as if they were nationals. …the Convention on Civil Procedures (45 Parties) also has provisions on legal aid."[22] Indeed, one of the most important constraints that limits the utilisation of the tools which are provided for by the above Conventions is their small number of state Parties.

Besides, the effectiveness of the provisions of Article 18 of the Nagoya Protocol (on Compliance with MAT) has to be reviewed by the CBD Conference of the Parties serving as the meeting of the Parties to the Protocol four years after its entry into force.[23] Such review process may provide an opportunity to pursue establishing an ABS ombudsman along the lines indicated by a proposal tabled during the Protocol's negotiations.[24]

Thus, at least in general terms, the Protocol enshrines basic principles for determining jurisdiction and access to justice standards in relation to contractual disputes that arise from mutually agreed terms. However, while compliance with domestic ABS legislation or regulatory requirements must be provided under Articles 15 and 16 of the Protocol, these Articles are silent on jurisdiction and access to justice standards in cases of non-contractual ABS disputes.

Parties have the duty to cooperate in cases of alleged violation of domestic ABS legislation or regulatory requirements.[25] Besides, they have

do or refrain from doing anything in British Columbia." See Article 10(i)(i) of the Act, available at: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03028_01#section10

18. See the submission from the European Community and its Member States (UNEP/CBD/ABS/GTLE/2/2, at p. 21).

19. Article 18(2) of the Nagoya Protocol.

20. See Article 9(3) of the 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. In particular, Koester notes that "Article 9 on Access to Justice […] provides for a review procedure before a court of law or another independent and impartial body established by law to safeguard the rights afforded in the Convention. The procedures shall, *inter alia*, provide adequate remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive." The author also emphasises that "the scope of [the above provision of the Protocol] is unclear. This is because it is not specified whether such expression [i.e. 'access to justice'] will also cover access to legal aid, which is a relevant matter since most often it will be the Party granting access to genetic resources and TK that will be the weaker Party." See Veit Koester, "The Nagoya Protocol on ABS: Ratification and Implementation Challenges for the EU and its Member States", (forthcoming 2012), IDDRI, at section 5.

21. G.S. Nijar (2011), *ibid*., at p. 13.

22. See the submission from the European Community and its Member States (UNEP/CBD/ABS/GTLE/2/2, at p. 21).

23. Article 18(4) of the Nagoya Protocol.

24. G.S. Nijar (2011), *ibid*., at p. 13. The text proposed by the African Group for establishing an ombudsman states that: "The International Regime on ABS shall establish an international ABS ombudsman's office. The ombudsman's office shall be responsible for provider countries, ILCs to identify breaches of their rights and to provide aid in seeking fair and equitable resolution of disputes. The ombudsman's office shall be empowered to take action on behalf of ILCs through the binding Dispute Resolution Mechanism. The ombudsman's office shall also where necessary represent ILCs in proceedings in foreign jurisdiction, take deposition from ILCs and provide evidence of customary law and practice as and where appropriate." (UNEP/CBD/WG-ABS/7/5, at p. 45)

25. Articles 15.3 and 16.3 of the Nagoya Protocol.

the obligation to take appropriate, effective and proportionate measures to address situations of non-compliance with the user measures that are referred to in Article 15.2 (on ABS for genetic resources), Article 16.2 (on ABS for TK) and Article 17.1(a)(ii) (on providing information at checkpoints). Thus, it can be argued that the above measures would fall short of meeting the requirements of appropriateness, effectiveness and proportionality unless the concerned Parties provide that an opportunity to seek recourse is available under their legal system in cases of disputes arising from non-compliance with such user measures.

The specific situation of non-compliance that is referred to above is not *direct* compliance with the domestic ABS framework of the provider Party, but compliance with the domestic legal, administrative or policy measures taken by a user Party under Articles 15 or 16, where GR or TK are utilised. Under normal circumstances, Parties are expected to enforce their own laws. Therefore, an opportunity to seek recourse should be provided not only for allegations of inaction by a competent body of a user country to apply and enforce the relevant user country measures, but also with the view to providing a remedy to or redress for the violation of such measures by users. On the one hand, this case is different from contractual disputes, where the responsibility to pursue contractual rights rests with the parties to the contract (as well as with any third party beneficiaries). On the other hand, not only government entities, but also legal persons that sustain the damage, which arises from the violation of a non contractual-obligation, should be provided with access to judicial remedies in the jurisdictions of the Parties. In terms of *locus standi*,[26] the most challenging issue is to provide for a broad entitlement of stakeholders to appear in courts, in particular, indigenous and local communities and relevant civil society organizations, while at the same time preventing spurious claims.[27] Therefore, the notion of "effective" and "appropriate" measures that is contained in Articles 15.2 and 16.2 would not be met absent the possibility for foreigners to challenge both the violations of domestic user measures (that are to be taken under these Articles) and the public authorities' inaction on their enforcement.

26. *Locus standi* can be defined as the right of a party to bring an action in courts or to be heard in a given forum.

27. Such broad-based entitlements for the *locus standi* of stakeholders in the context of ABS disputes would provide more transparency than the solution that was eventually implemented in the Multilateral System of the FAO ITPGRFA through the Third Party Beneficiary mechanism.

Consistently, it may be concluded that the same jurisdictional principles and access to justice standards, which apply to contractual disputes arising from MAT, should be applied, *mutatis mutandis*, to non-contractual disputes. In particular, they should be applied to cases of alleged misappropriation of genetic resources and TK with the view to enforcing relevant user measures.

4. APPLICABLE LAW

As mentioned at the outset, the second key functions of private international law is to provide the procedural rules to be used by a competent jurisdictional authority for identifying the law applicable to the merits of a dispute. Therefore, the applicable law will determine the substantive rules of law that are applicable to resolve the dispute at stake. For analytical purposes, it is useful to distinguish disputes concerning cases in which MAT have been established (contractual disputes) from cases in which MAT have not been established (non-contractual disputes).

If the MAT have been established, the following question arises: how should the competent jurisdictional authority identify the law applicable to the mutually agreed terms? Such question is important because the resolution of all other questions of contract interpretation – for instance, whether benefits are shared in accordance with the MAT; or how to qualify the nature of acts of "misuse" in violation of the MAT – will depend on the applicable law.

Two sub-cases can be identified. Firstly, in the MAT, the parties may have expressly chosen the applicable law by including a choice of law clause. On the one hand, if the applicable law chosen by the parties is the law of the provider (that is the country of origin of the genetic resources or TK), the chosen law is normally to be used for interpreting the contract. However, mandatory norms of a law, other than that of the forum chosen by the parties, can prevent the chosen law from being applied if there is a close link between the contract and the country of that law. This is because, by definition, mandatory norms are "imperative provisions of law, which must be applied to an international relationship irrespective of the law that governs the relationship. …mandatory rules of law are a matter of public policy (*ordre public*) and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws … In matters of contract, the effect of a mandatory rule of the law of a given country is to create an

obligation to apply such a rule, or indeed simply a possibility of so doing, despite the fact that the parties have expressly or impliedly subjected their contract to the law of another country."[28]

On the other hand, if the applicable law chosen by the parties is not the law of the provider, can such law (or some elements of it) still be applied to interpret the MAT? Similarly to the previous case, mandatory norms (in particular, those of the provider Country) may apply to the contractual relationship even if the parties have contractually chosen a different applicable law. For instance, this may occur when the parties have disregarded key requirements of the ABS law of the provider Country that can be regarded as mandatory norms because of their fundamental importance.[29]

Secondly, the Protocol establishes that its "*Parties shall encourage providers and users of genetic resources and/or traditional knowledge* […] *to include provisions in mutually agreed terms to cover* […] *dispute resolution including* […] *the applicable law.*"[30] However, providers and users may still avoid choosing the applicable law. In such cases, each different jurisdictional authority may apply the private international law rules of its forum in order to identify the applicable law. Therefore, if a dispute arises, the absence of a choice of law clause creates legal uncertainty with regard to how the contract may be interpreted.

The following paragraphs consider the choice of law applicable to the responsibility arising from non-contractual obligations. Such responsibility should arise when the prior informed consent of a provider Country is not obtained prior to the utilization of genetic resources and TK, and MAT are not established in accordance with the applicable domestic ABS legislation or regulatory requirements.[31] In cases of non-contractual ABS disputes, the following questions arise: does the Protocol provide for the extraterritorial application of "*domestic ABS legislation or regulatory requirements of the other party*" and if so, to what extent?[32] In other words, to what extent should the law of a contracting Party, which is entitled to benefit sharing (*e.g.*, as the country of origin from which the genetic resources or TK are misappropriated), be applicable to qualify alleged acts of "misappropriation," including those which occur in a third country? Finally, what does the expression "*the other party*" means in the context of the Protocol's compliance obligations?

The provisions of the Nagoya Protocol that concern compliance with domestic legislation (i.e. Articles 15 and 16) state that: "*Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures*" to provide that:

- genetic resources utilised within its jurisdiction have been accessed in accordance with PIC and that MAT have been established, as required by the domestic ABS legislation or regulatory requirements of the other Party; and that
- traditional knowledge associated with genetic resources utilised within its jurisdiction has been accessed in accordance with the PIC or approval and involvement of indigenous and local communities and that MAT have been

28. Pierre Mayer (1986), *Mandatory Rules of Law in International Arbitration*, 2 Arb. Int'l, 274–75. On the concept of *ordre public* see also, for instance, UNCTAD-ICTSD (2004), *Resource Book on TRIPS and Development: An authoritative and practical guide to the TRIPS Agreement*, (New York, USA: Cambridge University Press), at pp. 375, 379 and note 621, which states that: "The term *ordre public*, derived from French law, […] expresses concerns about matters threatening the social structures which tie a society together, i.e., matters that threaten the structure of civil society as such. […] *Ordre public* encompasses, according to European law, the protection of public security and the physical integrity of individuals as part of society. … [It] is a legal expression with a long tradition in the area of international private law, where it serves as a last resort when the application of foreign law leads to a result which would be wholly unacceptable for the national legal order. See, e.g., Rainer Moufang, *The Concept of "Ordre Public" and Morality in Patent Law*, in Geertrui Van Overwalle (Ed.), Patent Law, Ethics and Biotechnology, Katholieke Universiteit Brussel, Bruxelles 1998, No.13, p. 71."

29. If the law of the provider Country were to require that the parties shall compulsorily reference it as the applicable law to the MAT, a different choice of law clause would be against that law. While such violation of the ABS law of the provider Country may trigger different remedies, the choice of law requirement *per se* would unlikely be regarded as a mandatory norm. However, the illegal choice of law clause of the contract would be void. Besides, the contract may still be valid if the deletion of the illegal clause "does not defeat the purpose of the broader agreement." See "Contract Law - Contracts, Party, Parties, and Legal," *JRank Articles*, available at: http://law.jrank.org/pages/12504/Contract-Law.html#ixzz1cMBb6CzB. To put it in another way, a competent jurisdictional authority could deem the contract to be voidable only in part, while applying the law of the provider Country for its interpretation.

30. Article 18(1)b.

31. However, the Nagoya Protocol gives Parties, when they act as providers of genetic resources, a discretional choice on whether or not to require PIC from the users of such resources. Obviously, if a providing Party has decided not to make PIC and MAT requirements compulsory for the users, the above responsibility shall not arise. See also the explanations concerning the *implicit* validity of sovereignty claims *vis-à-vis* the decision of a Party not assert its sovereign rights in the form of a compulsory PIC requirement at the end of this section of the present study. Besides, the question of whether the provider Country should be a "legitimate" provider (i.e. "*the country of origin of the genetic resources or a Party that has acquired such resources in accordance with the Convention*") is further considered below.

32. See Articles 15.1 and 16.1 of the Nagoya Protocol.

established, as required by domestic ABS legislation or regulatory requirements of the other Party where such indigenous and local communities are located.

As further considered in the conclusions of this paper, there can be two possible interpretations of the role of private international law under the Protocol. With regard to the possible "choice of law" function of the above provisions, a narrow interpretation would predict that the Protocol does not purport developing a private international law of ABS. Therefore, the scope of the Protocol's private international law provisions would be limited to "neutral" references to the inclusion of PIL elements in the mutually agreed terms (e.g. in the form of jurisdiction and applicable law clauses). A corollary of the above is that such provisions would only refer to elements which can be defined contractually by the parties. However, the Protocol would not directly define the law applicable to users' responsibilities that may arise from ABS-related obligations of non-contractual nature.

In accordance with such narrow interpretation, the private international law clauses of the Protocol would bear implications for users and providers of genetic resources and TK under a particular ABS contract. However, the references to the "*domestic ABS legislation or regulatory requirements of the other party*" under Articles 15.1 and 16.1 would not constitute choice of law provisions, which may be directly applied in cases of non-contractual disputes. This interpretation is consistent with the idea that the Protocol would not establish an obligation to exercise jurisdiction in such disputes. It would only establish the Parties' general duty to cooperate, "*as far as possible and as appropriate,* […] *in cases of alleged violation of domestic ABS legislation or regulatory requirements referred to* […] *above*."[33] It would follow that no question of applicable law would arise, in terms of private international law, with regard to non-contractual ABS obligations. This is because the Protocol would not provide for making dispute settlement available to resolve such disputes.[34]

However, the extensive interpretation of the role of the private international law provisions of the Protocol may be also legitimately set forth. As emphasized in the previous section of this paper, Parties have obligations to take appropriate, effective and proportionate measures to address situations of non-compliance with user measures under Article 15.2 (on ABS for genetic resources), Article 16.2 (on ABS for TK) and Article 17.1(a)(ii) (on providing information at checkpoints). Aside from the latter provision,[35] the former two Articles define situation of non-compliance by cross-referencing the positive obligations to promote compliance under Article 15.1 and Article 16.1 of the Protocol. It was also emphasized above that the required user measures could be deemed not to meet the requirements of appropriateness, effectiveness and proportionality if the concerned Parties do not provide for an opportunity to seek recourse under their legal system in cases of non-compliance with such user measures.

On the one hand, it is clear that it may be possible to enforce compliance only with relevant user measures, while it is not possible to seek *directly* the extraterritorial enforcement of domestic ABS legislation or regulatory requirements of a foreign country.[36] On the other, it may be argued that the Protocol, by virtue of its references to "*the domestic ABS legislation or regulatory requirements of the other Party*", does purport a choice of law rule. Such rule would stipulate that the courts of the forum should give extraterritorial application to the domestic law of a foreign country (e.g. the alleged country of origin) in order to determine the conditions under which a responsibility for non-contractual ABS obligations should arise – *i.e.* by qualifying the disputed facts in the merit.[37]

To conclude, in this limited sense, the Protocol appears to provide grounds for the extraterritorial application of the "*domestic ABS legislation or regulatory requirements of the other Party*" as the law applicable to non-contractual ABS obligations, namely, obligations that require the users of genetic resources and TK to obtain PIC and establish MAT. In particular, the responsibility that arises out of acts of misappropriation should be established on the basis of the ABS legislation or regulatory requirements of the other Party that prohibits such acts.[38] Besides, it shall be applied to

33. Articles 15.3 and 16.3 of the Nagoya Protocol.

34. An EU leading negotiator has highlighted that "the wording and negotiating history of the clause seem to point very strongly in the direction of this interpretation." Mathias Buck (16/11/2011), personal communication.

35. The scope of such provision appears to refer specifically to non-compliance with disclosure obligations at checkpoints.

36. For instance, only the remedies and sanctions provided for in the law of the user Country could be enforced against the user, while the remedies and sanctions provided for in the law of the provider Country could not be applied extraterritorially.

37. Besides, in establishing eventual breaches of domestic measures of a user Party taken under Articles 15 and 16, the question may arise on whether the forum courts should give particular consideration to any legal and factual findings by competent administrative or judicial bodies of "the other Party."

38. While the term 'responsibility' is used here in its general

the facts of the case to the extent that the claim of the legal person sustaining the damage is based on the above requirements and that a factual connection exists between the misappropriated genetic resources and/or TK and "the other Party."

Thus, the meaning of the expression "the other Party" is of pivotal importance, as the criteria to be prescribed for indentifying the law applicable to non-contractual ABS obligations may depend on its interpretation. The issues under consideration are as follows: what does the Protocol prescribe concerning the kind of factual connection that would be required in order to trigger the application of law of the claimant's Party to a non-contractual ABS dispute? And what does it prescribe in terms of how to assess whether such factual connection is established?

The comparative analysis of Article 15.1 (compliance with domestic requirements on ABS for genetic resources) and Article 16.1 (compliance domestic requirements on ABS for TK) can be useful for clarifying what the above factual connection may consist of. At first glance, Article 16.1 is more precise than Article 15.1, because the former states that the domestic ABS legislation or regulatory requirements that are referred to are those of the "*other Party where* [the concerned] *indigenous and local communities are located*." Irrefutably, all Parties have the obligation to take user measures "*to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with PIC or approval and involvement of indigenous and local communities and that MAT have been established* […]". Therefore, if a claim is brought to court to enforce compliance with such user measures, the Protocol provides that the law, which shall determine whether a responsibility arises for the alleged violations, is the law of the Party where the concerned indigenous and local communities are located.

Thus, Article 16.1 of the Protocol appears to provide a basic principle of private international law, which allows Parties to identify the applicable law. Besides, since Article 16 does not establish a distinction between the responsibilities arising from contractual obligations *vis-à-vis* non-contractual obligations, there is no reason to believe that such private international law principle should not apply to the latter case.

The same conclusions apply, *mutatis mutandis*, to Article 15 of the Protocol, which is almost identical in its structure and purpose (but not subject matter) to Article 16. It is unfortunate that such provision is far less clear than Article 16.1. In particular, Nijar notes that the use of the expression "the other Party" "departs from the language used elsewhere in the Protocol (for example in Article 5.1) …that the resources accessed must be those that are provided by the countries of origin of such resources or the Parties that have acquired the resources in accordance with the CBD. Concerns have been raised that departing from this CBD formula may countenance biopiracy as the following example shows. Resources may have been accessed illegally from a country of origin X, by another country Y. If a user accesses these from country Y ('the other Party') in compliance with the ABS law of country Y, the user country may argue that it does not have to ensure compliance with the ABS requirements of the country of origin X."[39] Therefore, Nijar's suggestion to adopt a COP/MOP decision that "brings this provision in line with …the CBD and the other provisions of the Protocol as to the country whose ABS law must be complied with" may be regarded with some interest.[40]

However, an EU leading negotiator has strongly disagreed with Nijar on this point.[41] In his view, "the other Party" in Article 15.1 "is the Party that has factually provided the material and given the PIC, so the appropriate reference point is not Article 16.1 of the Nagoya Protocol or CBD Article 15.3, but the Party that has provided the PIC as clarified in Article 17.3 of the Protocol – i.e. where the material was obtained." Elsewhere, an authoritative commentary to the Nagoya Protocol highlights that "the decision to refer in Article 15 to 'the other Party' was eventually taken on the consideration that it is beyond the ability of individual users of genetic resources and of 'user countries' to assess the validity of sovereignty claims that are implicit in decisions of Parties providing genetic resources under their domestic ABS frameworks."[42]

Against the backdrop of the above alternative interpretations of Article 15.1, it is interesting to further consider the difference that exists in terms of clarity and precision between Article 15.1 and Article 16.1. In particular, in light of the latter's

meaning (i.e. "the state or fact of having a duty to deal with something [… or] the state or fact of being accountable or to blame for something", see: *Oxford Dictionaries Online*, available at: http://oxforddictionaries.com/definition/responsibility, accessed on 14 February 2012), this use does not exclude the arising of such responsibility in the context of claims for damages.

39. G.S. Nijar (2011), *ibid*., at p. 7.

40. Ibid.

41. Mathias Buck (16/11/2011), personal communication.

42. M. Buck, E. Morgera and E. Tsioumani (forthcoming 2012), *Commentary on the Nagoya Protocol*, see, in particular, the section that discusses the interpretation of Article 15 of the Protocol.

further specification that "*the other Party*," which this article refers to, is the "*Party where … indigenous and local communities are located*."[43] While the Protocol does not consider monitoring the utilization of TK, it seems that a provision that is less ambiguous than Article 15.1 was eventually adopted in relation to compliance with domestic ABS requirements for traditional knowledge (i.e. Article 16.1). This is a positive outcome, because it will reduce the possibility that spurious claims are submitted for adjudication by actors which are not legitimately entitled to do so and clearly identifies the law that should provide for such entitlements.

However, regarding the provisions on compliance with domestic ABS requirements for genetic resources, concerns for legal certainty are poorly addressed. As shown above by Nijar, in terms of the criteria used to identify the country, whose ABS law must be complied with, the current formulation of Article 15.1 potentially leaves scope for contradictory outcomes. Namely, it leaves scope for considering a Party in compliance with the Protocol, even if such Party only takes measures to promote compliance with the legislation of intermediary countries – i.e. regardless of whether the concerned genetic resources have been legally acquired in the first place.

In practice, legal actions may be possible only in user countries that adopt an expansive interpretation of Article 15. On the contrary, the narrow interpretation entirely closes the door to the possibility of litigation.[44] In accordance with this interpretation, the case presented in Nijar's example should be directly settled between the alleged Party abusively acting as provider of genetic resources and the Party claiming to be the country of origin of the misappropriated genetic resources. This is because the disputed claim would be a claim concerning the sovereign rights of states over their genetic resources. Therefore, it would be "beyond the abilities of a private person and also beyond the legal realm of user Parties to assess the *implicit* validity of sovereignty claims underlying each time a Party provides genetic resources under the Protocol. [...] Indeed, it would likely create chaos if users or user Parties would carry such responsibility."[45]

While this legitimate concern does require further consideration, the validity of sovereignty claims may somehow be regarded as 'implicit' only if the provider Party has expressly granted the right to utilise genetic resources to the user in the form of "*a permit or its equivalent as evidence of the decision to grant prior informed consent.*"[46] This would be evidence of the fact that the provider Party conclusively intends to exercise its jurisdiction over the concerned genetic resources. Therefore, the very existence of conflicting sovereign claims over genetic resources, which would require both users and user Parties not to interfere in disputes concerning other Parties' sovereign rights, is underpinned by the idea that a Party, whether legitimately or illegitimately, has actually taken the decision to require (and grant) PIC.

However, the utilization of genetic resources may also occur in cases where no prior informed consent is granted, *i.e.* where no permit or its equivalent is issued at the time of access by a provider Party. Two different situations can be envisaged. This may occur either because the providing Party has decided not to require PIC from users or because a user may have illegally acquired the genetic resources from a country that does require PIC. The first situation does generally entail a legitimate "utilization" of genetic resources. However, a Party's decision not to assert its sovereign rights in the form of a compulsory PIC requirement leaves undetermined the genetic resources over which that Party intends to exercise its rights, notably by granting an express authorization for their utilization.

On the one hand, the freedom of the Parties to provide unfettered access to genetic resources *within* their jurisdiction must be respected. On the other hand, a conflict of sovereignty would not necessarily arise between a Party claiming that a particular genetic resource was misappropriated by a user and the providing Party.[47] This is because the decision of a Party to provide unfettered access to genetic resources *within* its jurisdiction *per se* does not entail a claim of sovereignty *over* the totality of such resources in the same way (and to the same extent) that such sovereignty claim is entailed by the decision of a Party to require (and eventually grant) PIC over specific genetic resources that allegedly belong to that Party.

43. It can be argued that at the tenth Conference of the Parties to the CBD in Nagoya some countries only felt comfortable with leaving their compliance obligations with the domestic ABS requirements for genetic resources more "constructively ambiguous" than the compliance requirements for TK. This could indirectly be explained – at least in part – by the fact that monitoring obligations only apply to the utilization of genetic resources. See, in particular, Article 17 of the Nagoya Protocol.

44. Such interpretation postulates that the Protocol does not provide for making dispute settlement available to resolve non-contractual ABS disputes.

45. Mathias Buck (16/11/2011), personal communication. *Emphasis added*.

46. Article 6.3(e) of the Nagoya Protocol.

47. Emphasis added.

In sum, the freedom to provide unfettered access to generic resources does not (and should not) diminish the sovereign rights of the Parties that do require PIC and from which genetic resources may have been illegally acquired. In accordance with principle that was first enunciated by William Blackstone, "...every right when withheld must have a remedy and every injury its proper redress."[48] Therefore, every country, which may legitimately assert to be the country of origin of allegedly misappropriated genetic resources, may feel entitled to seek redress for non-compliance with its domestic ABS legislation or regulatory requirements, notably by seeking to enforce the user measures specified in Article 15 of the Protocol. Indeed, many developing countries do expect that appropriate, effective and proportionate legal remedies will be provided in user countries.

In conclusion, in the absence of PIC and MAT, the filing of a complaint against a user or an intermediary in their respective jurisdictions, in many cases, may not concern a conflict between the sovereign rights of Parties over genetic resources, but a mere violation of the applicable law. Appropriate, effective and proportionate legal remedies should be provided to redress such violations in all Parties.

5. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRAL AWARDS

In international disputes, the successful party may need to enforce the judgment or arbitral award in a jurisdiction that is different from the one that has granted the judgment. Therefore, the key question for the Parties to the Protocol is as follows: which obligations does the Protocol establish in relation to facilitating the recognition and enforcement of foreign judgments and arbitral awards? Article 18(3)(b) of the Protocol states that: "*Each Party shall take effective measures, as appropriate, regarding:* [...] *the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards*." This provision leaves no doubts that the Parties have the express duty to participate effectively to the above mechanisms or establish them, when they are not yet established.

However, in practice, different cases may be distinguished. If MAT have been established between the parties, they may provide for a jurisdictional clause. In such clause, the parties may establish that the provider country (or any other country) is the jurisdiction to which they subject the disputes concerning the MAT. If the designated jurisdictional authority does not belong to the country of the unsuccessful party, the judgment may need to be executed in the latter country (or in any other country in which the unsuccessful party holds property and other assets). In such cases, the recognition and enforcement of a foreign judgment will depend on the existence of a bilateral agreement between the county where the recognition and enforcement are sought and the country whose courts have granted the judgment.[49] Thus, it also can be argued that the Parties to the Protocol may fulfill their relevant obligations by establishing such mutual recognition agreements, if they are not yet established.[50] However, the assessment of the extent to which the Parties may actually be required to do so under international law demands evidential elements other than those merely provided by the Protocol's provisions. *Mutatis mutandis*, the above duty to cooperate also applies when the recognition and enforcement is sought for foreign judgments that concern disputes in cases of misappropriation.

If MAT are established, the parties may have agreed to include an alternative dispute resolution clause. In such clause, the parties may establish that an arbitral tribunal is the exclusive jurisdiction to which they will subject any disputes concerning the mutually agreed terms. The recognition and

48. William Blackstone (1832), *Commentaries on the laws of England*, Book III, at p. 82.

49. In absence of such agreement, it will depend on the domestic law of the former country, jointly interpreted with the principles of comity, reciprocity and *res judicata*, and in accordance with the General Principles of International Law. See, for instance, U.S. Department of State, *Enforcement of Judgments*, available at: http://travel.state.gov/law/judicial/judicial_691.html In particular, under the general principles of law, the court of the country where the recognition and enforcement is sought may examine a foreign judgment on the grounds that: the foreign court properly accepted jurisdiction over the defendant; the defendant was properly served; the proceedings were not vitiated by fraud; and the judgment does not offend the public policy of the recognizing state.

50. The group of technical and legal experts (TEG) on compliance also noted that "[...] it may be difficult to enforce [a foreign] judgment across jurisdictions. Enforcement will usually depend on national laws. International efforts to create a mechanism for the recognition and enforcement of foreign judgements have not been very successful." See: Report of the Meeting of the Group of Legal and Technical Experts on Compliance in the Context of the International Regime on Access and Benefit-Sharing, UNEP/CBD/WG-ABS/7/3, 10 February 2009, at p. 11. See also the relevant Conventions on "International Legal Co-Operation and Litigation" under the Hague Conference on Private International Law, available at: http://www.hcch.net/index_en.php?act=text.display&tid=10#litigation

enforcement of a foreign arbitral award is generally easier than the enforcement of a domestic foreign judgment, because a larger number of countries have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[51]

However, in certain instances, the MAT may have not been established – e.g. in cases of misappropriation. In other cases, the parties may have not included an alternative dispute resolution clause. However, if the litigants/parties agree to do so, they may establish an *ex-post* arbitration agreement and submit the dispute to arbitration after the latter has arisen.[52] In these cases, the rules of the 1958 New York Convention will also apply.[53]

6. CONCLUSIONS: TWO POSSIBLE INTERPRETATIONS OF THE ROLE OF PRIVATE INTERNATIONAL LAW UNDER THE PROTOCOL

This section concludes by comparing the narrow interpretation of the Protocol's private international law provisions *vis-à-vis* their extensive interpretation with the view to clarifying the institutional capacities that may be required for implementing such provisions.

The Protocol enshrines basic principles for determining jurisdiction and access to justice standards in relation to contractual disputes that arise from mutually agreed terms (MAT). It also establishes the duty of state Parties to provide for judicial remedies, including access to their courts and tribunal, to nationals of other state Parties. Therefore, the ground rule is that the forum courts, which are seized of a dispute arising from MAT, should assert their jurisdiction over the dispute unless the complaint is apparently based on dubious jurisdictional grounds.

However, the narrow interpretation of the Protocol's private international law (PIL) provisions postulates that the Protocol does not purport developing a private international law of ABS. The scope of application of the above provisions would be limited to "neutral" references to the inclusion of private international law elements in the mutually agreed terms (*e.g.* jurisdiction and applicable law clauses). Besides, the 'access to justice' requirements of the Protocol would apply only to disputes concerning compliance with MAT (*i.e.* in cases of misuse); therefore, excluding cases of misappropriation where non-contractual obligations are involved. A corollary is that private international law provisions would only cover elements that can be defined contractually by the parties. Therefore, the Protocol would not directly identify the law applicable to define the users' responsibilities that may arise from ABS-related obligations of non-contractual nature. This interpretation is consistent with the idea that the Protocol would not establish an obligation to exercise jurisdiction in such disputes. It would only establish the Parties' general duty to cooperate, "*as far as possible and as appropriate,* […] *in cases of alleged violation of domestic ABS legislation or regulatory requirements*…" under Articles 15.3 and 16.3. In terms of private international law, it would follow that no question of applicable law arises with regard to non-contractual ABS obligations. This is because the Protocol would not provide for making dispute settlement available to resolve such disputes.

However, the extensive interpretation of the Protocol's PIL provisions may be also legitimately set forth. Such interpretation arises primarily from the question of whether the Protocol, by virtue of its references to "*the domestic ABS legislation or regulatory requirements of the other Party*" (in its compliance provisions), does purport a choice of law rule. In particular, the application of such rule would require the extraterritorial application of the domestic law of a foreign country (*e.g.* the country of origin) to the responsibility arising not only from contractual obligations, but also from non-contractual ones.

This paper has highlighted that Parties have obligations to take appropriate, effective and proportionate measures to address situations of non-compliance with user measures that are to be taken in accordance with the Protocol's compliance provisions. Therefore, the above user measures may meet the requirements of appropriateness,

51. The New York Convention has currently 146 Parties. Information on its status of ratification can be found at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, accessed on 30 November 2011. The Convention also "*requires the courts of the Contracting States … to recognize arbitration agreements made in writing and to refuse to allow a dispute to be litigated before them when it is subject to an arbitration agreement*."

52. Experts of the Permanent Court of Arbitration have noted that arbitration has potential advantages over domestic court proceedings, particularly in cases of TK associated with genetic resources, and could help alleviate some of the challenges resulting from lack of definition of key terms as well as the eventual relevance of customary law norms. Mathias Buck (16/11/2011), personal communication.

53. On the role of New York Convention in the context of dispute settlement see also: C. Chiarolla (2008), "Plant Patenting, Benefit Sharing and the Law Applicable to the FAO Standard Material Transfer Agreement," *The Journal of World Intellectual Property*, Vol.11 (1), 1-28, at p. 8.

effectiveness and proportionality only if the concerned Parties do provide for an opportunity to seek recourse is available under their legal system in cases of non-compliance.

While the extraterritorial enforcement of domestic ABS legislation or regulatory requirements of a foreign country is not required by the Protocol, the Protocol does purport a choice of law rule. Such rule would postulate that the courts of the forum shall give extraterritorial application to the domestic law of a foreign country in order to determine the conditions under which a responsibility for (contractual as well as non-contractual) ABS obligations may arise. In this limited sense, the Protocol provides for the extraterritorial application of the "*domestic ABS legislation or regulatory requirements of the other Party*" as the choice of law rule that is applicable to all cases of non-compliance. In particular, such requirements shall be applied to the facts of the case if the claims of the legal person sustaining the damage are based on such legislation and a factual connection exists between the genetic resources or traditional knowledge and the other Party. In sum, while Article 18 (on compliance with MAT) specifies the treatment of contractual ABS obligations, Article 15 (on compliance with domestic ABS requirements for genetic resources) and Article 16 (on compliance with domestic ABS requirements for TK) make clear that the "*domestic ABS legislation or regulatory requirements of the other Party*" should be referred to in the context of non-contractual ABS disputes (*e.g.* in cases of misappropriation).

Finally, with regard to the recognition and enforcement of foreign judgments and arbitral awards, state Parties have an obligation to effectively participate to relevant cooperation mechanisms. However, the Parties may disagree on the extent to which the above obligation may also entail the duty to establish and participate to such mechanisms.

The narrow interpretation of the Protocol's private international law provisions suggests that the latter should not be expected to play an important role in countering biopiracy and – more generally – in the implementation of the Protocol. However, private international law would still be accorded a certain prominence as a tool for resolving disputes that concern compliance with contractual ABS obligations. On the contrary, the extensive interpretation of such provisions indicates that private international law can play a prominent role in relation to all the compliance-related obligations *under* the Protocol.[54] Consequently, the capacity development strategy for the Nagoya Protocol should provide for strengthening the institutional capacities that are necessary to resolve questions of jurisdiction, applicable law, and recognition and enforcement of foreign judgments and arbitral awards, both in the context of contractual as well as non-contractual ABS disputes.

54. *Emphasis added*. For the purpose of this study, the compliance-related obligations that are referred to above exclude obligations under Article 30 of the Protocol, which concerns procedure and mechanisms to promote compliance by Parties *with* the Protocol.

Biopiracy
and the Role of Private International Law under the Nagoya Protocol

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For more effective action, IDDRI operates with a network of partners from the private sector, academia, civil society and the public sector, not only in France and Europe but also internationally. As an independent think tank, IDDRI mobilises resources and expertise to disseminate the most relevant scientific ideas and research ahead of negotiations and decision-making processes. It applies a crosscutting approach to its work, which focuses on five threads: global governance, climate change, biodiversity, urban fabric, and agriculture.
IDDRI issues a range of own publications. With its *Working Papers* collection, it quickly circulates texts which are the responsibility of their authors; *Policy Briefs* summarize the ideas of scientific debates or issues under discussion in international forums and examine controversies; *Studies* go deeper into a specific topic. IDDRI also develops scientific and editorial partnerships: among others, A *Planet for Life*. *Sustainable Development in Action* is the result of collaboration with the French Development Agency (AFD) and The Energy and Resources Institute (TERI), and editorial partnership with Armand Colin.

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