

**CONVENTION ON
BIOLOGICAL
DIVERSITY**Distr.
GENERALUNEP/CBD/WG-ABS/5/INF/3
20 July 2007

ENGLISH ONLY

**OPEN-ENDED WORKING GROUP ON ACCESS
AND BENEFIT-SHARING**

Fifth meeting

Montreal, 8-12 October 2007

Item 3 of the provisional agenda*

**ANALYTICAL STUDY ON ADMINISTRATIVE AND JUDICIAL REMEDIES AVAILABLE
IN COUNTRIES WITH USERS UNDER THEIR JURISDICTION AND IN
INTERNATIONAL AGREEMENTS***Note by the Executive Secretary*

1. The terms of reference of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing as the negotiating body of the international regime, contained in annex to decision VII/19 D, provide that the negotiation of the regime is to draw on *inter alia* “an analysis of existing legal and other instruments at the national, regional and international levels relating to access and benefit-sharing, including: [...] compliance and enforcement mechanisms; [...]”
2. In addition, in decision VII/19 E, when considering the issues of measures to support compliance with prior informed consent and mutually agreed terms in Contracting Parties with users under their jurisdiction, under paragraph 10 (e), the Executive Secretary was requested to gather information and carry out further analysis on “Administrative and judicial remedies available in countries with users under their jurisdiction and in international agreements regarding non-compliance with the prior informed consent requirements and mutually agreed terms”.
3. Against this background a study was commissioned to IUCN-Canada with the aim to explore and gather information on existing administrative and judicial remedies at both the national and international levels. The study is available in annex. It was carried out thanks to funding provided by UNEP.
4. The study has been reproduced in the form and language in which it was received.

* UNEP/CBD/WG-ABS/5/1.

Annex

Administrative and Judicial Remedies Available in Countries with Users under their Jurisdiction and in International Agreements

*Tomme Rosanne Young, Consultantⁱ
By contract with IUCN - Canadaⁱⁱ*

ⁱ Tomme Rosanne Young is a consultant on international and domestic environmental law and policy, based in Bonn, Germany. She may be contacted at Tomme.Young@gmail.com. Some of the discussions in this paper have been developed while working with co-author Morten Walløe Tvedt (Fridtjof Nansen Institute) on a forthcoming book entitled *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD* (IUCN Environmental Law Centre, 2007), Book 2 in The ABS Series. The author is grateful for those discussions and their contribution to this work.

ⁱⁱ IUCN-Canada may be contacted in care of John.Herity@iucn.org.

Table of Contents

1. Introductory Discussion.....	1
1.1 Basis for this study	1
1.2 Organisation of this analysis	2
2. The Nature and Role of Remedies	3
2.1 What are “Administrative and Judicial Remedies”	3
2.2 Remedies vs. penalties	4
2.3 Available remedies.....	4
2.3.1 Kinds of remedies	5
2.3.2 Sources of remedies	5
2.3.2.1 Remedies available from judicial institutions.....	6
2.3.2.2 Remedies available through administrative agencies	6
2.3.2.3 Direct contractual remedies	7
2.3.2.4 Arbitration and other dispute resolution processes.....	8
2.4 Prerequisites for claiming remedies	9
2.4.1 Legal basis for claiming a remedy	9
2.4.2 Standing to seek redress.....	10
2.4.3 Jurisdiction over the defendant or his property	10
2.4.4 Action in the source country	10
2.4.5 Arbitration and remedies.....	11
3. International Remedies.....	12
3.1 Applicability of International Law	12
3.2 Public International Law	13
3.2.1 Sources of public international law	13
3.2.2 Remedies under public international law	15
3.2.3 Forums of public international law	15
3.2.4 Action and Remedies under the Multilateral Environmental Agreements.....	15
3.3 “Private” International Law – the conflict of laws.....	16
3.3.1 The nature and sources of ‘private international law’	17
3.3.2 Forums for private international law	18
3.3.3 Remedies in private international law	18
3.4 Special concerns – Development of international commercial law	19
4. “Remedies Available” in ABS	20
4.1 ABS situations in which remedies may apply	21
4.1.1 Where the user has obtained an ABS contract or permission	21
4.1.2 Where the user has no ABS agreement or permission	21
4.2 Contractual remedies in ABS agreements.....	22
4.3 Legal remedies specifically directed at ABS and compliance with PIC and MAT.....	23
4.3.1 Submission by Denmark	23
4.3.2 Submission by Sweden	24
4.3.3 Submission by Norway	25
4.3.4 Submission by European Community.....	26
[a] Integration through national ABS focal points or the CBD.....	26
[b] Utilisation of CBD Articles 23 and 27.....	27
4.3.5 African Model Law	28
4.3.6 Penalty measures	28
[a] Source-country penalties for use of source-country resources	29
[b] Penalties for use of foreign genetic resources without PIC and MAT.....	30
4.4 General remedies and other relevant provisions	30

4.4.1 Commercial and other remedies in national and private international law	31
4.4.1.1 Submission by the European Community	31
[a] Alternative dispute resolution	31
[b] Enforcement of foreign judgements	32
4.4.1.2 Submission by France.....	33
4.4.1.3 Submission by Spain	34
4.4.1.4 Costa Rica.....	35
4.4.2 Penalties for the illegal importation of biological resources	35
4.4.2.1 General penalty law: Submission by Colombia.....	35
4.4.2.2 Other penalty measures – illegal importation of wildlife and other property	36
[a] CITES implementation laws and ABS.....	36
[b] Other controls on possession and importation of wildlife	37
5. Determining Whether a Remedy is “Available” to ABS Claimants	37
5.1 Availability of remedies for violation of ABS contracts	37
5.2 Broader issues of availability of remedies.....	38
5.2.1 Ambiguities and Other Regime Enforceability Problems	38
5.2.2 Disconnections regarding coverage of ABS laws.....	39
5.2.3 Activities that are Legal in the User Country.....	40
6. Current and Future Effectiveness of Administrative and Judicial Remedies in ABS	41
6.1 What remedies are needed in the ABS Regime?.....	41
6.2 Can ABS remedial needs be satisfied by existing remedies?	42
6.3 Enabling the use of existing remedies for ABS claims	43
7. Conclusion – A Balance of Certainties	44
ENDNOTES.....	46
REFERENCES.....	57

Administrative and judicial remedies available in countries with users under their jurisdiction and in international agreements

Tomme Rosanne Young, Consultant
By contract with IUCN - Canada

1. Introductory Discussion

In 2002, the Conference of Parties to the Convention on Biological Diversity called upon the Convention Secretariat to

“gather information, with the assistance of Parties, Governments and relevant international organizations, and undertake further analysis relating to... [a]dministrative and judicial remedies available in countries with users under their jurisdiction and in international agreements regarding non-compliance with the prior informed consent requirements and mutually agreed terms.”

CBD COP Decision VII-19, Annex, Part E.10 (e). Such information is critically important for the Parties seeking to address a key challenge for the ABS system – ***How can source countries and providers obtain legal certainty that users operating in another country will share the “benefits arising from the utilisation of genetic resources”?***

Seen in this way, this analysis is the next logical step in a series of analyses undertaken by IUCN-Canada into the underlying causes of current difficulties in the implementation of ABS. That series began with an investigation of the various factors affecting legal certainty for users of genetic resources,ⁱⁱⁱ followed by a detailed analysis of claims that have been asserted regarding unauthorised access to genetic resources.^{iv} This article rounds out these two initial studies, by considering the role of a particular kind of “user measures” – administrative and judicial remedies in user countries – in protecting the rights of the source country.

The author believes that a better understanding of these measures will be an essential and positive contribution to the ABS regime discussions – that increased certainty of their own rights will enable the source countries to engage in actions and decisions that will increase certainty for users as well as streamlining the ABS processes in source countries. Such knowledge and the resulting legislative cooperation and integration it fosters may encourage countries to coordinate measures to that will encourage users to comply with source-country law and protect these compliant users from unwarranted claims of “biopiracy.”

1.1 Basis for this study

This study is based on four primary sources. First, following the COP-VII decision, quoted above, the Secretariat issued a notification to Parties, Governments, relevant organizations and other relevant stakeholders, inviting them to provide information in relation to the points raised in paragraph 10 of Decision VII-19, including by providing information on administrative and judicial remedies relative to non-compliance with PIC and MAT. That request was fully or partially met by seven submissions, documented in the Note by the Executive Secretary circulated to the third meeting of the Ad-hoc Working Group on ABS.^v

Second, the CBD’s ABS database includes a variety of laws connected in some way to ABS. All measures included in this database have been examined to determine if they include administrative or judicial remedies that are applied to users who are utilising foreign-origin genetic resources within the legislating countries. This analysis found no measures that are clearly aimed at providing remedies for foreign claimants (source-countries and other providers) in any country, but did identify some domestic provisions that might be useful in this context. As

further discussed below, nearly all legal provisions in the database that apply to non-compliance with ABS are focused only on penalising users of the country's own resources. In a few cases, general law of some countries has been cited which could allow it to impose penalties on users, but none that allow foreign ABS claimants to seek remedies in those cases.

Third, the law of 'remedies' is not usually sectorally specialised. In nearly all countries, "administrative and judicial remedies" are provided in general national law, applicable to all legal issues and structures. A sectoral law will adopt specialised remedies laws only where a gap or other problem exists in the country's general remedial framework, which prevents basic remedies from being fully effective in that sector. Consequently, in analysing remedies available to address ABS claims, it was necessary to focus on general remedies, and to consider how they apply to ABS issues. Obviously, it was not possible within the relatively limited time and financial resources of this analysis to review and analyse each country's remedies law. This report therefore addresses considers overarching principles of administrative and judicial remedies, that are common to many countries. This analysis is based on the author's background and experience with the administrative and judicial laws of numerous countries,^{vi} as well as general comparative law studies and other research sources, cited as REFERENCES, below.

Fourth, the author has examined questions regarding the international law of remedies, and the international instruments and bodies through which ABS relevant remedies may be available. Her sources for this work were the international instruments themselves, and the broad body of legal analysis of those instruments and the basic principles on which they operate. Very little of the available sources are focused on remedies issues, however; so the author's analysis of these issues represents a first inquiry, rather than a product of in-depth study.

1.2 Organisation of this analysis

This analysis is organised as follows: The next two parts will focus on the nature of "remedies." First (in *Part 2*), it provides a brief (by legal standards) summary describing what a "remedy" is, including the role of administration and judicial remedies in legal and political regimes, the relevant concepts and sources of remedies and arbitration, and how remedies operate to protect the rights of persons, countries and other entities This summary is a necessary part of the overall analysis, because "administrative and judicial remedies" are, by definition, legal issues. As such, it may be difficult for non-lawyers to understand them without some background information.^{vii} This analysis is continued in *Part 3* which extends the remedy question to international law, including both public and private international law.

The question of remedies in ABS is not answered simply by identifying remedy provisions. It is essential also to determine whether remedies are "available" in the ABS context – to consider practical situations in which an ABS remedy would be needed, and determine which remedies may apply to those situations. This evaluation has three steps – identifying particular remedies that apply or may apply to ABS situations, considering when and whether they are "available" and examining their potential effectiveness in terms of the ABS regime. Accordingly, the last three sections of the report examines the role of remedies in the ABS system, as it is currently envisioned. *Part 4* identifies particular remedies that have been or could be considered to apply within ABS. *Part 5* identifies a few issues that may impact the actual availability of these remedies in countries with users under their jurisdiction, and *Part 6* provides some observations about the overall effectiveness of existing remedies in addressing the needs of the ABS regime, and makes some observations about how the international negotiations might address problems relating to the need for remedies within the ABS regime. *Part 7* provides a very brief summary of conclusions that can be drawn from this study.

Before beginning, however, the author offers the following caveat: Private remedies are created, applied, and enforced by national law, and particular remedial rules and practices are as varied as the many different existing systems of law. Readers seeking to obtain a remedy (or apply national remedial law) in a particular country should use this article as a way to understand the primary underlying principles, but realise that each country will reflect these principles in their own unique terms, processes and categories.^{viii}

2. The Nature and Role of Remedies

“Administrative and judicial remedies” is a legal concept with immense practical importance in the ABS negotiations. The existence of effective legal remedies in the user country is the primary means by which all ABS parties (especially source countries and other providers) obtain certainty about their rights and how they will be protected and applied. The CBD’s provisions and the ABS regime negotiations have created certain concepts (new sovereign legal rights) and all CBD parties have committed to adopt legislative and administrative measures to recognise and apply those concepts. Legal remedies are the tools for ensuring that these commitments and their underlying objectives are achieved in practice.

2.1 What are “Administrative and Judicial Remedies”

When used in law, the word “remedy” has a meaning that is very different from its normal dictionary definition.^{ix} This legal meaning of “remedy” is much more detailed and specialised; however, it clearly arises from the conventional definition. In normal usage, ‘remedy’ means a cure or action by which problems and illnesses are addressed. In legal language, the term “remedy” refers to the use of laws, courts and administrative agencies to “cure” a legal problem. Legal “cures” generally occur in several ways:

- by bringing a non-complying situation into compliance;
- by compensating (with money or other benefits) losses suffered, including by the failure to receive a legally vested payment or other expectation;
- by issuing an order mandating required actions, or prohibiting those that are illegal or do not comply with legal requirements, and
- other legal prescriptions.

Remedies are created and applied by law. In some situations, a national or subnational law on a particular topic may specify the remedy exactly, by stating a precise amount that must be paid or action that must be taken in a particular situation. Often, however, the law cannot specify all of the variables in the situation. In that case, a law will authorise particular courts, agencies or other officials to declare and enforce a remedy – providing specific guidance (called a “legal standard for decision-making”) to ensure that those decisions are legal and fair. In these remedy decisions, agencies and judges sometimes have wide discretion, but are still held to legal standards of fairness, equity and due process of law. In nearly all countries, remedy decisions are subject to oversight or appeal rights, which ensure that other agencies or higher levels of government will protect against improper decisions and secure the rights of all parties and the “rule of law.”

The following sections explain three critical points: (i) the difference between “remedies” and “penalties”; (ii) the kinds of ‘remedy’ that can be obtained in law; and the legal conditions (pre-requisites) that must be met by a party seeking a remedy.

2.2 Remedies vs. penalties

The most important definitional point about remedies is that they are different from penalties. The purpose of a penalty is to identify the violator and punish him in some way; whereas the purpose of a remedy is to “fix” or “cure” the person/entity/etc. who has, as a consequence of the violation, been injured or damaged or suffered a financial loss.

The primary difference between a remedy and a penalty relates to *who collects any funds that are awarded*. In a penalty, any financial amounts assessed (fines) are paid to the government of the country (or sub-national jurisdiction) in which the action is brought. A financial remedy, by contrast, produces an amount that is paid to the person or persons who have suffered a loss caused by the violation. Similarly, a penalty may result in imprisonment, a term of “public service,” loss of permits, or other means of punishing violators. By contrast, a non-financial remedy may include an order requiring the defendant to comply with terms of a contract (*e.g.*, to provide reports, give access to records, etc.), sharing non-financial benefits (*e.g.*, data, contacts, etc.) and other actions that directly “cure” the situation for the complaining party (source country or other provider.)

A second important difference is the fact that, in the context of remedies, the claimant controls the claim. He brings the action, and he determines whether to continue or drop it. The only way that his claim will be dismissed is by his decision, or by the court’s conclusion that the claim may not be prosecuted. By contrast, penalties are assessed/prosecuted by decision of the government and its prosecuting officers. These officials have complete discretion as to whether to devote limited human resources (time and expertise) and expend other costs necessary to amass a case against the violator, and whether that case has a high enough probability of success to be worth the effort. This control has a downside, however. In most cases, the party who controls the legal action is also the party that pays for it. Governments do not normally take action to provide remedies to injured parties – they create legal systems and institutions that *enable the injured party to seek a remedy*.

In some cases, the remedy-penalty distinction is blurred. For example, in some countries, it may be possible to increase the amount of a remedy, as a way to punish the violator. This practice, is often called “exemplary damages” or “punitive damages.” Their purpose is basically to protect against repetition by the defendant. Absent the possibility of “punitive damages,” very wealthy defendants might feel that they can commit the same actions tomorrow, so long as they are willing to pay the remedy. The claimant (not to the government) receives the added funds, as a sort of “bonus.”

More rarely, in some penalty laws, the court may require the defendant to recompense the victim, as one part of the final judgement. In many countries, however, the rights of the victim to receive a remedy are tried in a separate process (civil court), usually after the penal claims have been adjudicated.

2.3 Available remedies

Another important characteristic of remedies is that they must be created in law. Over the 3000 years since King Solomon’s decision to cut a baby in half as a means of resolving a dispute over parental rights,^x the concept of governance has become more rigorous, and the list of remedies that may be awarded has been very clearly defined. Even with this limitation, there are many different types of remedies that may be awarded. It is important to remember that all remedies are not available in all situations. Whether a particular remedy is authorised in a particular case will depend on (i) the nature of the basic legal right involved, and (ii) the legal and institutional source of the remedy.

2.3.1 Kinds of Remedies

Some of the kinds of remedies that may be relevant to claims based on ABS agreements or obligations include the following:

- *compliance orders*, (legal writs mandating or prohibiting certain actions);
- *compensation* for harms caused (payment of ‘damages’ or ‘restitution’ calculated based on the value of the injury, damage or financial loss suffered by the claimant), including ;
 - “compensatory” remedies (*i.e.*, the direct value of the harm suffered), and
 - “punitive” remedies (discussed above);
- *rescission, cancellation, revision or termination* of permits, licenses or other government instruments;
- *reformation or invalidation* of a contract or other agreement;
- *declaratory decisions* (the court’s binding determination of questions regarding rights under certain kinds of relationships. In some countries, the rights to obtain declaratory remedies is only available in a limited number of situations);
- contractual remedies, including, among others:
 - ‘*specific performance*’ – *i.e.*, ordering a party to perform his responsibility under a contract;
 - *accounting* (calling on a party to provide a record of relevant matters within his sole knowledge);
 - *lien* rights (in cases where the law enables the creation of a lien against certain properties for certain purposes – especially where the claimant gave property or services that are incorporated into a valuable property) ;
 - *other special rights* (sometimes called ‘constructive trusts’) in property, where the property of the claimant is later legally exchanged for other property.^{xi}
- *estoppel* (an order which prevents a party from taking certain actions in future.)

While there are other types of remedies,^{xii} the above list includes those that appear to be the most useful in ABS situations.

2.3.2 Sources of remedies

The existence of a particular remedy or group of remedies in the laws of the user country does not necessarily mean that a source country or other provider will be able to utilise those remedies to obtain redress under ABS laws. Thus, after determining the existence of a legal remedy, the second step in determining whether that remedy is available is to consider the path by which the remedy is obtained – to ask ‘*Where (from what law or legal category) is the remedy obtained?*’ ‘*Through what institution or system can I seek the remedy?*’ and ‘*What limits or restrictions apply when seeking remedies through this path?*’ The nature of the remedies available, the processes of seeking them, and many other factors depend on the source of the remedy. This paper considers four basic sources of remedy – judicial institutions, administrative bodies, direct contract mechanism and arbitration/mediation panels. Despite their various names, each of these sources represents a component of “administrative and judicial remedies” since all must be founded in and compliant with national law and administrative regulation in order to be applied.

2.3.2.1 Remedies available from judicial institutions

The term “judicial remedies” refers to the range of actions that may be taken by a court, judge, appellate panel, magistrate or other judicial official, (or in some cases the legal bodies of traditional communities^{xiii}) when acting formally in that capacity. In most countries, these officials may act in a variety of specified ways, to suit the needs of the situation. For example, in very urgent cases, a judge may often issue of an emergency writ or other order, in a short “*ex parte*” process (that is, a hearing where the defendant is not present). The fairness of these procedures is ensured by requiring that they be reviewed in a formal legal process at a later date. Most judicial decisions, however are given through a more complete judicial process, where both parties are present and able to argue in their own behalf.

The powers of the judiciary are not unlimited. Each court may only act within its “jurisdiction” – that is, it may only decide cases that (i) occur within geographical boundaries and involve specified financial levels, (ii) are assigned to the court’s judicial level and division, and (iii) (sometimes) that addresses the particular kinds of law or subject matter of the particular court’s portfolio. Most important, courts are authorised to act only as to matters governed by law – including both written laws, and in some countries broader concepts of law that are recognised in practical terms, but may not be memorialised in legislation. This last category of authority may include concepts such as negligence, endangerment, breach of contract, and other matters, in countries where these issues are decided on the basis of accumulated legal decisions in the courts.

One problem that is particularly difficult in using judicial remedies is the rigidity of the procedures that apply. By filing the first papers bringing a lawsuit, the complaining party is inadvertently “sculpting” his claim – that is, the contents of his initial filing may limit the remedies available. Consequently, if the source country does not have access to adequate legal advice, he may file a claim under which the desired remedies are not possible. This is particularly problematic in the case of ABS, where the central issues – the nature of “*genetic resources*,” the meaning of “*utilisation of genetic resources*,” the determination of which countries have ABS rights with regard to a particular species, and the question of what constitutes “*equitable sharing of the benefits*” in these cases – are all completely new and cannot be reliably answered under prior law. As further discussed in part 3 of this analysis, current law does not include sufficient legal basis to enable the use of judicial remedies to address ABS claims.

2.3.2.2 Remedies available through administrative agencies

A second general category of remedy is “administrative” – that is remedies that are available through government ministries, agencies and other bodies that are not formal courts. Most countries authorise administrative bodies to undertake some “administrative” decision processes in response to claims.^{xiv} In some countries the justification for administrative remedial processes is that they might reduce demands on the formal court system. These countries might call on a claimant to “exhaust his administrative remedies” (*i.e.*, to attempt to resolve his problems through administrative processes), before bringing an action in the courts.

In other countries, the opposite justification applies – citizens do not normally want to take the difficult and confrontational approach of bringing an action in court. Instead, they prefer to act informally and personally by speaking directly to an agency official. Through these requests for personal attention, individuals sometimes attempt to pressure individual administrative officials to make a particular decision or grant an exception for them.

In both of these situations, government agencies and officials need to have clear administrative regulatory standards to guide their judgement. These tools enable the agency to control and manage claims, and to ensure that fair and replicable decision-making is happening throughout the agency. They also assist the individual decision-maker, who can point to the

specific standard as a reason that they cannot respond to individual pressure for special treatment. National administrative processes are designed to help regularise and control both the process and the impact of personal contacts, while providing a comfortable avenue for legitimate claims.

An administrative body's powers to hear and resolve claims is limited in several ways. First, only specific types of claims can be raised before an administrative agency, and only within the specific substantive area of the agency's mandate. For example, conservation agencies may act only in conservation-related matters, pollution control agencies to pollution-related matters, etc. More important, direct administrative remedies are usually tied to very particular decisions or authorisation of the agency. For example, an agency that has the power to grant a concession or permit will often have the right to adjudicate appeals from applicants who have been denied, and challenges by others who oppose the issuance of a permit that has been granted. They may also have the right to review claims that the permit-holder is violating the permit. But they may not have the power to award a remedy to neighbouring landowners who are injured by the concession-holder's actions. Similarly, an agency that has the power to conduct inspections, issue citations or compound penalties will often have the administrative authority to hear appeals related to these actions.

2.3.2.3 Direct contractual remedies

A contract contains a "direct contractual remedy" where it specifies a particular remedy that will apply in cases in which one party breaches the contract, and gives the other party the authority to apply the remedy directly. Up to now, in ABS, the discussion of remedies has not separately considered direct contractual remedies. The apparent reason for this is that during the first 8-10 years of negotiation and implementation of the CBD contract law was the only legal avenue considered or addressed in ABS discussions. Many commentators appear to have assumed that only contract remedies would apply in ABS.^{xv} Consequently, where ABS remedies have been discussed at all (very rarely) they have not separated contractual remedies from remedies that are more broadly applicable – both to contracts and to situations in which the ABS user did not comply with ABS law and/or did not obtain any contract.

There are two common types of direct contractual remedies: liquidated damages and guarantees. A "liquidated damages clause" in a contract between X and Y states that, if Party X defaults on his obligations, then Party Y shall receive a specified remedy, as liquidated damages.^{xvi} Then if X does not comply with the contract, Y automatically takes the liquidated damage amount, and no lawsuit or other action is needed. A liquidated damages clause will be most effective where there is a specific bank account, escrow account or other fund from which the liquidated damages can be taken.

Although they can limit the need for courts, liquidated damages clauses do not eliminate the possibility of a formal action (lawsuit or arbitration.) If the parties do not create a sequestered account, then Y must request the payment from X, and may have to file a lawsuit if X refuses to pay. In addition, if X and Y disagree about whether the liquidated damage clause has been triggered, they may have to go to court. In most other cases, however, a liquidated damages clause operates as a simple and more direct remedy.

A guaranty clause in a contract operates in a very similar way, but focuses on ensuring the ability of one party to pay sums that will come due, or to take other action that is required under the contract. Such a clause will generally require that Party to provide some financial assurance of his ability to pay or to afford the costs of other requirements. That assurance must continue to be in force until the party has fulfilled the guaranteed obligation or until the other party agrees to release the surety. Guaranty clauses may be satisfied by the creation of a fund or other set-aside of resources, or by hiring a 'guarantor' or 'surety' who will, for a fee, agree to

back up the party's promise to pay or to take other action.^{xvii} As with liquidated damages, a guaranty clause may sometimes result in a legal action (lawsuit or arbitration) if the parties disagree about whether the clause has been triggered, but where it operates according to the contract, it provides a simple, direct and quick remedy.

2.3.2.4 Arbitration and other dispute resolution processes

Finally, another possible source of remedy is increasingly relevant – arbitration and alternative dispute resolution (ADR). Over the past few decades these special processes have been developing, creating less formal procedures, and offering a possibility to shorten the time between initiation of the claim and final decision, and possibly to decrease costs. Although they are not limited to commercial issues and contracts, arbitration processes are usually applied to contract dispute,^{xviii} especially where the contracts or commercial relationships are 'international.'^{xix} Arbitration and mediation may be used by governments, agencies, private persons, corporations, NGOs and other types of entities.

The primary alternative mechanism is private arbitration, which is defined, for purposes of this article,^{xx} as a non-judicial (and usually non-governmental) process that uses alternative processes to resolve non-penal legal disputes. Arbitration is a set of formalised rules (less strict and detailed than most national judicial requirements, but still formal procedures) for obtaining binding resolution of a claim or problem. The use of arbitration enables all sides of a claim to be resolved less formally, but still result in a final decision that is binding as between the parties. Typically arbitration is used where all of the persons involved in the legal claim specifically consent to be bound by the decision.^{xxi}

An even less formal process, mediation, is also used with increasing frequency. Ideally, mediation operates in a non-adversarial manner. Mediation processes are generally defined as "an attempt to reach a common middle ground through an independent mediator as a basis for a binding settlement." Mediation is thus different from arbitration, which operates like a court, where the parties are adversaries, each seeking to be declared the "winner" in relation to the claim. Mediation emphasises the use of dialogue among the parties in order to find a solution, which might be described as "the best compromise." Mediation is often conducted in a non-binding format – that is, the parties do not begin by agreeing to be bound to the results. Rather, they may wait until the final compromise is achieved, if it is, and have the option then to agree to be bound. The success of mediation usually depends on the quality, abilities, and impartiality of the mediator, and the good faith of the parties in desiring a mutually acceptable solution.

ADR process may allow Parties to 'sculpt' their arbitration in whatever way they can agree on. Arbitration panels and processes are usually based on particular pre-existing rules and principles, such as the UNCITRAL Model Law on Commercial Arbitration,^{xxii} and the International Chamber of Commerce's Rules and Guidelines on arbitration.^{xxiii} While some of these systems provide a platform of actual arbitrating services, it is not necessary to use that platform in order for an arbitration to be conducted under those rules. There are many other sets of primary rules on arbitration, and the first task in any arbitration (often decided in the contract or elsewhere, before the claim arises) is to determine which rules and guidelines apply. Beyond this, however, most arbitrations begin by setting any special "ground-rules" that the Parties might choose. For example, the parties may agree that the financial award may not be less than a specified minimum, nor more than a specified maximum.

There are two primary limitations to arbitration and other ADR, however. First, these mechanisms cannot be forced on either party. ADR mechanisms can only be used where both parties agree to their use.^{xxiv} In some cases, this consent may be given long before any claim has arisen. For example, a contract may include an 'arbitration clause' in which the parties agree to

use arbitration rather than the courts, in the event of a future claim or controversy, relating to the contract. In the ABS area, for example the ITPGRFA's Standard Material Transfer Agreement includes a provision requiring arbitration.^{xxv} That clause specifies that in the event negotiation and mediation are not effective in resolving a disagreement among the parties to the Agreement, then binding arbitration will be required.

If a disagreement is not contractual (for example, if a source country is seeking benefit-sharing against a user who never obtained an ABS Agreement or complied with other relevant law), the parties may agree to submit their dispute to binding arbitration. If they do not agree, however, then independent arbitration or mediation will normally not be possible.^{xxvi}

It is generally recognised that arbitration clauses may favour one party over another in different situations. To non-lawyers signing the agreement, arbitration clauses often seem to be innocuous "boilerplate." At a later point, some parties may discover that the arbitration clause limits their rights and remedies in some way.^{xxvii} Having signed the contract, they will have no ability to change their mind at this point.

2.4 Prerequisites for claiming remedies

The third step in determining whether a particular remedy will be effective to address a particular legal issue is to consider the primary conditions that must be met, in order for the remedies to be sought or applied. Since remedies are created and applied through national law, any person seeking remedy within a country must research and comply with the prerequisites established under that national law. For purposes of this analysis, there are several essential prerequisites that must be met in order to obtain a legal remedy on any claim. The three that seem most directly relevant in the current report are (i) a law which forms the basis of the claim; (ii) "standing" of the claimant to bring the claim under that law; and (iii) jurisdiction over the defendant, his actions, or some of his property.

These questions form the most critical aspect, in determining whether a remedy is available and effective in a given situation. They if examined in detail, they are very technical questions on which many long legal debates may be required in any case. They are also, however, extremely difficult to generalise across many different countries, except by limiting the discussion to the broadest description of the concepts. It must be noted (discussed in more detail below) that even where a remedy is "available" it may not operate to redress the harm in question.

2.4.1 Legal basis for claiming a remedy

In order for a person to seek redress for harm, damage or financial loss to a particular right, interest or property, the law must

- (i) recognise the right, interest or property as worthy of remedy, and
- (ii) have a basis for determining that the actions that caused the harm, damage or loss was wrongful or inequitable.

If the law does not include these basic concepts, then the courts cannot award a remedy. Where the concepts exist, but are unclear at law, many courts will not award a remedy due to ambiguity. Many kinds of right or interest have been clear in law for many millennia. For example, the legal rights of individuals to own land, plants and animals, and to seek redress when they are taken or used without permission or payment has been recognised for nearly 4000 years.^{xxviii} Hence, the courts are generally comfortable making decisions in such cases.

By contrast, the law has only recently recognised the distinction between the rights to own a computer programme, and the right to reproduce that programme and sell it commercially.

These rights must generally be spelled out carefully in national law, and contracts often include special provisions and clarifications, if the parties do not feel that the law is clear enough on a particular point, or if they want to apply it in a different way.^{xxix}

In some cases, a law may state that a particular activity is illegal without providing a private remedy. For example, a law may prohibit any person from bringing any item into the legislating country if that item was illegally obtained in the source country.^{xxx} Such a law would give rise to action for penalty – to fine or imprison the smuggler – but the source country’s rights are not addressed. To obtain redress, the source country would have to make a claim under the property-based tort laws of the legislating country.

2.4.2 Standing to seek redress

A second element determining whether a particular claimant may seek a remedy is whether he has “standing” before the court – that is, whether the court or agency will allow a particular person to bring a particular type of claim. For example, if one party to a contract brings an action based on his fear that the other party will violate the contract in the future, the question of standing arises, because there has not been any violation of the contract yet. In most countries, a claimant may not bring an action for violation until that violation has occurred, except in very special circumstances. In standard contract law, the possibility that a contract party will not perform in future, is sometimes a basis for terminating the contract.^{xxxi} Other “pre-emptive claims” (seeking protection against future violation) may be allowed in some countries where the defendant appears to be planning to defraud the claimant. Similarly, some countries allow courts to consider some matters in advance, issuing “advisory decisions” regarding, for example, the interpretation of a particular clause of a contract.

Another aspect of standing is the nature of the party bringing the action. Normally, in an action for redress of an injury or wrong, the injured or wronged person must bring the action, or it must be brought on his behalf. Often, it is necessary to describe the nature of the injury or wrong, and demonstrate that a legal remedy exists that is capable of redressing the injury.

2.4.3 Jurisdiction over the defendant or his property

Perhaps the most important element determining the effectiveness of a remedy is whether it is possible to obtain legal jurisdiction over the defendant, over the actions that form the basis of the lawsuit or over some of his property. Where the court has jurisdiction over the defendant, he must participate in the lawsuit. If he does not do so, the judgement will be entered against him “in default” and he will still be obligated to abide by the judgement (to pay any remedy that the court or other decision-maker assesses).

If the court cannot assert jurisdiction over the defendant, it may still be able to assert jurisdiction over some property or assets of the defendant that are within the country. In that case, if the defendant does not participate in the lawsuit, the assets may be used to satisfy the judgement. If neither of these is possible, however – *i.e.*, if the defendant is not present in the country, his actions do not create local jurisdiction, and he does not have any assets within the country – then the source country’s law cannot provide an enforceable remedy.

2.4.4 Action in the source country

Another option may be to bring the action against the user in the source country. This can be effective in providing remedies in two ways. First, if any assets or property of the defendant are located in the source country, it may be possible under national law to use those assets to satisfy the judgement, as described above. Second, if other countries recognise the validity of the judgement, it will be possible under basic principles and instruments of private international law

to call on the country in which the user is based or is conducting obligations, and ask that country to enforce the judgement against the user.

Special rules may apply where the court does not have direct jurisdiction over the defendant. In those cases, the claim may still be possible, if the court has jurisdiction over the defendant's actions. For example, if he injures someone in the country, and then leaves the country, the court may still have jurisdiction over a claim to redress the injury he caused. If he wins the lawsuit, however, the claimant faces another challenge – how to enforce the judgement. He may have to go to another place – where the defendant is located or has assets – and ask the courts of that country to compel payment. Enforcement of foreign judgements is one aspect of “private international law” described in 3.3, and can be both legally complex and expensive. If there are doubts about the country's jurisdiction over the defendant's actions, the ultimate remedy may be uncertain.

One of the problems in using this mechanism to seek remedies for ABS violations arises when the user's “utilisation of genetic resources” occurs outside of the source country. Since it is impossible to look at a particular specimen or product and determine whether it is a “genetic resource” or simply biological material, it is not practically possible to adopt or enforce a law against “possessing” genetic resources. This means that a collector who acquired the specimen in the source country and then removed it to another country did not break the law of the source country. The source country or other provider will only have a claim for remedy if the user's subsequent actions involved the “utilisation of genetic resources” without sharing the benefits from that utilisation.

Legally, this suggests that the user's violation did not occur in the source country. Since no country's law may regulate actions by foreign citizens in foreign countries, there would be a legal basis for making an ABS claim against the user. This is particularly true where the user acquired the genetic resources through a middleman. Consequently, the possibility of using source country remedies, and enforcing them in other countries seems somewhat doubtful legally.

2.4.5 Arbitration and remedies

One last comment in this section must clarify the question of remedies in connection with arbitration and other ADR mechanisms. In 2.3.2.4, this article noted two critical facts: (i) ADR is primarily a non-governmental mechanism; and (ii) arbitration provides only a *path* to a remedy – the remedy itself is created through the application of law (including the legally binding nature of a contract.) Since law can only be created by government, it follows that ADR does not *produce* remedies, it is only a tool to facilitate the pre-remedial process – to make it easier for the parties to get to the point of agreeing on, awarding and/or paying a remedy.

In essence, when parties have a dispute, the dispute can only go to ADR if the parties agree (either by earlier contractual agreement, as described above, or by agreement at the time of the dispute.) That agreement, like any other contract, can then be the basis for a legal remedy in at the point where the arbitration produces a final “binding” award, or when the parties agree to apply ADR result. At that point, the arbitration or ADR result becomes, in essence, a new contract, although it is a type of contract which is given special treatment in the courts.^{xxxii}

Like a contract, however, arbitration awards can only be enforced under state law, once the panel has decided. This means that

- (i) if the Parties willingly to comply, the result need not be examined by any country's courts; but
- (ii) if either party does not comply then the other party's only options are (a) to give up and allow noncompliance; or (b) to formally demand compliance. In the latter

case, the arbitration panel has no power to compel anything. It is only a panel. The only way to compel a party to comply with an arbitration award is to ask a court with jurisdiction to “execute” the award, under the national law of some country. Consequently, its terms may only be applied through the remedy structure of that country. Often, this means that the courts or other enforcement officials will review to determine that the arbitration procedure was fair, and that the results do not violate basic standards in the country, before formal enforcement.^{xxxiii}

Countries normally allow a great deal of flexibility in arbitration awards,^{xxxiv} and general conventions and international procedural standards regarding the enforcement of foreign arbitration awards are very well accepted. In fact, it is often easier to enforce foreign arbitration awards than foreign court judgements in most countries.^{xxxv} Consequently, it appears that ADR offers a broader range of possible remedies, since the deciding body is not governmental, and has more flexibility than a court or agency would. Some users view arbitration and other ADR clauses as a means of avoiding national law entirely.^{xxxvi} In fact, however, arbitration is not an alternative legal system, but an alternative tool, and in any situations of doubt the only recourse is to the law, not only the principles of law, but also an implementing authority. Internationally, there is no body or authority responsible for private contracts. The only governing law is national.

In addition, the general statement that arbitration awards are easier to enforce in foreign countries may not be true if the subject matter of the arbitration is not recognised by the country’s laws or otherwise subject to question. If enforcement of an ABS award must be compelled, one must do this through national courts with jurisdiction over the user. If these courts do not recognise genetic resources as a protectable legal interest, or if they feel that the contract or its operation were unfair in some way, the arbitration result may ultimately not be paid.

In general, it arbitration is more likely to focus on awarding a specific amount (damages or restitution), while mediation is more likely to include a requirement of specific action (fulfilment or revision of the contract, for example, or a declaration of how the contract shall be interpreted and applied in future.) Both types of processes may give greater flexibility to apply principles of fairness, equity and common practice than courts.

3. International Remedies

The next question that is usually asked is “*What additional remedies are available to the parties to a multinational contract under international law?*” Unfortunately, unless and until the CBD creates them under ABS regime (or other international processes do so,^{xxxvii}) there is no direct remedy available to contract parties in international law. So-called “private international law” does not create remedies nor provide forums for decision. It only provides rules and other tools that make it easier for private claimants from one country to bring action in another country. The concepts of international law can be critically important to remedial discussions, however, so they should not be dismissed. Thus, a brief overview of what international law is, and how it works is a necessary element of this report.

International law is highly complex and detailed.^{xxxviii} A full discussion of the rights of parties (both governmental and non-governmental) in international commercial law is much too detailed for this paper. Instead, the following discussion will provide a very basic explanation of the nature of international law (based on three basic subcategories – public, private, and commercial), and including the limited meaning of the concept “international remedies” as discussed in the initial mandate of this paper.

3.1 Applicability of International Law

Many people, when considering international law, assume one of two things – (i) that it is basically the same as domestic law, but applied on a global or multinational scale or (ii) that it is not law at all, because it cannot impose its requirements directly on any country. Both of these assumptions are generally incorrect. International law and its enforcement and other operations are completely different from domestic law and their effectiveness cannot be measured on the same terms for a very basic and important reason – national sovereignty. That is, with very few exceptions, every country has a basic right to govern the territory, persons, actions, property and rights within its jurisdiction as it sees fit. National sovereignty can only give way to international law where two or more countries enter into a specific agreement under which they voluntarily commits to limit or to take particular actions or agree to apply specific norms, standards or legal principles. In practice, international law operates as follows:

- (i) *every person, and all his actions, as well as all lands or waters and resources within national territorial boundaries, are governed by the law of a particular country (although in some cases more than one country's law may be relevant to a person, action or situation),*
- (ii) *each country may be bound by specific agreement to comply with certain international laws and commitments which it is obligated to implement, and*
- (iii) *these commitments are implemented by passing laws^{xxxix} that are binding on the persons, lands and resources under their jurisdiction. Without those national implementing laws, international law cannot be applied to individual action.*

In order to understand most questions of international law, it is necessary to recognise either three subcategories under that general heading –

- Public international law,
- Private international law, and
- International commercial law.

The third category may be considered by some authors to be an element of ‘private international law,’ but in some ways it is easier to consider it separately. The following brief definitions do not consider any of the complicating factors, but merely provide a basis for consideration of international law issues, when discussing “remedies available” in Part 4. In some ways, they oversimplify the issue, and should not be relied on beyond the scope of this paper.

3.2 Public International Law

Public international law is often described as the ‘law of nations.’ It focuses entirely on the requirements imposed on each *country* to adopt and implement laws, or to take other actions in response to its obligations under international law.

3.2.1 Sources of public international law

The primary components of public international law are the international conventions; however, there are other recognised sources, as codified in the Statute of the International Court of Justice:

[In deciding disputes before it,] the Court shall apply:

- (a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

- (b) *international custom, as evidence of a general practice accepted as law;*
- (c) *the general principles of law recognized by civilized nations;*
- (d) *judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.^{xl}*

In the context of ABS, these primary sources can be summarised as follows:

(i) *International conventions:*

(a) *Treaties and bilateral agreements:* Most ABS occurs through private contracts, in which only one sovereign government (or none) is directly included as a party.^{xli} If, in a given case, the source country and the user country (country with jurisdiction over the user) had taken the rare step of creating a direct bilateral treaty to memorialise the ABS-related agreement (or to clarify any specific elements of it), that treaty would constitute the first (strongest) basis for resolving the case. Recently, the government of Japan has begun efforts to negotiate clearer relationships regarding access to and utilisation of genetic resources with individual countries. These measures are primarily intended as a way to eliminate some of the challenges and controversies that have prevented companies from obtaining legal certainty regarding ABS compliance. In addition, however, depending on how they are phrased, they may provide a basis for easier resolution of any disputes that may arise at international law.

(b) *Multinational Agreements:* At present, the primary multinational ABS agreement is CBD. As to plant genetic resources that are included in the multilateral system (MLS) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), two multinational agreements would have to be considered – the CBD and the ITPGRFA. (As noted below, however, more significant work in the ITPGRFA has focused on the issues of ‘private international law’ – in particular through the development of the ITPGRFA’s Standard Material Transfer Agreement.)

(A significant body of other work has been done in international meetings considering ABS issues, including the Bonn Guidelines and other COP decisions and declarations providing guidance to Parties regarding ABS. It is not clear what standing, these instruments have in international law. As non-plenipotentiary instruments, they probably fit in the fourth tier – subsidiary determinations.)

(ii) *International Customary Law:* There is no indication that any “international customary law” on ABS exists. In the CBD’s database, only 19 countries and 1 regional body have submitted specific ABS measures that have been adopted into their written law.^{xlii} This figure represents 10% of CBD Parties.

In addition, the measures adopted to date address only one aspect of the Parties obligations. Specifically, they are focused *only* on the use of the legislating country’s own genetic resources (provider-side measures). At present, although all countries are recognised to be both users and providers, no country has adopted any user-side measures – *i.e.*, measures which require (or provide incentives to) users of foreign-origin genetic resources to pay benefits to other countries which are the source of those genetic resource.^{xliii} Of the national ABS laws that have been adopted several are only general statements which may require the adoption of specific regulations to be implementable. To date, no case or controversy relating misappropriation of genetic resources (*i.e.*, utilisation without permission and/or without benefit-sharing) has been

decided (either in public international forums or in national courts applying private international legal principles) on the basis of ABS issues.^{xliv}

- (iii) *General Principles of Law*: have not yet been applied to ABS. Many very general principles (those that forbid fraud and abuse of superior position in contracts, for example)^{xlv} clearly apply; however, it is difficult or impossible to apply “general” contract law where the nature of the main subject matter of the contract (genetic resources and their utilisation) remains legally ambiguous.^{xlvi}
- (iv) *Subsidiary Determinations of Law*: This category is normally focused on case-law, in the form of decisions by the highest court in one or more countries, and/or decisions in international forums. As noted above, however, COP-Decisions and other non-binding guidance documents could be considered under this heading. Subsidiary determinations are generally considered as evidence or indicators of international law, not law itself.

3.2.2 Remedies under public international law

As noted, public international law is focused on each country’s governmental actions. Its role is to help countries determine what they must do, what they must not do, and any limits on what they are permitted to do, under international instruments and international customary law. Consequently, *public international law provides a remedy only where one country sues another*.

In environmental areas, public environmental legal actions usually involve either (i) a claim that a country which has made a commitment to regulate has failed to do so; (ii) a claim that a country has failed to implement laws or other governmental measures required under international law;^{xlvii} or (iii) a claim that a particular governmental decision or permit violates international law.^{xlviii} In those cases, the available remedies are usually declaratory – that is, the court declares that one of the countries is (or is not) obligated to take a particular action.

As noted by many critics, national sovereignty principles may limit the effectiveness of public international law and the decisions of the international tribunals, since a country which receives such an order is still a sovereign nation, and has discretion with regard to its regulations.^{xlix} The primary forces that compel countries to comply with international decisions are (i) reciprocity – the knowledge that international governance only works if all countries commit to it and comply with it; (ii) the fact that countries usually only make international commitments as to matters about which they are willing to obey international legal judgments; and (iii) the possibility that other countries will (formally, informally or individually) accord them fewer rights, or take other actions against a country that refuses to comply such decisions.

In other words, the remedy of public international law is a determination that a State must take a certain kind of action (adopt a law, enforce a law, cooperate in accordance with international agreement, etc.) Public international law will normally not lead to any kind of judgement or order calling for an individual or other private party to take any action (such as to pay benefits in accordance with the CBD.)

3.2.3 Forums of public international law

International courts provide remedies only in the form of judgements for or against the States that are parties to the action. This limitation has not prevented further steps toward the development of this aspect of the international rule of law. There are presently thirteen permanent international courts operating, comprising the International Court of Justice, Court of Justice of the European Communities, Andean Community Court of Justice, Benelux Court of Justice, European Court of Human Rights, Court of the European Economic Area, Inter-American Court of Human Rights, International Tribunal for the Law of the Sea, the Appellate Body of the World Trade

Organisation, the Court of the European Economic Area, the Central American Court of Justice, the Economic Court of the Commonwealth of Independent States, and the Court of Justice of the Common Market of Eastern and Southern Africa. The rapidity of development is shown by the fact that last seven courts listed above have started operation since 1993, and all seven of them involve at least some mandatory jurisdiction (provisions under which member countries to are required to submit to jurisdiction.)ⁱ In a few instances, the international court's jurisdiction is mandatory on a much broader scale.ⁱⁱ It seems likely that international forums, both formal and informal will continue to develop and will play a greater part in ABS implementation in future than is possible immediately.

3.2.4 Action and Remedies under the MEAs

Public international law also provides several narrower forums through which countries can seek redress. Under a number of the multilateral environmental agreements (MEAs), for example, remedies are available, but narrowed to address the particular issues specified in the MEA. The MEAs design remedies in a variety of ways. Although they cannot completely eliminate any options of the Parties, they focus the remedial structures in a manner that limits or places restrictions on those options. The instruments most relevant to ABS (the CBD and the ITPGRFA) take two different approaches to remedy, with the ITPGRFA focusing most of its attention on issues of private international law.

The CBD offers essentially a “public international law” remedy – that is, dispute resolution mechanisms (international court, arbitration and conciliation) available for disputes between States. In the event of such a dispute, Article 27 (“Settlement of Disputes”) provides simply that, where any two or more Contracting Parties cannot find a solution to their dispute by negotiation, they may “jointly seek the good offices of, or request mediation by, a third party.” The Convention allows (but does not require) each Contracting Party to submit a written declaration that it will accept one or both of the following, as a means of settling any dispute that cannot be resolved through negotiation:

(a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II; [or] (b) Submission of the dispute to the International Court of Justice.

Where either Party to a dispute has not submitted this declaration, then their dispute

shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.

The ITPGRFA contains provisions for inter-Party dispute resolution,^{lii} which are basically similar to CBD Article 27 in impacts. It focuses more of its attention on individual contracts for the use of plant germplasm, discussed in 3.3.3, in a groundbreaking approach that appears to merge the public and private aspects of remedies.

3.3 “Private” International Law – the conflict of laws

National laws and sovereignty directly address every person on the planet, most of the planet's land area (except Antarctica), and the most intensively utilised parts of the oceans (oceans landward of the boundary of national exclusive economic zones (EEZs) and outer continental shelves (OCSs)). This means that nearly all regulation of territory, persons, actions, property and individual or entity rights is governed by a particular country.^{liii} There is no international forum, law or system that legislates, oversees, enforces or provides remedies with regard to private action (including private-public actions such as contracts between private actors (individuals, companies, institutions) and the government of any country.)^{liiv} In other words, direct legal

actions by private individuals, companies, and other institutions seeking remedies are governed by national law – always. Individuals have no direct access to the international forums described in 3.2.3, but must ask their government or an intergovernmental body to bring any action that they feel must be brought in those forums.^{iv} There are (only a few) very specific situations in which allow broader rights against individuals, such as for international crimes against humanity – including especially “war crimes” – and as a legal matter, these too are addressed through national law.^{lvi}

This raises a question – “*If no international law applies directly to private action, then what is ‘private international law’?*” The following brief discussion provides a summary answer to that question.

3.3.1 The nature and sources of ‘private international law’

As noted, all private actions (even actions brought by a private individual/entity against a government) are “national” for purposes of law and procedure, that is, they are governed by and brought under national law. At the same time, in practical terms a constantly increasing percentage of commercial and other activities are “international” in the sense that they involve persons, property, actions, and rights from or relating to more than one country.

In governing and protecting the rights of the persons or entities involved in such activities, national courts can face significant difficulties. For example, if a contract is entered in one country, but a contract violation occurs in another country, it may be procedurally necessary to bring action on the violation in the second country. The contractual laws and expectations in the first country may be different in critical ways in the second country, similarly the procedural and practical laws governing bringing lawsuits on contractual issues may be very different. Both of these differences (and many others) may operate as obstacles that prevent one party from seeking or protecting his rights under the contract. They may also create serious legal complications for court in the second country in deciding which country’s law to apply, in finding and interpreting the law of the first country (where that law applies). Even if the case can be brought in the first country, it may be necessary to use the governmental processes of the second country in enforcing with the judgement – *i.e.*, compelling the losing party to pay the amount awarded or to provide information, records, rights, etc.

Historically, where a country’s legal system was operating in a way that impacted the rights of foreign citizens and entities, diplomatic processes (public international law) would be commenced. Although these actions helped in individual cases, and began to build a body of internationally accepted practices, the situation remained somewhat confusing and problematic. Eventually, various international instruments have been developed to help clarify –

- (iii) the rights that litigants from one country will have in the courts of another country;
- (iv) a number of common principles that can be applied where a contract is “international” (in the sense that at least one party, property, action or resource occurs in another country from that in which the contract is created, implemented or enforced);
- (v) rules of “civil and criminal procedure” (that is, the procedures by which cases are filed, evidence is gathered, jurisdiction is determined, responsibility is analysed, and judicial and arbitral awards are collected or enforced) which apply to particular claims involving parties, property, actions, etc., in more than one country;
- (vi) rules on “enforcement of foreign judgements.

These concepts, which we now know as “private international law,” originated under the legal name “conflict of laws.” Conflict of law principles are applied through a complex interrelationship of national law and the application of internationally recognised rules and principles for determining which country’s law will apply, and if necessary, providing guidance to national courts. In some cases, international codes are developed which can be used directly, in transboundary transactions or other situations to avoid creating a conflict of law in the first place. Private international law embodies a number of issues that are either unresolved or incompletely resolved to this day, and form the basis of a thriving professional services market for international lawyers.

3.3.2 Forums for private international law

To repeat for clarity, the forums for private international law are (only) the same forums that are available under national law. The difference is not in the forums themselves, but in the paths by which one gets to those forums, and the tools that are used to decide on whether remedies should be awarded and what remedies are appropriate.

In commercial arena, private international law is increasingly conducted using arbitration. For this purpose, the number of international arbitration agencies is growing,^{lvii} and a great many firms are offering their services as arbitrators, mediators, and other ADR providers. No matter who conducts the arbitration, however, its results can be binding only by virtue of meeting the jurisdictional and other requirements of the national forum, as described in 2.4.

The primary advantage of using an “international arbitrator” or other international provider is that those persons, forums and entities are more familiar with problems of international commerce and claims, and may be able to accommodate the needs of “private international” claimants and claims more effectively as a result of this experience. At the national level, however, arbitrators and other ADR providers often have specialised in other ways, including some which offer specialised expertise and experience with environmental matters. In some cases, this scientific/technical qualification may be more important than the international one. It is important to consider these questions in selecting ADR providers, and also in deciding whether to agree to an “arbitration clause” in your contract, and in phrasing that clause.

3.3.3 Remedies in private international law

Similarly, the remedies in private international law are (only) the remedies available in national law, since in private remedies may only be created under national law. This basic premise also applies to arbitration and other ADR, whether the arbitrator/mediator/panel was an “international arbitrator/mediator/panel” or was operating at the national level. Either way, as noted above, the award of a private arbitration or other ADR outcome can be enforced only in accordance with either (i) consensus by the parties to the arbitration or (ii) application of national law, in generally the same way as any contract or other agreement would be enforced.

One interesting development with regard to private international remedies is found in the ITPGRFA. Unlike most international instruments, the Treaty includes long and detailed terms relating to private commercial instruments, including the adoption of one such instrument – the Standard Material Transfer Agreement. In an unusual move, the Treaty does not call on Parties and other affected institutions (the international agricultural research centres (IARCs))^{lviii} to adopt particular law or regulations implementing the Treaty. It also does not make these rules a part of the Treaty (although this would have made these provisions “self-executing”^{lix} it would probably have prevented many countries from ratifying the Treaty due to issues of national sovereignty.) Rather, it takes a third path, discussing the contracts as if they were entirely separate from any country’s law, and designates that they will be subject to arbitration.^{lx} Article 8 of the Treaty

includes a specific provision which allows “any party” (including the Governing Body of the Treaty, which is considered a ‘third party beneficiary’ of all SMTAs) to

submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.

To avoid reference to national law, the SMTA specifically adopts the UNIDROIT Principles of International Commercial Contracts 2004, for interpretation purposes.^{lxi} On the other hand, however, the Treaty’s submission to the Note by the Treaty’s Secretary stated that “Contractual disputes arising under the standard MTA will be determined under normal national contract law, or in such other way as may be specified in the standard MTA.”

3.4 Special concerns – Development of international commercial law

Since the middle years of the 20th Century, the growth in international commerce and trade has caused many experts to consider “international commercial law” as a particular category of law. International Commercial Law includes some elements of public international law, such as the WTO processes and global trade issues, which are addressed directly between governments, even where the problems arise in specific individual transactions.^{lxii} In addition, however, international commercial law focuses on some specific international instruments and principles relating to many aspects of private international law. For purposes of the current discussion, one of the most important developments is a combination of public/private international law – the development of international commercial codes.

“Conflict of laws” create difficult challenges in the area of commerce and trade, because the locales and situation of each element of a contract may be different in ways that alter the application of law. The provision of goods and services may occur in one country, the receipt of those goods/services may happen in another country, financial assurances (guarantees and sureties) may be provided through an entity in another country. The contract may state particular provisions regarding the law governing the contract, but the national court must still use its own laws to determine whether it has jurisdiction over the defendant, actions and properties involved. Many other aspects of the intersection of potentially relevant national laws add other complications.

The only options that seemed to offer a long term solution to these challenges was to negotiate a Convention that includes a specific and detailed international code applicable to the transactions in question, which allows the national court to bypass many of the most difficult problems. These codes are “self-executing” – that is, if a country becomes a party to the international convention, then it automatically agrees to apply the international code to all specified transactions. For example, countries that are party to UNCITRAL’s Convention on Contracts for the International Sale of Goods^{lxiii} agree that the code contained in that Convention shall be applied to all international contracts for the sale of goods. The code does not solve all conflict of laws issues in those cases, but it makes them a lot simpler.

Normally, countries become party to such self executing conventions with difficulty, owing to the underlying sovereignty problem of allowing foreign governments to dictate laws binding within their jurisdictions. For example, the UNCITRAL Convention mentioned above has only 70 parties, and a similar earlier attempt – the UNIDROIT system of contracts – currently lists five or fewer parties to its various instruments.

Despite this low number of direct participants, both systems have a broader role in international commerce, since they provide a common ground for parties to contracts. It is possible for such parties to utilise either system by specifying it in their contract. This can make it much easier to enforce the contract, even where the countries involved are not Parties to the convention. For example, although it has very few remaining parties, the UNIDROIT series of instruments remains particularly interesting to ABS negotiations, because the FAO negotiators, in adopting the Standard Material Transfer Agreement for the International Treaty on Plant Genetic Resources for Food and Agriculture chose to apply the UNIDROIT system, for purposes of interpreting or enforcing the individual agreements that are entered into using the SMTA.

It is important to remember, however, that these are just codes which *enable* contracts to be interpreted and enforced and, if necessary, also enable remedies to be awarded. They cannot exist as binding codes or provide remedies, unless they are applied through a national legal system to interpret, enforce or remedy them. Similarly, these international documents do not provide any basis for addressing violations of a foreign-country's administrative documents (permits and licenses), and they do not apply to actions for failure to comply with domestic law.

4. “Remedies Available” in ABS

The next step in this analysis is to marshal a list of particular remedies that apply or may apply to ABS situations. In doing this, it is necessary to look at the laws relevant to actions and remedies in the “user country.”

This part of the analysis must begin by being clear about what “user country law” (or more correctly, “user-side law”) means. Every ABS situation involves at least two countries, one which is the source or provider of the genetic resources in question, and one (or more) in which the genetic resources will be “utilised” and generate commercial and/or non-commercial “benefits arising from the utilisation of genetic resources.” However, each ABS situation involves a different combination of countries. In some situations, Country A will be the user of resources from Country B, while in others Country B will be the user and Country A the source.

Which country is the “user country” in a given transaction. Currently, it is not always clear which activities constitute the “utilisation of genetic resources,” however most countries seem to agree that this term includes both the manipulation of DNA in the laboratory and the development of new varieties of domesticated plants and animals through more conventional methods. If that is agreed, then it is clear that every country is a “user country” in at least some situations, since all countries obtain and use plant germplasm to develop of new plant varieties.

For this reason, this study has analysed all ABS legislation available through the CHM's Database of ABS Measures, as well as other laws and mechanisms, from both developed and developing countries. In this analysis, it was looking for “user-side measures” – that is, laws that authorise foreign source countries and other providers to seek remedies against users in the legislating country. Very few ABS provisions appear to meet this criteria, or even to discuss in any way the ABS responsibilities of the users under their jurisdiction. Accordingly this report includes many provisions which are not “user-side measures, but which might be relevant in some way.

As a practical matter, however, the question of available administrative and judicial measures is largely a question of obtaining redress from situations in which significant benefits have arisen in the user country, which cannot be replicated in the source country. This prevention of replication happens primarily in two situations – where user-side patent laws prevent replication, and/or where the source country does not possess the technological or other

capacity to replicate the benefits. Consequently, most current remedy situations arise in the context of users from highly developed countries.

In short, although recognising that all countries may be “user countries” at some times, and considering all countries’ laws, this study has attempted to provide a better understanding of the laws and legal needs of “countries with large numbers of users under their jurisdiction” – that is, highly developed countries. The author wishes to underscore that *all* countries must comply with Article 15.7’s requirements, and that so far *no country* appears to have done so.

4.1 ABS situations in which remedies may apply

As usual in ABS discussions, when one considers ABS remedies, he must separately consider two primary situations – where the user has obtained an ABS agreement or permission, and where he has ‘utilised genetic resources’ without any formal contact with the source country. In many instances (but not all) a user’s compliance with national ABS requirements of the source country will result in an agreement which can be interpreted, overseen, enforced and remedied under the contract law. By contrast, if the user obtains and uses genetic resources without permission, the source country or other provider must seek redress through other legal theories.

4.1.1 Where the user has obtained an ABS contract or permission

Where a user has obtained an ABS Agreement, remedy issues are significantly influenced by the law of the user country, since many of the user’s ABS-related activities occur after he has left the source country, and is no longer subject to its jurisdiction. Obviously, source countries cannot draft laws that govern the actions of persons or entities in another country.^{lxiv} This means that the source country’s rights will largely depend on two sources, the ABS contract and the law and remedies available to it in the user country for enforcing that contract. Even where the contract specifically states that the law of the source country will govern the Agreement, the user country’s law will apply to key determinations, such as whether there is jurisdiction over the user, whether the source country has a sufficient legal basis for bringing an action, and what remedies, if any are available.

One unanswered question that may be critical is the difference between an “ABS permit” (or “ABS license” or other term) and an ABS contract. This question may highly relevant in the remedies issue, but has less noticeable impact where remedies are not involved. Within the source country, there is little difference between an “ABS permit” and an “ABS contract.” Both have essentially the same impact, when they are negotiated, signed, and implemented solely within the jurisdictional boundaries of the source country. Beyond those boundaries, however, there may be a significant difference. While most countries include at least some law enabling foreign claimants to bring actions in their courts with regard to contracts, it is less common for a country to have laws that say that domestic administrative documents (permits, licenses and other governmental instruments) of foreign countries can be enforced in the legislating country. These documents are creations of the issuing country, designed for domestic application and intended to be implemented and enforced by its processes.

Consequently, it may be much easier to obtain remedies in the user country, where the source country has granted PIC and MAT through a “contract” or similar instrument, rather than through an administrative instrument such as a permit or license. This is another issue that could be resolved simply, if countries adopted ‘user-side measures’ – that is specific laws stating that anyone within their jurisdiction who is utilising of foreign genetic resources must comply with PIC and MAT as set forth in the CBD. Without such legislation, however, source countries

should consider whether their (non-contract) rights to under their ABS law are enforceable under internationally recognised principles of contract law and civil procedure.

4.1.2 Where the user has no ABS agreement or permission

More difficult questions are raised by the possibility that a user might utilise genetic resources without an ABS Agreement and without sharing benefits. Here also, if the user (and the genetic resources being utilised) are outside of the source country, they are not directly subject to the laws and legal processes of that source country.^{lxv} The source country or other provider will have a remedy only if one of the “user countries” involved^{lxvi} has adopted laws and practices that enable and support the rights of the source country.

Situations in which a user is utilising genetic resources without permission may occur intentionally or unintentionally, wherever the user has obtained and utilised genetic resources of foreign origin indirectly – that is, without direct contact with the source country. For example a specimen collector (who did not obtain any ABS agreement, because he did not intend to use the specimen’s genetic resources) might later sell or give the specimens to the user. In such cases, many users assume that they are not bound by ABS requirements, since they did not directly obtain the resources directly from the source country.^{lxvii} If this were true, it would create an un-mendable loophole in ABS – any user could avoid ABS simply by using resources collected by some other person, whether recently or in the past, without complying with ABS processes. The later transfer of the specimens to a user of genetic resources would happen outside the jurisdiction of the source country. Consequently, for the system to make sense rationally/legally, it must apply to indirect acquisition, such as where the user obtains specimens or genetic information from some other person or entity (user, collection or middleman.)

There are many different possible frameworks that might be used to achieve the basic ABS objectives. The current framework, involving specific permission from the source country to the user for each access to genetic resources and benefit-sharing directly from the user to the particular source country whenever benefits arise from the utilisation of genetic resources, appears to be generally accepted by the Parties to the negotiations. So long as this type of framework is used, however, there is a need for care in framework creation. It is important to develop the system in a way that creates and controls carefully planned *exceptions* (that enable the system to function while recognising special cases and situations) rather than allowing *loopholes* of this type to develop.

At minimum, it must be noted that Article 15 does not limit the user’s benefit-sharing obligation to situations in which he collected the specimens directly.^{lxviii} To the contrary, it simply requires countries to legislate some provision that results in “sharing the benefits” with the source country, whenever benefits arise from the utilisation of genetic resources. It further requires that such benefit-sharing must occur on the basis of terms that have been mutually agreed with that country. This provision is entirely separate from the PIC/MAT requirements relating to access.^{lxix} As the ABS concept is currently framed, in order to provide a remedy for source countries or other providers of genetic resources, it is essential for the law in the user country to specifically recognise a duty of users to share benefits and/or take other steps to comply with the source country’s requirements.

4.2 Contractual remedies in ABS agreements

The first type of remedy to be considered in ABS situations is a private remedy – remedies agreed between the parties to the contract. These have been described by a great many commenters as the primary method of addressing the remedy question in ABS. As noted, a well drafted and

legally unambiguous contract will normally provide a sufficient basis in itself for remedying any uncertainties that arise between the parties to the instrument. If its terms serve this function, it is possible that the parties to the contract will not need to utilise any legal, administrative or alternative process.

Normally, where the national law which governs the contract is clear and its application to the subject matter is legally certain, it will not be necessary to restate these legal matter in the contract itself. The contract will express the unique facts of the contract, but will usually not specify the underlying law or remedies in detail, instead relying on the basic remedies available at law. While special kinds of contractual remedies, such as liquidated damages clauses, guaranties and arbitration clauses, are often specified in contracts, other basic contractual remedies (rights of parties in the case of non-performance, and other rights) may not be specified, or may be mentioned only in minimum references to legal remedies.

For a variety of reasons, however, the “normal rules” governing ABS contracts are not clear. Ambiguities and other doubts cloud questions of how national law in other jurisdictions applies to “genetic resources.” Consequently, ABS Parties cannot make assumptions about the application of contractual law. Instead, they must specify many legal details, rights, and remedies, as well as the obligations of the parties, benefit-sharing formulas and other matters.

The result of this approach, however, is that ABS contract negotiations sometimes become protracted and difficult. In 2002, this fact led to calls for streamlining ABS processes – one of the points recommended by the Bonn Guidelines. Such streamlining is not practical, however, until the basic ABS concepts and laws are clearer, so that the parties and courts would have a consistent basis for interpreting and applying ABS contracts.

4.3 Legal remedies specifically directed at ABS and compliance with PIC and MAT

The following discussion describe and analyse provisions submitted by countries in response to the Secretariat’s request for information. Responses were provided only by a few countries. To confirm that this list of relevant provisions, the author also examined the legislation in the ABS database, and from other sources.

For each provision, this study will usually consider three specific points: (i) description of the law or remedy; (ii) conditions under which it can be asserted; and (iii) special issues relevant to ABS compliance. Except where noted, this study does not analyse measures that are not adopted in law or are not currently available in national courts or administrative processes.

4.3.1 Submission by Denmark

In response to the Secretariat’s request, Denmark provided information on its patent law.

Description of the law or remedy

As the Secretariat noted regarding Denmark’s submission:

Denmark has revised its Patent law with a provision requiring patent applicants provide information on the origin of the genetic resources used in the invention for which a patent is applied for. In cases of non-compliance, no sanctions are provided in the patent system. However, under criminal law sanctions are established regarding the provision of false information to public authorities.

Although not a remedy, this provision might give additional information to the source country, and may allow the source country or provider to ask Denmark to bring a criminal action against the patent-holder.

Conditions under which the remedy can be asserted

Patent disclosure provisions are not actually remedies, but pre-remedy information tools. If a user makes such a disclosure, then the source country can possibly become aware of his utilisation of genetic resources or of the fact that this utilisation has produced a patent (either a non-commercial or pre-commercial benefit).

The penalty provision described above appears to increase the amount of information available to a source country or other provider. Such information may improve the source country's ability to take formal or informal action to ensure compliance or seek remedies in cases of non-compliance.

Additionally, the law allows the source country to ask the government of the Netherlands to take criminal action against the user, if the source country knows that this patented innovation "arises out of the utilisation of [the source country's] genetic resources." Admittedly, few source countries will have information enabling them to make this request, however, other interested parties (including NGOs for example) may also be able to make such a request.

As further discussed in 4.3.6 and 4.4.2, however, the penalty element of this provision may have an indirect impact on compliance, but will not offer a remedy. In addition to the other limitations on the remedial impact of penalties, it should be noted that the above provision applies only to patent disclosure, not to the user's failure to comply with the laws of the source country. A user who properly discloses the country of origin of his materials, or states without fraud that he does not know the country of origin, is not subject to any legal action in Denmark for failure to comply with PIC and MAT of the source country.

Special issues relevant to ABS compliance

The international attention directed at "disclosure of origin in patent applications" is based on the idea that the patent application can provide information to the source country or other provider, who may then use that information to compel the user's performance with PIC and MAT. This presupposes that there is other law in existence under which such compulsion can be enforced. Like most other CBD parties, Denmark has not submitted any measures for inclusion in the CBD's database of ABS measures. The author lacks the linguistic capacity to review Danish law, and so cannot determine if this means that there are no such measures in Denmark, or only that Denmark has not submitted them yet. Tentatively, however, it appears that there is no direct ability of the source country or other provider to bring an action in Denmark against a user who has utilised genetic resources without complying with the source country's ABS legislation.

In addition, as noted in the Danish submission, the disclosure requirement is not tied to patent validity. This means that if the patent holder violated the disclosure requirement, the patent cannot be revoked or invalidated.^{lxx}

4.3.2 Submission by Sweden

In response to the Secretariat's request, Sweden, too, provided information on its patent law.

Description of the law or remedy

As the Secretariat noted regarding Sweden's submission:

In Sweden, a new provision on the disclosure of origin of biological material of plant or animal origin in patent applications came into force on 1 May 2004, in accordance with article 5 of the Patents Regulations (SFS 2004:162) under the Patent Act. The article provides that if the origin is unknown, it shall be stated. It is also provided that "lack of information on the geographical origin or on the knowledge of the applicant regarding the origin is without prejudice to the

processing of the patent application or the validity of rights arising from a granted patent.”

This provision invokes the same analysis as the Danish provision (above.)

4.3.3 Submission by Norway

In response to the Secretariat’s request, Norway, too, provided information on its patent law.

Description of the law or remedy

As the Secretariat noted regarding Norway’s submission:

In Norway, the new paragraph 8(b) of the Patent Act is to support compliance with prior informed consent of the Contracting Party providing the resources. Infringement of the duty to provide information is subject to penalty in accordance with the General Civil Penal Code §166. The duty to provide information is however without prejudice to the processing of patent applications or the validity of granted patents. The General Civil Penal Code §166 reads as follows:

“Any person shall be liable to fines or imprisonment for a term not exceeding two years who gives false testimony in court or before a notary public or in any statement presented to the court by him as a party to or legal representative in a case, or who orally or in writing gives false testimony to any public authority in a case in which he is obliged to give such testimony, or where the testimony is intended to serve as proof.

“The same penalty shall apply to any person who causes or is accessory to causing testimony known to him to be false to be given by another person in any of the above-mentioned cases.”

This provision invokes much of same analysis as the Danish provision (above.) Norway’s submission gives greater information regarding the penalties that may be asserted against one who violates the disclosure law, emphasising the lack of any right of the source country or provider to invoke this law directly.

Conditions under which the remedy can be asserted

The conditions and concerns relating to this provision are, for the most part, the same as those described in the Danish provision. In addition, the Norwegian provision applies to “biological material” rather than “genetic resources”^{lxxi} suggesting that the breadth of the disclosure will be greater, possibly providing source countries and other providers with a very large body of information.^{lxxii}

Special issues relevant to ABS compliance

As noted in connection with the Danish submission, Norway’s law currently does not include any specific provision requiring users within its jurisdiction to comply with source country law and/or PIC and MAT. It has taken some steps to resolve some of the deficiencies in its law, relating to source countries. Most notable, Norway has publicised ongoing proposals for a specific requirement^{lxxiii} that calls for compliance with source-country law:

Import for the purpose of utilising genetic material from a country which requires prior informed consent for either the utilisation or for the export can only happen in compliance with such prior informed consent. The entity with the genetic material in hand is bound by the conditions imposed on the use of the

material. The Norwegian government can, by court case, enforce the said conditions.^{lxiv}

As this proposal is not in force as yet (and some sources indicate that a new draft is being prepared that will replace it), it will not be separately evaluated as a remedy. However, it is worth noting that this provision satisfies one of the problems described above, since it specifically addresses compliance with PIC and MAT in the source country. It does not, however, enable the source country or other provider to bring an action to enforce these requirements.

4.3.4 Submission by European Community

Although specifically noting the possible relevance of intellectual-property-based approaches (such as those described in the Danish, Swedish and Norwegian submissions), the European Community's submission focused on four elements: (i) clarification and enhancement of the role of the national ABS focal point;^{lxv} (ii) the application of the dispute resolution provisions of the Convention; (iii) measures to create alternative dispute resolution systems, and (iv) need for further study, analysis and legal development in the area of "enforcement of foreign judgements." The following discussion addresses on points (i) and (ii) – which involve solutions that are strictly directed at ABS matters. Points (iii) and (iv) relate to general remedy questions, and are discussed in part 4.4.

[a] Integration through national ABS focal points or the CBD

Description of the law or remedy

The Note by the Executive Secretary quoted the following from the EC's submission:

Another problem that could arise in relation to access and benefit-sharing disputes concerns the possibility for providers to obtain information and access to justice in the countries where the users are located. In this respect, countries' access and benefit-sharing focal point could play a facilitator role by providing information, including on the legal system of their country.

These comments constitute a suggestion for resolving ABS issues without the need for legal remedies, rather than a definite remedial measure.

Conditions under which the remedy can be asserted

Unless the specific countries in question agree to utilise their respective ABS focal points as mediators/facilitators of such disputes, the use of this suggestion in lieu of a remedy will require two elements. First, the parties to the particular ABS contract or other instrument will have to agree, either in the instrument or at the time of the dispute, to turn the matter over to this resolution process and to abide by its result. Second, the ABS focal points (or at least one of them) will have to be willing to take on this responsibility. In many countries, government officials who take on extra responsibilities of this type, without specific legal authorisation may risk being liable to one of the parties, or to third parties who oppose or challenge the decision. Consequently, before this approach can become functional, it may be necessary for Parties to adopt appropriate legislation authorising ABS focal points to take this action, including measures for oversight and appeal (to ensure that the ABS focal points' decision is legal and fair) and protecting the focal point from liability, so long as the mediation or facilitation is conducted in accordance with those legal requirements.

Special issues relevant to ABS compliance

Assuming that either the user or the user country was willing to recognise the ABS claim of the source country or other provider, it may be possible to utilise national ABS focal points, or to develop COP-based mechanisms for resolving ABS disputes, without the need for formal

remedies in user-country law. Remedies would still be needed where the user was unwilling to recognise an ABS claim, however.

[b] Utilisation of CBD Articles 23 and 27

Description of the law or remedy

Another suggestion made by the EC submission was the possibility of direct use of the CBD's COP and dispute-resolution mechanisms to address these problems:

Moreover, controversies between providers and users located in different countries could be presented to the Conference of the Parties on access and benefit-sharing and mediated by national authorities.

As noted earlier in this study, CBD Article 15 applies only to trans-border genetic resource issues. The CBD does not require any country to control or address purely domestic access or benefit-sharing (*i.e.*, where the user and provider/source are both within the same country), so that all ABS matters would be “*between providers and users located in different countries.*”^{lxxvi}

The suggestion of using the CBD Conference of the Parties as a mediating body in ABS disputes must be guided by the contents of the Convention itself. The most relevant provisions to consider are Articles 23 (“Conference of the Parties”), 31 (“Right to Vote”), 27 (“Settlement of Disputes”) and the two parts of Annex II to the Convention (addressing “Arbitration” and “Conciliation.”) In this connection, the first question that must be addressed is what steps must be taken to enable the COP to serve as a forum for the presentation of disputes “on access and benefit-sharing and mediated by national authorities,” as suggested in the EC submission. In general, Article 23 empowers the COP to take two actions that might lead to such a forum, specifically,

The Conference of the Parties shall keep under review the implementation of this Convention, and, for this purpose, shall

(g) Establish such subsidiary bodies, particularly to provide scientific and technical advice, as are deemed necessary for the implementation of this Convention; [and]

(i) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation.

Both of these options would appear to require the development of special procedures before the COP could operate as a *quasi*-judicial forum for reviewing and protecting the rights of parties in situations in which ABS compliance is in dispute.

One of the most important obstacles to the use of the COP in this way relates to the right to vote in COP meetings, as expressed in Article 31, and the ongoing open question regarding the rules of procedure in the COP. Article 31 basically gives every Contracting Party one vote in all decisions, however, this right is significantly impacted by the Rules of Procedure of the CBD, which determine how voting shall be conducted. Currently, with regard to voting the Rules of Procedure and the Convention provide that,

- Decisions regarding the financing of the Convention or COP shall be taken pursuant to rules that may be separately agreed by the parties;^{lxxvii}
- Decisions establishing the Rules of Procedure of the Convention must be unanimous;^{lxxviii}

- Decisions on other procedural matters may be made by a vote of a majority (one more than half) of the members present and voting (that is, not abstaining);^{lxxxix} and
- The COP has been unable to resolve disagreement over the manner in which decisions on “matters of substance” shall be made.^{lxxx} The relevant section of the Rules of Procedure (Rule 40.2) remains bracketed. Unless/until those brackets are removed, the COP can act only by consensus.

Unless/until the controversy over Rule 40.2 is resolved, this means that the COP can only take action by consensus. Under the current bracketed rule, any Party placing an ABS dispute before the COP could pre-control the decision, by choosing how the dispute was phrased, and any country which wished to prevent the COP from deciding need only vote against the consensus.

A second possibility for utilising the Convention in settlement of ABS related disputes would be the use of Article 27 and the Annexes governing arbitration and conciliation under the Convention. These provisions, however, only apply to disputes between Parties to the CBD, and are generally not available to private or non-governmental litigants. That is, any ABS dispute addressed under Article 27 must be characterised as a dispute between countries. In some cases, this will be true from the outset – where a government or governmental agency formally obtains genetic resources and ABS contract or permission directly from another country or some other authorised provider. In general, however, ABS arrangements involve private users or users who are not acting as representations of the user-country government. In those cases, Article 27 will only be available where the user country is willing to take on the role and responsibilities of the user (private company or other non-governmental user) in order to bring the dispute. In that case, the dispute can be resolved under primary principles of public international law, whether through the International Court of Justice, or in accordance with the provisions of Annex II, which provides some basic principles for arbitration and conciliation (the public international law equivalent of mediation.)

A less problematic statement of the role of the CBD in dispute resolution is found in Decision 391 of the Andean Community, which notes that “Any disputes that arise with third countries (not members of the Andean Community) must be settled according to the provisions of this Decision (*i.e.*, *Decision 391*.) If a dispute arises with a third country that is a party to the CBD, the solution adopted must also abide by the principles established in that agreement.”^{lxxxix}

Special issues relevant to ABS compliance

As noted in literally hundreds of books, articles and presentations on ABS, there is little current agreement on the legal issues and concepts that create the ABS system. Any process facilitated by the national ABS focal points will have to be based on principles of equity and willingness of both parties to participate in development of a satisfactory solution. At present, there is little basis to enable the COP to take action in these cases, suggesting that a COP-based remedy framework would require significant negotiation and development.

4.3.5 African Model Law

The African Model Law^{lxxxii} offers an example of the inclusion of special provisions for arbitration as a possible remedy, in the context of “plant breeders rights.” Since the author is not aware of any country which has yet adopted the model law, however, this report will not further discuss it.

4.3.6 Penalty measures

As noted above, penalty provisions are not normally considered to provide remedies, however, many national submissions and other documents suggest that, for many countries, the primary (and sometimes the only) legal measures that can be used in the case of an ABS violation may be penalties. Where penalty provisions appear in existing legislation, it appears to be focused only on penalties against users of the genetic resources of the legislating country. This means, that, if the user, some of the resources being used, or other property is found in the source country, or some other basis for jurisdiction is claimed a penalty may be sought. Although, as discussed in 2.2, penalties are not remedies or compensation to the claimant, there are some remedial consequences to the use of these penalties, as discussed below.

In addition, draft legislation in Norway offers the first and only example of a specific “user measure” – that is, a law which requires users under the jurisdiction of the legislating country to share benefits when they utilise genetic resources of foreign origin. Although this law does not provide remedies, its penalty provisions offer another kind of possible remedial impact.

[a] *Source country penalties for use of source country resources*

Description of the law or remedy

Legislation available through the CBD’s ABS database includes a number of penalty provisions that can operate to provide some return to the source country, although only applicable within the source country’s courts and agencies. These are found in the laws of Australia (Commonwealth^{lxxxiii} and State of Queensland^{lxxxiv}), Afghanistan,^{lxxxv} Bulgaria,^{lxxxvi} Costa Rica,^{lxxxvii} El Salvador,^{lxxxviii} Ethiopia,^{lxxxix} The Gambia,^{xc} India,^{xc1} Kenya,^{xcii} Malawi,^{xciii} Mexico,^{xciv} Philippines,^{xcv} Portugal,^{xcvi} Republic of South Africa,^{xcvii} Uganda,^{xcviii} and Vanuatu,^{xcix} as well as in the African Model Law.^c These provisions include a range of direct penalties (fines and imprisonment), as well as powers to inspect, seize, confiscate and, in some cases, retain and sell specimens, equipment and other material and property. A few other countries, which have adopted general ABS penalty legislation have phrased those provisions in a way that might allow them to be applied to illegal use of foreign genetic resources in the source country, including the Draft Central American Agreement on ABS,^{ci} and the Andean Community Decision 391.^{cii} All of these provisions operate in a remedy-like fashion, when the country applying the remedy is the party that would be entitled to a remedy under the ABS arrangement.

Conditions under which the remedy can be asserted

In limited circumstances, penalty provisions and other rights may operate as a remedy for a source country. For example, consider a source country that is seeking remedies in its own courts against a user who has used that country’s genetic resources in violation of the source country’s ABS law. If that source country can get jurisdiction over the user or some assets of the user – *i.e.*, if the user is operating or owning property within the borders of the source country – it may be possible to bring a criminal action against the user in source country courts. That action could result in fines and confiscation of equipment, in addition to other possible penalties.^{ciii} Since these fines and confiscated properties are paid to the source country, the net effect of these financial penalties would be very similar to a financial remedy. The primary differences would be

- ii. the amount of the fine may be different, (penalties are often calculated differently from remedies, or the value of seize-able property may not be significant),
- iii. most criminal/penalty suits actions are brought at a single point in time, so that the fine will not satisfy the longer term benefit-sharing obligation, if any;

- iv. penalties are generally paid to different accounts – hence where ABS payments (and remedies) might be owed to a specific agency or ministry or subject to specific distribution rules, a penalty will typically be paid into the country’s general fund and allocated under national budget processes;^{civ} and
- v. courts deciding penalty and criminal actions often are not empowered to order the non-compliant user to comply in future, especially a user operating in another country. Their decisions are not as easily enforced across borders as civil and arbitration awards (see below.)

At most, however, these provisions provide a “pseudo-remedy” only for the legislating country itself, as to its own resources.

Special issues relevant to ABS compliance

The “remedy” aspect of these laws is limited to the situation in which the source country brings a domestic action against a foreign user of the source country’s own genetic resources. As these laws are phrases, a domestic company or researcher is utilising genetic resources of another country, this law will not provide any remedy or other return to that other country or provider.

[b] *Penalties for use of foreign genetic resources without PIC and MAT (draft)*

Although not yet adopted, proposed legislation in Norway (the “draft Nature Diversity Act”^{cv}), offers a much stronger legislative base for utilising penalties as a means of deterring ABS violations (a negative incentive that might encourage users to comply with ABS requirements.) The Norwegian draft legislation represents the only publicised legislative proposal to squarely attempt to meet the primary obligation of Article 15.7. It specifically states that the utilisation in Norway of genetic resources from other countries of origin or providers may only happen if the user has complied with the requirements of those other countries – specifically with the requirement of PIC and the contents of any MAT. At present, no country has adopted such a provision.

The adoption of this provision would not actually create a remedy for source countries and other providers, since the draft Act only considers penalty. It could, however, create a possible basis for them to seek remedies under Norwegian civil law, by clearly stating that benefit-sharing is required of all users.

4.4 *General remedies and other relevant provisions*

An obvious conclusion of the analysis in 4.2 is national ABS legislation does not authorise direct remedies in the user country, although a few countries have adopted measures that may be partially relevant to the protection of the rights of the source country or other provider. This suggests that countries expect or hope that general law on remedies, contracts and other relevant issues will be sufficient to address ABS issues without more. From the earliest negotiations, and in the early years following the adoption of the CBD, it was stated, emphatically and repeatedly that ABS implementation would occur through national contract law. This assumption continues to be held by many today.

As note in 2.3, however general remedies are broadly available only when a claimant is able to bring a legal action in the courts of the user country. This means that to obtain a remedy –

- (i) the claim (whether it is brought through a court, in an administrative agency, as an arbitration award, or using some other path) must meet the substantive requirements of law of the country in which the claim is filed or enforced,

- (ii) the claimant must comply with that country's procedural and jurisdictional rules,
- (iii) the claim must be supported by evidence and arguments in a form and content that is recognised and useable in those courts,
- (iv) the claim must seek one of the above remedies, and that remedy must be authorised for use with the particular kind of claim involved.

These four factors are generally not a problem for litigants who are based or operate within the country in which the claim is brought. They have access to lawyers trained to use that system, legal assistance programmes (where they lack funds or experience necessary) and a general awareness of how law, courts, litigation and alternative processes fit into their society.

ABS complicates the picture in that most claims for remedies will be brought by foreign claimants. In addition ABS necessarily involves a re-conceptualisation of several critical aspects of conventional law. As a legal matter, it creates a special legal interest or right in the "genetic resources" of a species, which is not automatically obtained by legal possession of a specimen of that species. In other words, one may legally own the biological specimen, but not have a right to "utilise" its "genetic resources."

The full impact of these legal ambiguities is discussed in part 5, below. In identifying national remedy legislation, it is important to remember that we currently have not developed an understanding about how each country's standard forms of law (civil and equitable court claims, administrative actions, arbitrations, etc.) should apply to ABS. It is likely that, should such cases be brought, they will be decided in very diverse ways. Since every ABS claim or remedy involves transboundary litigation, this diversity of approaches suggests that additional principles of "private international law" may be needed to help clarify the precise nature of these claims and the procedures and processes that apply.

So long as the law has not clarified the critical concepts underlying the ABS framework, it may be very difficult to know whether/how an ABS claim can fit within the normal substantive requirements of contract law, tort law or other laws (see 2.4) to meet the basic requirement of point (i). In ABS, the existing ambiguities have generally prevented claimants from seeking legal remedies under ABS authority. As a consequence, more acrimonious claims of "biopiracy" are prosecuted in the "court of public opinion" (through the news media and internet), from which no legal solutions can evolve. In order to regularise this situation, it is necessary to clarify national law regarding genetic resources and its application to those users within the country's jurisdiction who are utilising genetic resources of other countries.

A few of the submissions to the Note by the Executive Secretary, suggested or discussed the applicability of general commercial and other remedies. In addition, other submissions as well as presentations in other ABS meetings regarding the application of general penalty laws (those not directly written about ABS situations).

4.4.1 Commercial and other remedies in national and private international law

The following sections discuss the application of national and private international law in the commercial and procedural fields to ABS claims. The EU and two other countries included some of these laws and issues in their submissions, as included in the Note by the Executive Secretary. In addition, Costa Rica's ABS legislation offers a potential step towards clarifying the relationship of ABS to these more general provisions of private international law.

It is likely that these procedural issues will have a significant impact on ABS, by enabling courts to consider and decide ABS cases. Over time, the body of relevant solutions will provide guidance for future decisions, which may evolve into primary principles.

4.4.1.1 Submission by the European Community

In addition to the CBD-specific measures discussed in 4.2.4, the EC submission discussed the relevance of two more general bodies of law: alternative dispute resolution systems, and “enforcement of foreign judgements.”

[a] Alternative dispute resolution

Description of the law or remedy

The Secretariat’s Report quoted the following from the EC’s submission:

One alternative dispute resolution system that could help addressing these problems is arbitration. For instance, it could prove helpful, under the terms of a MTA, for parties to agree to submit their disputes to a specific arbitration system available under international law whose decisions would be enforceable in a great number of States. Arbitration procedures are normally faster and less expensive than court proceedings and could therefore prove more attractive than court proceedings.

These comments do not reflect an existing measure in the European Community, but rather a suggestion regarding a direction in which the Parties might look for further assistance.^{cvi}

Conditions under which the remedy can be asserted

As noted above, ADR mechanisms provide a pathway to obtaining a remedy where the parties to the ADR process (source country and the user) have agreed to be bound by their outcomes. This may happen where an ABS contract or other instrument contains an arbitration clause, for example, or where the parties agree to binding dispute resolution at the time of the dispute.

Special issues relevant to ABS compliance

To enforce a binding arbitration award in any country, one must first determine whether the laws of that country will enforce this particular type of award, and then bring an appropriate action that complies with the relevant national requirements. Other types of alternative dispute resolution are non-binding – that is, the parties must later agree to the result, and if they do, that agreement may constitute a separate (enforceable) contract.

Arbitration and other alternative dispute resolution processes can provide a good and final result where there is a controversy over whether a user is complying with his ABS contract or other instrument, if the user has agreed to arbitration. It offers no particular remedial option in cases in which there is no ABS contract, unless the user voluntarily submits to binding arbitration.

[b] Enforcement of foreign judgements

Description of the law or remedy

The Note by the Executive Secretary quoted the following from the EC’s submission:

Enforcement problems in relation to access and benefit-sharing national laws and agreements can arise. Possibilities to prevent these situations need to be further studied on the basis of experience gained under international law in the enforcement of foreign judgements. Experiences in the field of intellectual property, in relation to the issue of entitlement to apply for or be granted a patent, could also provide inputs to solve enforcement problems.

This comment does not describe any particular remedy available, but notes that, in addition to the current efforts to require or permit of “disclosure of origin in patent applications” (discussed in 5.1.1, 5.1.2 and 5.1.3, above), patent law can demonstrate some of the problems that arise where one party controls the entitlement to use a commodity, and this right is granted or enabled on the basis of a contract or agreement which cannot be monitored by objective control on the movement or transfer of physical goods.

In this connection, it is useful to note that patent law (considered by some to be a primary model on which regulation of genetic resources should be based) places all of the cost and responsibility for overseeing controlling the use of the patented invention or discovery on the holder of the patent. This apportionment is very appropriate in the patent context, since that holder is presumably engaged in promotion or moving toward commercialisation of the innovation or discovery – and therefore has the best financial and technical ability to undertake such oversight and control. Even so, it has proven nearly impossible for large multinational companies that are patent holders to prevent commercial piracy and unauthorised reproduction and sale of patented products. Smaller entities with fewer resources available for oversight, litigation and other enforcement are essentially unable to prevent patent infringements of this type.

If the patent model were used in the context of genetic resources, it would repose all responsibility and cost of protecting the source country’s interests on the source country, rather than on the entity that is commercialising/utilising the genetic resource. This burden could effectively prevent most developing countries from taking any action to enforce their rights under this model.

4.4.1.2 Submission by France

Description of the law or remedy

The French submission identified a number of provisions in response to the inquiry about administrative and judicial remedies, focused primarily on a number of international instruments enabling or facilitating foreign claimants seeking redress in French courts (described in 3.3, above.) Amid these international instruments, however, this submission noted the following national remedial measures:

The New Civil Code of Procedure governs international arbitration in its articles 1492 to 1507;... [and] judicial cooperation at the different procedural stages, [listing three international instruments relating to the procedural ability of foreign parties to bring legal actions in courts of another country] is completed by a regime of judicial assistance defined by law no 91-1266, 18 December 1991.^{cvi}

The submission’s list of international agreements designed to enable or facilitate access to the courts in transboundary commercial disputes, includes, the European Community Convention on the Law Applicable to Contractual Obligations (Rome, 1980), Convention on the Law Applicable to Agency (The Hague, 1978); UNGA resolution 57/18 (which seeks to promote the use of international conciliation mechanisms in public international law disputes); the Convention on the Taking Evidence Abroad in Civil or Commercial Matters (The Hague, 1970); the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 1965); and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1965). Some of these documents have regional application, but many are global in scope. Their use in the context of ABS Contracts will be enhanced if (i) such contracts

are drawn in the expectation of being interpreted under a consistent international system such as those represented in this list, and (ii) the courts in the country of the user apply such a system.

Conditions under which the remedy can be asserted

As noted above, civil procedure, arbitration and related international instruments do not *provide or constitute* remedies, but rather *facilitate access to remedies* by the foreign claimants in the courts of the legislating country. Without this facilitation, remedies could not be made available to anyone. This submission provides a good overview of the possible sources of such procedural assistance in bringing an action seeking remedy.

Special issues relevant to ABS compliance

As noted in the French submission, “Legislative and administrative provisions therefore exist in France for the different aspects of the settlement of economic disputes concerning private entities.” This clearly demonstrates that ABS remedies in France are expected to be those remedies that can be asserted using the country’s general commercial law.

4.4.1.3 Submission by Spain

Description of the law or remedy

The Secretariat’s note quoted the following, from the Spanish submission:

In Spain it is clear that institutions from and/or countries party to the Convention on Biological Diversity could use all the judicial remedies under civil law to redress a situation of non-compliance with article 15 of the Convention. Under article 96 of the Spanish Constitution article 15 would be self executing (direct effect) and there is no doubt that Spanish courts could hear and remedy any case in which article 15 has not been respected whenever anybody having enough standing (and the law on standing is very open) might bring a case under contract law (if there is evidence of disregarding an MTA) or under general civil actions (civil damage caused by somebody’s conduct) whenever the use of the genetic resource has not been subject to any MTA, or PIC.

Conditions under which the remedy can be asserted

The submission suggests that an action will lie for any claim against a user, whether having obtained an ABS contract or not.

Special issues relevant to ABS compliance

The statement that Article 15 is self executing, although clearly demonstrating the strength of the Spanish government commitment to promote ABS, is somewhat confusing when applied in the context of administrative and judicial remedies under Article 15.7, which calls for each country to “adopt legislative, administrative and other measures....” Rather than suggesting any specific controls or requirements of private actors that could be ‘self executing. Since Article 15.7 does not specify the nature or contents of the measures (only the results that must be obtained), either Spain or the EC or the international regime will need to provide more specificity to enable Article 15.7 to be directly used as law in countries that consider the CBD to be ‘self-executing.’^{cvi}

4.4.1.4 Costa Rica

Although not specifically submitted on this point, one provision of the Costa Rican Biodiversity Law is worthy of note. The law includes a specific statements that the State has the duty to engage in international cooperation with other countries in connection with the conservation, use,

development and exchange of elements of biodiversity.^{cix} Although this provision focuses on neighbouring countries and those that share transborder ecosystems or other common interests with Costa Rica, it is possible that a general provision regarding a duty to cooperate might constitute a useful first step enabling countries to adopt frameworks for regulation or oversight of users of foreign-origin genetic resources who are active in the country.

4.4.2 Penalties for the illegal importation of biological resources

As noted above, some countries have adopted penalty provisions in their “provider-side” ABS measures that may have some remedial impact with regard to claims by that country against users who are still operating in that country. In a similar fashion, some countries’ general penalty legislation may operate in a similar way. Such general provisions would also apply in countries without ABS laws, as all countries are clearly authorised to protect their sovereign rights in their own resources.^{cx} In addition, a few countries have indicated that penalties under other specific laws (*i.e.*, laws not directly mentioning ABS issues) can operate to penalise users under their jurisdiction who do not comply with the ABS requirements of the source country.

4.4.2.1 General penalty law: Submission by Colombia

Description of the law or remedy

The Secretariat quoted Colombia’s submission, as follows:

The Criminal (Penal) Code (Law 599 of 2000), in article 328 establishes that: ‘Everyone who through breach of the existing legislation introduces, exploits, transports, deals illegally, trades, takes advantage or profits from the specimens, products or parts of fauna, forest, floral, hydro-biological resources of threatened species or species in danger of extinction or of genetic resources, will be sentenced to imprisonment of two (2) to five (5) years and a fine of up to ten thousand (10,000) times the current monthly minimum wage.’

The author has not been able to review this provision directly, and so cannot determine whether the phrase “the existing legislation” refers only to Colombian legislation or includes legislation of other countries. It seems clear (due to the references to “threatened species or species in danger of extinction”) that this provision is intended to address more than just ABS-related legislation (possibly including legislation on endangered species protection and protected areas.)

Conditions under which the remedy can be asserted

In general, it appears that this provision will provide Colombia the same kind of partial remedy as is described in 4.2.6, above, where it is seeking remedies against user of its own genetic resources, but does not address the obligations of Colombian users of foreign genetic resources. As noted there, these penalty provisions currently provide the clearest source of any redress available to source countries, although they have certain limitations with regard to jurisdiction over foreign users, and also with regard to the recipient and distribution of any moneys received. They may have some potential use as deterrents or negative incentives encouraging compliance.

4.4.2.2 Other penalty measures – illegal importation of wildlife and other property

In previous public meetings and presentations, the use of environmental penalty measures relating to the illegal importation or possession of wildlife, have been offered as a possible legal solution for enforcement of ABS. These proposals can be divided into two categories –

- legislative measures implementing CITES and

- other controls on the smuggling or importation of wildlife.

As noted above, neither category of measure actually provides a ‘remedy’ for the source country or other provider, however such penalties may, if they can be applied to issues of ABS compliance, constitute one more disincentive to those considering non-compliance, and encourage users of genetic resources to seek ABS permission.

[a] *CITES implementation laws and ABS*

In general, the limitation of CITES to a specific list of (endangered and threatened) species forms the primary limitation on the use of CITES to address ABS needs, since ABS issues cover many species that are not listed, and thus would not be regulate-able under CITES. In addition, CITES regulations, which focus on the movement of and trade in products containing species or parts of them, would need to be modified in some detail to address the issues of genetic resource utilisation and rights. A variety of other differences between CITES and ABS have been listed.^{cxii} For example, CITES permits focus only on the moment of transborder transportation. Normally, after a specimen has entered a country legally, CITES concerns are ended. By contrast ABS violations occur through “utilisation” (rather than movement or sale of resources) – an activity that occurs over a period of the years after the species has been collected and transported.

The relationship between CITES and ABS has been examined in some detail in a variety of contexts.^{cxiii} Normally, these international evaluations of the CITES-ABS relationship have concluded that CITES mechanisms cannot provide a direct solution to any of the ABS implementation problems. Recommendations generally can be summarised as follows:

- a. CITES agencies may need to consider the ABS impact of their permits (stating specifically that a CITES permit or certificate does not necessarily constitute an ABS permit nor grant the right to utilise the genetic resources of the species); and
- b. ABS permits should not be granted as to CITES-listed species without ensuring that the user complies with CITES permit requirements as well.

CITES penalty provisions are normally relatively explicit – limited to activities involving the import, export, introduction from the sea or re-export of CITES-listed specimens without the relevant permit or certificate, and to other CITES offences such as falsifying or falsely obtaining CITES permits or certificates. These provisions would normally not be useful in addressing ABS issues. In some countries, CITES penalties may be encompassed in broader wildlife penalty provisions, as discussed in the next section.

[b] *Other controls on possession and importation of wildlife*

Where controls on wildlife importation or possession are broader in scope, they may in some cases enable the government to assess penalties for the transportation of specimens for purposes of the utilisation of genetic resources. As described in 2.2, these penalty provisions do not provide any basis for source countries and other providers to seek remedies (compensation, performance of non-financial obligations, etc.) from those who are utilising genetic resources without sharing benefits. If they can be applied to ABS violations, however, such penalties can provide incentives to users to comply with ABS requirements.

Two examples, mentioned in a variety of meetings and other communications, are the Lacey Act^{cxiii} and the Stolen Property Act,^{cxiv} which have been cited as the United States measures that will address Article 15.7.^{cxv} Both Acts are criminal statutes, enabling US officials to take

actions against persons who have either (i) transported, transmitted, or transferred goods; or (ii) imported, exported, transported, sold, received, acquired, or purchased fish or wildlife^{cxvi} in violation of foreign law. Consequently, their use as penalties against ABS violators would face several obstacles.

First, no law in the US recognises ‘genetic resources’ as a legal interest. Consequently, these two laws will be triggered only if the *biological* specimens were obtained illegally. In most countries which have adopted ABS legislation, however, the rights related to the utilisation of genetic resources are usually separate from the right to take or use “biological resources.” One might legally obtain biological specimens, but still not be legally permitted to utilise their ‘genetic resources.’ In addition, enforcement may depend on the market value of the items taken, rather their use value. The Stolen Property Act sets a minimum market value of the stolen goods at US \$5000. Often, however biological samples with low or non-existent market value have significant potential use value. These factors suggest that penalties and controls on smuggling and the importation of wildlife would appear to require amendment or detailed “interpretation” before they can operate as penalties for ABS violations.

5. Determining Whether a Remedy is “Available” to ABS Claimants

Ultimately, the most important factor that determines whether a remedy is “available” to a particular claimant is the substance of his claim. As the ABS regime stands currently, this factor, more than any other, appears to present the most significant obstacle, preventing source countries and other providers from obtaining remedies under the laws of any other country.

Up to now, however, ABS parties have little experience with the application of ABS by courts, agencies and other bodies capable of granting remedies. Consequently, it is not possible to provide clear indications of key issues or prerequisites to legislation, or particular factors that have prevented a court, agency or arbitrator from awarding a remedy in ABS cases. Instead, one can only examine the existing legal issues and uncertainties, and describe the choices that would appear necessary in considering action to enforce an ABS obligation or obtain a remedy. In general, one whose rights have been infringed will be unwilling to invest additional money and time needed to seek redress or remedy if he is not relatively certain of the result of that action. The potential costs of an action seeking remedy, when coupled with these uncertainties, often motivates source countries and other providers to be cautious, and choose not to take action. Until some of these issues can be addressed, however, greater certainty will not be possible, and source countries of limited means will continue to be unwilling to seek ABS remedies.

The following are some of the issues most relevant to remedies issues. If the ABS system is to provide dependable remedies for source countries and other providers, it will be important to resolve these open questions.

5.1 Availability of remedies for violation of ABS contracts

As noted, most commentators have assumed that ABS implementation, enforcement and remedies will be based on the law of contract, and related concepts of property law. This assumption is partially correct –

- Contract law will provide a remedy where the terms of the contract are “unambiguous and enforceable.”
- Even where some parts of the contract are ambiguous, contract law may still provide a remedy, if the remedy is specified in the contract, and the conditions that trigger the remedy are unambiguous and have occurred.

- Even where some parts of the contract are ambiguous, the contract may provide a remedy directly where it binds the parties to arbitration or other ADR, and the arbitrator or mediator feels that the situation is clear enough to enable resolution.

In all of these cases, however, the ambiguities in the ABS system (as described in the next section) may render the contractual remedy uncertain. Courts obviously cannot enforce contracts if it is not clear what the contract means. Even arbitrators and mediators are obliged to refuse to enforce a contract if they feel that the parties were not in agreement at the time that they executed the contract.

ABS Contracts often include very uncertain concepts (“genetic resources,” “utilisation of genetic resources” and “benefits arising from the utilisation of genetic resources,” as described below), without fully clarifying their practical meaning. As the contract progresses, questions arise which cannot be interpreted in a mutually agreed way, as a result of uncertainties about these terms. If these questions are not clearly answerable, then the contract may be considered to be too ambiguous and therefore unenforceable. The courts will deem that the contract was incomplete or invalid because the parties never reached agreement about the meanings of these essential terms. In addition, as noted above, some countries place other limits on the enforceability of contracts, based on constitutional principles and other legal standards.

5.2 Broader issues of availability of remedies

Where remedies are based on questions of compliance with the source country’s ABS law, rather than on the specific terms of an ABS contract, the availability of remedies may be even more dubious. In most countries the rights of persons governed by the law include the right to know the laws that will apply to them. Concepts of “due process of law” and “equal protection under the law” require that the law must not only be written, but must be clear and unambiguous. One cannot know if he is in compliance with a law, if he cannot understand what it means in practical terms.

As applied to commercial laws, these principles ensure that each person can determine exactly what is required in order to comply with the law, and can have “legal certainty” as to whether his actions meet the requirements of law.^{cxvii} Most important, clear and unambiguous laws are necessary to ensure that all applicants for a permit are subject to the same standards – to prevent the situation where officers can issue or deny permits on a personal basis.

The key factor that determines whether a claimant can find a remedy for a violation of law is whether the law enables such a remedy, and whether the law is unambiguous. In the ABS context, this can be complicated, because the law under consideration is law of another country. The following sections briefly describe three basic obstacles – (i) where the availability of a remedy is impacted by general ambiguities of the current ABS regime; (ii) where there are differences in coverage (and other legal factors) between the user country and the source country in a given ABS situation; and (iii) where the actions being complained of are illegal in the source country, but legal in the user country. Obviously (given that there have been no ABS remedy cases up to now) there may be many other possible obstacles that did not occur to the author in writing this part.

5.2.1 Ambiguities and Other Regime Enforceability Problems

Ambiguities in the ABS regime are generally recognized. There is a possibility that each of the 190 countries that are Parties to the CBD has a different interpretation of the key terms in Article 15. From the perspective of courts and other bodies attempting to interpret ABS obligations and/or to provide ABS remedies, these ambiguities are crippling.

It is not necessary to fully discuss these ambiguities here (they have been canvassed in many articles and discussions), but only to provide an example of their impact on legal processes. The most ready example of this problem is the term “genetic resources.” Confusion over the meaning of this term is apparent in the international negotiations themselves, where many disagreements, although discussing on some other point, actually arise out of the fact that, for example, one negotiator assumes that genetic resources are recognizable physical commodities, and another perceives them as intangible “genetic information.”

This uncertainty is reflected in national legislation as well. A great many countries have chosen not to use the term “genetic resources” in their legislation. Some of them have identified another term (*e.g.*, Brazil uses “genetic heritage”,^{cxviii} for example, Costa Rica speaks of “genetic and biochemical resources,”^{cxix} and Malawi of “plant germplasm.”^{cxx}) Others apply their ABS requirements to all “biological resources,”^{cxxi} sometimes including exceptions or other clauses to limit its scope.^{cxii} In some countries, the terminology is even farther from any current understanding of ‘genetic resources’ – simply addressing “the collection of research samples.”^{cxiii} Many countries’ laws include additional language regarding the intent, nationality, or other characteristics of the user and/or the activities (utilization) that he undertakes with regard to the resources. A number of countries have adopted general provisions using nearly the exact CBD terms and definitions, but with no attempt to clarify their meaning or explain how these terms will they will be implemented administratively.

In normal circumstances, it is perfectly reasonable (and even considered good legislative practice) for a country to use a term different from the international term, and to define that term in very clear terms for purposes of national implementation. Then, when another country’s court is considering a case involving that term, it can begin its analysis by comparing the term to the international requirements (*i.e.*, *Is the term stricter or more lenient than the international concept? Is it more inclusive or less so?* etc.) This comparison allows each country to understand its own role in the process, and also, in cases of uncertainty, to understand how broader international concepts regarding the obligation should be applied.

Unfortunately, since the ABS concept of “genetic resources” is unclear, it would be difficult for anyone, even the legislators that adopted the various national laws described above, to know which of these laws (if any) fully includes all genetic resources, and which is broader in coverage or less broad. This kind of uncertainty would make it difficult for most courts to apply principles or national laws based on the genetic resources concepts. In many countries, where a law or contract is too ambiguous for a court to understand and apply, it is deemed to be unenforceable. In that case, no matter what remedy exists and applies to ABS issues, that remedy would be unavailable through the courts and arbitration. The only remedy that could apply in such a case would be for the parties to the controversy to mutually agree to a particular solution.

5.2.2 Disconnections regarding coverage of ABS laws

For purposes of this report, we should also consider the possibility that the Parties will find a way to adopt the measures required under Article 15.7. Even in that case, remedies may be problematic, unless certain factors are consistent among all countries.

One such example is coverage. As noted in the previous section, some countries ABS laws and requirements apply to “genetic resources,” while others’ laws apply to “genetic and biochemical resources,” to “genetic material” or even in some cases to all “biological resources.” Even if the international definition of “genetic resources” is agreed and unambiguous, countries will have a full right to use other terms, or to adopt laws which cover more than what is covered by the international regime.

This creates a difficult situation – one that is currently preventing adoption of user-side ABS measures: *How can a user-side measure address the variety of provider-side coverage?* Consider this example: A country has adopted a user-side law states that

“users in this country must comply with national law of the ‘source country’ and share benefits with that source country when they utilise genetic material whose origin is from that source country.”

A user who is not using “genetic material” as defined in the user country’s law will not be required to comply with this provision. However, under the law of the source country, he might be required to share benefits if he is utilising the “biochemical resources” of species from that country. It is possible that “genetic material” defined in the user country’s law may be different from “biochemical resources” in the source country’s law, and both may be different from “genetic resources” as defined in the international regime. As a result of these (“minor”) differences, the source country or provider may have no remedy at all in the user country.

The only way to avoid this result would be for user country laws to require every user who is utilising biological material of any kind to (1) determine if it has a foreign origin, (2) determine which country is the source country of that material’s genetic resources, and (3) determine what is covered under that source country’s law, and so on. This is probably unreasonable, and in practice most countries do not require their citizens (or officials) to know or have access to foreign laws. Even judges and government officials cannot be required to read, understand or comply with laws or other instruments that are not available in official translations to the legislating country’s national language.

5.3.3 Activities that are Legal in the User Country

Where there is no ABS legislation in the country at all, the situation is even more dubious. If the user country does not have a law which recognises genetic resources as a separate type of legal right/interest/property, then it may be difficult for any party to obtain redress. It will not matter that the country has formally committed to adopt legislative, administrative and other measures necessary to implement the benefit-sharing objective. That failure can only be determined in a suit between countries (public international law) – if there is no national law that provides or defines a legal right/interests/property called “genetic resources,” then the country’s courts and agencies cannot provide remedies on the basis of such a right.

With ABS laws in effect in only about 20 countries, approximately 160 CBD parties do not have any law creating or describing rights in genetic resources. In the few countries that have adopted ABS legislation, *none* has adopted any provision requiring users under their jurisdiction to comply with the ABS requirements and/or PIC and MAT, of the country that is the source of the genetic resources. The reasons for this lack of performance are design problems such as the problem describe in 5.3.2. Regime-wide ambiguities currently make it virtually impossible to draft user-side provisions that would be enforceable and unambiguous and provide clear legal certainty for users, the user government, and the source country or other provider.

No matter why it arises, this legislative paralysis means that a user who has legal possession of biological material and is operating outside of the source country currently has no legal limits on his use the genetic resources of that material. Although the user country (like all other countries) is in breach of its Article 15.7 obligations, this does not alter the fact that the user is not in violation of law.

In order to seek a remedy in a user country for the misappropriation of genetic resources, the source country must be able to state a claim under that user country’s law. If there is no ABS contract, then currently no such claim is available in any country. Unless he has signed an ABS

contract, no legal and administrative remedies are available. Consequently, the lack of legislation implementing Article 15.7 is probably the most significant obstacle to functional ABS. This is even more serious when one remembers that all countries are both users and providers of genetic resources, but *no* countries have so far adopted legislation which requires users under their jurisdiction to comply with the ABS requirements of the source country.

6. Current and Future Effectiveness of Administrative and Judicial Remedies in Addressing ABS Needs

If it is limited solely to the *current ABS situation*, any discussion of remedies will end with the factors described in Part 5. The combination of ambiguity and the failure of all countries to adopt legal measures that clarify the obligations of users under their own jurisdiction may prevent any remedies from being effectively used in ABS contractual or permit-based claims. It also eliminates any chance of successfully obtaining such remedies where the user did not obtain PIC, MAT.

For purposes of the international regime negotiations, however, it is critical to take a further step:

Assuming that the international regime resolves the various ambiguities sufficiently to enable national legislation under Article 15.7, how can existing remedies be incorporated into that regime, and what other remedies are needed?

The following brief discussion

- compares the remedial needs of the ABS regime with the remedies that are normally available under existing law,
- asks whether additional or special ABS remedies are needed; and
- considers the legislative and political elements of the regime and implementing legislation that might be needed in order to ensure that appropriate remedies will be available to ABS claims.

6.1 What remedies are needed in the ABS Regime?

In order for any legal regime to be complete and effective, it is essential to know how it will address controversies, non-compliance, mistakes, and other operational uncertainties. These are questions of enforcement – remedies and penalties. This study has focused on the question of remedies, although considering some aspects of penalties. Lacking any cases or real life examples, this evaluation is based on legal experience in other contexts. Remedies that could to be needed in ABS claims might include:

- An order or other judgement clarifying or interpreting the ABS contract or other ABS legislation, as applied to the facts that have developed through the R&D process,
- An order or other judgement compelling the user to share benefits or take other actions required in the ABS contract or required under source-country law;
- Basic contractual remedies (specific performance of contract obligations, an audited or other verified accounting of activities, income, costs, etc.)
- A lien, performance bond, or other control that provides some external guarantee of the user's performance of his benefit-sharing and other obligations;

- An order imposing certain limits on one party, without specific notice to and/or permission from the other;
- An award (damages) where the user’s unpermitted action has caused financial harm to the interests of the source country or the value of its genetic resources;
- “Punitive” or “exemplary” damages, where there is a possibility that the user (or other users similarly situated) would violate ABS permissions again in future;
- Rescission, cancellation, reformation, revision, etc., of an agreement, permit, MOU, letter agreement or other document allowing access or use of genetic resources, if the source or provider can prove that the parties entered into the agreement on the basis of a mistake, or that one party’s consent was obtained under duress or on the basis of a misrepresentation or concealment;
- Finally, where the user country has not adopted legislation that enables the source country or other provider to seek an appropriate remedy against the user (in user-country agencies and courts), the source country may seek an order or decision requiring the country to adopt relevant legislation.

Currently, none of these remedies is reliably available in the ABS context; however, all are in existence. In most countries, courts, agencies and arbitrators have experience with applying them to any commercial, contractual or other situation in which the underlying rights, interests and instruments are clear and enforceable.

In addition, the CBD’s goal of “equity” would appear to require that user-side measures should include measures to minimise the costs of litigation and other obstacles which, as a practical matter, might prevent appropriate action by the source country or other provider (often the party with the fewest financial and legal resources, and sometimes located very far from the user country.) Countries already assistance and protections to domestic litigants who are prevented from pressing their claims due to social and other factors that limit their practical access to courts, arbitration and other remedial options. These measures could be the starting point for the development of provisions for equitable access to the courts and legal processes of the user country.

6.2 Can ABS remedial needs be satisfied by existing remedies?

All of the remedial needs described above can easily be satisfied by existing national remedies, if the ABS regime can be designed to enable the use of those remedies in ABS cases.^{cxxiv} The author has attempted, unsuccessfully, to identify remedial needs of the ABS system that could not be satisfied by existing remedies. Consequently, she concludes that sufficient remedies exist, so long as

- ABS claimants are able to obtain access to these remedies, and
- ABS questions are sufficiently unambiguous, that courts, agencies and arbitrators can come to final enforceable decisions granting or denying remedies in ABS cases.

To quote Jose Carlos Fernandez Ugalde, however, “the devil is in the details.” It is very easy to make the foregoing statements, but may be very difficult in practical terms to satisfy these two requirements.

6.3 Enabling the use of existing remedies for ABS claims

The only way to enable the use of remedies in ABS claims will be through legislation. The most important legislative needs in order to make ABS remedies effective are --

- Adoption by all countries of measures addressing the “user-side” of the country’s national obligations (requirements imposed on users under the country’s jurisdiction)
 - to ensure that the countries users who do not comply with ABS requirements of the source country are subject to remedial claims in courts, agencies and other forums in the user country; and/or
 - to clarify the manner in which the country’s rules and procedures regarding enforcement of foreign judgements apply to ABS claims.
- Amendment (or adoption) of the country’s ‘provider-side’ legislation (provisions governing access to the country’s own genetic resources, the benefit-sharing requirements imposed by the country through PIC and MAT procedures or in other ways)
 - to enable direct action on ABS compliance issues in the source country, even as to users whose connection with the source country is only the fact that they are using its genetic resources (under a theory that ensures that the judgement could be enforced in the user country, as above); and
 - to maximise the ability of the country (or other provider) to bring action directly in the user country (*i.e.*, by ensuring that all ABS permits, licenses and other instruments are enforceable as ‘private contracts’.)
- Development of relevant international understandings or instruments which
 - eliminate some of the most serious ambiguities in the ABS process (such as the definitions of “genetic resources,” “utilisation of genetic resources,” “benefits arising from the utilisation of genetic resources,” “country providing genetic resources” (especially in cases in which the user does not have an ABS contract or other compliance with the ABS requirements of a particular country), etc.);
 - provide guidance on the kinds of assistance that should be made available to source countries and other providers, to ensure that their lack of funding, experience with user-country law and other factors do not prevent them from asserting their rights; and
 - provide international standards of procedure, evidence and interpretation to minimise the obstacles and impediments faced by the source country or other provider in seeking remedies in user country.

The particular contents and operation of these legislative provisions are neither easy to draft nor easy to understand. Unattractive as the idea may be to many ABS negotiators and focal points, it may be necessary to find legal help in determining how to accomplish any of these tasks, and even these experts will probably need to engage in serious analysis and collegial discussion to find effective solutions.

In this connection, it is important to learn one final lesson from the national and institutional submissions response to the Secretariat’s request, reflected in the “Note by the Executive Secretary” submitted to the third meeting of the ABS Working Group.^{cxxv} Relatively little information on remedies was provided to the Secretariat in that processes. Responses relating to ABS remedies comprised only 10 paragraphs of that report (Paras 53-62) – a total of two pages of text.) Many essential elements necessary to provide a remedy for non-compliance

with PIC and MAT requirements of source countries have not been addressed at all. It is tempting to conclude from this that there are only a very few, partial remedies available to source countries under national law, addressing only one small aspect of the overall remedial needs of ABS. Other possible interpretations are possible, however. As noted by the Secretariat on this point:

a number of countries with users under their jurisdiction are still at the preliminary stages of raising the awareness of potential users of genetic resources. Based on the information made available to the Secretariat, administrative and judicial remedies available in countries with users under their jurisdiction regarding non-compliance with prior informed consent and mutually agreed terms, have been limited to those which apply in cases of non-compliance with disclosure requirements in patent applications.^{cxxvi}

The narrow focus of many experts and parties, looking for a single action that will “solve” the ABS problem may be a major obstacle to finding a solution. It is essential, for example, to recognise that patent disclosure provisions are not “ABS remedies,” but rather paths to remedy, and that the larger remedies questions must be addressed in order to make these disclosures serve their purpose of alerting source countries or other providers regarding the utilisation of genetic resources and the existence or imminent creation of benefits to be shared.

7. Conclusion – A Balance of Certainties

The basic question presented by this study – the remedies available to source countries and other providers against users of genetic resources (in countries with users under their jurisdiction) – is uni-directional in several respects.

First, it looks at the concerns of only one side of the ABS situation – the source country or provider. As such, it must be read in conjunction with other studies which consider the needs and legal position of users. Systemically, the question of remedies – legal certainty for providers – is integrally connected to the question of legal certainty for users. Neither type of certainty can be provided independently of the other. For example, it is much harder for a source country to create national processes that make PIC and MAT binding and unchallengeable, when those countries have no practical ability to enforce PIC and MAT or obtain remedies for violation. The knowledge that these rights are universally addressed in national legislation and elsewhere will remove the need to specially negotiate and document them in the ABS contract, and lead to streamlining of ABS-related negotiations and processes.

In addition, the ABS aspects of the problems underlying current claims of “biopiracy” and “misappropriation of genetic resources” are, to a large extent, a function of the lack of available, effective remedies. If their ABS rights, expectations, and instruments cannot rely on the courts to provide a final method of clear and fair enforcement. When such rights are clear and usable, they will not only constitute a factor motivating compliance, but will also provide a level of assurance of fair dealing that may diminish motivations to assert claims of biopiracy in the media and other non-legal forums.

For both sides of the transaction, a clear legal framework of rights and remedies will enable the development of realistic expectations regarding both the costs and benefits of involvement in ABS transactions. As such, it may enable countries to more competently address the underlying goal of the ABS regime – to provide a basis in equitable terms which is an incentive for all countries to conserve and sustainably use biodiversity.

Although the foregoing constitutes the primary conclusions of this study, the author recognises that many readers will have skipped the long discussion contained in Parts 2-5 of this paper, and come straight to this section. For their convenience, the following summarises the findings of this study. First, national law in user countries contains a variety of remedial options that might function well in addressing ABS claims by source countries and other providers, however, there is a basic functional gap which prevents their application. At present, no country has adopted any law which requires users of foreign-origin genetic resources to comply with source country ABS requirements, including PIC and MAT. This means that a user will not be subject to legal action in the user country, unless he has obtained an ABS contract, and the source country or other provider takes action in the user country to enforce that contract.

Where a contract exists, the source country will face two primary challenges -- (i) the challenges of costs, access to information and evidence gathering which are common to all commercial parties who are not located in the country in which the action is being taken; and (ii) the challenge of making certain that the contract is sufficiently clear and specific to enable a court, arbitration or other remedial action to come to an unambiguous decision. There are many factors relating to ABS which suggest that the Parties may need to have access to special measures and protections in order to utilise national remedial laws and processes, including the fact that many source countries and traditional communities will lack the funds, expertise and ability to engage in a protracted action in another country seeking redress from an entity which is probably better funded, more familiar with the relevant legal system, and better positioned to participate in a legal action.

Where no contract exists, there is at present no legal basis on which a claim for a remedy could be asserted in the courts, agencies or other adjudicating institutions in any country. The only exception occurs where the source country still has jurisdiction over the user (because the user or some of his assets or activities remain in the source country.)

It is critical to remember that the objective of administrative and judicial remedies is to “cure” the situation which gives rise to the action for redress. If the source country or other provider should receive a share of benefits, but the user is not providing that share, then a criminal action which punishes the user in the user country will not provide any ‘remedy’ to the source country or provider.

Finally, one point must be mentioned as a counterpoint to the discussion of legal remedies – the need to compel payment of any claim. In many countries, the courts are not directly responsible to collect the amounts that are assessed in deciding private claims. The court determines the nature and amount of the remedy, but it is up to the successful claimant to ensure that the losing party pays. If that party does not or cannot pay, the claimant must begin a separate action to collect this amount, and must pay the costs of sheriffs or other officials whose services may be needed in the process.

ENDNOTES

ⁱⁱⁱ IUCN-Canada, 2005, “Summary Analysis: Legal Certainty for Users of Genetic Resources under Existing Access and Benefit-sharing (ABS) Legislation and Policy,” distributed at AHWG-ABS-3 as UNEP/CBD/WGABS/3/INF10.

^{iv} IUCN-Canada, 2006, “An Analysis of Claims of Unauthorized Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge,” distributed at AHWG-ABS-4 as UNEP/CBD/WG-ABS/4/INF/6.

^v Note by the Executive Secretary, 2004, “Analysis of Measures to Ensure Compliance with Prior Informed Consent of the Contracting Party Providing Genetic Resources and Mutually Agreed Terms on which Access Was Granted, and of Other Approaches, Including an International Certificate Of Origin/Source/Legal Provenance,” UNEP/CBD/WG-ABS/3/5, section II, D. (Herein “Note by the Executive Secretary”.) The submissions that responded to the question about “administrative and judicial remedies” (beginning at page 10 of the summary) are Denmark, Norway, Sweden, the EC, France, Spain and Colombia. The full text of all of the submissions was also provided to AHWG-ABS-3 as “Submission to the CBD, in preparation for the third meeting of the CBD Ad-Hoc Working Group on ABS,” reproduced as UNEP/CBD-WG/ABS/INF/3/1. (Herein “National Submissions.”)

^{vi} Including the US (in which the author was trained), Germany, Canada, Australia, France, Costa Rica, and Brazil, Tanzania, Mauritius, Tonga, Trinidad & Tobago, and, in a more limited analysis: South Africa, Cyprus, Indonesia, Slovakia, Seychelles, Lao PDR, Mongolia, and others. The author also made use of the ECOLEX database, in an attempt to obtain a broader range of legislation. Language difficulties (and limitations of time and funding) prevented the review of laws not available in English, Spanish or French.

^{vii} The author apologises to the many readers who are already fully aware of these basic facts, but has noted in the course of previous work (cited in notes 1 and 2, above) that many readers were grateful for this step-by-step approach, which they felt was useful in ensuring that all parties to discussions are ‘starting on the same page.’

^{viii} This report attempts to summarise a very complex legal issue in a short description with a minimum of “legalese”. The simplification of these principles is intended to make them useful to non-lawyers who are involved in ABS negotiations, but not as an input for pre-litigation discussions or other legal analysis. The author assumes full responsibility for any errors arising from this simplification process.

^{ix} In law many terms have special meanings. (People sometimes speak of a separate language of law – “legalese.”) Unfortunately, “legal” words often also have very different “ordinary meanings” (usages in daily conversation). This can create confusion for non-lawyers who are not aware of the special meaning, leading to a situation in which, unknowingly, legal experts are speaking of one issue while in the same discussion persons of non-legal expertise are addressing a very different point.

^x This story is recounted in one of the historical books of the Judeo-Christian Bible, at 1 Kings 3:25.

^{xi} In these cases, it would not be fair to the ultimate owner of the claimant’s property to make the claim for the return of the precise property. Consequently, although the claimant never owned the new property, his remedy may be an interest in that new property.

^{xii} For example, other contractual remedies may include ‘rescission’ (un-creating a contract, and returning the parties to their pre-contract state), and rectification (“correcting” the terms of a contract that are written in error or do not reflect the true agreement of the parties).

^{xiii} Apart from this footnote, this report will not discuss “traditional law” and its institutions. In general, judicial bodies and decisions of traditional communities cannot have a significant legal impact outside of the traditional community in question, unless the national law of the country in which the decision is made specially provides – either treating them as subsidiary or sub-national courts, or as a special form of arbitration. If authorized under national law, of course, the traditional courts and their remedies would be bound by the same rules and issues applicable to governments, courts and arbitrators.

^{xiv} In Anglo-legalese, these are sometimes called “*quasi judicial* processes.”

^{xv} Nearly all discussions of enforcement of ABS obligations since the beginning of the ABS negotiations have focused solely on the ABS contract, apparently presuming that there would be no need of national legislative measures and remedies to enable those contracts to be overseen, implemented and enforced. *See, e.g.,* Glowka, et al., *Guide to the Convention on Biological Diversity*, (IUCN, 1994) at 82-83, which phrases all discussion of rights and remedies in the context of negotiated ABS agreements.

^{xvi} The UNIDROIT Principles of International Commercial Contracts, include some specific types of liquidated damages clauses. *See, e.g.,* Art, 7.4.13 (Agreed payment for non-performance.) *See also*, UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (A/38/17, annex I.) Both of these codes are directed at assisting parties to transnational transactions.

^{xvii} Guaranty and warranty aspects of contract law are sometimes quite intricate and confusing. A relatively simplified discussion of their use in international commercial contracts is found in DiMatteo, LA, *The Law of International Contracting* (Kluwer Law International, 2000.)

^{xviii} In some countries, the court may order parties in a lawsuits to participate in a governmentally sponsored process called “mandatory arbitration.” This process may not resemble commercial arbitration.

^{xix} Obviously, arbitration processes cannot be used in criminal cases, and other situations in which a government decision is needed. In particular, arbitration cannot be used to resolve patent infringement claims or to invalidate an IPR.

^{xx} “Arbitration” is another word that may be used differently from country to country. In some cases, the word “arbitration” is used to refer to a formal court. For example, the name of the commercial courts in Russia is normally translated into English as “Supreme Court of Arbitration.” For purposes of this analysis, those courts would be considered “judicial bodies” rather than “arbitration.”

^{xxi} In some cases, the Parties may specifically agree that the arbitration is “non-binding.” In that event, the arbitration will essentially operate as a formal and adversarial version of a mediation.

^{xxii} Adopted in 1994, available online at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.

^{xxiii} Found online at <http://www.iccwbo.org/policy/arbitration/id2882/index.html>, these rules are applied by the International Court of Arbitration.

^{xxiv} Any limitations or special arbitral rules must also be agreed by the parties to the arbitration.

^{xxv} SMTA, Art. 8.

^{xxvi} Some countries have judicial arbitration processes that are not actually arbitration but pre-litigation requirements, presided over by officials of the court. It may be possible to require these processes under national law of countries which use this system.

^{xxvii} Pre-adopted arbitration clauses do not always result in mandatory arbitration, however. For example, the case of *Graham v. Scissor-Tail, Inc.*, (28 Cal.3d 807 (Cal. 1981)), the US state of California, invalidated an arbitration clause, where the circumstances indicated that the clause would be unfair in its impact on one party to the contract. (It is for this reason that the author cautions readers who are non-lawyers never to trust a lawyer who tells you “you don’t have to worry about that, its just boilerplate.”) Such cases are diminishing however, as arbitration processes increasingly include protections for disadvantaged parties, results improve and courts’ interest in promoting arbitration increases. Folsom, et al., *International Business Transactions*, 7th ed. (Thompson West, 2004.)

^{xxviii} The Code of Hammurabi, created in about 1800 years BCE (*i.e.*, about 3800 years ago) devotes far more than half of its provisions to the rights of owners of land and agricultural commodities, including setting the value of such commodities when another person takes them without payment or permission.

^{xxix} In writing a contract, Parties may agree that “XXX (standard provision or law or principle) does not apply to this contract.” Unless XXX is an ethical principle or other issue that the government specially protects, the court will usually apply the contract’s provisions, rather than the law, where there is a conflict between them. *See UNIDROIT Principles of International Commercial Contracts*, art. 2.19-2.22.

^{xxx} Two US federal laws, the Lacey Act and The Stolen Property Act, cited in endnotes 110 and 111, below, are examples of such laws, which are often cited as “user measures” under Article 15.7.

^{xxx}_i For example, UNIDROIT, Principles of International Commercial Contracts, Art. 7.3.3 notes that “Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.”

^{xxx}_{ii} In general, arbitration agreements of this type are given special treatment in courts, since many countries and processes prefer arbitration, and seek to promote the use of arbitration rather than other legal remedies. One example of this is found in the ITPGRFA as described in 2.3.

^{xxx}_{iii} Thus, although the arbitrator is less rigidly bound by the strict construction of the law, he is not entirely free to make any choice he wants. Mediation processes are even more flexible, since they allow the parties to agree or drop the negotiation at any time. They, too, may be revisited by the courts under a normal contract law case, however. *See, e.g., Norway: Avtaleloven 31 Mai 1918 No. 4 § 36.*

^{xxx}_{iv} One commonly cited case of long standing that demonstrates this principle is *Norske Atlas Insurance Co v London General Insurance Co* (1927) 28 Lloyds List Rep 104 (holding that the duty of the arbitrator is “not necessarily to judge according to the strict law but, as a general rule, ought chiefly to consider the principles of practical business”).

^{xxx}_v It is generally recognised that, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) is so generally accepted (it has 141 parties) that an award issued by a contracting state can generally be freely enforced in other contracting state. Enforcement requirements are subject only to certain very limited defences. The treaty can be viewed online at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>. *See, also* Saltzman, N.J. 2005. “The Recognition and Enforcement of Foreign Awards in New York State,” which is available online at <http://lawfirminternational.com/enforceart.aspx>.

^{xxx}_{vi} This is apparently the view of the drafters of the ITPGRFA and its Standard Material Transfer Agreement, which do not include any reference to the governing law issue, but do include rather strong arbitration clauses.

^{xxx}_{vii} One current issue under discussion – the efforts to create a “universal patent” – would also appear to require the creation of a direct international remedy for private non-governmental actors (individuals, NGOs commercial entities, etc.) The likelihood of such a development in that context too, is unclear. *See, Tvedt, MW, “Recent Developments in Harmonisation of Patent Law – the Path to One Universal Patent,” in Environmental Policy and Law vol. 37, iss. 4 (IOS Press, June 2007)*

^{xxx}_{viii} These issues are infinitely entertaining to lawyers, however. Anyone wishing to obtain a more detailed understanding of these issues is referred to Allott, P. “The Concept of International Law” *10 European Journal of International Law* (1999); Shany, Y. *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003); McClean, D., *International Cooperation in Civil and Criminal Matters* (Oxford University Press, 2002); Brownlie, I., *Principles of Public International Law*, 4th ed. (Clarendon Press, Oxford, 1990); Collins L., *Essays in International Litigation and Conflict of Laws*, at 352-392 and 409-456, (Clarendon Paperbacks, Oxford University Press, 1994); Abi-Saab, G., “Cours Général de Droit International Public,” 207 *Recueil des Cours* 9, 93 (1987); and Romano, C.P.R., “The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,” 31 *NYU Journal of International Law & Policy* 709, 728-9 (1999). For a lighter treatment of private international law in the context of commercial transactions across national boundaries, see Folsom, R.H. *International Business Transactions in a Nutshell*, 7th ed. (West Publishing, 2004.)

^{xxx}_{ix} As further discussed in 3.4, a few international laws are called “self executing” – meaning that the international instrument itself contains very detailed about specific actions or standards – provisions, in short, which can be directly applied at the individual level. This does not eliminate the need for national law – each country must still ratify the convention, which usually happens by the adoption of a specific national law or other instrument. Rather, a self-executing law makes the creation of a national implementing law infinitely easier to draft. For most international agreements, the national ratification instrument is only the first step in a long process of creating and adopting laws and regulations to

implement the agreement, a self-executing convention eliminates all later steps – they can be simply inserted in the ratification – *i.e.*, “*This country ratifies Convention X, and adopts Articles Y-YY of that Convention as binding law under the ZZZ (Code or Ministry).*”

^{x1} Statute of the International Court of Justice, Article 38. A more detailed discussion of the way that these elements apply in the interpretation of treaties is found in the Vienna Convention on the Law of Treaties, 1969, which sets out eight components of interpretation, in order of their legal effect:

- (i) Direct application of the language of the Convention under consideration (Vienna Art. 31.1 & 2).
- (ii) Direct application of the language of other documents that are part of the same treaty (Vienna, Art. 31.2 & 3.) In the case of the CBD – the Cartagena Protocol and/or relevant annexes.
- (iii) Direct application of the language of separate instruments between the same parties and intended to interpret the “which establishes the agreement of the parties regarding its interpretation.” (Vienna, Art. 31.3(b)). Such “agreed interpretations” have not yet been used in the CBD, where COP decisions are not executed by national plenipotentiaries
- (iv) Subsequent practices which help to establish the agreement of the parties (Vienna, Art. 31.3 (b)). In the context of the CBD, this category describes “COP decisions.”
- (v) International customary law (Included by generic reference in Vienna Art. 31.3; defined by Statutes of the International Court of Justice Article 38.1 b.).
- (vi) Information gleaned from study of “the preparatory work of the treaty and the circumstances of its conclusion” (Vienna, Art. 32).
- (vii) Broader analysis of the objectives or intention of the instrument (authorized under Vienna, Art. 32).
- (viii) Determination of the meaning from contemporaneous information regarding the intention of the parties (Vienna, Art. 32.)

The order of precedence is clearly set by Article 32.

^{xlii} It is possible in some countries (*e.g.*, Australia) for some ABS Agreements to be entered between an individual provider (usually either the owner of land on which biological specimens were collected, or a non-governmental *ex-situ* collection.) More rarely, an ABS agreement may occur between two governments, in their capacity as governments. Usually, when an agency or institute of the user country enters into an ABS Agreement with a source country, however, that agency/institute enters into the contract as a “private contract” governed by ordinary contract law, and does not make a plenipotentiary commitment on behalf of the user country.

^{xliii} An additional 9 countries and 2 regional bodies have submitted documents. In two countries, the documents submitted are un-adopted draft laws, and in all the others, they are non-binding policy or strategy documents.

^{xliiii} The only so-called “user measures” adopted to date are the so-called “disclosure of origin” provisions in national law governing patent applications. Six such measures have been adopted – in Norway, Denmark, the Andean Pact, India, Peru and Venezuela. (Some reports indicate that Egypt has also adopted such a measure, however, it is not currently included in the ABS database, and the author has not been able to obtain a copy of it.) None of these imposes any direct requirements on the user to comply with benefit-sharing obligations.

In terms of their implementation of Article 15.7, the strongest of these is the Norwegian law (NORWAY: Implementation of EU Directive on Patents in Biotechnology (EC/98/44), cited and quoted in unofficial translation in the “National Submissions” documents (note 3 above) at page 66), Article 8(b) of which calls for disclosure of “the country from where the inventor received or collected the material” whenever invention “concerns or uses biological material.” Where the material was not collected by then inventor, or was not received by the inventor in the source country, this disclosure cannot promote ABS. Moreover, the amount of disclosure involved may be significant, since a very large number of products and

inventions utilise biological material. The remaining patent disclosure measures do not function as “user-measures” in terms of achieving the results required under Article 15.7: The Danish law reportedly calls for disclosures relating to “genetic resources,” but such disclosures are voluntary (completely within the applicant’s discretion.)

The remaining laws identified from the database are all focused only on the “provider side” of the issue. That is, they require that no person may use of genetic resources from the legislating country in a way that does not pay benefits to the legislating country, and specifically include a limitation on patenting any innovation or other results that are based on the genetic resources of the legislating country. Thus for example, India’s Biodiversity law provides that no person may apply for intellectual property rights “in or outside India” for an innovation that utilises the biological resources of India, without approval from India’s National Biodiversity Authority. INDIA: Biological Diversity Act, 2002 (No. 18 of 2003) at § 6, *see also* § 20.

Similarly, the Andean Community’s “Common Intellectual Property Regime” provides at Article 3, that the Andean countries’ intellectual property laws and practices must “ensure that the protection granted to intellectual property elements shall be accorded while safeguarding and respecting their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities,” but does not require any effort to protect the rights of other countries whose material is used in IPR protected innovations in the APC, nor to determine the origin of such resources. ANDEAN COMMUNITY: Decision 486, at § 3, and *see also* §§ 26(h) and 26(i).

PERU: Ley No 27811, *Ley Que Establece El Régimen de Protección de los Conocimientos Colectivos de los Pueblos Indígenas Vinculados A los Recursos Biológicos* provides in its final “disposiciones complementarias” that one who uses local traditional knowledge in an invention and seeks to patent that invention must provide the license authorising his use, as a part of his application, and that the failure to do this will invalidate the patent. (“*Presentación del contrato de licencia como requisito para obtener una patente de invención. En caso de que se solicite una patente de invención relacionada con productos o procesos obtenidos o desarrollados a partir de un conocimiento colectivo, el solicitante estará obligado a presentar una copia del contrato de licencia [Contrato de licencia de uso de conocimientos colectivos], como requisito previo para la concesión del respectivo derecho, a menos de que se trate de un conocimiento colectivo que se encuentra en el dominio público. El incumplimiento de esta obligación será causal de denegación o, en su caso, de nulidad de la patente en cuestión.*”) *See also* VENEZUELA: *Ley de diversidad biológica* (2000), at Art 82.

The “African Model Legislation for the Protection of the Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources” similarly focuses only on the country’s rights (and rights of community and farmers within the country) as a provider. It does not provide any requirements applicable to domestic users of foreign genetic resources. The author notes, however, that all countries utilise genetic resources, at minimum in the course of agricultural variety development.

^{xliv} Several claims and cases have been alleged, however, in all cases, either the matter has not been formally resolved, or it was resolved under completely different legal theories (primarily patent law.) *See*, Young, T., 2006, “An Analysis of Claims of Unauthorized Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge,” distributed at AHWG-ABS-4 as UNEP/CBD/WG-ABS/4/INF/6.

^{xlv} *See, e.g.*, the UNIDROIT Principles on International Commercial Contracts, for a restatement of many of these principles.

^{xlvi} The basic ambiguity in the term “genetic resources” has been noted since at least 2001. *See, e.g.*, IUCN Policy Recommendations to the First Ad-hoc Working Group on ABS (Bonn, 2001), “Achieving the Benefit-Sharing Objective of the Convention on Biological Diversity.” The problem generally recognised throughout CBD expert contributions today. *See, e.g.*, Cabrera Medaglia, J. and C. Lopez Silva, 2007, *Addressing the Problems of Access: Protecting Sources, While Giving Users Certainty*, , Environmental Policy and Law Papers No. 67, The ABS Series Book 1 (IUCN Environmental Law Programme); Cassas, F., “Limits to Rights over Genetic Resources: the Issues of Derivatives. Defining the Line between Tangible and Intangible Property Rights,” and “Genetic Resources and Property Rights. Tangible and

Intangible Property Rights. The Issue of Derivatives” both in *Record of Discussions* (Canada/Mexico Workshop on ABS, Oct. 2004). As noted elsewhere in this article, drafters of national ABS measures seem to have had some difficulty with the concept of ‘genetic resources’ resulting in a variety of different approaches. For example, Costa Rican law governs “genetic and biochemical resources” (undefined), and Norway’s patent disclosure law applies to all “biological material.” One of the primary requirements, without which a contract cannot be enforced, is legally definite subject matter. *Discussed in* Bhatti, S., et al., 2007, *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts*, Environmental Policy and Law Papers No. 67, The ABS Series Book 4 (IUCN Environmental Law Programme); and Tvedt, MW and T Young, 2007, *Beyond Access – Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD*, Environmental Policy and Law Papers No. 67, The ABS Series Book 2 (IUCN Environmental Law Programme)

^{xlvii} Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), International Tribunal for the Law of the Sea, filed 30 July, 1999.

^{xlviii} An example of this kind of claim is found in a current International Court of Justice (ICJ) case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), known as the “Pulp Mills” case, under which Argentina originally brought suit alleging that Uruguay violated obligations under the Statute of the River Uruguay (a treaty signed by the two States in 1975) when it allowed the construction of mills on that River.

^{xlix} See, e.g., *The Lotus (France v. Turkey)* 1927 PCIJ (Ser. A) no 10. “

¹ See, for example, UN Convention on Law of the Sea (10 Dec. 1982), Arts. 187, 287, 290, 292 (further discussed below).

^{li} The broadest example of this is the Appellate Board of the WTO, which is invested with very broad subject matter jurisdiction over all of its parties. “Understanding on Rules and Procedures Governing the Settlement of Disputes,” Annex II to the Marrakesh Agreement Establishing the World Trade Organization (1994.)

^{lii} ITPGRFA, Art. 22.

^{liii} International law has even extended this principle to enable countries to take action against actions by persons not under their jurisdiction when taken in areas not under any country’s jurisdiction (Antarctica or the high seas.) See, e.g., *Naim Molvan v. A.G. for Palestine*, AC 531 (UK, 1948.) To do otherwise would mean that there is no forum for taking these actions.

^{liv} A very limited exception to this is sometimes put forward – the contracts between the UN itself and private individuals/companies/agencies. At present, however, there is no clear system for addressing these issues, apart from an arbitration mechanism set up within the UN, which external parties usually accept and comply with, given the lack of any clear international or choice of law mechanisms.

^{lv} A good summary of the role of international forums in protecting individual rights and natural resources is found in Brownlie, I. *Principles of Public International Law*, 4th Ed. (Oxford University Press, 1990) at Part IX.

^{lvi} Brownlie, *supra*, summarises the unusual status of criminal actions of this type at page 300-311.

^{lvii} See, for example, the Permanent Court of Arbitration – a freestanding (not attached to another legal forum) international arbitration processes, which “provides full registry services and legal and administrative support to tribunals and commissions. Its caseload reflects the breadth of PCA involvement in international dispute resolution, encompassing territorial, treaty, and human rights disputes between states, as well as commercial and investment disputes, including disputes arising under bilateral and multilateral investment treaties.” (PCA website at http://www.pca-cpa.org/showpage.asp?pag_id=363)

^{lviii} Much of the work in creating the Treaty was intended to help regularize and promote the operation of the IARCs, (including the 15 CGIAR Centres, described in detail <http://www.cgiar.org/centers/index.html>).

^{lix} See note 37.

^{lx} The Treaty does not discuss the need for national law.

^{lxi} ITPGRFA, Standard Material Transfer Agreement, Article 7.

^{lxii} For example the recent WTO cases involving invasive species controls imposed by Japan (apples) and Australia (salmon) were commenced by countries whose citizens and companies complained to their government that these foreign controls were altering the global market/profitability of their produce. *See*, On the Japanese apples case, *see*, Kiritani, K., “Invasive Pests and Plant Quarantine in Japan,” National Institute of Agro-Environmental Sciences, 1999; Japan Ministry of Agriculture, Forestry and Fisheries, “Report on Agriculture, Forestry and Fisheries Trades in 2002,” March 2002, at 20; and WTO, Request for the Establishment of a Panel by the United States, May 8, 2002 (WT/DS245/2.) On the Australian salmon case, *see* WTO Australia, Measures Affecting Importation of Salmon (WT/DS18/AB/R), Report of the Appellate Body, October 20, 1998.

^{lxiii} Vienna, 1980.

^{lxiv} An absurd example makes this clear. If countries could regulate outside their borders, then most governments would prefer to impose taxes on persons from other countries (who could not vote them out of office) than raising taxes on their own citizens.

^{lxv} *See* 2.4.4.

^{lxvi} As noted above, a country is characterised a “user country” or a “source country” on a case-by-case basis. Since user country is not necessarily (or only) the country of the user’s citizenship (or where he pays taxes), there may be more than one “user country” involved a given ABS claim. In many cases a company or institution may have operations ongoing in more than one location. Hence, if a company based in the US collects resources in Tanzania and then engages in R&D in a facility in India, it is possible to consider both the US and India as potentially being the “user country” for that particular claim.

^{lxvii} Henkel, Thomas, “A Perspective from Pharmaceutical Industry”, Presentation to High-level Experts Meeting - Addressing the Access and Benefit-Sharing (ABS) Challenges in the Context of the Convention on Biological Diversity (Tokyo, 8-9 February 2007)

^{lxviii} Such a loophole that would effectively eliminate ABS entirely, unless a user wished to offer benefits as a matter of individual charity. Even direct collection would be un-controlled, so long as the user asked others (non-users) to collect biological specimens and later (after bringing the specimens legally into the user country) to sell or give them to the user.

^{lxix} Early on, some commenters assumed a necessary link between “access” and “benefit-sharing,” implying that benefit-sharing was only necessary if one obtained the resources directly from the source country. (*See, e.g.*, Ten Kate, K. and S. Laird, *The Commercial Use of Biodiversity* (Earthscan, 2002) at 319) This presumption arose from the failure to recognize the difference between genetic resources and biological samples, and the lack of experience with attempting to regulate this new kind of legal right.

^{lxx} As noted in detail in “An Analysis of Claims...” (note 2, above), ABS would not call for invalidation of the patent, but rather the sharing of benefits arising from it. However, if the patenting country does not have a law enabling the source country to compel benefit-sharing, then the invalidation of the patent might at least enable that country to support the development of the innovation either directly or through a user who would share benefits.

^{lxxi} The unofficial translation of the Norwegian patent disclosure provision (NORWAY: National Patent Law, § 8b) reads as follows:

If an invention concerns or uses biological material, the patent application shall include information regarding the country from where the inventor received or collected the material (providing country). If it follows from national law in the providing country that access to biological material shall be subject to prior consent, the application shall inform on whether such consent has been obtained.

Norwegian Submission to the CBD, in preparation for the third meeting of the CBD Ad-Hoc Working Group on ABS, reproduced in UNEP/CBD-WG/ABS/INF/3/1 at pages 66-67.

^{lxxii} Oldam, 2004, notes that nearly 500,000 of the patent applications filed between 1990 and 2003, that are listed in the Worldwide Database, include genetic-related keywords (protein, gene, DNA, amino acid, nucleic acid, enzyme, polypeptide, peptide, nucleotide, RNA, microorganism, human gene, genome, plant gene, animal gene, microbe, deoxyribonucleic, ribonucleic, proteome) in their abstracts of publication.

^{lxxiii} NORWAY: first draft Nature Diversity Act, NOU 2004:28 <http://www.regjeringen.no/nb/dep/md/NOU-2004-28.html?id=388846> , the relevant provision is § 60.

^{lxxiv} That section also notes that

If the providing country is another than the country of origin, information about the country of origin shall also be given. Country of origin means where the material was found in natural conditions (in situ). If the country of origin requires prior informed consent, information of whether such prior informed consent is in place shall be given. If such information is not known, the user shall give information about the lack of information.

Naturmangfoldloven 2004: 28, § 60, pp. 636–637 (unofficial translation by M.W. Tvedt.) To date, however, the author is not aware of any country which is not a country of origin of the genetic resources in question, which has “acquired the genetic resources in accordance with this Convention” as specified in CBD Article 15.3 (that is, which has obtained from that country the right to grant ABS rights (PIC/MAT) to other users with regard to the genetic resources within a particular specimen or species. If this provision applies to other countries (which have not obtained such rights from the country of origin), it would not appear to alter the user-country’s responsibility to the actual source country.

^{lxxv} The European submission also discussed the possible role of voluntary certification measures, but noted that “Such a scheme would serve the purpose of helping users to improve their overall environmental performance, including in relation to access and benefit-sharing but would not alter their legal obligations.” See “Note by the Executive Secretary,” *supra*, note 3, at para. 30.

^{lxxvi} Domestic utilisation of the country’s own genetic resources is a matter entirely within the national sovereignty of the source country. Thus, although the CBD may provide guidance, there is no reason for the source country to follow that guidance, except its own discretion and desire. This means that, for purposes of the CBD, the only genetic resource access and use issues that are included in Article 15 are international issues (at least one user or utilisation outside the source country)

^{lxxvii} CBD Art. 23.3.

^{lxxviii} CBD Art. 23.3

^{lxxix} CBD, Rules of Procedure, Rule 40.2.

^{lxxx} CBD, Rules of Procedure, Rule 40.1. The rule for determining whether a particular decision is “procedural” or a “matter of substance” is not bracketed. That question will be decided in the first instance by the COP President, but his decision may be appealed in which case it will be upheld unless a majority (at least one more than half) of the Contracting Parties present and voting vote to overturn that decision. CBD, Rules of Procedure, Rule 40.3.

^{lxxx} *Comunidad Andina*, Decision 391, final provisions, “first” (unofficially translated by the author of this study.)

^{lxxxii} African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, § 36. This model is available from the CBD Database of ABS Measures.

^{lxxxiii} Australia, Environment Protection and Biodiversity Conservation Act 1999 (Act No. 91 of 1999 as amended), Chap. 6, Part 17. Supporting regulations (not directly discussing penalties or remedies) are found in Australia, Environment Protection and Biodiversity Conservation Regulations 2000 (Statutory

Rules 2000 No. 181 as amended.) These documents are available from the CBD Database of ABS Measures.

^{lxxxiv} Queensland Biodiscovery Act, at §§ 50-60, 68-69, 74, 78-87. This law is available from the CBD Database of ABS Measures.

^{lxxxv} Afghanistan Environment Act, Art. 73. This law is available from the CBD Database of ABS Measures.

^{lxxxvi} Bulgaria, Biological Diversity Act, No. 77/9.08.2002, at Ch. 7, arts 121-124 (administrative measures other than fine), 129 (confiscation). Specific penalties relating to the laws ABS provisions (Art. 66) are not in place. Possibly these will be addressed in regulations, called for by Arts. 66(6) and 'transitional provision § 3. This law is available from the CBD Database of ABS Measures.

^{lxxxvii} Costa Rica, *Ley de biodiversidad* (No. 7788), Art 112, and also 110-111 and 113. At Cap. III, the law also gives the possible option of requiring guaranty arrangements if the country determines that misuse or misappropriation of genetic resources (or other violation of relevant requirements) could constitute a potential threat to the present or future integrity of, *inter alia*, ecosystems (“*daños o perjuicios, presentes o futuros, a la salud humana, animal o vegetal o a la integridad de los ecosistemas.*”) Costa Rica, *Decreto* No. 31 514 (“*Normas Generales para el Acceso a los Elementos y Recursos Genéticos y Bioquímicos de la Biodiversidad*”), Arts. 20, 28. These instruments are available from the CBD Database of ABS Measures.

^{lxxxviii} El Salvador, *Ley del Medio Ambiente*, Decreto N° 233,1998, at Tit. XII, Arts. 85-90, 96-106. Sections 100-104 address civil responsibility, but again are limited to harms to resources, persons, etc. within El Salvador. This law is available from the CBD Database of ABS Measures.

^{lxxxix} Ethiopia, Institute of Biodiversity Conservation and Research Establishment Proclamation (No 120/1998), Art. 13; Ethiopia, Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation (No. 482 /2006), Arts. 20-21, 34-35. These instruments are available from the CBD Database of ABS Measures.

^{xc} The Gambia, National Environmental Management Act, No. 13/1994, Arts. 41-47 and 51. This law is available from the CBD Database of ABS Measures.

^{xcⁱ} India, The Biological Diversity Act (No. 18 of 2003) §§ 55-57, 61. This law is available from the CBD Database of ABS Measures.

^{xcⁱⁱ} Kenya, Environmental Management and Co-Ordination Act (No 8 of 1999), § 144-146; Kenya, Environmental Management and Coordination (Conservation Of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006 (L.N. N° 160), § 24. These instruments are available from the CBD Database of ABS Measures.

^{xcⁱⁱⁱ} Malawi, Environment Management Act, 1996 (Gazette, No 7(c), 16 Aug. 1996) § 61. This law is available from the CBD Database of ABS Measures.

^{xc^{iv}} Mexico, General Law of Ecological Balance and Environmental Protection (28 Jan, 1988) 171-175, 182, 188. Mexico, *Ley General de Vida Silvestre*, (last amended “10/1/2002”) 104-109, *et seq.* These instruments are available from the CBD Database of ABS Measures.

^{xc^v} Philippines, Wildlife Resources conservation and protection Act, §§ 27-28 (No. 10622, 2001); Philippines, Joint Implementing Rules and Regulations (IRR), (Adm. Order No. 1/2004). These instruments are available from the CBD Database of ABS Measures.

^{xc^{vi}} Portugal, Decree-Law No. 118/2002, Arts. 13-15. This law is available from the CBD Database of ABS Measures.

^{xc^{vii}} South Africa, National Environmental Management: Biodiversity Act (No. 10 of 2004). This law is available from the CBD Database of ABS Measures.

^{xc^{viii}} Uganda, NATIONAL ENVIRONMENT STATUTE (No. 4 of 1995), § 103; Uganda, National Environment (Access to Genetic Resources and Benefit Sharing) Regulations, 2005, §§26-29. These instruments are available from the CBD Database of ABS Measures.

^{xcix} Vanuatu, Environmental Management and Conservation Act (No. 12 of 2002) § 41-42 (specifically includes enhanced penalties for offences that continue over a period of time. This law is available from the CBD Database of ABS Measures.

^c African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, § 67. This model is available from the CBD Database of ABS Measures.

^{ci} *Acuerdo Centroamericano de Acceso a Recursos Genéticos y Bioquímicos y al Conocimiento Tradicional Asociado*, (draft), Art.27 (“Sanciones.”) “*Los Estados miembros crearán los mecanismos jurídicos necesarios para impedir la biopiratería de recursos genéticos y bioquímicos y conocimientos asociados y para aplicar las respectivas sanciones administrativas, civiles y penales.*” This law is available from the CBD Database of ABS Measures.

^{cii} *Comunidad Andina*, Decision 391 “Decision 391: Common Regime on Access to Genetic Resources,” Title VIII, Arts. 46-47. This law is available in English from the CBD Database of ABS Measures.

^{ciii} In a limited number of situations, government action that results in fines and penalties may operate as a remedy as well as a punishment. In addition, this category is included owing to the fact that many governments that submitted responses to the CBD’s request for information (note 3, above) include government laws assessing penalties and fines among the “administrative and judicial measures” they have submitted on this topic.

^{civ} In some cases, private parties may have the right to petition the government to exercise these powers. For example, where a facility is violating rules for the control of environmental pollution, neighbours may petition the government to cancel the facility’s operating permit. If the government fines the user, however, the private parties injured by the violation usually do not have a right to sums received.

^{cv} NORWAY: NOU 2004:28 <http://www.regjeringen.no/nb/dep/md/NOU-2004-28.html?id=388846>

^{cvi} Given the relatively limited response available, and the fact that the issue is of particular interest to the topic of this study, it has been included in the study, under the “consultant’s rule,” which reads (or would if it were ever written or acknowledged) as follows: *Where it is hard to find anything directly on the point of the study, include whatever you can find that is close.* This is also known as the “take-any-port-in-a-storm” rule.

^{cvii} French submission to the CBD, in preparation for the third meeting of the CBD Ad-Hoc Working Group on ABS, reproduced in UNEP/CBD-WG/ABS/INF/3/1 at page 30. CBD Secretariat translation.

^{cviii} A number of countries assume that international law can be implemented in their country without national implementing legislation. *See, e.g.,* Iran, Iranian Civil Code, at Article 9, which stipulates that provisions of treaties between the Iranian government and other governments in accordance with the Constitution shall have the effect of law. (S. Taheri Shemirani “Review of the Iranian Legislation Relating to Alien Invasive Species” UNEP 2006, who continues “Usually in such cases, I mean after ratification, the convention become enforceable and therefore mandatory for all authorities in the Country. In most cases, in the Act has been stipulated which Ministry or body has main responsibility for their implementation.”)

^{cix} Costa Rica – Ley de biodiversidad (No. 7788), Art. 12. (“*Cooperación Internacional. Es deber del Estado promover, planificar y orientar las actividades nacionales, las relaciones exteriores y la cooperación con naciones vecinas, respecto de la conservación, el uso, el aprovechamiento y el intercambio de los elementos de la biodiversidad presentes en el territorio nacional y en ecosistemas transfronterizos de interés común. Asimismo, deberá regular el ingreso y salida del país de los recursos bióticos.*”) This law is available in the CBD database of ABS measures.

^{cx} In this connection, it should be noted that CBD Article 15.5 notes that each country’s sovereign rights mean that PIC must be obtained from every country with regard to their genetic resources “unless otherwise determined by that Party.” The quoted phrase indicates that a country which has not adopted specific ABS law, but has not said that no PIC is required is entitled to protect its genetic resources, and to expect protection from other countries in accordance with Article 15.7.

^{cx} Fernández-Ugalde, J.C., “El papel de los Certificados de Legal Procedencia en la política global de recursos genéticos: Consideraciones prácticas y económicas,” Presentation in the Workshop on Synergies between the CBD’s Provisions for Access to Resources and Benefit-sharing and CITES, Lima, 2003

^{cxii} See, e.g., *Promoting CITES-CBD Synergy and Cooperation*, BfN Skriptum 116, at pp 20-21.

^{cxiii} Officially known as the ‘Lacey Act Amendments of 1981,’ (replacing the original Lacey Act) enacted as Pub. L. 97-79, Sec. 3, Nov. 16, 1981 (last amended 2003), codified in the US Code at 16 USC §§ 3371-3378.

^{cxiv} Included in the United States Code (federal law) as 18 U.S. Code §§ 2314 and 2315. The Stolen Property Act was originally enacted in 1949 and has been amended at least 7 times since its original adoption.

^{cxv} These documents were so identified in presentations (e.g., oral presentation in International Expert Workshop on Access to Genetic Resources and Benefit-sharing, Capetown, 20 September 2005.) and personal communications (2006) by Leonard Hirsch, (Smithsonian Institute), US delegate to the CBD, who specifically stated that the US has determined that they are sufficient to satisfy Article 15.7. The author has not yet found any publicly available US document confirming this conclusion.

^{cxvi} The former requirement comes from the NSPA, the latter from the Lacey Act. That second provision probably does not apply to plants (other Lacey Act provisions make it illegal to take “fish, wildlife or plants”, suggesting that plants are intentionally omitted from the international provisions.) No provisions of the Act make any mention of microorganisms.

^{cxvii} Often the permit applicant will try to find the dividing line between acceptance and denial. For example, if the law requires specific costly actions in order to obtain the permit, the applicant will often try to determine the minimum actions that he must take to get the permit. Similarly, many details to be complied with and standards to be balanced by the issuing agency in permit application process. Many of these, too, will affect approval. Consequently, it is not always a “sure bet” that an applicant will obtain the permit on the first try, even where the statute is considered to be unambiguous. However, so long as the language is unambiguous, and standards are clear, a law will usually be thought to be ‘unambiguous’ if it provides a basis for impartial and replicable decisions by the court, in case the parties file an appeal or seek judicial reconsideration of the decision.

^{cxviii} **Brazil:** Provisional Act N°2, 186-16, implementing CBD Arts. 1, 8j, 10c, 15 and 16, Act. No 2,186-16, (Aug. 23, 2001).

^{cxix} **Costa Rica:** *Normas Generales para el Acceso a los Elementos y Recursos Genéticos y Bioquímicos de la Biodiversidad*, Decreto No. 31 514, 2003, issued pursuant to the Organic Law on the Environment (N° 7554 of 4 Oct. 1995) §§ 46-47; and the Biodiversity Law (N° 7788 of 30 April 1998), § 62

^{cxx} **Malawi:** Environmental Management Act, Art. 36.

^{cxxi} See, e.g., African Union Model Legislation for the Protection of the Right of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (formally endorsed by all African Union States), applying benefit-sharing concepts to all biological resources.

^{cxxii} See, e.g., **Bhutan:** Biodiversity Act, art 4.a. ABS provisions apply to biological resources, but not “[w]here the biological material is used as a commodity for the purpose of direct use or consumption as determined by the Competent Authority, based on the processes and end use of genetic resources, in accordance with the provisions of the Act.”

^{cxxiii} For example, the proposed US measures on benefit sharing with regard to National Parks, would apply to “research projects involving research specimens collected from units of the NPS that subsequently resulted in useful discoveries or inventions with some valuable commercial application.” US NPS, 2006, Draft EIS, presented as Alternative B.

^{cxxiv} Obviously, not all of these remedies will be granted in all cases. Some will be most useful in ABS Agreement cases, and others in no-agreement situations. Usually, only the first of the outcomes listed in 6.1 will be sought or granted – a declaration of the meaning of the contract or ABS law, when applied to the

specific facts that develop through the bioprospecting, R&D, development, transfer, and/or commercialisation processes, and an order to comply with that interpretation.

In many cases, the most important remedy may be reports and accounts, some assurance that benefits will be shared in future, or some control on actions that might harm the interests of the source country or provider (transfer of the user's data, results, and other genetic resources, without appropriate measures to protect the right of the source or provider.) In some cases, the only remedy that will be granted is the right to bring a civil action, and get a fair and impartial hearing. If the court, agency or arbitrator does not find in favour of the claimant, no other remedy will be granted

^{cxxv} Note by the Executive Secretary, cited in note 3, above, at section II, D.

^{cxxvi} *Ibid*, at paragraph 53.

REFERENCES

(this list provides a sampling of useful international and comparative treatises only. Specific international instruments and national laws and publications omitted here. As the issue under study is relatively new, no specific single sources can be referenced that deal with it directly.)

ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press 2006.)

Beatson, J, and E. Schrage, *Cases, Materials and Texts on Unjustified Enrichment* (Hart Publishing, 2003)

Carnwath R., “EHCR: Human Rights Remedies from a Common Law Perspective” in *International and Comparative Law Quarterly* vol. 35 (July, 2000)

Cohen, N., and E. McKendrick, *Comparative Remedies for Breach of Contract* (Hart Publishing 2005)

Damaška, M.R. *The Faces of Justice and State Authority* (Yale University, 1986)

Dickensen, T. “Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters,” in *International and Comparative Law Quarterly*, vol. 53 (January, 2005)

Faure, M. and G. Heine, *Criminal Enforcement of Environmental Law in the European Union* (Kluwer Law International, 2005)

Fiorini, A. “The Codification of Private International Law: The Belgian Experience, in *International and Comparative Law Quarterly*, vol. 54 (April, 2005)

Folsom, R.H, M.W Gordon and J.A. Spanogle, *International Business Transactions in a Nutshell* (Thomson-West, 2004)

Goodnow, F.J., *Comparative Administrative Law* (reprinted by Beard Books, 2000)

Menski, *Comparative Law in a Global Context* (Cambridge University Press 2006.)

Owsia, P., 2004, *Formation of Contract: A Comparative Study under English, French, Islamic, and Iranian Law* (multivolume series)

Saunier, R.E. and R.A. Meganck, *Dictionary of Global International Law Governance* (Earthscan 2007)

Schlesinger, R., 1968, *2 Formation of Contracts: A Study of the Common Core of Legal Systems* 1652 (New York).

UNIDROIT, Principles of International Commercial Contracts (and other instruments articles and resources available in the website of UNIDROIT (the International Institute for the Unification of Private Law) at <http://www.unidroit.org/>)

UNCITRAL, Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (A/38/17, annex I) (and other instruments articles and resources available in the website of UNCITRAL (The UN Commission on International Trade Law) at <http://www.uncitral.org/uncitral/en/index.html>)