

## EU submission in response to Notification 2008-116 to the ABS Group of Legal and Technical Experts on Compliance – Tokyo 27-30 January 2009

### INTRODUCTION

The "International Regime"-Annex to CBD Decision IX/12 includes a range of components in Section III.C. on Compliance. Components that Parties agreed to further elaborate with the aim of incorporating them in the international regime are tools to encourage, monitor and enforce compliance, for instance, awareness-raising activities, mechanisms for information exchange or an internationally recognized certificate issued by a competent domestic authority. Other tools that Parties agreed to further consider are tools to encourage, monitor and enforce compliance, for instance, sectoral menus of model clauses for material transfer agreements, disclosure requirements, codes of conducts for important groups of users, an international understanding of misappropriation as well as information technology for tracking. The experts participating in this group are mandated to look at a fairly generic set of questions. It would therefore be useful if the experts were to identify in their report, where appropriate, specific consequences that flow from their more generic discussion for specific components under consideration in the ABS WG. This would be in line with the mandate given to the experts to "assist" the ABS Working Group in the further negotiation of the international ABS regime and to "provide legal and, as appropriate, technical advice, including where appropriate, options and/ or scenarios."

The EU looks forward to the deliberations of the experts in this ad hoc technical expert group and expects to benefit from the advice of the experts particularly regarding the following issues:

- The relevance of sectoral menus of model clauses for potential inclusion in Material Transfer Agreements to support compliance with ABS requirements;
- The role of existing agreements and mechanisms under public and private international law in supporting ABS compliance;
- The relevance of national decision-making on access for compliance with ABS requirements set out in prior informed consent decisions and mutually agreed terms;
- The relationship between measures taken by Parties to support compliance of users under their jurisdiction to national decision-making on access to genetic resources in parties providing genetic resources under the international ABS regime.

### TERMS OF REFERENCE OF THE ABS LEGAL AND TECHNICAL EXPERTS ON COMPLIANCE

What kind of measures are available or could be developed under **private and public international law** to facilitate access to justice/courts; facilitate recognition and enforcement of judgments and provide remedies.

Public international law covers the relationships between States. The main sources of public international law are international conventions, international custom, as evidence of a general practice accepted as law, and the general principles of law recognized by civilized nations<sup>1</sup>.

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<sup>1</sup> International Court of Justice Statute, Article 38

In contrast, private international law regulates relationships between private entities across borders. In particular, it seeks to regulate (1) which jurisdiction applies to a dispute; (2) which laws apply to the dispute and (3) whether and how eventual decisions or judgments are recognized and may be enforced in another jurisdiction. Each State has its own national rules on conflicts of laws, but some of these may have been harmonized through conventions, guidelines, and model laws. With respect to EC Member States, the rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters have been harmonized through Regulation (EC) No. 44/2001<sup>2</sup>.

The relevance of public international law to the issue of ABS stems from Article 15 of the CBD in which Parties are required to implement Article 15 at the national level. Any dispute among Parties concerning the interpretation or application of Article 15 would be a matter of public international law and settled in accordance with Article 27 of the CBD.

The operation of Article 15 at national level could give rise to private international law issues considering that Mutually Agreed Terms (MAT) will normally be set out in a civil law contract.

### **1. Private international law**

There are three main organizations involved in the harmonization of private international law, namely the Hague Conference on Private International Law<sup>3</sup>, the International Institute for the UN Commission on International Trade Law (UNCITRAL)<sup>4</sup> and the Unification of International Law (UNIDROIT)<sup>5</sup>.

The Hague Conference was established in 1893 and has 69 members. Its mandate is to work for the progressive unification of private international law and its work encompasses commercial law, banking law and international civil law procedures as well as family law. It has adopted a range of Conventions, the ones of most relevance to ABS being the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the 1986 Convention on the Law Applicable to Contracts for the Sale of Goods, the 2005 Convention on the Choice of Courts and the 1980 Convention on International Access to Justice.

UNCITRAL was established by the UN General Assembly in 1966 with the mandate to further the progressive harmonization and unification of the law of international trade. It has a Commission composed of 60 members, who are appointed on an equitable geographical balance. It has produced various Conventions and soft law instruments, including the UN Convention on Contracts for the International sale of Goods plus rules on arbitration. While not developing the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), UNCITRAL actively promotes it.

The third organization UNIDROIT is an independent intergovernmental organization with 61 members. Its basic statutory duty is to prepare modern and, where appropriate, harmonized rules of private international law. Its primary focus is on substantive rules, and only includes conflict of law rules incidentally. It prepares conventions, model law and guidelines, the most relevant for the purpose of this discussion being the UNIDROIT Principles of International Commercial Contracts.

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<sup>2</sup> OJ L 012, 16/01/2001 p. 1-23. This Regulation binds all Member States apart from Denmark.

<sup>3</sup> [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)

<sup>4</sup> <http://www.uncitral.org/>

<sup>5</sup> <http://www.unidroit.org/>

Some of the instruments developed by these organizations have only a small number of Parties and therefore only limited application or are not yet in force. In addition they mainly apply, in some cases exclusively, to commercial transactions.

- *Access to justice (including alternative conflict resolution)*

Contractual arrangements usually determine the way in which a dispute should be settled and include appropriate dispute settlement clauses. Such clauses provide legal certainty to the parties of a contract. An international regime could facilitate the enforcement of contractual obligations by encouraging the inclusion of (an) appropriate dispute settlement clause(s) in material transfer agreements and also, provide parties to an ABS contract with a (menu of) relevant model clause(s).

The choice of the jurisdiction is a critical issue when looking at a national law approach. The location of the defendant and his/her assets, the place of the breach, the extent of relevant national laws and the ability to enforce a judgment in another jurisdiction will, to a large extent, determine whether parties to ABS contracts bring a case in the provider or in the user country. The 2005 Convention on Choice of Court Agreements adopted under the Hague Conference, once in force, will become relevant within the jurisdiction of states that are Parties.

Where a contract, expressing MAT does not provide for a dispute settlement clause, the party seeking redress will fall back on national law rules on conflicts of laws and applicable private international rules.

From EU's perspective, a distinction could be observed between 1) judgments rendered within the Member States of the EU and 2) judgments rendered by third countries. In the first situation, the Brussels Convention of September 1968 on simplified procedures of Exequatur was concluded between EU Member States. Moreover, the Council Regulation (EC) No. 44/2001 is the EU legal basis for the recognition of judgments among Member States (except for Denmark). If a Member State recognized a foreign judgment within its jurisdiction, it has "*force obligatoire*" (can be enforced) within all Member States. However, Regulation 44/2001 does not apply to arbitral awards. In the second situation the recognition of judgments is possible according to national legislation and international agreements (bilateral / multilateral agreements mentioned above).

If an aggrieved party has been able to get access to justice and obtains a judgment in its favor, the next step is enforcement. This only becomes an issue when the defendant refuses to respect the Courts judgment. The Hague Conference's Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters provides a mechanism for enforcement between Parties to it. But it has a limited membership of 4 Parties. Otherwise, enforcement would depend on national laws but would only cover civil law matters, and not criminal or similar public law measures.

Where a court has jurisdiction, the next issue would be to identify a cause of action and the applicable law. These issues would largely be decided by national law, which would also determine the available remedies.

In addition, the notion of 'access to justice' is underpinned by social equity issues, which look beyond purely procedural matters. This is to address the concerns of some Parties as to the high costs of litigating, especially in a developed country. In this regard the Hague Conference has adopted a Convention on International Access to Justice, which provides that nationals of any Contracting State shall be entitled to legal aid for court proceedings in civil or commercial matters on the same conditions as if they were nationals. The Convention is in force but has limited number of Parties (24

largely developed countries). In addition the Convention on Civil Procedures (45 Parties) also has provisions on legal aid.

- *Alternative Dispute Resolution*

Alternative Dispute Resolution (ADR) covers a wide range of mechanisms which allow parties to resolve differences without recourse to national courts. Mediation and arbitration are both types of ADR. Mediation refers to a non-adversary, non-judicial process whereby a neutral third party attempts to steer parties to a mutually agreed settlement. It can be effective where both parties are acting in good faith to agree a mutually acceptable settlement. Arbitration is also a non-judicial process. It is a formalised series of rules and procedures which can be used by State, public bodies or private individuals. Parties must consent to arbitration (either upfront or after a contractual conflict has arisen) and, where so agreed, the final arbitration award is binding on the parties.

Arbitration has become the preferred method of dispute resolution in many commercial sectors. It provides a flexible mechanism for parties to resolve disputes without recourse to national legal systems. This avoids some of the uncertainties associated with litigation in terms of jurisdiction, choice of law and enforcement and the resultant unpredictability on costs and time. One of the major benefits of arbitration is that it can be tailored to the needs of the parties. In this regard, specialist arbitrators, who are familiar with the area of dispute, can be selected.

There are numerous types of arbitration and arbitration bodies. A dispute may be submitted to an administered arbitration body or to an unadministered arbitration body (ad hoc) or parties to a contract may decide to establish a new 'standing' arbitration mechanism and rules, but this could be a costly and time-consuming exercise.

There are a number of well known and respected arbitration bodies, such as the ICC International Court of Arbitration, the London Court of International Arbitration (LCIA)<sup>6</sup>, and the Permanent Court of Arbitration. These bodies could service the whole arbitration procedure, including service of documents and appointment of arbitrators. In addition, there is also a WIPO Arbitration and Mediation Centre<sup>7</sup> which deals with the resolution of international commercial disputes between private parties. Factors such as: who are the parties to the dispute (private or State), the location of parties, preference for certain procedures and experience of disputes within their sector, will determine the choice of arbitration forum.

Parties could also agree to establish an ad hoc arbitration and apply existing arbitral rules such as UNCITRAL or the London Court of International Arbitration.

Another significant advantage of arbitration is the relative ease of enforcement of judgments due to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Article III of the New York Convention provides that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.

An international award originating in a country that is a Party to the New York Convention may be enforced in any other Country that is a Party. Given that the New York Convention has 142 Parties there is wide global coverage.

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<sup>6</sup> <http://www.lcia-arbitration.com/>

<sup>7</sup> <http://www.wipo.int/amc/en/index.html>

In an ABS context, some existing Material Transfer Agreements already include settlement of dispute clauses based on arbitration, notably in the standard Material Transfer Agreement of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). This practice is also reflected in the African Model Law<sup>8</sup>.

A further noteworthy issue regarding contractual disputes is Article 12.5 of the ITPGRFA: "Contracting Parties shall ensure that an opportunity to see recourse is available, consistent with applicable jurisdictional requirements, under their legal systems,...recognizing that obligations arising under MTAs rest exclusively with the parties to those MTAs."

## 2. Public international law

Public international law regulates the relationship between states. Article 15.1 of the CBD stated that "*recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation*". Moreover, according to Art. 15.2 each Party are furthermore obliged to endeavor to create conditions to facilitate access to genetic resources (GR) for environmentally sound uses by other Parties and not to impose restrictions that run counter to the objectives of the CBD. In addition, art. 15.7 claims that Parties are obliged to take legislative, administrative or policy measures, as appropriate, with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of GR with the Party providing such resources and such sharing shall be on mutually agreed terms.

Where a dispute arises between Parties to the CDB concerning the interpretation or application of the CBD, Article 27 would provide Parties with a means to resolve disputes by first negotiation, then mediation and if so desired, be recourse to the arbitration procedures set out in Part I to Annex II and/or the submission of the dispute to the International Court of Justice (ICJ). If the parties to the dispute have not accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.

Certain benefit-sharing activities, for example, the establishment of in-country laboratories to carry out certain steps of research programmes and training, may be considered "investments" and might fall under the scope of bilateral investment treaties. Such treaties, which constitute part of the body of public international law, regularly contain a clause that dispute between a foreign investor and the host country related to the treaty should be settled through arbitration.

- ***Potential Measures in Public International Law that could be developed***

An international regime could provide for a number of options which facilitate compliance, such as a commitment to establish an information exchange mechanism between national ABS focal points of Parties to support both providers and users of genetic resources. Also, mutual legal assistance in litigation could help facilitate compliance across jurisdictions.

### **What kind of voluntary measures are available to enhance compliance of users of foreign GR;**

This section will review some of the voluntary measures that are currently available, looking at both national and user initiatives:

- The most significant voluntary measure is the Bonn Guidelines themselves.

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<sup>8</sup> See UNEP/CBD/ABS-WG5/INF3, p.28

- In the FAO Commission, the Code of Conduct for Plant Collecting and Transfer of Germplasm<sup>9</sup>, which was adopted in 1993.
- Commission recommendation C2008-1329 on PI management and code of conduct for universities and public research institution
- Government Initiatives: Some examples
  - A Nordic project on “Access and Rights to Genetic Resources – A Nordic Approach”, mandated by the Nordic Genetic Resources Council. This project addresses various aspects related to rights and access to genetic resources in the Nordic countries<sup>10</sup>.
  - A booklet on ‘Good Practice for academic research on genetic resources’<sup>11</sup>, produced by the Swiss Academy of Sciences.
  - The Federal Department of Economic Affairs in Switzerland, in partnership with the International Institute for Sustainable Development, has produced a best practice standard and handbook for Implementing Genetic Resource Access and Benefit Sharing Activities<sup>12</sup>.
  - The Japanese Ministry of Economy, Trade and Industry and the Japan BioIndustry have developed ‘Guidelines on Access to Genetic Resources in Japan’<sup>13</sup>.
- Codes of conduct such as:
  - Rules and provisions by national institutes and organizations elaborated e.g. by the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG), the Leibniz Institute of Plant Genetics and Crop Plant Research (Institut für Pflanzengenetik und Kulturpflanzenforschung – IPK), the Federal Centre for Breeding Research on Cultivated Plants (Bundesanstalt für Züchtungsforschung an Kulturpflanzen (BAZ)).
  - The International Plant Exchange Network (IPEN) Code of Conduct is the unified policy of the network of botanical gardens. It covers acquisition, maintenance and supply of living plant material by the gardens as well as benefit-sharing. The Code further provides a Material Transfer Agreement (MTA) to be used for exchanges with institutions that are not member of the IPEN network for non-commercial uses.
  - Another Botanical Gardens initiative is the ‘Principles on Access for Genetic Resources and Benefit Sharing for participating Institutions’<sup>14</sup>.

<sup>9</sup> <http://www.fao.org/biodiversity/conventionsandcodes/plantgermplasm/en/>

<sup>10</sup> The Nordic project can be found in : <http://www.norden.org/pub/sk/showpub.asp?pubnr=2003:016>

<sup>11</sup> Found at <http://abs.scnat.ch/downloads/index.php>

<sup>12</sup> Found at [http://www.iisd.org/pdf/2007/abs\\_mt.pdf](http://www.iisd.org/pdf/2007/abs_mt.pdf)

<sup>13</sup> Found at [http://www.mabs.jp/information/oshirase/pdf/iden\\_tebiki\\_e.pdf](http://www.mabs.jp/information/oshirase/pdf/iden_tebiki_e.pdf)

- The Belgian Co-ordinated Collections of Micro-organisms launched Micro-Organisms Sustainable use and Access regulation International Code of Conduct<sup>15</sup> (MOSAICC) with a number of partner organizations. MOSAICC is a voluntary Code of Conduct to support the implementation of the CBD in microbial work. Its aim is to help facilitate access to genetic resources and to help partners make appropriate agreements when transferring micro-organisms.
- The International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) has established a set of 'Guidelines for IFPMA members on Access to genetic resources and Equitable Sharing of Benefits Arising out of their Utilization'<sup>16</sup>.

Consider how internationally agreed definitions of misappropriation and misuse of GR and associated traditional knowledge could support compliance where genetic resources have been accessed or used in circumvention of national legislation or without setting up mutually agreed terms

Failure of parties to a benefit-sharing arrangement to implement obligations established in mutually agreed terms can be pursued through a well established set of national and international level rules if the mutually agreed terms are set out in contracts governed by private law.

An internationally agreed definition of misappropriation of genetic resources could help addressing situations in which mutually agreed terms do not exist. Either because genetic resources have been acquired in circumvention of national prior informed consent requirements or because mutually agreed terms have not been established.

An internationally agreed definition of "misappropriation" of genetic resources could support compliance if Parties were to agree that instances of "misappropriation" would trigger measures in the jurisdiction of countries where genetic resources are used.

A key challenge to developing an international understanding of misappropriation is how to approach the link between national access legislation of provider countries and eventual user country measures to pursue instances of misappropriation so that fundamental legal principles of clarity, predictability, proportionality and reciprocity are respected. Any such discussion should also address practical implementation issues such as the burden of proof in national court proceedings or the distinction between genetic resources within and outside the scope of the international ABS regime are addressed.

Against this background, the EU continues to see the need as explained in the previous EU submission of 28 April 2008, to establish international standards on national access law and practice regarding genetic resources and an international mechanism/process for assessing whether or not national access frameworks meet international standards that provide clarity, predictability, proportionality and reciprocity, as a precondition for its ability to engage in discussions on misappropriation.

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<sup>14</sup> Found at <http://www.bgci.org/abs/Downloads/>

<sup>15</sup> Found at <http://bccm.belspo.be/projects/mosaicc/>

<sup>16</sup> Found at <http://www.ifpma.org/Issues/CBD>

How could compliance measures take account of customary law of indigenous and local communities?

Customary laws of indigenous peoples are the rules that govern all aspects of indigenous people lives and their communities. They define rights and responsibilities of community members, as well as relate to the cultural and spiritual life and access to and use of natural resources. These are local systems of laws, norms, and regulations that have been devised to keep social order and maintain continuity of cultural practices. Therefore, these laws are relevant also for interactions with non-community members.

A practical example of interactions between governments and indigenous peoples is the establishment of Saami parliaments in Finland, Norway and Sweden, representing the Saami people in specified affairs the domestic law of the three countries. The Saami parliaments – together with the Saami Council - have jointly established a trust, which manages certain common cultural elements of the Saami people, such as the flag and the national anthem.

While these local systems represent rules binding among the respective community, they do not bind outsiders. In addition, they differ from statutory laws in that they are often not laid down in writing and thus can change easier and more frequently than statutory laws. While this could be a practical difficulty in obtaining PIC and MAT of indigenous peoples and local communities, some communities have appointed an authority or representative for interactions with non-community members in matters of community interest.

Such an approach is one means to ensure that community level procedures are respected for instance when traditional knowledge associated with genetic resources is involved. Compliance measures discussed above, such as specific dispute settlement arrangements within MTAs and arbitration procedures could also be facilitated through reference to the appointed community representative or authority.

Analyze whether particular compliance measures are needed for research with non-commercial intent, and if so, how these measures could address challenges arising from changes in intent and/or users, particularly considering the challenge arising from a lack of compliance with relevant access and benefit-sharing legislation and/or mutually agreed terms;

The EU considers that an international ABS regime needs to address the issue of simplified access to genetic resources for non-commercial research. However, non-commercial users of genetic resources have an important responsibility in generating confidence and trust with providers of genetic resources.

This confidence can be generated through practical and meaningful steps for distinguishing non-commercial research from other, including commercial, uses of genetic resources and for ensuring that simplified access procedures for non-commercial research are established but will not be abused.

Specific steps to address the particular challenges arising from non-commercial research could include:

- the appropriate classification of research depending on its varying form and objective;
- ensuring that obligations are passed on to subsequent users;

- addressing potential changes in intent by non-commercial users, including through identification of clear reference points for changes in intent.
- The renegotiation of MAT with the provider of the genetic resource in cases of changes in intent by non-commercial users.
- preventing that users of genetic resources without obligations vis a vis the provider make use of generated scientific information (eg, through publication policies) if such use is restricted.
- measures to allow the tracking of genetic resources in cases of doubt on the fulfillment of ABS requirements by users.
- linking decisions on simplified access with adherence of researchers to Codes of Conduct and other voluntary systems applicable to the research community.