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Balancing Building Blocks of a Functional ABS System

Tomme R. Young and Morten Walløe Tvedt

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Access and Benefit Sharing
ABS Capacity Development Initiative for Africa

Balancing Building Blocks of a Functional ABS System

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Abstract

The Ad Hoc Working Group on Access and Benefit Sharing under the CBD aims to propose a system for ABS to the CBD COP-10. Based on the current draft, this report seeks to identify a balanced approach to the components ('building blocks') of ABS for the purpose of making it 'legally certain' (functional and implementable) at both an international and a national level. It defines legal certainty as one of the core criteria for a functional system and sets forth concrete legal proposals for elements in order for the system to achieve this virtue. It identifies several possible 'building blocks' that may be useful in creating a balanced ABS regime, including the following:

o A clearer 'map' of the coverage and processes that comprise ABS is needed. It must also enable countries to use whichever 'legal vehicles' are most appropriate within their own systems for ABS implementation.

o Within the generally accepted view of the ABS process, the greatest opportunity for definitional clarity arises at the point of 'utilization of genetic resources'. Agreement among the parties about which activities constitute 'utilisation of genetic resources', can sharpen the basic understandings of the ABS process, defining one core trigger of the obligation to share benefits.

o A global 'ABS ombudsman' may also be a useful component of such a regime.

o The report also considers the potential roles that may be played by standards, models and forms, in a balanced regime.

o Another key international element of any cross-border legal relationship is the need for official communication between the various users, providers, middlemen, countries and others that are directly involved in each ABS transaction. This report also considers a new development in the field of user-measures – the new ABS provisions adopted by Norway – and provides a 'thought experiment' analyzing how one might bring a legal action for benefit-sharing in Norway.

To date, some of the most successful ABS development (on both provider- and user-sides) has involved the initiation of bilateral discussions between a specific provider country and another country whose citizens and entities propose to bio-prospect in or utilise the genetic resources of that provider country. These negotiations can 'prepare the way' for the negotiation of particular ABS contracts by individuals and entities from the two countries, as well as helping to protect the parties against misunderstandings and allegations of bad-faith and/or biopiracy that may arise when the individual negotiations go forward without confirmation of key certainties.

One main virtue which the ABS WG should provide is to propose a functional system which can operate on the ground between the private parties using the genetic resources in actual research and development.

Key Words

Access and benefit sharing, regime scope, utilization of genetic resources, functional elements of ABS, international legal tools, forms and models, national implementation

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1 Entering the 'Home Stretch'

Regardless of whether negotiations relating to ABS continue after CBD COP-10, it is clear that all parties and participants in the ABS Working Group hope and expect to complete the Group's main assignment[3] before the end of 2010. Consequently, it is essential to build the Working Group's final text on the basis of what is known and needed to make the system functional rather than to undertake additional studies or to propose new theories. It is essential, however, that the negotiations *do* incorporate the knowledge already obtained, particularly regarding legal issues and the specific legal and legislative impacts of provisions in the Working Group's operational text.

To this end, this action-paper asks a couple of question that is critical to the functionality of an ABS regime based on contracts and enforceable: First: 'how would various proposed provisions affect the functionality of ABS "on-the-ground"'? And second, 'What other provisions are needed in the international regime to enable adoption and implementation of a balanced approach with user-side measures which are compatible with provider legislation, by each CBD Party[4] (and to encourage their adoption by non-CBD countries)?' The main aim of this action-paper is to identify legal specific issues and proposals for making ABS functional on the ground.

1.1 The Balancing Act – Creating a Functional Regime

The main mandate of the WG-ABS is to solve the problems with Access and with Benefit Sharing; in the time after the entry into force of the CBD, the bulk focus has been on the provider side of this balance. This action-paper identifies the elements relevant to creating the ABS-balance, with primary attention to the factors which have inhibited CBD countries from fulfilling their user-side obligations, which user- and provider-side measures can enable a balanced and functional ABS implementation,[5] and the manner in which all sides are impacted if the system is developed in a way that makes user-side implementation impractical, unreasonable or undesirable.

The world is not uniformly divided into 'user countries' and 'source countries'. The 'balance' in this action-paper arises from two general recognitions: that any country may be a source of genetic resources, and that any country, whether highly developed or not, may be a 'user country'.[6] ABS is somewhat 'schizophrenic' – based on a commitment of all CBD countries to adopt user-side measures, while containing many passive obstacles to such measures.[7]

1.2 The Cornerstones – Functionality and Legal Certainty for User and Provider

This action-paper starts from the two apparently fixed points of departure:

- First, it assumes that all CBD Contracting Parties, having committed to Article 15 by ratifying the Convention, are therefore committed to fulfilling their ABS obligations.[8]
- Second, it is mandated to consider the meaning and implementation of general calls for 'legal certainty,' as discussed below, as a basis for developing a functional ABS system.

In commercial law, the term 'legal certainty' refers to *the ability of each user, provider, national legislator, official, judge, arbitrator or other person to know with a relatively high degree of confidence whether the regime applies to a particular person or action, and if so what the regime will require (or probably require) in each case*.[9] The current negotiations address to the two aspects of legal certainty:

- The commercial system is built on the ability of the user to know with certainty (i) which resources and rights require permission or payment, and which are un-owned and thus can be freely used; and (ii) what processes one must go through in order to acquire the resources and rights he desires. For each transaction, it is necessary to identify precisely the relevant legal requirements and costs, as part of the process of assessing commercial risk, and determining the value of the transaction.[10] This is the concept most often meant when ABS negotiators speak of 'legal certainty';
- In granting access to genetic resources and/or the right to utilize them, the source country and/or provider also need certainty. From the provider perspective, 'legal certainty' refers to the assurance that the user will comply with the terms of the countries chosen legal vehicle for ABS, performing his obligations and that if he fails to do so, the provider or source country will have avenues of legal or informal recourse. Although this too is an issue of legal certainty, it is normally referred to in ABS discussions as the need for 'a binding regime'.

The twin goals of 'legal certainty' and the creation of rationally functional ABS regime serve as the fundamental principles underlying this action-paper.

1.3 Key Issues Raised Affecting the Development of a Legally Functional ABS Regime

The current negotiations of the international regime are forcing the delegates to work on two fronts: On one hand, they are called to identify those positions and provisions that most strongly affect national positions and negotiate clauses which ensure that the regime will support national interests, while on the other hand, they are called to develop a regime that will function in law and in practice in a consistent and integrated way, across all CBD countries and sectors.

The ABS discussions currently remain unsettled regarding the firm outlines of the meaning and process of ABS. As a consequence the political and the practical elements of the negotiations are intensively intertwined. The current draft text under negotiation reflects the fact that the parties

have been unable to separate political negotiations from functionality. Hence, the Paris Annex does not yet reflect a basic functional framework on which the delegates have agreed to move forward, but includes a variety of very different options for the operation of ABS. As a consequence, in addition to negotiating political positions regarding the ABS concept, the parties are also negotiating that concept itself, root and branch.

1.4 Methodology

This action-paper is focused on the current draft of the ABS Working Group's Operational Text[11] (the 'Paris Annex', as it stands following the end of Working Group-7). It is organised in three parts:

a. Chapter 2 includes a tabular 'key' to the current headings contained in the Paris Annex, identifying which points in this action-paper are most relevant to the provisions discussed under each heading;

b. Chapters 3, 4 and 5 identify of key points and principles affecting on-the-ground functionality, emphasising points raised by the 'Paris Annex'. This part will discuss legal and functionality matters relevant to the choice among options. It provides thoughts and practical solutions, focusing on key provisions on legal and practical implementation needs.

c. Chapter 6 takes the foregoing discussion to the ground level of enforcement by considering how the currently existing national user-side measures apply (or would apply) if/when they are called upon to address a particular legal vehicle or transaction. These discussions take the form of a 'thought experiment' (hypothetical case study) considering particular types of legal or administrative action and how they apply to the various 'legal tools' adopted by provider countries.

In all three, the authors endeavour to identify specific text and practical solutions, where possible, and to note particular functionality issues that underlay the selection among options and might help to remove or minimise obstacles to agreement in the present negotiations. Finally, Chapter 7 provides some concrete proposals for completion of the current negotiations.

2 Paris Annex Table

The following pages identify sections of the Paris Annex that have particular relevance to the functionality issues described above, including a brief identification of the issues relevant to each section.

Table 1: Paris Annex

Part	Section	Title of Paris Annex section	Relevant functionality issues (sections of this action-paper)
I	-	**Objectives**	The objectives discussion in the Paris Annex operate at a higher (international political) level. Although very important, these provisions do not appear to directly impact on-the-ground functionality of ABS, and are not directly discussed in this action-paper.
II	-	**Scope**	Inclusion/exclusion from regime level of specificity affects legal certainty. (Ch. 3, *and see* 1.1-1.3)
III	A.1	**Linking access to the fair and equitable sharing of benefits [Note relatively little of this part currently discusses the 'linkage' issues]**	Legal certainty regarding coverage of particular resources, activities and transactions (4.1); ensuring that these provisions are consistent with (and/or do not inhibit the use of) all of the standard legal vehicles currently in force for ABS access (4.2). Also relevant, research issues (4.3.2), transfers of genetic resources received under ABS (4.5.2); the relevance of 'no ABS legislation' in source country (4.2)
III	A.2	**Benefits to be shared on mutually agreed terms**	Benefit-sharing issues (4.3.1); promoting functionality of ABS contracts (4.4); model and default clauses (4.6.1); compliance (4.6, generally)
III	A.3	**Monetary and/or non-monetary benefits**	Promoting functionality of ABS contracts (4.4)
III	A.4	**Access to and transfer of technology**	(Discussions of technology transfer in the Paris Annex are expressed as international political commitments. Although very important these provisions do not appear to have any direct impact on ABS functionality or legal certainty and are not discussed in this action-paper)
III	A.5	**Sharing of results of research and development on mutually agreed terms**	Research issues (4.3.2)
III	A.6	**Effective participation in research activities, and/or joint development in research activities**	(Discussions of 'participation in research activities', in the Paris Annex are expressed as international political commitments. Although very important these provisions do not appear to have any direct impact on ABS functionality or legal certainty and are not discussed in this action-paper)
III	A.7	**Mechanisms to promote equality in negotiations**	Provisions in this section of the Paris Annex focus only on one aspect of 'Equity and/or equality' –provisions of external assistance to traditional and rural groups in ABS contract negotiations (5.2).
III	A.8	**Awareness-raising**	These issues are closely related to the discussion of incentive, motivation and voluntary measures (4.8)
III	A.9	**Measures to ensure participation and involvement of indigenous and local communities in mutually agreed terms and sharing of benefits with traditional knowledge holders**	(Discussions of 'measures to ensure participation and involvement of indigenous of local communities…', in the Paris Annex are expressed as international political commitments. Although very important, these provisions do not appear to have any direct impact on ABS functionality or legal certainty and are not discussed in this action-paper.) A few key related issues have a practical impact, such as the benefit of community bio-cultural protocols and encouragement of countries and communities to provide clear guidance regarding which individuals or groups, if any, may act for or speak for the community. These issues are not further discussed in this action-paper.

Part	Section	Title of Paris Annex section	Relevant functionality issues (sections of this action-paper)
III	A.10	**Mechanisms to encourage benefits to be directed toward conservation and sustainable use of biodiversity and socio-economic development, in particular the Millennium Development Goals (MDGs) in accordance with national legislation**	(In general, provisions regarding 'mechanisms to encourage benefits to be directed…' in the Paris Annex are expressed as international political commitments and recommendations. As such, although very important, they do not appear to have direct impact on ABS functionality and are not examined in this action-paper.)
III	A.11	**Development of international minimum conditions and standards'**	Contractual functionality (4.5 and 4.6); benefit-sharing (4.4) and compliance measures (including model and default clauses) (4.6)
III	A.12	**Benefit-sharing for every use**	Legal certainty regarding coverage of particular resources, activities and transactions (4.1)
III	A.13	**Multilateral benefit sharing options when origin is not clear or in transboundary situations**	Legal certainty regarding coverage of particular resources, activities and transactions (4.1); contractual functionality (4.5 and 4.6); benefit-sharing (4.4); compliance, especially model and default clauses (4.6); bilateral agreements for ABS (7.3)
III	A.14	**Establishment of trust funds to address transboundary situations**	[Not discussed in this paper]
III	A.15	**Development of menus of model clauses for potential inclusion in material transfer agreements**	Compliance, especially model and default clauses (4.6). Also relevant: contractual functionality (4.5 and 4.6); benefit-sharing (4.4); bilateral agreements for ABS (7.3)
III	A.16	**Enhanced utilisation of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilisation**	(In general, the provisions regarding 'utilization of the Bonn Guidelines..' in the Paris Annex are expressed as international political objectives and recommendations. As such, although very important, they do not appear to have direct impact on regime functionality and are not examined in this action-paper.)
III	B.1	**Recognition of the sovereign rights and the authority of Parties to determine access**	(In general, the provisions reiterating the CBD's 'recognition of sovereign rights…' in the Paris Annex are expressed as international political objectives and recommendations. These matters are not examined in this action-paper, however the provisions in this section of the Paris Annex as currently drafted also raise potential functionality issues, regarding contractual functionality (4.5 and 4.6); benefit-sharing (4.4); compliance, especially model and default clauses (4.6); bilateral agreements for ABS (7.3)
III	B.2	**Linkage of access to fair and equitable sharing of benefits**	Legal certainty regarding coverage of particular resources, activities and transactions (4.1, especially 4.1.2); consistency with all of the standard legal vehicles currently in force for ABS access (4.2); and compliance (4.6). Also relevant: contractual functionality (4.4); benefit sharing (4.3); research issues (4.3.2), transfers of genetic resources received under ABS (4.5.2); the relevance of 'no ABS legislation' in source country (4.2)
III	B.3	**Legal certainty, clarity and transparency of access rules**	Legal certainty regarding coverage of particular resources, activities and transactions (4.1, especially 4.1.2); consistency with all of the standard legal vehicles currently in force for ABS access (4.2); and compliance (4.6)
III	B.4	**Non-discrimination of access rules**	(In general, the Draft Operating Text provisions regarding 'non-discrimination' in the context of access to genetic resources are expressed as political commitments relevant to the application of international trade concepts to ABS. As such, although very important and interesting, they do not have direct impact on regime functionality and are not examined in this action-paper.)
III	B.5	**International access standards (that do not require harmonization of domestic access legislation) to support compliance across jurisdictions**	Consistency with all of the standard legal vehicles currently in force for ABS access (4.2); and compliance (4.6). Also relevant: contractual functionality (4.4); benefit sharing (4.3); research issues (4.3.2), transfers of genetic resources received under ABS (4.5.2); the relevance of 'no ABS legislation' in source country (4.2)

Part	Section	Title of Paris Annex section	Relevant functionality issues (sections of this action-paper)
III	B.6	**Internationally developed model domestic legislation**	Consistency with all of the standard legal vehicles currently in force for ABS access (4.2); and compliance (4.6).
III	B.7	**Minimization of administration and transaction costs**	(NO CURRENT TEXT)
III	B.8	**Simplified access rules for noncommercial research**	Research (4.3.2)
III	C.1	**Development of tools to encourage compliance**	Compliance (4.6) and certificates and communication tools (4.7)
III	C.1	**Development of tools to monitor compliance**	Compliance (4.6) and certificates and communication tools (4.7)
III	C.1	**Development of tools to enforce compliance**	Compliance (4.6) and certificates and communication tools (4.7)

Many, but certainly not all, elements of Part III. of the Paris Annex have the potential either to enable the creation and operation of a legally and practically functional regime, or to be an obstacle to that functionality.

3 Objectives and Scope

In most international instruments, decisions relating to the instrument's 'objectives' and 'scope' are international policy choices. They constitute the countries' agreement on their shared objectives and commitments at the international level, but do not create or define direct obligations or limits on national legislation or the actions of private individuals and companies. In the ABS negotiations, by contrast, some of the objective and scope proposals in the international ABS negotiations appear to have this impact; while others (those relating to scope) have the potential to directly impact regime functionality.

3.1 Objectives

As one might expect, the Paris Annex's provisions in Part I, regarding 'Objectives', address political and international decisions, rather than the on-the-ground matters needed to create a functional ABS system based on individual transactions. For this reason, although very important, these provisions are outside the mandate of this action-paper and will not be further discussed.

3.2 Scope Provisions

The Paris Annex's discussions of the scope[12] of the international ABS regime have a broad potential impact. These proposals may affect not only the international political commitment, but also the impact of national ABS law, including user-side measures. Various scoping options in the Paris Annex refer to other legal regimes (outside the CBD), which as potentially relevant to a particular resource, transaction or activity under the ABS regime. Decisions of the international regime negotiators could have a direct effect on individual ABS contracts. If the negotiators choose to unilaterally integrate other instruments into the ABS regime, this will determine which international system governs each individual on-the ground transaction in a resource, transaction or activity.

Regardless of which (if any) of these proposals is adopted, they can have a positive or negative impact on 'regime functionality', depending on how specifically they define the particular relationships among the various instruments. As an example, if the scope is not written very clearly, one CBD country may view the scope of the ABS regime in a very broad way, and may expect another CBD country to apply user measures to particular ABS contract or activity.. If that second country has a narrower view of the scope of the ABS regime, it may not feel that is user measures apply to that situation. As a result, the legal regime would be controversial – neither functional nor legally certain.

At the contract level, the International Regime can be legally certain in cross-border situations only where each user, provider, agency, judge, arbitrator or other person can know precisely which regime applies to each individual resource or activity.

In developing international agreement regarding the ABS process, it is essential to be very clear on the scope – not only what is included, but what is exempted. In deciding what is included within the regime, one might also ask which technical issues the CBD Secretariat, COP, delegations and focal points will be able to address. Similarly, when deciding on an exemption, one must not only ask whether some other regime applies to a genetic resource, activity or transaction, but also whether that other regime will address CBD-related concerns in connection with that resource, activity or transaction. Finally, it is useful to remember that, in all areas of commercial operation, it is common for more than one legal regime to apply to each resource transaction or activity.

Specifically, whether the negotiators choose to define the basic scope in positive terms or by stating exemptions or exclusions, it is essential to provide or identify a clear dividing line between what is included in ABS and what is not. The following examples (relating to exemptions proposed in the Paris Annex) neither recommend nor oppose particular provisions, but only suggest particular questions that must be answered in the drafting scope provisions in order that the coverage of the regime will be sufficiently certain to enable cross-border implementation:

3.2.1 Example: Clarifying the Relationship between ABS and the ITPGRFA

The best example of the need for clear 'mapping' of the relationship between international instruments involves the International Treaty on Plant Genetic Resources for Plant and Agriculture (ITPGRFA) and the international ABS regime. For purposes of legal certainty, it is important to clarify the relationship between the two systems.[13] Several proposals in Part II of the Paris Annex suggest an ITPGRFA exclusion, but differ on the scope of that exclusion. Some would exclude all plant genetic resources (PGR); others only PGR being used in food and agriculture (PGRFA). A third separate option would exclude only crops listed in Annex 1 of the Treaty.

Deciding among these options, however, is only the first step of the exception. The second step would seek to achieve the higher level of specificity necessary for cross-border legal certainty, as described above.

The next questions in this process would depend on which of the above options is chosen. Thus, if the regime exempts 'all PGR', it will be necessary to consider whether the ABS regime's non-agriculture concerns can still be fully addressed with regard to PGR. Is there a need to develop a coordination mechanism? If the Treaty does not address the concerns of the CBD, will there be any means for the ABS process to cover this omission? Similarly, if the second option (exempting all PGRFA) is chosen, how will the CBD countries consistently distinguish between PGRFA and other PGR? If the third option (exception for all crops listed in ITPGRFA Annex 1), it will be essential to determine which rules govern non-Annex-1 crops:

A number of other factors may, depending on the Countries' decision, affect the functionality of the relationship between the two instruments, including the following:

1. Which regime governs PGR that are acquired for purposes other than agriculture?
2. If the ITPGRFA assumes full responsibility for PGR, but addresses only agriculturally-oriented PGR, will non-agricultural PGR be included in ABS or left unregulated?
3. Which regime's rules will apply to the PGR of the seventy-five CBD countries that are not Party to the ITPGRFA? Is PGR from these countries covered by ABS, or is it outside both regimes?
4. Where the Treaty deems that a plant species is not 'of actual or potential value for food and agriculture', is it –
    - still covered by the ITPGR exception? OR
    - covered by the ABS regime? OR
    - not covered by any regime?

Failure of the negotiations to answer these questions will ultimately create a grey area of legal uncertainty in the regime.

3.2.2 Example: UNCLOS and Marine Areas

In discussions of potential exemptions of marine resources, it will be important not only be clear, but also to consider the impact that CBD provisions might have on the UNCLOS regime. It is especially important to examine whether the exemption might alter the current marine jurisdictional balance, which would make it difficult for particular CBD countries to participate in the ABS regime. Some questions that might help clarify a marine exemption for functionality purposes include the following:

1. What specific ocean areas will the ABS regime consider to be 'beyond national jurisdiction'?[14]
2. Shall (or 'how should') the marine activities, rights and resources of CBD countries that are not party to UNCLOS be included or excluded from the regime?[15]
3. Will an exemption mean that all 'marine genetic resources beyond national jurisdiction' (however defined) are left unregulated (excluded from all ABS-related requirements and not specifically addressed by UNCLOS)?[16]
4. How will the exception ensure that it does not prevent each country from enforcing its rights to marine genetic resources from its exclusive economic zone (EEZ) and on its outer continental shelf (OCS)?[17]

An undefined scope would also create uncertainty when it comes to the need to externally verify the characteristics of the resource under the two international regimes (*i.e.*, a particular genetic resources was obtained from an 'ocean area outside the scope of national jurisdiction').

3.2.3 Example: CCAMLR and the Antarctic Treaty System

Similarly, the CCAMLR-related exemptions may call upon the parties to ask particular questions about the specific relationship between ABS and the Antarctic Treaty system (ATS), with particular attention to its Convention on the Conservation of Marine Living Resources (CCAMLR).

1. What specific rights and rules of CCAMLR/ATS address access and benefit-sharing?
2. Are CBD countries that are not party to CCAMLR/ATS engaging in Antarctic marine activities? If so, shall they be included in or excluded from the ABS regime?[18]
3. If a CCAMLR/ATS exemption is adopted, shall any part of the ABS regime apply to resources taken from the Antarctic Treaty Area?

3.2.4 Summary: Scope and Objectives

In summary, functionality is not affect by *which choices* the parties make regarding the scope of the ABS regime, but can be seriously affected by *how those choices are expressed*. It is essential that the scope provisions are expressed in a way that increases regime certainty, rather than adding to confusion.

4 System Provisions for Creating Regime Functionality

The bulk of the Paris Annex is contained in Part III, which addresses the 'main components' of the regime (benefit-sharing, access and compliance). The structure of this chapter follows the temporal structure of an ABS relationship from collection to benefit-sharing. These provisions raise many points which might impact the functionality of the International ABS Regime.

4.1 The Three Faces of Genetic Resources

A commercially acceptable level of legal certainty can exist in ABS only where all participants in any transaction involving biological material or rights can answer the following question with certainty: 'Is the subject matter of this contract a "genetic resource" or not?'

4.1.1 The 'Genetic Resources' Challenge

As discussed by many commentators, however, this question is difficult to answer, and there is a very broad spectrum of conflicting definitions, each of which presents a different challenge for the regime. On one side, is the view that 'genetic resources' refers to physical specimens and that ABS should be a process to control their movement. On the other, 'genetic resources' is seen to refer to the intangible, informational component.

4.1.1.1 Options Currently under Consideration

The Paris Annex currently indicates three primary options for clarification of the basic operational coverage of the regime.

- To **link access to benefit-sharing**, so that benefit sharing applies only to genetic resources acquired under and ABS Contract or PIC/MAT. Although it would simplify ABS in some ways (there would be no need for a court to determine which resources are 'genetic resources') this approach creates significant loopholes and perverse incentives. A user who obtained genetic resources through a middleman or in some other way would be excluded from ABS. This fact would create a perverse incentive of all users to find different pathways to obtain samples, and thereby avoid the source country's access process. [19]
- To require **benefit-sharing for every use of genetic resources** no matter how obtained. While it might could eliminate the loopholes described above, this approach would inject a very high level of complication and uncertainty into the regime – forcing courts and implementing agencies to prove whether every substance used in a product was a 'genetic resource'.
- To **apply ABS to all biological resources**. Although this approach eliminates the 'genetic resources' threshold, it would require the parties either to apply ABS to an incredibly large volume of material (*e.g.*, all raw materials, seeds, animals, food, textiles, lumber, etc) and number of transactions or to find some other basis for choosing which resources must meet ABS requirements.[20]

These options been partially studied by many legal and legislative experts, and are well documented in many publications.[21] For purposes of providing the basis for a functional ABS framework, it is necessary to clarify the selected option, and to make it functional and enforceable.

4.1.1.2 A Functional Approach to the Primary Genetic Resource Issue

The central definition problem ('genetic resources') is perceived very differently at each of the key moments of ABS – at access; at utilisation of genetic resources; and at the point that benefits arise from that utilisation.

At the point of access, the difference between 'genetic resources' (governed by the ABS regime) and 'biological resources' (outside the ABS regime) appears to rely on the **intention** of the person obtaining and/or removing the resource. To make this determination one must either accept the word of that person, or possess the supernatural ability to predict and prove the intended future use of the material.

At the point of 'utilisation', however, there is less need for speculation or mind reading. Utilisation can normally be verified externally, by any person, entity or agency that can enter or inspect the place of utilisation; however, there is a need to develop a clearer understanding of the meaning of 'utilization of genetic resource'. Unlike the 'genetic resource'-based approaches above, however, it is possible to establish criteria for determine whether a particular activity is utilisation of genetic resources or not.

Finally, at the point of 'benefits arising', the regime again appears to rely on the user to disclose whether a benefit has arisen and whether it arose from the utilisation of genetic resources.

4.1.2 Solving the Definitional Challenge

Uncertainties regarding the specific nature of 'genetic resources' pervade the entire regime, and affect the feasibility of every provision in the Paris Annex. For purposes of ABS functionality, it is essential for the negotiations to determine whether it will apply three different approaches (a different approach for each of the three key stages described above) or to attempt to apply a unified view across the entire ABS process. In either case, it is essential to determine how the concept of 'genetic resources' genetic resources will be defined and used in a legally certain and practically functional way. In this section, the authors consider a structural solution that might allow progress without forcing the Parties to agree on a definition of 'genetic resources'.

4.1.2.1 The 'Baby and the Bath' – Supporting ABS Complying Users, while Addressing the Problem of Non-Compliance

One serious difference of perspective dividing participants in the ABS regime negotiations becomes clearest during discussions on compliance.

On one side, most analyses that attempt to develop a functioning regime are primarily focused on users who wish to comply with ABS. These users and bioprospectors make no attempt to conceal their desire to search and screen an area or a grouping of organisms. Being clear about their 'genetic-resource-utilisation' intention, these users generally seek to comply with access legislation and contracts. Nearly all proposals relating to the ABS framework assume that users will obtain ABS contracts and be governed by those contracts. Nearly all regime framework proposals are built upon this basis, and assume that all national level legal vehicles for ABS are equivalent to an ABS contract.[22] As noted in Chapter 6, below, there are still serious legal challenges for ABS interpretation and enforcement against this category of users, but these obstacles are generally practical in nature, and able to be addressed by legal solutions.

By contrast, most discussions regarding **ABS compliance** focus on the number of persons and entities who are using genetic resources without ABS contracts. Measures that are sufficient to regulate users who wish to comply with ABS will normally not be sufficient to enforce provider-side requirements, especially where the user is operating outside of the provider-side country.

It is critical that the regime consider and support the needs of collectors and users who comply with ABS requirements, and recognise their positive contribution to international conservation, sustainable use and equity.

4.1.2.2 Manifesting Intent: The Utilisation of Genetic Resources

In a large number of bioprospecting and resource collection activities, however, it is not easy to identify the intention of the collector or demonstrate that he is collecting 'genetic' rather than 'biological' resources. For purposes of functionality, it appears important to release the ABS system from the bondage of species-by-species or specimen-by-specimen oversight responsibilities. Commentators note that a regime can best be enforced where its basic threshold matters may be empirically or externally determined. To make ABS determinations objective, they must be tied to specific characteristics. As noted above, however, cross-border legal certainty is a critical prerequisite for ABS to be both functional and legal certain. CBD countries, their decision-makers and all parties to ABS contracts and other legal vehicles must know whether each particular resource or activity is governed by the ABS regime. Hence, a functional regime requires that the CBD countries share a unified overview of the ABS regime framework during all stage of each individual ABS transaction. The most effective solution would appear to be one which (1) maximizes externally verifiability (legal certainty) and (2) minimises loopholes; and (3) create benefit-sharing incentives for users and user-countries (see section 4.8 below). In this section, the authors offer a structural solution that might allow progress without forcing the Parties to agree on a definition of 'genetic resources'.

As detailed in other writing, the text of Article 15 seems to adopt 'utilisation' as the link between the 'genetic resources' (a scoping concept) and 'benefit sharing' (the expected outcome of ABS).[23] A regime whose

operative requirements focus on **utilisation of genetic resources** has two primary advantages as a conceptual basis for ABS:

- It is objectively verifiable, as compared with systems (described above) focused on 'genetic resources', which rely on knowing the intent of the person holding the resource (which may change with time, or if the resource changes hands.)[24] By comparison, a functional definition of 'utilization of genetic resources' is potentially much easier to create, without broadening ABS coverage to all 'biological resources'.
- The phrase 'utilization of genetic resources' has not previously been defined in the CBD, so that the delegates may feel free to determine what it means by adopting a definition or approach that will enable and support on-the-ground operation of ABS.

Most important, a focus on utilisation has the potential to vastly simplify ABS, both practically and legally. In theory, it can be easier to recognize each 'utilisation of genetic resources' than to guess which biological material have been used and prove whether each of them 'biological' or 'genetic'. If the approach focuses on 'utilisation of genetic resources', which is more apparent on the user-side of each transaction than on the provider side, it may decrease the number of activities and approvals required at the time of collection – 'streamlining the access process' without diminishing ABS coverage or obligations.

To orient the regime around 'utilization of genetic resources', however, it would be necessary to define that concept concretely, to enable all parties to know or easily determine whether each individual activity is governed by ABS. Although this is a difficult task, it can both concretise the genetic resources concept and serve as an objective standard by which all participants can know whether and when ABS applies.

If it chooses to focus the regime around utilisation, the Working Group could approach it in four possible ways or a combination[25] of two or more of them:

(i) a legislatively concrete description of characteristics of 'utilization of genetic resources' (either in general or by sector[26]). Activities meet these characteristics must be subject to ABS oversight;

(ii) a specific list of specific activities that constitute "utilisation of genetic resources (coupled with a mechanism for the governing body (CBD COP or a body created for ABS) to amend the list if necessary);

(iii) a mechanism by which a source country may declare that a particular user's activity does not utilize genetic resources; and/or

(iv) a mechanism by which a user whose activity appears on the list can prove that he does not utilize any biological material of foreign origin.

Successful drafting of this kind of objective system as a basis for functionality of the regime would depend on two key factors: (a) any criteria or list (options i and ii) must be recognized as binding among CBD

countries, with all of them agreeing in advance to apply to the system to all listed activities; and (b) the list must include flexibility factors, such as those described in options iii and iv, above.

The utilisation-base approach would also make it easier to resolve existing controversies over, *e.g.*, research (discussed at 4.3.2), which could be defined through a separate list of activities, which may then be subject to separately specified standards; and the development of a single understanding which integrates concerns and misunderstandings related to 'derivatives' and 'products' (discussed at 4.5.3.)

4.1.2.3 'Benefits Arising'

The third face of ABS is to determine the point of time for when benefits 'arise out of utilisation' of genetic resources, and must be shared (unless an ABS contract exists stating a different time and/or type of benefit-sharing.) According to Article 15.7 this is the point of time when benefits shall be shared. When benefits have arisen they are not longer potential, but have materialised in the making of concrete results. This point in the ABS time-line is also external verifiable. In additional to financial benefits, genetic resources often produce benefits such as IPRs, new product approvals; and other marketing/export requirements, which may be more easily and externally identified. The challenge of using these as 'check points' lies in finding a way to externally determine whether the IPR, approval or other permit relates to a genetic resource. Thus, the 'utilisation approach' might be useful, eliminating that step.

4.1.3 Summarising the 'Genetic Resources' Challenge

Ultimately, benefit-sharing obligations could fall into two categories:

- Fixed-point for benefit-sharing: For some types of benefits which can be shared under an ABS system, it might be relevant and easily externally verifiable a fixed point of time when benefits have been created in a way sufficiently beneficial to the user of the resources that the ABS would oblige him to share a fair and equitable part of them with the provider.
- Process-oriented benefit-sharing: Other types of benefits (*e.g.*, research results), need take a rather more flexible form, calling for a more dynamic understanding and implementation.

This distinction could be recognised by identifying different categories of utilisation (defined according to the suggestions in sections 4.1.2.2 and 7.1.2.3) and linking them to with their more specific requirements and expectations. Establishing such clear rules would add to the legal certainty of the ABS-system as users of genetic resources would have an easier task in determining when they are supposed to share benefits, user countries would have a clearer idea of how they could expect benefits to be shared and mechanisms to clarify particular difficult aspects. In that case, courts, administrative bodies and arbitrators could identify or develop clearer rules and be which they would be more likely to apply and enforce in case of an accusation of infringement of that contract.

4.2 Primary Legal Vehicles of Access to Genetic Resources

The ABS rights and responsibilities under the CBD are seen to revolve around the provider/source country and the manner in which they exercise their sovereign rights over those resources. Currently, there are already nearly 20 examples of national ABS provisions through which CBD countries implement the concepts of 'Prior Informed Consent' (PIC) and 'Mutually Agreed Terms' (MAT). Separately required for access and for benefit sharing, MAT was believed at the time of the original negotiations to eliminate the need for detailed negotiations about the implementation of ABS, by placing ABS under the framework of national contractual law (a kind of law that exists in all countries).[27] Since 1992, CBD parties have addressed their responsibilities regarding PIC and the two MAT processes in many different ways.[28]

The Working Group has generally agreed that the use of a contracts-oriented system must be retained. It has also agreed that its output should not invalidate legislative and operational choices that have been made by CBD countries up to now regarding the provider-side of the ABS process. To ensure that this objective is met, however, it is not necessary to protect all options, only those that have been taken up to now. The following appear to be all of the recognized approaches (legal vehicles) to the 'provider side' of ABS implementation:

1. Enforceable contracts;
2. Other contractual instruments that are (intentionally or unintentionally) unenforceable (including Memoranda of Understanding and other non-binding instruments, as well as purported contracts that contain no enforceable provisions)
3. Implied or 'equitable' (de facto) contracts (including the innovative use of shrink-wrap and click-wrap contract mechanisms in the ITPGRFA);
4. Permits that qualify for contractual interpretation or enforcement at law;[29]
5. National law imposing other permit or approval requirements;
6. National law imposing requirements without specific permit or approval;
7. No relevant national law
8. Transactions which the parties believe to be outside the scope of the ABS regime

As shown in Table 2, these eight options have been applied in ABS situations, with varying results. Within the several of these options, there are a variety of sub-options which have not been fully applied.[30] Regarding the nine options listed above, a few frequently misunderstood points must be noted:

- Even where not formally 'enforceable' by law, tools 1-4 have been used and can operate relatively effectively in cross-border situations[31]; while 5-8 are normally operable only in the country of the provider.[32]

- The value and use of non-binding contractual instruments is frequently understated. The parties to such instruments are bound by a 'duty of good faith', to 'use best efforts' to achieve the instrument's objectives. Most parties to ABS contracts are more willing to agree to a non-binding instrument quickly, and such instruments often constitute the initial element of a long-term relationship. As a result, in many situations, those parties may be best served by a non-binding instrument.[33]
- Similarly, there may be many explanations where there is no ABS law. Often it may indicate a country's belief that its existing law (of sovereign powers, property ownership, natural resources, contracts, trade, and many other issues) is sufficient, genetic resources derive from 'the sovereign rights of States over their natural resources'.[34] A State must normally adopt a legislative or executive instrument in order to waive any claim on benefits arising from its genetic resources.[35] The CHM contains no indication that any states have made such a formal declaration abandoning their sovereign right to control their genetic resources and seek a share in the benefits arising from their utilisation.
- Finally, parties to ABS contract have frequently concluded that their proposed transaction is outside the scope of the ABS regime.[36] The legal correctness of these conclusions has rarely been examined, and is frequently not agreed by the ABS officials, law or focal point of the country involved.

Within the current negotiations, the delegates appear to view the breadth of current tools for ABS to be a factor limiting the precision and detail of the Paris Annex. Both precision and detail are essential to functionality. This action-paper seeks to identify issues and options that can increase functionality while supporting (or not inhibiting) any of these legal vehicles.

Table 2: Use of Legal tools

Legal tool for ABS (access-side) implementation	**On-the-ground experience with this tool[37]**
Enforceable contracts	12 countries require a formal contract under their national law
MoUs and other unenforceable contractual instruments	Although the MOU option is not mentioned in the law of any country, nearly all ABS contracts between a provider and a user are unenforceable at law
Implied or 'equitable' (de facto) contracts	This is the tool chosen by the ITPGRFA
Permits enforceable as contracts	15 national laws require negotiation of permits in a way that might render them enforceable as contracts.
Other permits, licenses or approvals	8 national laws appear to impose permit requirements that would not be enforceable as contracts.
Relevant regulatory control by law or agency, requiring no permit or approval	18 national laws impose specific requirements on users and collectors and presume that they will be enforceable even after collection has occurred (*i.e.,* when the user may have taken the resources and left the country.)
No relevant national law	Only 39 countries have filed any measures in the ABS database, and only about 18 of these include binding legal requirements. Other national law may be relevant, even if not called 'ABS law' or mentioning 'genetic resources'. .
Transactions outside the scope of the ABS regime	A large number of researchers, commercial users and other have concluded that their activities are outside the scope of ABS, citing various reasons.[38]

In sections 6.1 and 6.3 below, the hypothetical case-study of enforcing provider-side ABS law under Norway's user-side law provides some critical information about how provider-side tools would fare in a user-side enforcement action.

4.3 Sharing Benefits and Research Results

The central issues of the ABS discussion of benefit-sharing relate to the *nature* of the obligation to share benefits and the *means* by which this duty along with the obligation to share research results can be applied in each separate ABS activity.

4.3.1 Benefit-sharing

The CBD's benefit-sharing obligation is focused on the 'benefits arising from the commercial and other utilization of genetic resources'. It is these benefits which must be shared equitably.

4.3.1.1 Benefit-sharing and the Functionality of ABS

In the commercial sector, legal certainty of the user or purchaser of a resource is intrinsically connected to payment obligations (financial or non-financial) as well as other kinds of costs that may be incurred (including transaction costs, delays, and lost opportunities).[39] For the receiving party (provider and/or source country), legal certainty in ABS depends on assurance that the user will meet his benefit-sharing obligations, certainty regarding how the benefits and payments will be valued, and confidence that he can take effective action in the event that the user violates the laws or conditions relevant to ABS or breaches an ABS contract. For both, legal certainty exists where all parties know what is expected, and when a duty to act or a necessary condition has triggered the right of the provider to take action.

4.3.1.2 Making Benefit-sharing Work

It has generally been accepted that the benefits to be shared under ABS must be determined in the first instance through MAT or the negotiation of a legally acceptable ABS contract. It is also agreed that, when developed in this way, benefit-sharing may take any form that the parties agree upon. The wording of Article 15.7 however suggests that where there is no MAT, benefit sharing is triggered when benefits 'aris[e] out of the utilisation of genetic resources'. The challenge is to balance the carving out of relevant criteria for capturing all the activities creating benefits from the utilisation of genetic resources covered by the scope of ABS.

As noted in 6.3, this challenge arises where the user has not sought access to genetic resources through officially agreed processes in the source country, has not negotiated an 'ABS Contract' and most important has not complied with the duty to agree upon MAT regarding benefit-sharing.[40] In general, until the international negotiations can develop some alternative approach, the courts cannot force either party to an ABS contract to accept a non-monetary benefit to which he has not affirmatively/actually agreed. Where the user has not obtained specific ABS per-

mission, the court or arbitrator adjudicating a claim for ABS compliance must either call for the payment of financial benefits or refuse to rule at all. This indicates a high level of legal uncertainty for *both* user and provider.

As demonstrated by other recent instruments, such as the ITPGRFA and the Cartagena Protocol, if the parties cannot agree on such matters immediately, it is possible to specify a process by which the Governing Body is charged to address technical matters at some later time.[41] Experience has shown, however, that this kind of post-adoption development can be very difficult. As a consequence, the more specific details that can be agreed during the Working Group's negotiations, the better for the functionality of the regime.

Potential text on this point might include the following:

- Where the user and provider have agreed upon MAT relating to benefit-sharing, in conformance with CBD Article 15 and the national law of the provider, those mutually agreed terms shall govern all judicial or arbitral decisions taken in user country, provider country or any other body, regarding benefit-sharing.
- Within XX years following [entry into force of this document/some other date], the [Governing Body/some other body] shall adopt a schedule or standard for determination of the amount to be paid as 'benefit-sharing' in cases in which the user has failed to comply with the law of the provider. Such schedule may be in the form of 'penalty/remedial guidelines' and may be divided by sector or according to the list of activities constituting 'utilization of genetic resources'. It shall specifically define the point at which a claim for benefit-sharing can be commenced[42] and the method for identifying the particular benefits that must be shared.
- Any authorised administrative, judicial or arbitral determination of such user's benefit-sharing obligation, which is given with jurisdiction over all parties to the MAT, shall be a final decision regarding the specific obligation addressed, but shall not prevent either the user country, provider country or provider from seeking remedies or penalties for any other violation.

4.3.2 Research

The impact of ABS on commercial and non-commercial research has been a challenge since the adoption of the CBD. Researchers were among the earliest voices calling for the negotiation of the Convention,[43] but rapidly changed their tune when early national responses to Article 15 caused CBD countries to impose temporary moratoriums on their external research while they considered their options. Over time, a further serious challenge that has arisen under Article 15, relates to the sharing of research results, which is directly related to the parties' desire to support biodiversity research.

4.3.2.1 Special ABS Provisions for Researchers

Proposals for special rules for research are both important and challenging. The CBD and its Parties and delegates have been keenly aware of the importance of research to the achievement of all three of the primary objectives of the Convention. Because of its importance in the context to academic and taxonomic research, the research sector is the group of users most directly affected by national access controls.[44]

Many analysts have noted that research and researchers are very different from other users of genetic resources, and that the types of 'benefits arising from utilization of genetic resources', differ in many ways from benefits arising from commercial development.[45] CBD countries are generally able to recognize 'benefits arising' when they have concrete commercial value (products developed and produced, marketing permits, profits received, formal intellectual property rights filed and/or granted) a type of benefits which are generally not created by the researcher directly. 'Research results' may arise at a much earlier stage, and take a different form (*e.g.*, the samples themselves may be a research result, as may taxonomic identification, substance extraction, and other initial activities).

In a larger sense, however, it is difficult to separate researchers from other users. In fact, every utilisation of a genetic resource begins with some type of research, often initially undertaken with no commercial prospects or intent.[46] A provision granting special status for 'non-commercial researchers' must include a reliable basis for identifying which recipients are researchers and which are 'other users'. Specifically, a 'non-commercial research' provision must clearly and objectively determine (i) which persons qualify as 'non-commercial researchers' (to ensure that the special provisions cannot be abused by persons outside the target group) (ii) what requirements will still be imposed on researchers,[47] and (iii) whether the research exception shall be agreed and adopted by all CBD countries or decided at the national level (and posted in the CHM.)

A critical difference relates to the duration of the researcher's special status. In some discussions, researcher status is an 'absolute' protection (that is, it applies to remove the researcher-collected genetic resources from the ABS system entirely); in others, it is a temporary condition, and the researcher or his genetic resources will lose that special status when/if the material is used for commercially developed. Two CBD countries, Bulgaria and Australia, have adopted special systems for researchers.[48] Both provisions apply self-selection criteria. The Bulgarian system creates an absolute protection; while the Australian system is based on 'utilization'.

4.3.2.2 Sharing Research Results

The duty to share in 'the results of research and development', if unequivocal, could mean that the source country has a right to all data (whether preliminary and analyzed), public or not. This is not a small matter. From the perspective of the provider, it has two competing aspects. On one hand access to data could enable a technically capable developing country to participate more competitively in technical industries and even in global commerce involving the use of genetic resources. On the other hand, the publication of data by a 'non-commercial' re-

searcher may transfer that data to a commercial user, who may then utilise it without PIC and MAT.[49] If a country cannot easily exploit its own genetic resources, it can obtain value from a new genetic-resource discovery only by keeping that discovery secret, until it obtains a benefit share or an ABS contract. Once the discovery and its properties are known, the would-be buyer will have no reason to continue to deal with the provider country. [50]

For the researcher, a duty to share preliminary and unanalyzed data affects the exclusivity of his information. If forced to share proprietary data at this stage he may lose trade-secret protection of that data, particularly if the provider government agency is not able to guarantee that it can keep the data secret. For commercial research, the loss of trade-secrecy may put his proprietary data in the hands of competitors. An academic researcher may lose the credit for his discoveries.

4.4 Contractual Implementation

Prior to 2009, the role of contracts and the application of contract law in ABS has not been studied in detail. Recent analysis attempting to rigorously study the ABS contracts and identify best practices, has discerned that relatively little information is available regarding the provisions of ABS Contracts and their impact.[51] Of the fewer than 80 contracts that could be gathered, only 55 were provided with permission to share or publish their contents. Of the contracts reviewed, relatively few were examples of a formal contract or other instrument between a commercial entity and a provider of genetic resources:

Table 3: Contracts publicly available

ABS Contracts (user's or middleman's contract with provider or source country	35	
- ABS Contracts designed as 'Material Transfer Agreements' (transferring physical samples only)	7	
- ABS Contracts defining the 'res' as fully or partly intangible (information)		28
'Downstream Contracts' (original collector or his transferee transfering or licensing material to other users researchers and/or transferees)	33	
'Domestic' contracts (user/recipient acquired genetic resources from its own country and used them within that country)	7	
Seed multiplication contract	1	
Repatriation contract (drafted as non-binding MOU)	1	
Total	**79**	

This lack of data has made it difficult to discern best practices, affecting the ABS regime process in two ways. First, it limits the ability of the authors or other experts to undertake comprehensive legal analysis of ABS contracts. Formal contract law is over 5000 years old and is built on the record of millions, perhaps billions, of contracts. One cannot make legally valid determinations about the new aspect of contract law (the law

of ABS contracts) on the basis of only 80 examples. For the same reason, the lack of available data places certain limits on the ability of legal experts to draft models and other provisions with any certainty.

4.4.1 Contractual Certainty

One of the most basic principles of contract law is that a contract is legally 'enforceable'[52] only where it is 'sufficiently definite'.[53] A concept that is interpreted differently from country to country, it should be possible for the ABS negotiators to identify standards and practices that are definite enough to meet the most demanding national law. Such a common base of data is essential, whether it takes the form of an agreed legal system, or separate legal provisions adopted in each country and made available through the CHM or other appropriate mechanism.

The minimum goal of such standards and practices should be to establish seven key *certainties* that must be pinned down for every contract, whose parties intend it to be legally enforceable:

	What must be certain:
First certainty	**Who owns the genetic resource**, including: - who has the right to grant access to the genetic resource; - who has the right to give permission to utilise the genetic resource; and - who has the power to decide how benefits will be shared and how this information can be known/determined.
Second certainty	The **rights of each person** who has an interest in the genetic resource
Third certainty	Who (what person or entity) is bound as the user under the contract, , and what right or power he will obtain by complying with ABS access requirements
Fourth certainty	At what point does the ABS agreement and/or, PIC/MAT become 'final' for purposes of contract law, including explanation of
Fifth certainty	What it means in the country to have a 'final' ABS contract (*i.e.*, may the 'final' contract later be rescinded? Is it linked to some government permission that must remain in force? Etc.);
Sixth certainty	How and to what is the provider protected in cases in which a user violates the conditions of his ABS contract/permit (*i.e.*, through general provisions for legal redress, contractual guarantee/security, or other insurance).
Seventh Certainty	How source countries and other providers can know of, recognise or identify user-violations of the basic ABS requirements, including violations of source country law as well as instance of noncompliance with ABS contracts.

Certainties (3) and (5) are normally addressed in contractual agreement. Certainties (6) and (7) are also partially addressed by contract. The regime negotiations can aid in developing these certainties by developing consensus about them, tools for their application, and guidance and capacity-building identifying the best contractual and scientific practices

relevant to contract oversight. While it might be best to agree on these matters as part of the negotiations, it is also possible to agree on their future development.

By contrast, the answers to certainties (1), (2), (4), (6) and (7) are matters normally addressed by law in each country. It is not likely that most CBD countries will change their basic contract law, but they can determine (by legislative action, official interpretation or in some other way) what the law provides relevant to ABS matters (property ownership and rights, relevant administrative and governmental matters) and they can make this information available through the CHM.[54]

At the same time, it is critical for all CBD countries to consider their realistic ability to control the acquisition and use of those 'sovereign' genetic resources (*i.e.*, to answer the question 'How does the regime prevent users who do not comply with the ABS requirements from using genetic resources and/or from obtaining any user-incentive that is linked to the ABS regime?') It may be better to adopt a regime which helps to guide the 'good actors' (users who comply with national ABS legislation and contracts) than to press for rights which the CBD countries cannot exercise.

4.4.2 The Role of 'Industry Standards'

'Industry standards' are an important concept under contract law that may in future be a useful tool for ABS. In general, contract law recognises an 'industry standard' where a particular industry or sector's practices have become very well known and consistent throughout that industry or sector A recognised industry standard is often treated as contract law, unless the court, arbitrator or parties explicitly state that the industry standard is inequitable or illegal or otherwise should not be enforced in a particular contract.[55]

This practice may have advantages for both sides of ABS. Industry standards could streamline the ABS process, and eliminate some of the critical legal and evidentiary obstacles that inhibit ABS compliance actions. At the same time, commercial users would have the ability to shape the ABS concept by promoting its application in a consistent way throughout their industry or sector. In this way they could be recognised as positive contributors to the CBD's ability to meet its objectives.

In order for an industry's practices to become 'standards', however, they must, at a minimum, become well known. For ABS, the desire to have recognised industry standards could create an incentive for commercial users to be more open about the contents of their contracts.

4.5 Determining the End Point of the ABS Relationship

To the user, the value of genetic resources will diminish greatly if there is no clear end to the user's obligations relating to genetic resources. The value of the genetic resource may diminish, if the user is bound to an eternal obligation to make payments to the source country or provider. The terminus of the benefit-sharing obligation has not been discussed

directly. It has been indirectly addressed in three ABS discussions: (i) contract fulfilment, (ii) transfers of genetic resources and (iii) 'derivatives' of genetic resources.

4.5.1 Contract Fulfilment:

As in every other aspect of ABS, the regime functions best in situations where the user has obtained an ABS contract through the application of the provider country's PIC and MAT requirements. In general, a well drafted contract will provide clear indications of when and how one will know that the particular requirements of the contract have been fulfilled and are no longer 'live' requirements. If properly drafted, such provisions are fully enforceable.

4.5.2 Transfers of Genetic Resources to Third Parties:

Practically speaking, a transfer of genetic resources effectively ends the benefit-sharing relationship, unless the transferor takes two key steps: (1) transfers his contractual and legal ABS duties along with the transferred resources and (2) formally informs the provider and/or source country of the transfer in a way that puts the transferee in direct relationship with them. In practice, users who obtain genetic resources from researchers, collections, taxonomists and even middlemen often assume that they have no benefit-sharing responsibilities, because they did not directly collect the resources in the source country.[56]

4.5.3 'Derivatives' and 'Products' of Genetic Resources

Although the CBD does not mention or define 'derivatives' or 'products' the terms have increasingly arisen in the ABS discussions. Unfortunately, up to now the persons discussing these issues have utilised very different meanings of the term derivatives, for example:[57]

- One group considers 'derivatives' to refer to 'material that is later bred, cultivated, or otherwise generated through some multiplication process in the user country';
- Others use the term to mean meta-extracts, fractions or essences obtained from a plant, animal or other sample;
- A third meaning refers to a product or commodity that is created utilizing the genetic resource – which may be used in the development of further products, innovations or benefits.

The 'derivatives' controversy appears to stem from provider concerns that terms like 'access' and 'genetic resources' do not cover all relevant ABS activities, or can too easily be avoided. This suggests a need either (i) to agree on a single meaning of 'derivative' in the ABS context, or (ii) to utilise an alternative approach. For example, the current controversies might be circumvent-able in an externally verifiable system, such as one built on a clear list or standard defining the activities that utilize genetic resources (see sections 4.1.2 and 7.1.2.3). It would not be necessary to resolve the derivatives controversy, since each use whether direct or through another interim product would be separately evaluated as a possible 'utilization of genetic resources'.

4.6 Compliance: Remedies and Processes

As detailed elsewhere,[58] remedies and redress pose significant legal challenges for ABS, and for lawyers trying to help design the ABS regime. In a nutshell, although international (cross-boundary) contracts are not easy to enforce, they can be enforced, as long as they were carefully drafted as enforceable contracts. By contrast, there are very few existing (but generally unsatisfactory) options for provider countries seeking to enforce their national ABS legislation against users outside of the source country.

As shown by the case study in Chapter 6, there are three primary compliance situations:

- The parties have agreed to MAT in the form of an instrument that can be applied and enforced as a 'contract';
- The parties have agreed to MAT in some form that is not enforceable under another country's contract law; or
- The user has not complied with ABS requirements of the provider country.

These three situations are very different in impact.[59] Ultimately, ABS success is still a function of willingness to collaborate, rather than command-and-control-style legal mandate. Beyond this, it is often extremely difficult for foreign parties to effectively utilise the legislative, administrative and arbitration processes of any other country. There may be a need to develop guidance, technical assistance programmes or an ombudsman to assist providers and source countries seeking to protect their ABS rights and enable a better mechanism for applying conventional remedies to ABS claims.

4.6.1 Model and Default Clauses

As noted in 4.2 above, a primary challenge where the parties have entered into an ABS contract arises when they find out that their contract is not enforceable, either generally or under the unique provisions of a certain country's law. The Paris Annex offers two possible mechanisms that might help address that problem –model and 'default' clauses.

4.6.1.1 Model Clauses: Assistance to Contract Parties Negotiating Enforceable Contracts

Model instruments (that is instruments that are not mandatory, but may be used) may be very useful to parties negotiating ABS contracts. If parties' to ABS contracts are willing to use such clauses, that use would increase the regularity of ABS practices (begin the process of defining 'industry standards', see 4.4.2) without using any kind of compulsion or mandatory provisions. That willingness might be increased, where all CBD countries in the regime specifically state that agreed 'model clauses' are automatically valid and enforceable in their respective national courts.

4.6.1.2 Default Clauses: Binding the Parties to a *de* facto Contract

The idea of 'default clauses' takes a giant step past model-clauses, stating that each country's user-side law would apply the 'default requirements' to any user, unless that user could prove that he had received a valid ABS contract or complied with national requirements. As noted in 4.4, under contract law, **no person or entity can be bound to a contract to which he did not actually agree unless it is specifically imposed by the law of his country**. Given that user country law could not bind the provider country, default clauses adopted unilaterally by one or more user countries would be unenforceable in most cases.[60] The only way to make them work would be for all CBD countries to agree to them as part of the ABS regime.

To enable functionality, however, default clauses would have to exceed the minimum standard of legal enforceability in every country that is or might become a Party to the CBD. They must also contained sufficient information to enable agencies, courts or arbitrators to implement them. They must include at minimum answers to a number of critical questions relevant to enforcement of the law, including the following:

- How shall the CBD countries identify users who are potentially in violation of ABS law? (*e.g.*, by
  - complaint by provider or provider country?
  - oversight by user country?
  - watchdog NGOs?
  - ombudsman?
  - patent filings and other IPR applications? and formal inquiry or request for information from all applicants whose IPR relates to material of biological origin?
  - scrutiny of other legal filings, such as market permits, export permits, etc.?
- What standard must/may be used by the user-country's authorised agency to determine whether to bring the case?
- What obligation, if any, does the user *country* owe to the provider, where a user has violated provider ABS law or the minimum requirements under the default clauses?
- What country or countries will be deemed 'provider(s)' in cases where the user cannot or will not document the source of the genetic resources?
- Will the application and contents of the default clauses be different or differently applied to specific users and sectors?
- What evidence will be sufficient, if the user seeks to
  - prove (document) that he has complied with the ABS law of the provider country? (see 4.7, and note that the answer to this question would provide a basis for determining what specific instrument would be needed in a 'certificate of ABS compliance' or a 'certificate of legal provenance'.)

  - prove the specific provider country of all genetic resources he has used;[61] How will the user's equitable benefit-sharing obligation be quantified? (see 4.3 and 5.2)

- How will benefit-sharing be collected following a judgment or decision that the user must share benefits?[62]
- How will benefit-sharing be distributed in that case?[63]

The value of default clauses as an incentive depends on whether they set a 'minimum agreed requirement' or a 'higher-than-normal obligation'. If the amount to be charged and the terms of performance are sufficiently large and difficult, and if it is relatively certain that the user-country court or arbitrator will assess them, they may constitute an incentive for the user to comply with national requirements. If not, they may operate as a perverse incentive, encouraging users to remove genetic resources 'informally' and wait and see if any action is ever taken.

4.6.2 Other Mechanisms for Dealing with Users Who Have no Valid ABS Contract

In any field, a national law that calls for implementation, application or enforcement of another country's national legislation is very difficult or impossible to enforce effectively. A variety of practical legal obstacles prevent enforcement.[64] In ABS, the simplest way (legally speaking[65]) to avoid this type of problem would be for all CBD countries to identify specific legal and illegal acts in the same way. In socio-cultural and political terms, however, this is rarely possible. Failing that, alternative mechanisms for enforcement can be attempted. The legislative challenge will be to clearly identify the issues and situations covered by the solution, and the mechanism (specific contents of the law) that the parties will apply across borders.

Key challenges under cross-border enforcement treaties include the need to know exactly what the relevant laws say, to ensure that any future amendments to the law will be consistent with the treaty, and to ensure that each country's law contains all the requirements and provisions necessary to make it enforceable in the other country. Where the two countries use different official languages, it will be necessary to find some way for each judge to understand the precise contents of the other country's law and of other relevant national law for purposes of legal interpretation of these laws and application to particular fact situations.[66]

In light these problems, it would be impossible, as a practical matter, for 191 CBD countries to legislatively state that they will apply all other CBD countries' ABS law. Hence, where the user has not obtained legally valid contract with the authorised provider or provider country, it would probably be impossible to take direct action against the user in the user country, unless the 'default clauses' approach can be accepted and implemented by all parties.[67]

4.6.3 Unknown and Undisclosed Origin of Genetic Resources

The above ABS compliance solutions can only apply where the origin of the genetic resources is known, disclosed or undisputed. This is not always possible. For example, the records regarding the precise location of species collection may not be clear or the national jurisdiction over the area may be disputed. It is also possible that the user might answer 'I don't know' to the question 'Where do genetic resources used come from?' Cases of disputed or unknown origin may pose a legal challenge relating to the 'seven certainties' (see 4.4.1), even where the user has an ABS contract with some person.

The primary challenge for user countries in 'unknown source' cases is the mechanism for identifying defaulting users. Even with direct knowledge of who the user is, the provider has limited means of knowing what he is doing, relying primarily on the user's good faith to keep them informed and make payments when due. Where the user is not known to the provider both provider and user countries have even less ability to identify potential companies or laboratories utilising genetic resource. It would be extremely costly to attempt to determine this through random inspections.

Once the 'unknown users' are found and proven, two other challenges must be addressed – collection and distribution of a 'benefit-share' from those persons. For the first of these challenges, the nature and size of the benefit-share collected must be decided by some mechanisms or penalty schedule. As to the second challenge (benefit distribution) an obvious prototype mechanism is found in the ITPGRFA, where benefit-shares are paid into an international fund and then distributed among developing countries through a mechanism to be agreed in future. This process has not yet begun to function.[68]

4.7 Certificates and other Monitoring and Communication Tools to Support Compliance

The Paris Annex recognises that inter-governmental communications may form a critical obstacle to ABS compliance. Considered 'diplomatic' matters, and controlled by a high level of bureaucratic oversight in most countries,[69] direct communication between agencies of two different countries can be very complicated. Normally, direct communication may only be permitted where the countries involved have agreed to an international communication mechanism.[70] In ABS, compliance related communication could occur through one or more agreed 'certificates'; however, it is important to ensure that each specific certificate meets three practical criteria:

- It must contain all necessary information needed to support judicial, administrative or arbitral action in the country receiving the certificate;
- It must not require information that is not necessary to the specific purpose of the certificate; and
- It must be signed and verified by an official whose level of responsibility and oversight is sufficient to support judicial, administrative or arbitral action in the country receiving the certificate.

To date, discussions of the 'ABS certificate' have not yet been able to particularise their requirements to the particular situation in which the certificate will be used. When considering the communication needs of the ABS regime, it seems clear that a variety of different certificates may be needed, in order to provide a simplified mechanism of providing basic evidence in ABS compliance situations. [71]

4.8 Incentives

If ABS is to depends entirely on formal oversight and enforcement by the source countries, user countries, NGOs and/or private claimants, it will be very unwieldy, and possibly unworkable. Internationally agreed and/or nationally adopted incentives and motivational measures[72] could encourage user participation in and compliance with ABS.[73] The success of such measures depends on many factors. They are normally most successful when the value of the reward, as perceived by the user, is much greater than the cost of compliance. For most governments, the problem with incentive systems is that the government does not have money or value to 'pay' the incentive directly. Consequently, the most common types of incentives would be either indirect (*e.g.*, tax exemptions for users who participate in ABS) or market-based (creation of a certification for products that are 'ABS compliant').

The 'market' mentioned in 'market-based incentives' may be the retail market, but may also be the resource market,[74] financial/lending market, or the 'market' for foreign aid and technical assistance contracts.[75] Incentive systems of this type aim for varying levels of success. Forest certification systems are a well-known effort to create incentives for compliance with environmental standards. Although there are a large number of such systems, the total acreage of forests participating in all such systems combined does not yet reach 20% of all commercially usable forests. By contrast, government land registry systems, which are often non-mandatory, are used in more than 95% of land transactions in countries which have such registries. The primary factor determining the success rate is the user's perception of the value of the reward (incentive or motivation).[76]

Even where there is no specific reward offered, however, completely voluntary measures have proven effective where the measures are desired by the regulated industry (such as where the industry recognizes a need to act in a more coherent way, but requires government's help and guidance to do so, or where an industrial sector agrees to voluntary measures in order to prevent the government from adopting restrictive legislation.)[77] To date, voluntary measures have been developed successfully to govern ABS-related actions of *ex-situ* biological collections (which are primarily 'middlemen', although also engaging in taxonomic and other research.) Numerous ongoing efforts have created or are creating ABS voluntary measures with regard to botanic gardens,[78] microorganism collections,[79] and sourcing biological materials from rural and indigenous groups.[80]

Incentives and motivation measures place the onus of responsibility on the user, not by mandate, but by self-interest. The user will comply if it wants to receive the benefit. Although they do not completely eliminate

the need for governmental oversight,[81] incentives eliminate the need to inspect and compel individual users. In a functional system, users recognize that if they comply with the requirements, they will receive the 'reward'; but otherwise they will not.

5 Support for Functionality

The Paris Annex identifies two other types of measures that might provide essential supports to functionality.

5.1 Awareness Raising

In general, the CBD's provisions regarding awareness raising are expressed as political objectives and recommendations for domestic action by a country for the benefit of its own citizens and communities.[82] The current provisions in the Paris Annex are written in a similar vein. As such, although very important, they do not have direct impact on regime functionality and will not be examined in this action-paper.

It is important, however, to consider the possible linkage between awareness raising and the acceptance and use of voluntary and incentive measures, as discussed in 4.8. For example, international social responsibility/environmental certification systems (such as those developed under the Forest Stewardship Council or Fair Trade©) have been most successful when they are 'market based'.[83] In turn, market-based incentive systems are only successful where the 'market' is aware of and supportive of the objectives of the incentive. Consequently, awareness of ABS issues may have a significant impact on the functionality of any component of ABS which operates fully or partly through incentives and other motivation mechanisms.

5.2 Equity and Equality: Transactional Assistance for Traditional and Rural Providers

The imperative that benefit-sharing shall be 'fair and equitable' has been less explored in literature and ABS discussions. Normally, where parties have freely agreed to a contract in fair negotiations, it is assumed to be, fair and equitable by definition. This, however, can be challenged as there are standards in national legal systems which implement equity principles as substantive law. The Paris Annex speaks of promoting *equality* among parties,[84] but focuses on a limited aspect of this issue – the need for special assistance to rural communities and other providers during ABS negotiations.

In this connection, one must begin by noting that ABS is an undisputedly complex subject.[85] As a result, in transactions between commercial entities and rural communities or individuals, the former often experience high levels of uncertainty regarding the capacity of the rural individuals or communities to effectively negotiate in their own interests. In many cases the communities or rural individuals themselves feel similar misgivings. This uncertainty poses a significant risk that an administrator or judge could find that the commercial entity had exerted an unfair level of control in the contractual negotiations, due to the rural parties' lack of commercial and legal sophistication. If a court were to make such a finding, the result may be in a very unfavourable decision on the overall claim – rescinding the rights granted to the commercial entity and/or ordering remedies in favour of the rural community.

6 Functionality of User-side Approaches

In a previous study, published in 2007, the authors thoroughly examined the then-current situation relative to the adoption of user-side measures for applying and enforcing any type of legal vehicle regulating ABS aspects, law or contracts, finding very few actual user-side measures adopted in any country. Returning to this question in 2009, this situation has changed very little. This result may not be surprising, as it reflects the very serious legal obstacles faced by most developed countries when trying to address user-side obligations as currently stated in Article 15 and in the Bonn Guidelines.

In this connection, Norway and Japan stand as exception. Norway is one of the very countries to adopt formal legislative provisions clearly imposing any user-side obligations, while Japan has adopted and implemented a non-binding solution to good effect.

6.1 Recent Developments in Norwegian User-side Measures

Recently, in its new Nature Diversity act, Norway has implemented an interesting general rule entitled 'Genetic material from other Countries', along with disclosure requirements in the patent act and the plant variety protection act. The next sections discuss this new enactment, and its potential application as a tool for interpretation and enforcement of the ABS regime.

6.1.1 Norway's Laudable Legislative Efforts to Meet Its Obligations under Article 15.7: The Norwegian Nature Diversity Act

The Nature Diversity Act specifically recognises that the main entity responsible for regulating access and benefit sharing is the providing country. The supporting preparatory document prepared by the Ministry explicitly states that 'these measures [provided in the act] do not alone fully solve the challenge of meeting the obligation of fair and equitable benefit sharing',[86] clearly recognizing that these measures requiring support in other legal and political tools, and calling on providing countries to provide the needed supplementary tools at the international level.

Although it considered including a specific statement of the obligation to share benefits; the Ministry of Environment determined that the Act did not need such a clause, leaving to the providing countries' responsibility to require benefit sharing.[87] The supporting preparatory document also emphasises the need for controlling the right to use the material either at the time of use or at the time of commercialisation rather than the time of access, recognising that a utilisation approach is the most practical and enforceable of the regime-framework options. For purposes of functional user-side implementation of ABS, the most relevant provision of the Act is § 60:

> Import of genetic material for exploiting of genetic material to Norway, from a state which requires prior informed consent to use or export, can only happen in compliance with such consent. The one having genetic material in hand is bound by the conditions and limitations for the consent. The State/government can enforce the conditions and limitations, including by court-cases, pro-bono of the other country having established those criteria.[88]

This paragraph places the trigger of Norway's actual implementation on the two main substantive facts: **import** of genetic material requiring PIC; and Norway's expectation that its courts and agencies will directly apply the terms and conditions set by the provider country. Although a huge step forward in ABS implementation, this approach has two unaddressed weaknesses: 1) It creates a level of uncertainty for Norwegian users and decision-makers, given that access legislation will vary among countries, creating legal uncertainty as to whether and how each country's provider side law will be legally transferred to the Norwegian legal situation; and 2) there is no specified minimum level for a share of benefits which will be recognised as 'fair and equitable.' As to the latter, the Act apparently assumes that Norwegian law will apply to determine the benefit-share in cases involving no compliance with provider-side law, as well as situations in which the ABS contract might be subject to challenge as 'inequitable' under Norwegian law.

Most important, the act establishes procedural competence for the Norwegian 'State/government' to 'enforce the conditions and limitations'. This rule is a major addition to the former legal situation in Norway relating to ABS.[89] It gives the government specific competence to enforce either a contract or a national legal requirement of another country in the legal system of Norway.

Even if the **import** of the genetic material is not legally challenged, the second paragraph of this provision extends the user's substantive obligation to the time when genetic material is 'utilised':

> When genetic material from another country is used in Norway for research or commercial purposes, the material shall be accompanied by information identifying the country from which the genetic material is received or collected (providing country). Where the providing country requires prior informed consent, information documenting such consent shall also follow the material.[90]

This presumption that genetic material may be followed by an informational 'passport' indicates that the government views 'genetic resources' as a physical resource, rather than an informational resource. The Act does not currently specify any consequences for a user who does not meet this passport obligation.

A third section of the article extends the obligations specified above also to cover the situation where genetic resources have passed through multiple hands, since they were removed from the country of origin:

> If the providing country is not the [a] country of origin for the genetic material, then information regarding the country of origin shall also be disclosed. 'Country of origin' means the country where the material was found or accessed in its natural habitat. If the national law of the country of origin requires prior informed consent for access to genetic material, the disclosure shall contain information about whether such PIC has been received. If the information dealt with in this paragraph (section) is unknown, this fact also shall be stated.[91]

The last sentence implements an obligation to explicitly note whether the information is unknown. When lack information is made illegal through a general obligation to give correct information, it makes sense to also establish a duty to state the negative.

Additional clauses address traditional knowledge by granting a general right for the government, the King, to expand these obligations of keeping information available also to cover traditional knowledge. The Act also notes that special rules apply in the case of PGRFA:

> The King (government) may adopt supplementary regulations, regarding the disclosure of information in cases in which the utilisation of genetic material also utilises local peoples or indigenous peoples traditional knowledge.[92]
>
> For material which is covered by the scope of the ITPGRFA, it shall be accompanied by information about the acquisition of the material in compliance with the SMTA of the MS.[93]

6.1.2 Norway's Disclosure Requirement in the Patent Act

In addition to the new Nature Diversity Act, Norway has implemented a disclosure obligation in the patent act:

> Section 8 b. If an invention concerns or uses biological material, the patent application shall include information on the country from which the inventor collected or received the material (the providing country). If it follows from the national law in the providing country that access to biological material shall be subject to prior consent, the application shall state whether such consent has been obtained.
>
> If the providing country is not the same as the country of origin of the biological material, the application shall also state the country of origin. The country of origin means the country from which the material was collected from its natural environment. If the national law in the country of origin requires that access to biological material shall be subject to prior consent, the application shall state whether such consent has been obtained. If the information set out in this subsection is not known, the applicant shall state that.
>
> The duty to disclose information under the first and second paragraphs applies even where the inventor has altered the structure of the received material. The duty to disclose information does not apply to biological material derived from the human body.
>
> Breach of the duty to disclose information is subject to penalty in accordance with the General Civil Penal Code § 166. The duty to disclose information is without prejudice to the processing of patent applications or the validity of rights arising from granted patents.[94]

The required disclosures under Norwegian Patent Act involve several different and complementary types of information:

- The providing countries from which the inventor received or collected the material;
- If *prior informed consent (PIC)* is required in the providing country, information about the existence of such consent should be included;

- The country of origin, if different from the providing country;
- If *prior informed consent (PIC)* is required in the country of origin, information about the existence of such consent should be included;
- In all four cases, if the required information is not known, the applicant shall include a statement about the lack of information in the application

Interestingly, the focus of this obligation is on **biological** material – not **genetic resources**, as in CBD article 15.7. It is triggered if the providing country is not the same as the country of origin.[95] The Act does not require the applicant to make the PIC available or to document legality to the material, the obligations are met if the information is enclosed in the application. Similarly, there is no actual benefit-sharing obligation stated in the Act. Most important, if the listed information is not known to the patent applicant, the applicant need only include a statement to this effect in the application. In the case of a false statement, the applicant is subject to penalty under article §166 in the Norwegian Penal Code.

The obligations in the Patent Act do not solve any of the key procedural issues and they do not create by itself a functional ABS-system. Its contribution lies in providing information which then could hypothetically be used in an enforcement action. The disclosure requirement is triggered wherever 'an invention concerns or uses biological material'-- a very low threshold of dependency or similarity between the biological material and the invention. The Act goes on to specify that 'these obligations […] apply also when the inventor has altered (or changed) the structure of the received material,' underscoring the legislator's desire to give broad scope to the rule, by including all genetic modification. These good intentions have not produced results, however, it is not always easy, from a practical-legal point of view, to prove that an invention 'concerns or uses' biological material. The challenge of applying and enforcing this obligation upon private parties may be very difficult to overcome, particularly where the evidentiary standards of the Penal Code apply to all such actions.

The most significant reason that the Patent disclosure requirement does not contribute to functional ABS is the lack of consequences. As noted in the Act, the consequence of not meeting the disclosure obligation is left outside the patent system: '**Non-compliance with the disclosure obligation has no effect for the proceeding of the patent application or the validity of a granted patent**.'[96] Failure to provide information according to the Patent Act § 8b is not a sufficient basis for penalty. Under the Penal Code (§ 166):

> Any person 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, shall be liable to fines or imprisonment for a term not exceeding two years.
>
> The same penalty shall apply to any person who causes testimony known to him to be false to be given by another person in any of the above-mentioned cases, or who aids and abets thereto.

Hence, failure to provide full and correct information is only a crime in the cases where the person has deliberately stated that the given information is correct and complete.[97]

In practice, a further limitation on the value of patent disclosure requirements as functionally effective user measures arises from their limited scope. These provisions apply only to patent applications addressed directly to the Norwegian Patent Office, and only when they were filee directly (not sent via the system under the Patent Cooperation Treaty (PCT), WIPO.)[98] Since Norway joined the European Patent Organisation (EPO), the number of Norway-filed patents is expected to decline.

6.2 An Alternative Approach in Japan: A Non-mandatory System of User Measures

The longest experience with user measures of any country is that of Japan which has officially adapted the Bonn Guidelines for Japanese users and is formally implementing those guidelines. In 2005, the Japanese Ministry of Economy Trade and Industry (METI), in conjunction with the Japan Bioindustry Association, concluded a multi-year process through which they developed a set of guidelines for users of genetic resources (the 'Japanese Guidelines').[99] Based on the Bonn Guidelines, the Japanese Guidelines provide a set of basic principles and suggestions for users seeking to comply with best practices for ABS compliance. Two aspects of the Japanese Guidelines to stand out:

- They are directly focused on the obligations of users; and
- they include a direct incentive for users to comply with the guidelines (the Government offers direct assistance to any company that complies with the Guidelines and still encounters difficulty in obtaining provider approval) [100]

The operation of the Japanese Guidelines in practice is not a theoretical matter. They have been used, and the Government has addressed them in individual situations. Those experiences, although confidential, provide an excellent example of the manner in which voluntary measures, backed by active support, can significantly contribute to ABS functionality.

In essence, when the appropriate Ministry (the Ministry of Economy Trade and Industry (METI) is contacted by a provider (country or individual) or otherwise discovers that there is discontent or negative publicity in a developing country regarding the utilisation of genetic resources by a Japanese user (company or researcher), METI contacts the user and asks them to come in for a consultation, during which METI's information and analysis of the problem is communicated along with the benefits and advantages to the user of compliance with the Japanese Guidelines. Although the Guidelines are voluntary, this type of conference has resulted in compliance with the Guidelines and acceptance of METI's view, in most or all cases to date.[101]

Beyond this, Japan also has adopted a consultation system for users, through which they can obtain advice about implementing the Japanese Guidelines, in advance (before the user finalises his 'access' process).

This system is a natural partner to the 'official' conferences with METI in cases where a problem has arisen, but entirely separate from it – available through the government/private joint organisation, the Japan Bioindustry Association (JBIA). Since Japan's adoption of the guidelines in 2005, JBIA has held over a hundred consultations of this type.[102] This advisory process is linked to a series of bilateral processes at the governmental level, through which more specific information is agreed between Japan (often through JBIA) and the governments of some particular countries that Japanese users are interested in. This enables JBIA's consultation process to be more specific regarding what is needed or desirable in each country.

6.3 A Thought-Experiment: A Enforcing a Provider-side Legal ABS Vehicle in Norway

In this section, we follow a thought-experiment, considering how an ABS claim would fare under Norwegian law. This discussion will be general, considering all of the ABS-vehicles described in section 4.2; and asking how a provider country could enforce each legal vehicle under the ABS provisions of the Norwegian Nature Diversity Act and Patent Act, described above in the context of general Norwegian law. This discussion is designed to demonstrate the legal needs of the only country with a 'binding' user-side requirement in its national law, and to show what the international regime negotiations might address to improve the ability of Norway to apply its user measures.

The following discussion provides a practical legal point of view – that of an attorney of law in Norway preparing a case before the courts on behalf of a provider country. In other words: what would he need to apply the above user-side obligations before a court and to enforce them in a valid court decision? The legal vehicles followed in this though-experiment are the three following situations: (i) where the user has a formal ABS contract, but does not comply with that contract; (ii) where the providing country utilizes a different legal vehicle (administrative permit or other measure); and (iii) where a genetic resource is taken from a source country which has implemented a PIC-procedure, but there has been no approval.

6.3.1 Initial Awareness of a Potential Infringement

The first challenge in Norway would be the need to become aware of a genetic resources being utilized in Norway. Neither of Norway's genetic-resource-related laws provides any guarantee that any relevant officials will become aware that its genetic resource is being utilized in Norway. Where the user has agreed to an ABS contract or other legal vehicle, the provider has an incentive (if not the ability) to examine or enquire into that user's activities using of genetic resources. In the other two situations, neither the provider/source nor the Norwegian officials would necessarily be aware of who the users in Norway are. The use of a genetic resource has no obvious external verifiable manifestations which would be controllable by either government. The provider and/or source country could detect such use only (i) where the user's contractual obligation which requires reporting back to the providing country and provides a

power of inspection, or (ii) where the Norway engaging in other oversight. If the user's access was obtained using other types of provider-country law (administrative permits, etc.), similar problems would arise. Where the private user has failed to comply with any provider-side legal vehicle or requirement, the user-side measure calling for information (*e.g.*, Nature Diversity Act § 60) cannot compete with the perverse incentive which encourages the private user not to disclose the origin of the material. This challenge cannot be resolved solely through national law in either the user or the provider country (unless they both have developed and adopted provisions with virtually identical scope, application, and criteria, and have agree to their 'mutual enforcement'). current situation of law could therefore be improved if the CBD countries (or the specific countries in each individual ABS situation could agree on specific external criteria that determine which users are subject to concrete ABS measures (possibly including a means by which a user can demonstrate that he is not using genetic resources, and thus not subject to ABS requirements).

If the law created a reason that users would affirmatively desire recognition as ABS-compliant entities, the Norwegian disclosure requirements could be very useful. It could operate to give both the user and the government a clear check-point at which to document their compliance and to inform the government about the provider country's involvement. Even with such a check-point, however, the provider country would not be much closer to receiving its benefit-share from a defaulting user. The next critical step involves identifying and exhausting enforcement opportunities.

6.3.2 Enforcement Outside the Court System

Supposing that the provider or source country has overcome the challenge of identifying an ABS violator, he must next embark on the process of turning that information into legal enforcement of his right to a benefit-share. At this point, the user-side application issues relating to the three legal vehicles investigated start to diverge.

Where the user has not complied with any legal vehicle, the provider or source country has only a few very limited administrative avenues for compelling the user to share benefits. The general provisions in the Norwegian Nature Diversity Act requiring the user to keep a record of certain types of information, does not specifically state an obligation regarding sharing benefits with the provider or source country. Norwegian administrative public law requires that the Storting (the Parliament of Norway) clearly state such an obligation, before it can be legally binding upon persons or entities in Norway. The existing procedural requirement would not meet that standard.

Where the user's ABS rights were obtained by an administrative decision or other non-contractual compliance in the providing country, he could easily comply with the information-requirement; but again, could not be compelled to share benefits, for the same reason.

The provider or source country who has bound the user to a written ABS contract would have a clear advantage, here, since such a contract could easily be taken to the arbitration, mediation or other process. There is, however, no significant body of legal remedies where enforcement is sought outside the court system. In Norway one can complain to different types of ombudsmen about different aspects of legal challenges and equitable needs. The most general ombudsman in Norway deals with all kinds of complaints relating to the administrative branch of Norwegian government. He has no formal powers to enforce, however, nor even to find an administrative decision invalid. His competence is to look at the case with fresh-eyes and give a recommendation to the administrative unit either to change the result in that particular case or in their practice. An ombudsman could be given the resources to survey information and make such recommendations to the accused user of genetic resources.

6.3.3 Taking the User to Court

The next challenging step is to seek enforcement of any of the three legal vehicles in a Norwegian court:

6.3.3.1 Access to Courts for Plaintiffs from another Country

In order to seek legal action in court, the plaintiff must meet two general prerequisites, and must also define a 'case' or 'cause of action' on which a court can decide:

- **Personal competence:** Section 2-1 of the Civil Process Act lists the entities which have ability to act before a court in Norway (partsevne). Although it is applicable to foreign legal persons, it does not mention other countries, and there are no indications that the government of other states can use the court system of Norway on equal footing with Norwegian citizens. Indeed, the ability of organizations to have access to courts has been a dubious question in Norwegian law, addressed by various court cases. This case-law is now implemented in the act §2-1(2), making it also difficult for an international NGO to take a Norwegian entity to court.
- **The object of the dispute:** Under Norwegian law, 'only judicial claims can be brought before by a court'.[103] A claim is considered to be 'judicial' where it meets certain legal standards. For example, the claimant must justify a need for a judicial decision against this defendant.[104] This requirement is much easier to meet where the claimant has a contractual instrument and can show a breach of contractual terms. Where the user's right is based on the user's violation of a properly obtained provider-side administrative decisions or other legal vehicle, the legal justification for a claim is less obvious, and the result is much less certain. It appears nearly impossible to justify the use of Norwegian courts under this requirement, where the claim is based simply on the user's violation of law with the laws of the providing country. These probable results emphasize the perverse incentives inherent in the ABS-system.

  Another requirement[105] states that the legal person must have a sufficiently close connection to the case; whose objective must be included within their organization's objective. This requirement would

probably prevent a Norwegian NGO from taking a Norwegian company to court with a provider country as the beneficiary to the court case.

6.3.3.2 Cases based on the Nature Diversity Act § 60.1.3

Where the case is brought under the Nature Diversity Act, the Norwegian government can enforce provider/source-country's conditions and limitations, including by court-cases, which are brought on behalf of that provider or source country. This Act specifically establishes that the Norwegian government has a formal legal interest in ABS, a statement which enables the Government's ABS actions to more easily meet the criteria for bringing an ABS case in Norwegian court. One open issue, which may be a limiting factor in this competence, arises from the 'conditions and limitations' language, which is not linked to legal vehicles. Uncertainties about how this language will be applied suggest that it may be necessary to test the Government's ability to apply it to all three types of legal vehicles.

The process of granting foreign governments access to the Norwegian court system might sound like a relatively simple drafting principle. In fact, however, it is very difficult and controversial, because it cuts across basic principles of national sovereignty.[106] Similarly, it would be difficult within Norway's legal system to open the courts to whichever NGO wishes to raise an ABS issue in court, as this would be seen to have the potential of increasing the public's appetite for dragging whichever question to the courtroom, and make it easier for them to do so. Also the strict criteria for a Norwegian NGO to take a national matter to court is rather limited; so the political possibilities to grant a more extensive right to foreign- or international NGOs would probably be limited.

To better enable enforcement of any ABS legal vehicle by a Norwegian court, the national act on civil procedural must be adapted to identify and empower particular persons or officials taking care of ABS-issues. This provision must be adapted to each user-country's court system. **The ABS Working Group's output could contribute to this process by specifying which types of cases that should have cross-border access to the courts; perhaps providing (or calling on the CBD COP, ABS Governing Body or some expert body to provide) guidance on how non-contract 'legal vehicles' can be created in a way that maximizes cross-border enforceability.**

6.3.3.3 Organization matters for institutions considering ABS claims

One further issue may have a significant impact on ABS enforcement actions, the requirements imposed on persons seeking to represent a party to an ABS contract or other instruments in Norwegian court. Under these laws, an attorney who has not been certified to practice law in Norway must receive specific clearance before he may represent a client in a legal action.

6.3.3.4 Choosing the national venue of a court-case (international verneting)

Beyond all of the above requirements, Norwegian law includes a basic provision of 'private international law'.[107] A dispute in an international matter can only be brought before a Norwegian court if the case has a link to Norway.[108] This requirement can be difficult to satisfy, particularly in cases against a multinational company. These issues are clearest with regard to ABS contracts, where the case is brought under contract law.

6.3.3.5 What Would the Court Do on the Substantial Questions?

Substantive application of foreign law depends on many factors, including the legal rules about what elements must be present to make a law or contract 'enforceable' (a valid legal basis for a court action), as well as how the court will interpret foreign legal instruments.

- **Enforceability/validity:** A first question which would be relevant for the court would be to assess the validity of the provider side law or other legal ABS-vehicle which the claimant refers to as the legal basis for the claimed obligation. The question the court will ask is 'Does the law or legal vehicle used provide a basis for legal action in Norwary?' If the vehicle used is an enforceable contract, this choice is simpler to answer. The answer is usually positive (the law of most countries will recognize and apply such a contract.) It must be remembered; however, that not every contract is 'enforceable', and that many countries have quite different standards for determining enforceability.[109]

  Regarding the two other legal-vehicle situations above, however, the answer is less clear. This question is currently not resolved by the Nature Diversity Act. If the court decides that the legal vehicle is a valid source of law, then the next question would be to what extent it is interpreted as a binding obligation upon the parties.

- **Interpretation and Application of foreign law**: Upon concluding that the contract is valid and binding, the court's next challenge would be to interpret it -- to identify the particular meaning of the legally binding obligations within it, and apply them to the facts of the particular case. Here the Norwegian court (and the parties involved in a case before it) would face four additional concerns: 1) ABS is a unknown legal concept among judges in Norway, so there would be little understanding of the underlying rational for the legal vehicle which it is asked to enforce. 2) ABS will relate to technical questions of either biotechnology, gene-technology or a related technical field. Judges are trained in law and very seldom in biology or even less in these technical fields. This could be an obstacle for the court to conclude in a clear obligation upon the parties. 3) foreign laws are often written in official languages which judges cannot read directly. As a result, the judge will need to obtain a translation, which would probably be 'unofficial' meaning that the parties may raise significant challenges to the manner in which the translation conveys (or fails to convey) subtle concepts. 4) Foreign laws are often built on principles and legal approaches that are very different

> from the basic legal approaches underlying the Norwegian legal system. A judge is normally called upon to determine specific questions (the relevance of a specific phrase, the application of one party's obligation following an unexpected event or change, etc.) which is not explicitly discussed in the law. In the provider country, this type of interpretation could often involve carefully parsing the details of the law and contract, applying other basic laws of the land, or even delving into the parties' intentions, by examining particular actions or statements made by the parties during contract negotiations. It may be difficult for a Norwegian court to know which matters of provider-country law must be applied,[110] and to find a basis for resolving the parties competing claims on these matters.

If the court can overcome these difficulties of legal basis and interpretation, it would be faced with more detailed challenges in applying the ABS law to the facts. If it is able to render a basic judgment, and finds that the user must share benefits, he may face even further challenges in setting and/or enforcing the benefit-sharing obligation. This question will typically face both legal and economical difficulties.

The legal difficulties are different depending on which of the three situations is before the court. Where there is an enforceable contract, it is generally believed that the benefit-sharing and other payment and value-transfer provisions.[111] In most countries, including Norway, however, the courts are specifically obliged to determine if the contract's provisions are fair and equitable before enforcing them. This requirement adds a level of doubt to the enforcement process, since not all countries use the same meanings and principles regarding equity in their national legal order.

Where the court action relates to compliance with a different type of legal vehicle (administrative order or permit, for example) similar challenges arise. In particular, the administrative objectives underlying the permit contents may not be clearly stated in the document, increasing the difficulty for a court trying to apply equitable principles to determine whether it can enforce the payment obligations under the permit. Finally, as noted above, in actions claiming that the user failed to obtain any legal approval (failure to comply with PIC and MAT) it will be difficult for any court to order specific benefit-sharing, without first obtaining the provider's and/or source country's consent. Any such order would create a *de facto* contract. A Norwegian court could make such an order against the citizens and entities under Norway's jurisdiction, but normally force a party outside that jurisdiction to be bound by such a contract. This result is underscored by the CBD's separate requirement of MAT for benefit sharing.

Apart from the legal questions, raised above, the court could also face economic challenges, particularly in cases involving the third hypothetical situation – *i.e.*, cases in which the user did not comply with national ABS law, and has no ABS contract or permit. Lacking any agreement to guide the decision; and lacking information about how ABS contracts and courts have valued the resources in the past, the court will have to set

value using basic legal principles of the country. There will be a significant level of uncertainty here for the claimant and the respondent.

If all these difficulties are overcome, the court would be faced with yet another 'legal personality' question: 'Who is legally entitled, as right-holder to the benefits, to receive any payments?' Normally, this question will be decided earlier in the legal action, because most courts have a basic rule that one person may not bring an action to enforce the rights of another. Hence, unless the action is technically brought by or in behalf of the actual right-holder, the case will not stand. At the time of the judgment and its execution, the legal rights of a particular individual, community, entity or country must be clear – only the person(s) with a legal right may receive funds under the judgment. As discussed in Chapter 4, the particular 'owner' of genetic resources within the provider country is decided by each country as a matter of sovereign right. As such, the legal status of genetic resources varies from jurisdiction to jurisdiction. Unless the right-holder can be determined with certainty, however, no judgment may be given or enforced. This determination involves a broad variety of difficult legal issues requiring examination of both 'ABS law' and other law of the providing country (raising the same difficulties mentioned above). It would be even more complicated if the core of the dispute involves customary law and its application.

Assuming he has been notified, one might expect the ambassador of the provider country to become involved in this issue through the Foreign Minister of Norway (validating or refuting the right of the group appearing before the Norwegian court.) Ultimately, if the Norwegian court chooses to decide this case, it would be forced to come to some (prejudicial or binding) decision regarding the legal status of the resources in the providing country. It is unlikely that a Norwegian court would be willing to embark on such a difficult task. Even if it did so, it would be difficult for the parties to predict that decision. In either case, this issue and process constitute an obstacle to the legal certainty.

6.3.3.6 Limitations on the Verdict

In order for a Norwegian court decision to be legally accepted, it must meet certain other requirements, as well. Its substantive content must be 'actual and concrete' in a legal sense. Breach of contract is a simple and well-recognized issue, on which courts can easily issue a concrete verdict (damages or strict performance of the contract), suggesting that, in this aspect as well, the provider/source country are best protected where there is a formally enforceable ABS contract. Enforcement of foreign administrative and legal instruments may be less clear-cut in this respect, and where the provider/source claim that the user did not comply with ABS law at all, it is difficult to envision a way for a Norwegian court to formulate a verdict forcing a Norwegian citizen to comply with the law of the other country.

In law practice, the duty to identify and propose an acceptable verdict rests with the claimant, would normally improve his chances by calling for payment of a concrete sum of money or performance of some equally certain action or compliance. In particular, a court decision in Norway

could hardly oblige a user to share research results with another entity, in light of existing rules on competition and trade secrets.

6.3.3.7 Enforcement of a Decision from another Country

In some cases, claimants may seek to avoid some of the uncertainties and challenges described above by obtaining the verdict on their claim in another country (the provider country) and seeking enforcement in Norway. This avenue will also require the claimant to bring the request for enforcement as a court case in Norway. A great many issues may arise in such a case, as the court is normally required to determine whether the verdict is acceptable under Norwegian law. This determination raises many difficult questions, including those described above.

If the verdict to be enforced was initially decided by a European Court, a difficult question arises under the Lugano Convention, which provides a variety of rules for determining whether such a decision could be enforced by a Norwegian court upon a Norwegian citizens. These rules have been examined in many court cases in other subject areas, and the result would depend on the general rules developed through those cases. These principles may also guide the courts where the parties are not members of the EU or EFTA.

6.3.3.8 Addressing (Eliminating) these Obstacles by National Law

One alternative way which could solve some of these practical enforceability questions is to implement a clearer obligation in the Norwegian law targeting benefit sharing directly: by stating the all (closer defined) utilisations of genetic resources should trigger an obligation of Norwegian law to share a part (which also must be implemented in the Norwegian obligation) to a closer defined legal person.

Clearly defined steps of **utilisation of genetic resources** and clearly defined points when **benefits have arisen from such utilisation** could circumvented several of the problems identified above.

6.4 Addressing Obstacles Identified by this Thought Experiment in an International Instrument or Document

When preparing the Norwegian Nature Diversity Act, the Ministry of Environment stated that this act would not solve all the issues related to ABS – neither the access side nor the benefit-sharing side. Based on this thought-experiment, that conclusion is even clearer: It does not solve all the issues relevant and necessary for creation of a legal enforceable and externally verifiable system. This is certainly not the fault of the Norwegian government in any respect, as it has taken a serious and important step that will at least enable and mandate greater attention to user-side issues within Norway. For purposes of developing an objective case-based system that implements ABS in a functional way, however, it is clear that one country's legislature, acting alone cannot resolve all of the challenges that would inhibit its courts from enforcing ABS obligations against that country's users.

As demonstrated in the above thought-experiment, cross-border legal certainty in ABS will largely depend on balancing two types of international mechanisms – informational mechanisms (using the CHM or some other international communication mechanism as an official source of information regarding every country's legal choices relevant to ABS) and agreed legal mechanisms (identifying and agreeing, at the international or bilateral level, provisions and principles to apply in cases where the user has violated provider-side ABS law by failing to obtain a contract, permit or other specific instrument. These measures can address nearly all of the challenges described above, so long as the CBD countries are willing to make specific commitments regarding ensuring the official accuracy of information and evidence needed under both mechanisms, and also agree that they will consider the provider-side legal vehicle as a valid basis for enforcement and other legal action on the user side, so long as the provider/source country complies with relevant prerequisites.

Similarly, where there is a contract or legally enforceable permit, some sort of model provisions might assist the ABS parties seeking to apply a provider-side ABS legal vehicle in user-country courts, if the ABS countries not only agreed on the model provisions, but also agreed that, where those provisions are used, they will be recognized in the courts of all ABS Countries as valid, enforceable provisions.

Finally, some issues, especially the problem of identifying users of genetic resources where the user has not complied with provider-side laws, can be possibly be addressed in the decisions which set the framework of the regime. For example, to avoid the evidentiary and practical problems relating to the identification of 'genetic resources', it may be most useful to focus the implementation/enforcement aspects of the framework on a different concept 'utilization of genetic resources'. It should be more feasible to externally verify whether each individual or company is engaged in activities which 'utilize genetic resources' than to attempt to identify particular material as a 'genetic resource' by inspection.

7 Functional Building Blocks for the Regime

One of the most consistent requests received by the authors relating to future contributions to the Working Group has been the request for specific recommendations and text. On one hand, as lawyers, we are always ready to make recommendations. On the other, however, we are mindful of our presumption in doing so, and beg pardon of any delegate who does not feel it appropriate. The objective of this action-paper, including this section, is to focus our attention on legal options and issues involved in making ABS **functional**. Therefore, we have focused on 'what will make benefit sharing work', and have attempted to avoid any involvement in the political decisions that are at the forefront of current discussions. In essence, this paper is not about which ABS political choices are made, but **how they are drafted** in order to endure that they can be implemented.

Our discussion focuses on the 'components' of the regime – the various smaller building blocks involved, including national provider-side and user-side legislation and various actions, mechanisms and decisions at international levels. In keeping with the basic approach of the CBD, we assume that the bulk of ABS implementation will happen at the national level. Recognising the cross-border nature of ABS, however, we also identify issues, tools and agreements that must be essentially international in scope, in order to promote functionality.

This chapter divides our suggestions into three groups of actions: at the national, international, and bilateral levels. As demonstrated by the hypothetical case-study of the situation in Norway, as well as by many years of developing and applying individual national provider-side legislation, it is clear that major legal deficits in ABS affect both provider-side and user-side actions. Solutions require a combination of specific agreement at international levels, individual legislative action at national level, and other measures (including bilateral agreement among governments) that increase the capacity of parties to ABS transactions to develop appropriate and well-framed legal instruments (ABS contracts and other legal vehicles) that meet their needs as well as the needs of a court or agency that might, in future seek to enforce them.

Normally, where the Countries are motivated to comply, the processes under an international instrument will be most easily adopted where they call for action at the national level.

The following sections consider and discuss (i) which matters to be addressed though national law that is decided separately (and differently) in each country, (ii) which matters specifically agreed at the international level (whether immediately or within some specific time following completion of the current negotiations) and enabled at the national level; and (iii) which international mechanisms appear to be necessary to enable functionality.

7.1 Promoting Functionality through National Decision-making

It is common, where an instrument focuses on building consensus to achieve an internationally shared political objective, to speak of national action in general terms – *i.e.,* to call on parties to adopt measures that will achieve certain specific elements of that shared objective. Where the goal is to mandate specific inter-country legal action, however, some matters must be more specifically mandated and relatively consistent from country to country. In each international provision, it is essential to determine which types of measures are needed. This is a basic question of functionality. To date, the ABS regime has operated entirely through unrestricted national-level choices regarding how (and indeed whether) to adopt ABS measures, and what those measures may contain. Many commentators assume that the ABS regime will become functional if more countries adopt legislation under Article 15 and the Bonn Guidelines, and assume that such legislation will continue to be highly diverse.

As demonstrated by the Norwegian hypothetical case study, in Chapter 6, above, however, there are some elements of the ABS regime that can only function if they are substantively agreed by all CBD countries, who all agree that provider-side legal vehicles that comply with those elements will be enforceable in their national courts against persons and entities under their national jurisdiction. In order to be valid in practice, however, it will be essential for all countries to adopt, enact or otherwise ensure that these provisions are part of their national legal basis underlying ABS implementation and enforcement.[112]

7.1.1 Necessary Legal Provisions that May be Different in All Participating Countries

As detailed in section 4.1.1, above, ABS relies heavily on many types of law that (i) differ greatly from country to country, but (ii) are so ingrained in the country's national system that they cannot be changed simply to accommodate a single new international instrument. The following sections identify two such areas most relevant to ABS.

7.1.1.1 Basic Commercial and Administrative Rights (Provider Side)

One critical issue relates to the clarification of each country's 'access' requirements, in a form that will make it easier for users to know what is needed. This process involves determining how the general law of the provider country applies to ABS, including

- the **ownership** of various kinds of property and/or property rights;
- the **particular rights of an owner** under national law;
- the **finality** of contracts and administrative/legal decisions; the **rights** of the party to a final contract or under a final decision;
- **legal protection of the parties** to contracts and administrative documents and negotiations (especially the parties that are least able to protect themselves); and
- the system for **oversight, implementation and/or enforcement** and for administrative or judicial action within the country.

Nearly every country has direct legislation or formally accepted practices addressing all of these matters, although at present few countries have officially considered how they will apply to ABS resources, activities and legal actions.

It would be virtually impossible for the ABS regime to adopt provisions which require countries to change or harmonise these basic laws, for two reasons. First, all of the types of law mentioned above are very complex and detailed in many countries. The international regime negotiators would find it difficult to agree on the lengthy documents needed to impose a harmonised law requirement. Second, however, if the negotiators were able to adopt specific calls to harmonise all relevant aspects of the above-listed legislation, its inclusion in the regime document would virtually ensure that few, if any, countries would be willing to ratify it.

Fortunately, legal certainty and a functional ABS regime do not depend on harmonisation of these points. What is important is that users, user-countries, judges, prosecutors, arbitrators and others can know with certainty what laws of the provider-side country are relevant in each case or transaction. Instead, **it seems essential to the functionality of the regime if each country should formally and officially identify the specific laws, requirements and relevant information** necessary to inform any user can who owns the resources he seeks to obtain, what the relevant national laws require, and what his particular rights are. The regime instrument or other document could call upon them to officially provide this information through the CHM.[113]

While many other political matters are discussed in the Paris Annex, these matters do not seem to affect specific functionality of the ABS regime. As such, they can appropriately be based on each country's separate adoption of relevant provisions.

7.1.1.2 Evidentiary Rules

In addition to the above, it will normally be necessary for users and all other parties and decision-makers to know what specific evidence is needed (on both provider-side and user-side) to demonstrate that a particular user complied or failed to comply with national law. These provisions normally will include a fair mechanism for clarifying responsibility, such as the following:

1. A legal requirement that enables any user to document the legal sourcing of genetic materials, in order to avoid the liability described below;
2. A clear rule regarding what kind of proof must be presented in order to meet the 'documentation of source' requirement (see 4.7).
3. Where the user documents that genetic resources came from a foreign source country, he must have a way of proving that his utilisation is based on PIC and MAT (showing existing documentation, if it exists, or obtaining a new agreement otherwise.)
4. A specific benefit-sharing amount (or standard for determining the amount in each case) and/or performance that would be required where a user could not make the above proof.

A great many other matters relevant to the ABS regime may be developed on a country-by-country basis, as stricter measures, but their enforcement by other countries might be difficult or voluntary. In addition, over the long term, there is a significant role for industry groups and voluntary collections of data. Through these means, the international regime can develop industry standards, and build up a common practical understanding of the particular elements of ABS contracts and the way that they can be consistently understood and implemented.

7.1.2 Provisions whose Content Must be Agreed by all ABS Countries

There are many aspects of ABS enforcement that may be difficult or impossible unless all countries agreeing to certain very specific requirements. For example, the acceptance by all countries of particular default and model provisions may be a major tool to resolve problems with remedies and other legal actions. To enable their acceptance, it may also be necessary for countries to agree to enforce the model and default provisions against citizens, entities and activities under their respective jurisdiction, so long as certain minimum standards are met.

7.1.2.1 Default and Model Provisions

Proposals regarding default clauses and model clauses may have varying levels of impact on functionality, depending on whether the CBD countries adopt them as (i) an 'option' which particular countries and/or particular ABS transactions may choose to apply, or (ii) a set of agreed provisions which countries agree to adopt with regard to both their user-side and provider-side obligations.

- **Default clauses:** To maximise the ability of a default mechanism to apply in a contract situation, the CBD countries could make two commitments.
  - First, as providers and source countries, they would have to agree to accept the default provisions, in any foreign legal, administrative or arbitral action taken where the user did not comply with the requirements of the provider-side legal vehicle.
  - Second, as user countries and countries enforcing user-side measures against persons, entities and actions under their national jurisdiction, CBD countries would need to agree to apply those measures.
- **Model clauses:** The incentive of user and provider to use 'model clauses' for ABS contracts can be greatly affected by the question raised at the beginning of this section 7.1.2.1. In this connection, it is important to note the discoveries of ABS research to date: that in most circumstances, it would be extremely difficult (perhaps impossible) and very expensive, to engage in governmental oversight necessary to compel a user to participate in ABS and obtain an ABS contract. Consequently, even if the regime is built using very strong mandatory language, its functionality and success will depend on creating incentives that encourage the user to participate. In light of the difficulties of oversight and enforcement, it would appear that very strong language and extreme requirements in mandatory provisions and provider-side processes would normally operate to reduce this incentive, rather than to increase it.

It must be noted, that these mechanisms, although increasing the legal ability of user-side courts to implement ABS, may also create an effective 'minimum standard' for the entire regime. As noted in Section 4.6.1, above, the impact of these clauses will depend on the level of performance they would impose (even where they are formally agreed). If the terms of performance under default clauses are difficult and certain to be imposed, then the default provisions themselves may generate an incentive for the user compliance. Otherwise, they could operate as a perverse incentive, encouraging users to remove genetic resources 'informally' and wait and see if any action is ever taken.

Finally, where the regime calls for cross-border enforcement and compliance, it may effectively limit which provider-side measures the user-side country is required to apply the hypothetical case-study noted particular problems with regard to each potential claimant's access to the court system of another country. This is difficult to address legally. In some cases, it may be perceived as conflicting with the sovereignty of the country that is asked to commit to opening its courts to specific foreign actors in specific situations.

7.1.2.2 International Agreement on Coverage Matters

In addition to the matters described above, it must be noted that the problems faced by user countries in seeking to enforce ABS provisions multiply rapidly where particular matters of coverage differ from country to country. For this reason, as noted in Chapter 2, it is essential for the coverage of the regime to be agreed relatively concretely in the current negotiations. Without specificity at the international level, national provisions implementing international ABS decisions may differ markedly – resources or activities which one country considers to be governed by the international regime may be excluded under the laws of another country. A similar disconnection might arise where some countries' national laws exempt research activities and others do not, or where those exemptions differ from country to country.

7.1.2.3 Definition of Utilisation of Genetic Resources

As set forth in Chapter 4, the authors are keenly aware of the fundamental obstacle to ABS functionality posed by the difficulty in finding a way to externally identify which biological material or information constitutes a 'genetic resource' to be governed by the ABS system. Our conclusion has been that the best solutions to this issue can be built around agreement among the parties on which activities constitute 'utilisation of genetic resources'. If they are able to agree on this first step in making the regime functional, that process and negotiation might be very difficult. Consequently, we offer the following example of a textual framework for that determination.

The authors regret that we were unable to develop sample lists for the first example, fearing that our own expertises were not sufficient to identify all of the particular activities or characteristics that might be needed for such lists. We note, however, that any such list approach is virtually useless for purposes of functionality, unless agreed at the inter-

governmental level (the development of 191 separate and different national lists would have little or no positive impact on regime functionality). Accordingly, we have provided an example of a second approach, as a reminder of this option.

Text example for including 'utilisation of genetic resources' as a formative element of a functional ABS framework:

(a) the following is a list of activities that constitute 'utilization of genetic resources' for purposes of this instrument:

[here insert a list of specific activities that will be considered to 'utilise genetic resources'].

(b) In addition to the items listed in (a), any activity that meets the following criteria shall be considered to be 'utilization of genetic resources' for purposes of this instrument:

[here insert a list of the characteristics that define 'utilization of genetic resources'].

If the above lists cannot be generated in time, a second approach is also possible:

Not later than XXX, the Governing Body [or CBD COP or other body] shall agree on (i) a list of activities that constitute 'utilization of genetic resources' for purposes of this law and (ii) a list of objective criteria that shall determine which other activities shall be considered to be 'utilization of genetic resources' for purposes of this instrument:

7.2 International Measures for Promoting ABS Functionality

There is a strong element of internationality in the national measures described in section 7.1, given the need to agree on some national measures in detail and to call on parties to adopt or provide information on others. In essence, oversight of this type of provisions is primarily the task of some international body (the CBD COP, a MOP or other Governing Body specially created for ABS, etc.) Beyond these, however, a functional ABS regime would appear to require other types of international action – specific mechanisms to assist the CBD countries.

Inevitably, where the CBD countries will be expected to operate in a coordinated manner, applying and enforcing legal requirements across national borders, it will be necessary to develop some mechanisms to facilitate cross border communication and functionality. The following are particular functional international mechanisms, which might be effective in addressing particular needs of the ABS regime and its functionality.

7.2.1 Ombudsman

There is relatively little dispute among the participants in the ABS negotiations that ABS is unavoidably complex. Even if the basic framework for ABS can be simplified, the challenges of cross-border implementation

and the need to enable developing countries to gain access to, and make claims in, user-side courts and agencies will remain complex and difficult. Accordingly, best practice in applying a complex regime in this type of situation would involve the creation of an ombudsman or designation of some institution to serve that role.

In the Scandinavian administrative tradition, there is a system of different kinds of ombudsmen; who are appointed because of their credibility to act on behalf of a group (in Norway e.g. children or women or the Consumer) or the general Ombudsman appointed by the Storting (the parliament of Norway) to overview the administration. The ombudsman has in fact very limited actual decisive power; but he enjoys a high credibility because of his un-political position and experience in his field of responsibility. He can both receive complaints from the citizens regarding a particular matter; or he can take independent initiatives in concrete cases.

By creating a global ABS ombudsman there could be established an institution for following the implementation of the ABS system; and look at particular ABS cases. Preferable the ABS ombudsman should be an existing institution working the field of ABS. It should probably be chosen for its credibility of balancing ABS and enjoying ABS-relevant expertise.

7.2.2 Financial Proposals

The Paris Annex includes provisions for simplification of benefit-sharing through the use of an international fund similar to the Fund created under the ITPGRFA. This concept, which was raised, but not accepted, at the time that the CBD was adopted, may appear more reasonable now that more parties have become aware of the difficulties in attempting to develop and apply a transaction-by-transaction benefit-sharing solution. As noted with regard to the ITPGRFA, such a fund may be difficult to set up and slow to fill with money, however, its inclusion in the Treaty may signal that the Parties are ready to adopt such a fund as a simpler solution to the benefit-sharing challenges.

7.2.3 Use and Evolution of the CHM

The effective coordination of national measures to form an operational and legally ABS system appears to depend on the ability of users, providers, agencies, communities, NGOs, advisors, judges, arbitrators and others, from any CBD country to obtain officially sanctioned information about the key matters of certainty and evidence required by each country, with regard to access to, collection of and utilisation of its genetic resources.

As noted in 7.1.1, above, it will be essential that

- only official sources provide information to the CHM on these matters,[114]
- all countries acknowledge and commit to the legal certainty of the matters they list in this way; and
- all countries agree to recognise these provisions in their national user-side implement of ABS

If used in this way, the CHM can become the primary international implementation of the functional elements of cross-border implementation of the ABS regime.

7.2.4 Communication Processes and Disclosure Requirements

Another key international element of any cross-border legal relationship is the need for official communication between the various users, providers, middlemen, countries and others that are directly involved in each ABS transaction. Whether styled as an 'ABS certificate', a 'voluntary (or mandatory) disclosure requirement' or something else, official communications of this type are important for many reasons. As documented in Chapter 6's 'thought experiment' a court seeking to implement or enforce an ABS legal vehicle of a provider country will need to have validation of many facts from official sources in another country. In addition, they frequently need some basis for assurance that the courts and agencies of the relevant country will stand behind particular ABS contracts, permits or other legal vehicles. There may be many particular elements of any ABS that require proof, including

- identification of the particular species, subspecies or population of a specimen being accessed or utilised;
- proof that a the provider or country that provided the resource either was the country of origin or has "acquired GR in accordance with the CBD (CBD Art. 15.3);
- documentation of the process by which it was achieved (certificate of source);
- proof that the user obtained access to the material legally, from an authorised provider or owner (certificate of legal provenance);
- documentation of the transaction or transactions by which it reached the hands of the particular user in question (certificate of origin);
- proof that the initial acquisition of genetic resources by user or transferee was done in compliance with the provider country's ABS legislation, ABS contract or other legal vehicle (certificate of compliance);
- proof that at the particular moment it is requested, the user or transferee remains in compliance with the provider country's ABS legislation, ABS contract or other legal vehicle (certificate of current status); or
- registration of particular types of users (non-commercial researchers, middlemen, or certain types of agricultural relief programmes, for example).

In addition, as discussed in section 6.3, while the concepts of mandatory and/or voluntary disclosure in patent applications have some potential, such disclosure requirements need to be tied to both specific legal obligations and to specific incentives or mandates. If this can be accomplished, it may be appropriate to extend the coverage of such disclosures, applying them to applications for other permits, and other specific 'check points' which can indicate that a user of genetic resources has generated or is about to generate a sharable benefit from that utilisation.

7.3 Enabling Bilateral Action

To date, some of the most successful ABS development (on both provider and user side) has involved the initiation of bilateral discussions between a specific provider country and another country whose citizens and entities propose to bio-prospect in or utilise the genetic resources of that provider country. Through such bilateral discussions, the two countries can determine key factors, including some of the matters identified in 4.4.1 as essential 'certainties' for the development of any ABS relationship. These negotiations can 'prepare the way' for the negotiation of particular ABS contracts by individuals and entities from the two countries, as well as helping to protect the parties against misunderstandings and allegations of bad-faith and/or biopiracy that may arise where the individual negotiation goes forward without confirmation of key certainties.

A similar objective is also addressed through another avenue, by recent work in the development of 'bio-cultural protocols' at the community level, which might be preparing each community to negotiate more effectively and expeditiously when approached by a particular user. One advantage of the bio-cultural protocol approach is that it is not limited to ABS and TK issues or genetic resources, but addresses and provides a community basis for participating in a full range of resource-related issues that may arise and significantly affect the cultural, legal and financial rights of the community. The protocols essentially are directed at enabling the community to function as an entity and to operate from a base of community vision and to agree on shared objectives that can guide future negotiations and processes.

Notes

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[2] Morten Walløe Tvedt, Senior Research Fellow, Fridtjof Nansen Institute. Together the authors wrote the book *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD*. IUCN Environmental Policy and Law Paper No. 67/1 (available in English, Spanish and French). IUCN Environmental Law Centre, Bonn Germany. Tvedt has published extensively in the area of intellectual property and biological resources law in recent years (see www.fni.no for a complete publication list). He is currently working on a monograph about patent law and the sui generis option in the plant sector for developing countries. Mr. Tvedt may be contacted at: mwt@fni.no or by post at Fridtjof Nansen Instute, P.O.Box 326, N-1326 Lysaker, Norway.

[3] *See* UNEP/CBD/COP/8/31, at 129, Decision UNEP/CBD/ COP/VIII/4, which charges the Working Group with the duties to 'continue the elaboration and negotiation of the international regime in accordance with its terms of reference in decision VII/19D and instructs the Ad Hoc Open-ended Working Group to complete its work at the earliest possible time before the tenth meeting of the Conference of the Parties'.

[4] The authors have found that terminology may create confusion in a paper that addresses both the international level of ABS (*i.e.*, relationship of the countries as 'Contracting Parties') and the private level (*i.e.*, the relationships between the 'parties to a contract') Accordingly, when speaking of countries that are Contracting Parties to the CBD, we use the term 'countries' or 'CBD countries'. When speaking of the participants in an individual ABS relationship, we have tried to use the term 'parties to the ABS contract'.

[5] Many sections of this action-paper discuss 'user-side measures'; however, this action-paper is neither supporting 'user countries' nor challenging or criticizing them.

[6] Based on the records and data of the Consultative Group on International Agricultural Resources (CGIAR), every country has been involved in the use of germplasm from one or more of the International Agricultural Resource Centres. Fowler, C., M. Smale and S. Gaiji. 2001. 'Unequal Exchange? Recent Transfers of Agricultural Resources and their Implications for Developing Countries.' In Development Policy Review 19(2): 181 204.

[7] See Tvedt M.W. & T. Young *Beyond Access Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD*. IUCN Environmental Policy and Law Paper No. 67/1. IUCN Environmental Law Centre, Bonn Germany. At Chapter 2, that book notes that the CBD benefit-sharing obligation already exists. As in that case, the authors have been instructed to focus on enabling countries to meet the responsibilities to which they have already committed.

[8] By this observation of the legally binding character of ABS, it is not the intention of these authors to promote any political solutions, mere analyzing options and obstacles for implementing the CBD obligations in practice.

[9] Detailed analysis of the question of 'legal certainty' was undertaken in 2005. IUCN Canada. '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, which

noted that 'The [best] ways to enhance legal certainty for users … are to balance that need against the sovereign obligations of providers need for certainty.'

[10] Many other kinds of risks and potential costs may exist affecting a transaction, some of which are far less predictable. The primary task of commercial law is to ensure that the 'legal risks' are minimal and the legal costs are knowable. Commercial parties are often unwilling to enter into any contractual relationship where the legal risks are manifestly uncertain. *Ibid*.

[11] The Draft Operational Text, in its current form, is contained in document UNEP/CBD/WG-ABS/7/8, dated 5 May 2009, starting at page 21. Although relatively little material in this document is unbracketed, it provides a wealth of information regarding the options and points of concern that are likely to be addressed in some way in the final document (including by express exclusion from it.)

[12] Part II of the Paris Annex.

[13] The authors neither support nor oppose an ITPGRFA-related exclusion (nor any others.) This action-paper lists points that will help clarify the relationship between the two and minimise ambiguities affecting ABS functionality.

[14] UNCLOS Parties have not agreed which of the various marine areas are 'beyond national jurisdiction'. Many UNCLOS countries have not declared EEZs, for a variety of reasons, and some have chosen not to become party to UNCLOS owing to marine jurisdictional concerns. The CITES COP has frequently, but unsuccessfully, attempted to agree on the meaning of the term 'ocean areas beyond national jurisdiction', which appears in CITES text. If CBD countries succeed in adopting a definition of 'areas beyond the limits of national jurisdiction', it may legally impact their respective national positions relevant to, *inter alia,* fisheries, CITES, and Basel Convention.

[15] Currently (as of 1 August 2009, thirty-two CBD countries, including many landlocked countries are not members of UNCLOS. One (Somalia) is party to UNCLOS, but not the CBD.

[16] UNCLOS's provisions for 'marine scientific research' apply only within national EEZs/territorial seas, and would thus not apply to most 'ocean areas beyond national jurisdiction', no matter how that term is defined.

[17] Only a few countries have the technical facilities to monitor activities in their EEZs / OCSs beyond the range of binocular-assisted sight. The others could not know whether bioprospectors acted in or beyond national waters.

[18] There are 159 CBD countries that are not party to CCAMLR. One country (USA) which is a member of CCAMLR is not party to the CBD. Under UNCLOS, CCAMLR is considered a regional fisheries management instrument, and other UNCLOS members (i.e. most but not all CBD countries) are responsible to cooperate with its efforts to conserve living resources of the oceans within the Antarctic convergence.

[19] 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) and other remarks in that meeting. There are a large number of legal ways to obtain samples without contacting the source country. This type of avoidance would not be illegal, if the regime were designed to apply only where the user obtains access through source country ABS measures.

[20] This might require the Parties to pose and answer a series of 'mapping' questions, similar to the scope questions described in Chapter 3 of this paper, above, mapping the relationship between ABS and conventional commerce. See also Tvedt and Young *(supra note* 7) at Chapter 2 and section 4.1. See also Young, T., 2003, *Options and Processes for the International ABS Regime,* IUCN Environmental Law Centre pamphlet.

[21] *See, e.g.,* Cabrera Medaglia, J. and C. López Silva. 2007. *Addressing the Problems of Access: Protecting Sources, While Giving Users Certainty*. IUCN Environmental Policy and Law Paper No. 67, The ABS Series, Book 1. See also the 'Report of the meeting of the group of legal and technical experts on concepts, terms, working definitions and sectoral approaches', 2-8 April 2009, UNEP/CBD/WG-ABS/7/2.

[22] The assumption that all types of provider-side legal vehicles for ABS (see part 4.2 of this chapter) are equally effective is normally correct, when applied to a user who makes a positive effort to comply with the provider/source country's national ABS requirements. The differences among these choices arise when one attempts to enforce the legal vehicle through legal or pseudo-legal (arbitral or other) process against a user who is not in the provider/source country.

[23] The 'utilization of GR' as a basic concept for the ABS regime was detailed in Tvedt and Young (*supra,* note 7), at chapter 4, where the justification and legal basis for applying 'utilisation of genetic resources' as the primary trigger of ABS responsibilities is explained in detail.

[24] As discussed in many different sources, including Cabrera Medaglia et al., 2007; Young, 2006, intention is an element of every existing definition of 'genetic resources,' and of every use of an alternative term ('research samples', 'genetic heritage' etc.) except those who apply ABS to all biological resources. When controlled at the access level, the difference between genetic resources and other resources is determined by the intention of the holder -- unknowable at the time of collection. Even in the laboratory, a distinction between 'biological research' and 'genetic research' might cause the User to conclude that his work is not subject to ABS provisions.

[25] In national legislation, it is common to include multiple approaches, especially both a list and a descriptive standard to apply to items not specifically on the list, as a flexibility tool.

[26] As detailed in Tvedt and Young (*supra,* note 7) at 4.1.2, the ITPGRFA operates essentially as a subsectoral list of utilization activities (agricultural development, agricultural genebanks and the seed sector), and links that list to a specific mechanism by which a limited group of resources are obtained, held, transferred and utilized, pursuant to a sectorally specialized set of requirements and processes. See also Hiemstra et al., 2006; and Tvedt et al., 2007, examining the very different concepts relevant to another agricultural sub-sector – animal genetic resources. The subsector addressing wild animal genetic resources is also examining these questions. The 11th, 12th, and 13th CITES COPs all noted concerns that veterinary specimens would be used for commercial development, deciding not to adopt expedited or non-document-required transport of these specimens, in light of ABS concerns.

[27] *See* Glowka, L, F. Burhenne-Guilmin, H. Synge, J.A. McNeely and L. Gündling. 1994. *A Guide to the Convention on Biological Diversity*. IUCN Environmental Policy and Law Paper No. 30. Glowka, L. 1998. *A Guide to Developing National Legislative Frameworks to Determine Access to Genetic Resources*. IUCN Environmental Policy and Law Paper No. 34. Reid, W., S. Laird, C. Meyer, R. Gámez, A. Sittenfeld, D. Janzen, M. Gollin and C. Juma. 1993. *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development*. World Resources Institute.

[28] See, Bhatti, S., S. Carrizosa, P. McGuire and T. Young. 2009. *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts*. IUCN Environmental Policy and Law Paper No. 67, The ABS Series, Book 4 at Chapter 1.

[29] A license or permit is a document which represents a governmental process, as such it straddles the division between individual instruments (such as contracts and other measures described above) and governmental processes.

[30] For example, although numerous enforceable contracts have been developed, those known to the author have all been 'unsecured' contracts. It may be that the application of legal mechanisms of secured transactions (mortgages and other security arrangements, may operate to eliminate some of the more significant limitations on the functional enforceability of ABS contracts. Discussed in detail in Young, T., 'Contract Provisions and Experience', Chapter 3 in Bhatti, Carrizosa, et al., (*supra* note 27.)

[31] As detailed in Young, T., 2007 'Administrative and judicial remedies available in countries with users under their jurisdiction and in international agreements' (posted as UNEP/CBD/WG-ABS/5/INF/3 and summarized in 4.6 of this action-paper), it is vastly easier from a legal perspective to enforce contracts than other types of legal mechanisms discussed in this section.

[32] Ibid. Noting that one country's laws and legal/administrative decisions are not enforceable in foreign countries, in the absence of very specific legal agreements.

[33] A similar principle may apply in the case of legislation, where a guideline or other non-binding instrument may be quicker for countries to adopt, and equally effective as a control on user actions, with regard to many users. This experience is found in many areas of law. (*See* Tvedt and Young, 2007, *supra* note 7, at 3.5 and 6.1.2) In ABS, one of the few user-side measures currently functioning in ABS are the 'Japanese Guidelines', which are rigorously applied and broadly complied with, even though not formally binding law. Discussed at 6.2 of this action-paper.

[34] CBD Art. 15.1. The CBD also reminds us, in Article 3 that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies…' Normally, a State is not held to have abandoned its sovereign rights of a certain type, simply because it has not adopted a law whose title directly addresses that type of right. In other words, a state may still retain and recognize its sovereign rights in 'genetic resources', even if it has no law or provision specifically using this term.

[35] Regulatory processes are simply time-consuming. Recent comparison of other multilateral environmental instruments shows that even more than 25 years after entry into force, some Parties to an MEA have not adopted the minimum national legislative or administrative measures that are unequivocally required by that instrument. Hårstad, J. et al. 2005. Evaluation of GEF Support for Biosafety. GEF This suggests that a primary reason for the low rate of adoption of implementation legislation may simply be time. The delay is hardly surprising given the legal and practical difficulties that national legislative developers and others must address in order to draft ABS legislation that will be legally acceptable to governmental attorneys and parliamentary decision-makers.

[36] See note 19, *supra.*

[37] Most information in this table derived directly from two basic sources: The ABS measures Database in the CHM, and the combined databases of ABS contracts and contract provisions, developed by WIPO and by the authors of Bhatti, S., S. Carrizosa, P. McGuire and T. Young 2009. *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts*. IUCN Environmental Policy and Law Paper No. 67, The ABS Series, Book 4.

[38] Holm-Müller *et al.*, 2005 ; Latorre, 2005; Frison and Dedeurwaerdare, 2006.

[39] Research into these issues is addressed in 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. *See also* and IUCN-Canada, *supra,* note 9.

[40] The 'second MAT' provision of Article 15 is contained in article 15.7, which focuses solely on equitable sharing (of research results and of benefits arising

from the utilization of genetic resources.) It provides specifically that '[s]uch sharing shall be upon mutually agreed terms'. This indicates that the second MAT covers entirely different matters from the first, which requires in Article 15.4 that '[a]ccess, where granted, shall be on mutually agreed terms'.

[41] For example, the ITPGRFA's provision calling in essence for a specific task – the revision of the CGIAR's existing MTA to align with specific Treaty's requirements – was adopted relatively expeditiously (although requiring difficult negotiations). By contrast, the Cartagena Protocol's broader call for the COP-MOP to 'adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms' (Cartagena Protocol on Biosafety, Art. 27) is now long past its original four-year deadline.

[42] As discussed in Tvedt and Young, 2007, the questions of when and how benefits arise, triggering a claim for benefit-sharing is legally unclear, and might pose a significant obstacle to the enforcement of benefit-sharing obligations.

43 Examination of the earliest drafts of the CBD demonstrate that the objectives of maximizing conservation-related research was second only to protected areas as the primary motivation for the negotiation of the CBD, and was the specific reason for the initiation of the ABS concept.

[44] Schindel, David, et al, 2008, 'Submission of Views from an International Workshop on Access and Benefit Sharing in Non-Commercial Biodiversity Research', submitted to the CBD Group of Technical and Legal Experts on Compliance in the context of the International Regime on Access and Benefit-sharing (January, 2009, Tokyo) As detailed that report, a significant proportion of field scientific researchers operate focus on developing long-lasting cooperative relationships with relevant government agencies, including ABS compliance. As a consequenceIn some countries, the only persons who formally seek access to genetic resources under national law are researchers. At the same time, a large percentage of field research is conducted by academics, museums, biological collections and other institutions which operate at a very low level of funding.

[45] Efforts to distinguish non-commercial research from 'utilization of genetic resources' (see, e.g., Fernandez-Ugalde, 2005) would have to take into account the reference to research results in Article 15.7, which suggests that research was originally believed to be within the scope of 'utilization' for this purpose.

[46] The vast majority of all ABS contracts that have been made available for legal research were executed only by an individual researcher or field project manager, rather than by the company or institution sponsoring the research. The combined result of multi-year efforts by WIPO and a private consultant to collect copies of ABS Contracts (including agreements in force, models and forms) produced seventy contracts, including a great many that were completely identical apart from the parties names.

[47] A recent meeting of researchers focused on this issue suggested that the qualification criterion should be membership (in good standing) in an organization which imposes clear requirements regarding the post-access transfer of genetic materials and extracts, as well as coordination with the source country prior to publication of data or research results relating to the genetic resources accessed. If this option is developed, it may be essential to enquire into the particular requirements of each such organization, and the manner in which it imposes or confirms compliance with them. Schindel, David, et al, 2008, 'Submission of Views from an International Workshop on Access and Benefit Sharing in Non-Commercial Biodiversity Research', submitted to the CBD Group of Technical and Legal Experts on Compliance in the context of the International Regime on Access and Benefit-sharing (January, 2009, Tokyo).

[48] BULGARIA: Biological Diversity Act: Art. 66.4 ('Gratuitous provision of genetic resources may be agreed where the said resources are intended for non-commercial purposes: scientific research, education, conservation of biological

diversity, or public health benefits'); and AUSTRALIA: AUSTRALIA: Environment Protection and Conservation Regulations, 2000, Statutory Rules 2000 Nº 181, as amended (taking into account amendments up to SLI 2006 Nº 131, Parts 8A, 9, 10, and 17). QUEENSLAND AUSTRALIA: Queensland Biodiscovery Act, Act Nº 19, 24 Aug 2004; and other documents available on the CBD's ABS Measures database through March 2007.

[49] See, e.g., the Tricolor frog case, described in Mgbeoji, 2006. The researcher who published research results about the frog's unique poisons did not seek or receive any compensation or commercial benefit from that research. On the basis of the published data, however, multinational corporations filed 17 different patents for new synthetic compounds based on the researcher's results. One has since developed and patented a product or pre-product. That company had no contact with the source country or any part of any Tricolor frog.

[50] See, e.g., the Tricolor frog case, described in Mgbeoji, 2006. The researcher who published research results about the frog's unique poisons did not seek or receive any compensation or commercial benefit from that research. On the basis of the published data, however, multinational corporations filed 17 different patents for new synthetic compounds based on the researcher's results. One has since developed and patented a product or pre-product. That company had no contact with the source country or any part of any Tricolor frog.

[51] In Bhatti, *et al.,* (*supra,* note 27), the four editors made a concerted attempt over nearly five years of formal and informal information-gathering, to obtain copies of ABS contracts and anecdotal information about them.

[52] The term 'enforceable contract' has a very precise legal meaning, which unfortunately differs from country to country. Not all contracts or legal promises are 'enforceable' and in many cases, the parties to the contract are not aware until they get to court that their contract is un-enforceable. Discussed in Bhatti, et al. (*supra*, note 27) at chapter 2.

[53] Discussed in Young T., 2009 'Applying contract law to ABS', Chapter 2 in Bhatti, et al. (*supra*, note 27).

[54] Based on each country's sovereign rights to its own biological (including genetic) resources (CBD Arts. 3 and 15.2), each country has the right to set whatever requirements and prerequisites it chooses on those who would take or use its genetic resources.

[55] Discussed in detail in Young T., 2009 'Applying contract law to ABS', Chapter 2 in Bhatti, et al. (*supra*, note 27).

[56] Holm-Müller *et al.*, 2005 ; Latorre, 2005; Frison and Dedeurwaerdare, 2006. A similar view applies to foreign-origin biological materials that have been growing in the user country for many generations. The user's failure to get permission from the source country for the use of these materials normally is often not considered in ABS.

[57] *See* 'Report of the meeting of the group of legal and technical experts on concepts, terms, working definitions and sectoral approaches', 2-8 April 2009, UNEP/CBD/WG-ABS/7/2.

[58] See Young, T., 2007 'Administrative and judicial remedies available in countries with users under their jurisdiction and in international agreements' (posted as UNEP/CBD/WG-ABS/5/INF/3 and summarized in 4.6 of this action-paper).

[59] Legal difficulties encountered in the negotiation of ABS contracts, indicate that other instruments (MOUs, non-binding agreements, permits and joint work-plans) have been equally successful up to now date in ABS.

[60] To apply a unilateral default clause as a '*pseudo*-contract' the user-country courts must obtain a signed agreement from the relevant official of the provider, agreeing to the default clauses in their entirety (without changing any element of the clauses). It must be noted however, that international negotiations in the area

of genetic resources have already chosen to adopt many innovative mechanisms whose legal impact is not known. These issues have been addressed in the ITPGRFA through the innovative, and as yet unvalidated use of shrink-wrap and click-wrap contracts to impose affirmative duties on parties who have not met any of the contractual requirements that would otherwise bind them.

[61] This would include showing, where genetic resources were acquired from a country other than a 'country providing genetic resources' as defined in Article 2 of the CBD, that the country had 'acquired [those resources] in accordance with the Convention' (CBD, Art. 15.2).

[62] In most countries, collection of judgments in criminal matters happens through a process which results in payment of the funds into the national treasury or other financial account of the government. Relatively few criminal matters result in remedies or other payments to the person who was injured by the criminal act. In civil matters, the collection of remedy following judgment or arbitration is a private matter, backed up by the legal system. The winning party must either formally collect the amount, or comply with the relevant laws that govern how he enlists the assistance of police or other officials to formally compel payment. This issue was discussed in more detail in Young, T., 2007 'Administrative and judicial remedies available in countries with users under their jurisdiction and in international agreements' (posted as UNEP/CBD/WG-ABS/5/INF/3).

[63] With regard distribution of benefits, it is useful to recall that the CBD includes for two separate MAT requirements – one for access, and another for benefit sharing. CBD Arts. 15.4 and 15.7. While the two MAT processes may be negotiated together in some cases, this may not be possible in all situations. At minimum, the 'second MAT' provision indicates that the provider country's sovereign rights include the right to designate the manner in which benefits are shared and the form this will take. It also, however, indicates that this is a matter for negotiation, and that a user who does not agree with the provider's position regarding how benefits will be distributed can attempt to negotiate an alternative option.

[64] Detailed in T., 2007 'Administrative and judicial remedies available in countries with users under their jurisdiction and in international agreements' (posted as UNEP/CBD/WG-ABS/5/INF/3 and summarized in 4.6 of this action-paper).

[65] The authors recognize that 'simple' is a relative term, and that the solution proposed in this paragraph, although quite straightforward legally, would be extremely difficult politically.

[66] In any room containing ten lawyers and a question, one is likely to find 10 different legally supportable answers to the question. Particularly when the question relates to the application of a particular law to a specific factual situation, there may be a very large number of subtly different legally valid interpretations.

[67] It is possible in many countries to take a case to judgment in the provider country, without the presence of the defendant. Such judgments are frequently impossible to collect, unless / until the defendant happens to return to the provider country.

[68] No formal benefit-sharing payments have yet been paid by recipients of PGRFA under the MLS. In the meantime, some donor agencies have provided initial funding which is being distributed to developing countries for projects developing national collections and addressing other food and agriculture-related needs.) The same type of mechanism that is now used in the ITPGR was proposed and rejected in the original ABS negotiations at the time of creation of the CBD. This approach may be a more acceptable concept now, particularly when limited to the situation of users who do not know with certainty which is the country of origin of their resources.

[69] Demonstrated in Anton, M., N. Dragffy, S. Pendry and T.R.Young (eds). 2002. Proceedings of the International Expert Workshop on the Enforcement of Wildlife Trade Controls in the EU. IUCN-ELC and TRAFFIC International.

[70] This is the approach used in CITES, although in some countries the CITES certificates are not sufficient to overcome diplomatic obstacles relating to enforcement of violations (*see* Ibid.).

[71] Ruiz, M. and I. Lapeña (eds.) 2007. A Moving Target: Monitoring the International Flow of Genetic Resources. IUCN Environmental Policy and Law Paper No. 67, The ABS Series, Book 3.

[72] In the ABS context, there has been a different between 'incentive measures', 'motivation measures' and 'voluntary measures', although some participants assume that the three terms mean the same thing. Basically, an ABS incentive measure is a legal provision which states that a user will receive some particular 'reward' which is not available to other users, if he complies with ABS requirements. Many delegations distinguish between incentive and motivation assuming that, in an incentive the 'reward' is either money or some other direct value, while a motivation provides its reward in the form of non-monetary benefits, such as good will, or a publicized reputation for social responsibility. Finally, the third category 'voluntary measures' refers to user options that are described and permitted, but not supported by a reward mechanism.

[73] As a practical matter, from a very simple fact: most 'genetic resources' are found within biological material, and most biological material may be moved across national boundaries legally. Some exceptions to this statement exist for species are thought to be dangerous (dangerous or poisonous animals, plant pests, narcotic substances, 'weaponized' bacteria, etc), whose international movement is sometimes prohibited. Even these species may often be legal to own or use, once they have successfully crossed the border. These controls have limited impact, even though they address only a small number of species. Once he has a specimen in hand, a user's operations are often not overseen or overseeable by external or government observers. Although this lack of observability is not an excuse for non-compliance with ABS, it does make noncompliance very difficult to discover, and may constitute an element of a perverse incentive, that encourages users not to disclose their activities. To address this problem, user-side measures must either (i) impose controls (command and control) on the users' actions in the user-side country, (ii) provide a legal incentive or other motivation for user compliance or (iii) (preferably) both.

[74] The primary impact of the ISO-14000 series of standards has been in the pre-product value chain, where producers sometimes require that companies they deal with be certified using the ISO 14000 and 9000 standards.

[75] According to the CBD Secretariat, 'Denmark and Sweden provide examples of situations where access and benefit-sharing requirements are to be met as a prerequisite for funding. In Denmark, as set out in the submission, providers of funding for research and development projects should, by contract, include the application of the Bonn Guidelines as part of the conditions for funding. In Sweden, a policy adopted by the Swedish International Development Cooperation Agency requires the establishment of a material transfer agreement between the provider and receiver of genetic material in research cooperation activities financed by the Agency where those activities involve genetic material. From the Note by the Executive Secretary, 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, at para 29, 'Incentive measures', citing 'Communication from the Commission to the European Parliament and the Council, "The Implementation by the European Community of the 'Bonn Guidelines' on Access to Genetic Resources and Benefit-sharing under the Convention

on Biological Diversity", Brussels, 23.12.2003, COM(2003) 821 final, p. 22'. The US's ICBG under the National Institutes of Health reportedly also uses benefit sharing as a factor in the grant approval process. Rosenthal, 1996; Rosenthal, 2006; and Rosenthal *et al.*, 1999.

[76] See Smith, A. and T. Young. 2006. 'Innovative financial and incentive mechanisms for promoting the conservation of High Conservation Value Forests'. Forest Stewardship Council.. For forest certification, the primary benefit offered is access to a market for certified timber, for example. That market has been slow to develop. In addition, as more users qualify for the incentive, the value of the reward might diminish. This has been demonstrated in economic terms in connection with the 'payment for environmental services' concept. As a consequence PES is evolving away from the approach which would make the payments self-sustaining, to a broader efforts to develop markets for PES, while ensuring that they don't grow unsustainable as the market expands.

[77] Several historical examples of this process are discussed in Young, 2004, 'An Examination…', at 50. *See also* Börkey, P, M Glachant and F Lévêsque. 1999. *Voluntary Approaches for Environmental Policy: An Assessment*. OECD, at 42 and 129 (assessing voluntary mechanisms and noting that such mechanisms have limited impact, unless they are used selectively, as part of a 'policy mix' that enables them to address issues where other mechanisms are either not needed (because there is a strong desire to cooperate) or not possible (because the basic system and relevant understandings not yet developed.) In some cases, the government may ultimately decide to formally adopt the voluntary standards, to ensure that the system is uniformly recognized.

[78] *See* the International Consortium of Botanic Gardens (ICBG) principles – 'Principles on access to genetic resources and benefit sharing for participating institutions' (available at www.rbgkew.org.uk/conservation) and the International Plant Exchange Network (IPEN) Code of Conduct (www.biologi.uni-ulm.de).

[79] Micro-organisms Sustainable use and Access International Code of Conduct (MOSAICC), available at www.belspo.be/bccm/mosaicc.

[80] UNCTAD, Draft concept note: Practical Guidelines for Equitable Sharing of Benefits of Biological Resources in BioTrade Activities, 3 March 2007. Discussion in this book is based on the 31 January 2007 draft (not yet available for citation). It is discussed here with permission from the BioTrade initiative.

[81] To be effective incentive systems must include some types of oversight to protect against abuse – *i.e.*, to ensure that the 'reward' is only available to those who have met the requirements. Thus, Incentive measures are not cost-free to the government, since it will be essential to have mechanisms for confirming compliance, for preventing attempts to obtain the incentive without complying, and for keeping records. *See,* Smith and Young, 2006.

[82] CBD Arts 16-18.

[83] The ISO has undertaken numerous studies and analyses on this point, documented through their work on Social and Environmental Responsibility Standards.

[84] Whereas 'equity' refers to a duty to ensure a high level of fairness, 'equality' means something very different. Equity recognizes that all parties are different and have different needs, and imposes a duty on the stronger or more sophisticated party to take measures to ensure that negotiations are fair and all parties operate on a 'level playing field'. A duty of equality, if it existed would require parties to be or become actually equal. This is probably not possible in law.

[85] Outside of the international negotiations there are few experts who understand the ABS concepts, and even they admit to being uncertain about how an ABS contract would fare in the courts, if a claim were to arise. Up to now, although there have been several court cases regarding situations which include ABS-related issues, those cases have never applied or addressed the ABS issues. No

formal case has ever been filed alleging ABS violations or breach of an ABS contract. IUCN-Canada, (*supra,* note 27).

[86] Ot.prp 52, 2008-2009, p. 311.

[87] Ot.prp 52, 2008-2009, p. 312.

[88] § 60. (genetisk materiale fra andre land) Innførsel for utnytting i Norge av genetisk materiale fra en stat som krever samtykke for uttak eller utførsel, kan bare skje i samsvar med slikt samtykke. Den som rår over materialet, er bundet av de vilkår som er satt for samtykket. Staten kan håndheve vilkårene ved søksmål til fordel for den som har satt dem.

[89] Tvedt, M.W. Elements for Legislation in User Countries to Meet the Fair and Equitable Benefit-Sharing Commitment. The Journal of World Intellectual Property (2006) Vol. 9, no. 2, pp. 189–212.

[90] § 60. annet ledd: Når genetisk materiale fra et annet land utnyttes i Norge i forsknings- eller næringsøyemed, skal det følge med opplysninger om hvilket land det genetiske materialet er mottatt eller hentet fra (leverandørland). Hvis nasjonal rett i leverandørlandet krever samtykke til uttak av biologisk materiale, skal det følge med opplysning om slikt samtykke er innhentet.

[91] § 60. tredje ledd: Hvis leverandørlandet er et annet land enn opprinnelseslandet for det genetiske materialet, skal også opprinnelseslandet oppgis. Med opprinnelsesland menes det landet der materialet ble hentet ut fra sine naturlige omgivelser. Hvis nasjonal rett i opprinnelseslandet krever samtykke til uttak av genetisk materiale, skal det opplyses om slikt samtykke er innhentet. Er opplysningene etter dette leddet ukjent, skal det opplyses om dette.

[92] § 60. fjerde ledd: Kongen kan gi forskrift om at det skal følge med opplysninger om det, hvis utnyttingen gjør bruk av lokalbefolkningers eller urfolks tradisjonelle kunnskap.

[93] § 60. femte ledd: Kongen kan gi forskrift om at det skal følge med opplysninger om det, hvis utnyttingen gjør bruk av lokalbefolkningers eller urfolks tradisjonelle kunnskap.

[94] Unofficial translation for this purpose.

[95] In the CBD, 'country of origin' is to be understood as the country where the genetic resource was taken from its natural environment, under *in situ* conditions, CBD Article 15.3.

[96] Patent Act § 8b, see also the EU Patent Directive which prohibits rejection of a patent application as a consequence of not complying with the obligation: (1) non-compliance 'has no effect for the proceeding of the patent application'; and (2) lack of information shall not have any effect on the validity of a patent after it has been granted.

[97] §40 of the Penal Code. The prosecutor must investigate whether the information is wrongful, and must provide sufficient evidence, beyond any reasonable doubt, for the information both being wrongful and that it was wrongful deliberately. A patent applicant found guilty of false statement(s) about the origin or the provider or regarding the lack of or prior informed consent of the material face imprisonment for a maximum of two years or fines, paid to the Norwegian government – not that any benefits must be shared with the provider or the country of origin. Also here we can observe discrepancy between the objective of benefit sharing and the breach of law.

[98] In such cases, PCT Article 27 prevents countries from imposing different or additional requirements to the content of a patent than those listed in that treaty 'National Requirements (1) No national law shall require compliance with requirements relating to the form or contents of the international application different from or additional to those which are provided for in this Treaty and the Regulations.'

[99] JAPAN: METI/KBA, 2006, *Guidelines for Access to Genetic Resources for Users in Japan,* Ministry of Economy, Trade and Industry (adopted March 2005, published in English, 2006).

[100] Id. at Part IV.

[101] This information was gleaned from information and discussions at meetings of the ABS Committee of the Japan Bioindustry Association. Because the Ministry's meetings with users are confidential, no specific data or statistics could be obtained at the time.

[102] Interview with Seizo Sumida, Japan Biodindustry Association. Again, information about specific consultations was not discussed, being completely confidential.

[103] The Civil Procedural Law of Norway, Nr. 90, 2005, §1-3(1).

[104] The Civil Procedural Law of Norway, Nr. 90, 2005, §1-3(2).

[105] The Civil Procedural Law of Norway, Nr. 90, 2005, §1-4.

[106] Tvedt and Young, 2007, *(supra,*note 7).

[107] Chapter 2, in Bhatti, et al (supra, note 27), discusses the concept in more detail, however, 'private international law' is not international at all. Instead, it is the name given to the collection of all countries' national law which determines whether an international issue may be decided in the country's courts.

[108] The Civil Procedural Law of Norway, Nr. 90, 2005, §4-3.

[109] Bhatti, et al, (*supra*, note 27) at chapter 2.

[110] The interaction among national laws of Norway and the provider country, governing which national law applies in a particular legal case, is known as 'private international law' (or sometimes called 'conflict of laws') and is a very difficult area of specialization in law. It is discussed in more detail in Chapter 2 of Bhatti, et al. (supra, note 27).

[111] In this connection, it is useful to remember that most ABS contracts that are available for review include many provisions under which the user transfers value. Some of these are direct sharing of benefits received by the user, and some are payments for access, for sample collection or for the use of private land. Many of the value transfers in ABS contracts (training and equipment, for example) are not defined as either 'payments for access' or benefit-sharing. Bhatti, Bhatti, et al, (*supra*, note 27) at chapter 2.

[112] Many countries use various methods for adopting or enacting international legal instruments. Some countries have enacted basic laws stating that international instruments that the country has ratified automatically become national law, without parliamentary or other legislative action. See, *e.g*., Shemirani, S.T. 2006. 'Review of the Iranian Legislation Relating to Alien Invasive Species' Caspian Initiative, UNEP, 20 September 2006 (detailing the use of this practice in Iran. This approach is sometimes legally uncertain, particularly when the international instrument calls on each country to develop measures to achieve a particular objective. Where the international instrument includes specifically agreed concepts, however, it will be easier and more legally for the country and for parties to ABS contracts when operating in countries that use this approach.

[113] Based on each country's sovereign rights to its own biological (including genetic) resources (CBD Arts. 3 and 15.2), each country has the right to set whatever requirements and prerequisites it chooses on those who would take or use its genetic resources.

[114] At present, CHM (including the ABS Measures database) and BCH include many legislative documents and other legal instruments that are still in draft, or that have been prepared and proposed by technical assistance projects, but have not been adopted or proposed by government. A large percentage of the instruments in both databases have not been posted by officials of the relevant government, and may not represent any assurance of the particular instrument's or measure's validity and the country's commitments with regard to it.

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