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Realizing the objectives of public international environmental law through private contracts: the need for a dialogue with private international law scholars

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Elisa Morgera[1] and Lorna Gillies

1. INTRODUCTION

This chapter maps little-studied interactions between public and private international law by comparing experiences in using private contracts to specify the meaning of international environmental treaty objectives that relate to equity (namely, fair and equitable benefit-sharing). In particular, the chapter contrasts two possible approaches in relying on private contracts: a bilateral approach – that is, reliance on ad hoc contracts under the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing (ABS) under the Convention on Biological Diversity (CBD) – and a multilateral approach, namely reliance on standardised contractual clauses that have been developed intergovernmentally under the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty). In both cases, private contracts have played a key role in specifying the meaning of certain obligations that were left vague in the treaty text in relation to the objective of equity.

The selected international environmental treaties serve to highlight more generally the significant private law dimension of public international law instruments on fair and equitable benefit-sharing,[2] which should be included in a debate on a broad notion of private international law.[3] The delegation of regulatory powers foreseen in public international law in the pursuit of common interests to private parties negotiating private law instruments that are generally governed by self-interest[4] has the potential result that different contracts may give different meanings to international obligations to the point of undermining a treaty objective, rather than upholding it. Such potential should be seen in the light of the 'deeply ideological' nature of a choice between private or public law instruments, which 'has shielded and perpetuated relationships of dominance in the past and present by the pretence that they belonged to the private realm.'[5] The risks of contractualization of environmental governance have already been discussed (to some extent) in public international environmental law scholarship with a view to emphasizing the likely arising of a "limited and instrumentalist view of law": such risks have been identified in the implicit bias towards market-based approaches and the protection of private interests on the basis of contractual freedom, private dispute resolution and confidentiality, to the disadvantage of other "constituencies" protected by the relevant international environmental

[1] Prof Morgera's contribution to this chapter was provided under the framework of the project 'BENELEX: Benefit-sharing for an Equitable Transition to the Green Economy – The Role of Law', funded by the European Research Council (November 2013–October 2018): www.benelex.ed.ac.uk. The authors are thankful to: the BENELEX team; BENELEX Advisors Duncan French, Colin Read and Claudio Chiarolla; BENELEX visiting scholar Dimitri Pag-yendu Yentchare; as well as to Shakeel Bhatti, Alex Mills and Veronica Ruiz Abou-Nigm, for helpful comments and suggestions on previous drafts of the chapter.

[2] Another relevant instrument is World Health Organization (WHO), Pandemic Influenza Preparedness (PIP) Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits, WHO Doc. WHA64.5, 24 May 2011, which follows, to a great extent, the model of reliance on standardized contractual clauses of the International Treaty on Plant Genetic Resources for Food and Agriculture.

[3] See Mills' chapter in this volume.

[4] A von Bogdandy, M Goldmann and I Venzke, 'From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 *European Journal of International Law* 115, at 119 and 136-139.

[5] Ibid, at 124.

agreements but that are "left out of contractual negotiation, implementation and enforcement."[6] This is still a partially developed debate, however, that has not engaged with the private *international* law dimensions of this phenomenon.

For this reason, the chapter also serves to focus on private international law more narrowly and traditionally construed, in relation to its role in ensuring access to justice in the context of the implementation of the selected international instruments. This is another key aspect of realising equity through private contracts. Private international law rules equip States with legislative competence to adjudicate disputes and enforce decisions between private parties in different countries.[7] The extent of private international law's 'just distribution of regulatory authority,'[8] however, depends on whether it operates as a fully-fledged 'international system of rights protection.'[9] On the one hand, the strategic use of private international law may impede access to justice, on the basis of political choices behind the technicalities of private international law.[10] On the other hand, increasingly, private international law supports the recognition and enforcement of international human rights and fundamental rights frameworks.[11] For example, the right to an effective remedy and to a fair and public hearing has been recognised and extended to parties in private disputes.[12] Thus, the increasing[13] role of the human right to have access to justice in the evolution of private international law needs to be considered from the perspective of public international environmental law, when its implementation relies on private contracts.

Ultimately, comparing the opportunities, challenges and drawbacks arising from the interactions between public and private international law under the selected international environmental law treaties may help identify key questions that would benefit from a more systematic dialogue between public international lawyers and private international lawyers. These questions are both of a practical and principled nature. As to the former, questions are mainly due to unequal bargaining powers and the need to protect vulnerable parties to a contract, as well as the utility of bilateral and multilateral approaches to the resolution of disputes concerning contracts.[14] As to the latter, the questions concern how the doctrine of comity in private international law enables States to reach non-State actors and provides contextual application of certain public international law obligations in furtherance of equitable objectives that go beyond the specific stakes and interests of parties to the contract. The modern construct of comity in private international law focuses on notions of 'mutual trust,'[15] and

[6] Eg N Affolder, 'Square Pegs and Round Holes? Environmental Rights and the Private Sector' in B Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford, Oxford University Press, 2015) 12.
[7] L Gillies, 'Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I: Back to the Drawing Board?' (2012) 8 *Journal of Private International Law* 489; A Mills, 'Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?' (2016) 65 *International and Comparative Law Quarterly* 541, at 562.
[8] A Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge, Cambridge University Press, 2010); H Muir-Watt and F Fernandez Arroyo (eds), *Private International Law and Global Governance* (Oxford, Oxford University Press, 2014).
[9] Mills (n 3); Gillies (n 7).
[10] See chapter by Hood in this collection.
[11] L Gillies, 'Fundamental Rights and Judicial Cooperation in the Decisions of the Court of Justice on the Brussels I Regulation 2009-2014: The Story So Far' in S Morano-Foadi and L Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Oxford, Hart, 2015); L Gillies and Mangan (eds), *The Legal Challenges of Social Media* (Cheltenham, Edward Elgar, 2017).
[12] Gillies (n 11) at 224-225 with regard to Article 47 of the Charter.
[13] See words of caution in this connection in Mills (n 3).
[14] C Chiarolla, "Biopiracy and the Role of Private International Law under the Nagoya Protocol," IDDRI Working Paper No.2/February 2012, at 15, available at http://www2.ecolex.org/server2neu.php/libcat/restricted/li/MON-086724.pdf.
[15] L Gillies (n 11); Opinion 2/13 of the Court (Full Court), 18 December 2014, Opinion pursuant to Article 218(11) TFEU; Gillies in Gillies and Mangan (n 11).

'mutual recognition of State interests,'[16] and operates as an 'expansive'[17] technique to support the relationship between international law and domestic legal orders, to the benefit of the efficient 'operation of systems of law.'[18] Comity can operate in two principle ways. First, comity seeks equivalence through recognition of acts and judgments of foreign States. Second, it may operate to enforce contractual rights relating to jurisdiction or arbitration [19] agreements or, more frequently, to limit foreign court proceedings. [20]

Against this background, the chapter starts by assessing the relevance of private international law in the context of the Nagoya Protocol and identifies questions that deserve further research regarding the reliance on *ad hoc* contracts to realize the treaty objective of fair and equitable sharing of benefits. It then contrasts the reliance on standardized contractual clauses under the International Treaty, the role of private international law in that context and outstanding research questions. The chapter concludes with a broader reflection on the challenges arising from the intersection of public and private international law on the rationale, potential and pitfalls of the increasing reliance on private contracts in international environmental law.

2. THE NAGOYA PROTOCOL AND AD HOC PRIVATE CONTRACTS

The Nagoya Protocol is an international environmental treaty that regulates trans-boundary aspects of bio-based research and development, with a view to contributing to the conservation and sustainable use[21] of biodiversity,[22] as well as broader sustainable development issues (such as global health and poverty eradication).[23] The Protocol includes international obligations between countries that provide access to, and countries that use, genetic resources and the traditional knowledge of indigenous peoples and local communities.[24] The Protocol's objective refers explicitly to fairness and equity in sharing benefits in two scenarios: among States – that is, between a State providing genetic resources – as well as within States, with indigenous peoples and local communities that provide their traditional knowledge associated with genetic resources or genetic resources that they hold.[25] The Protocol, however, does not specify how equity should be ensured in either scenario, or whether efforts to that end should be monitored (either at the international or national level).[26]

Nevertheless, the Protocol is expected 'to reduce enormous global asymmetries' among developed and developing States,[27] by guiding the development of domestic legislation and the arising interaction of rights and duties for individuals/entities sharing benefits from different countries. The Protocol therefore aims at setting a multilateral framework coordinating domestic measures

[16] Gillies, in Gillies and Mangan (n 11).
[17] S Breyer, *The Court and the World American Law and the New Global Realities* (New York, Knopf, 2015) at 91-92.
[18] *Ecobank v Transnational Inc v Tanoh* [2015] EWCA Civ 1309, para 132.
[19] *Cresendo Maritime Co, Alpha Bank A.E v Bank of Communications Company Limited, Nantong Mingde Heavy Industry Stock Co. Ltd., New Future International Trade Co. Ltd., Bank of Communcations Company Limited Qingdao Branch* [2015] EWHC 3364 (Comm); *Ecobank v Transnational Inc v Tanoh* [2015] EWCA Civ 1309, English Court of Appeal para 85-91 and 99.
[20] D Holloway, 'Case Comment England and Wales: *Ecobank Transnational Inc v Tanoh*' (2016) *International Arbitration Law Review* N-16.
[21] Nagoya Protocol Article 1.
[22] The variability of life forms on earth: Convention on Biological Diversity (CBD), Art. 2.
[23] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (NP), preamble.
[24] E Morgera, E Tsioumani and M Buck, *Unraveling the Nagoya Protocol: Commentary on the Protocol on Access and Benefit-sharing to the Convention on Biological Diversity* (Leiden, Martinus Nijhoff, 2014).
[25] NP Articles 1 and 5, and preamble.
[26] Morgera et al (n 24) at 48-52 and 375-377.
[27] B Dias, 'Preface', in E Morgera, M Buck and E Tsioumani (eds), *2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective: Implications for International Law and Implementation Challenges* (Leiden, Martinus Nijhoff, 2013) 1.

governing contractual transactions,[28] and fostering international cooperation, thereby operating 'across the public-private divide.'[29] This should ultimately ensure the implementation of fair and equitable private-law contractual arrangements in each individual ABS transaction.[30] These contractual arrangements (referred to in the Protocol as 'mutually agreed terms'[31] or MATs) are expected to set out conditions for access to genetic resources and traditional knowledge, and specific benefit-sharing obligations, in order to achieve the overarching equity objective of the Protocol in the context of specific ABS transactions.[32] To add further complexity, the Nagoya Protocol's open-ended provisions allow for a variety of legal approaches to implementation, through creative relations among international, national, and local law, including the customary laws of indigenous peoples and local communities.[33]

MATs may be included in different types of contractual forms, and in effect an ABS deal may entail a plurality of contracts among different parties (individual researchers, private companies indigenous and local communities, public research institutions or government entity).[34] As a result, the question of who has the authority to enter into an ABS contract can also be quite complicated, particularly when traditional knowledge of indigenous peoples and local communities is at stake and national law does not clarify the issue.[35] For the purposes of the present paper, attention will focus on potentially weaker parties to MATs, who are likely to be developing-country research institutions and indigenous peoples' representatives, who may have less exposure to transnational commercial practices and resources to tackle complex contractual negotiations. That said, because of the variety of contractual arrangements and of the type of parties to them, one should keep in mind that this is a generalization that may not apply in a number of cases in practice.

A simple example is provided by the MATs on Teff (an annual grass with edible seeds)[36] between the Ethiopian Institute of Biodiversity Conservation, which was authorized to conclude the contract on behalf of Ethiopia as the provider country, and a Dutch company in 2005. According to this contract, the company was permitted to access and use genetic resources specified in an annex for developing non-traditional food and beverage products listed in another annex. The MAT also included a a prohibition for the company to access, claim rights over, nor make commercial benefit out of, the traditional knowledge of Ethiopian communities on the conservation, cultivation and use of Teff without their explicit written agreement. The Institute retained the right to grant access to, and export, Teff genetic resources to other parties, as long as the buyers did not use it to make any of the listed products in the contract with the Dutch company. Finally, the MAT listed four different ways for the company to share monetary benefits, and five ways to share non-monetary benefits (such as sharing research results with the provider institution; involving Ethiopian scientists in research; preferring local institutions for breeding purposes and establishing businesses in Ethiopia together with Ethiopian counterparts).

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[28] S Oberthür and K Rosendal, 'Conclusions' in S Oberthür and K Rosendal (eds), *Global Governance of Genetic Resources: Access and Benefit Sharing After the Nagoya Protocol* (London, Routledge, 2013), 231, at 237-239.
[29] Ibid.
[30] T Young, 'An International Cooperation Perspective' in Morgera, Buck and Tsioumani (n 27), 451, at 457.
[31] NP Art 5(1-2 and 5).
[32] On the objective of the Nagoya Protocol, see Morgera et al (n 24) at 48-58 (where there is no reference to MAT). For a discussion on MAT, see Morgera et al (n 24) at 131-132, 167-169, 283-292 and 375-376. See also CBD Article 15(7), second sentence.
[33] *Ibid*., Art. 12(1).
[34] F Bellivier and C Noiville, *Contrats et vivant : les droits de la circulation des ressources biologiques,* (LGDJ, 2006), 147- 149; B Tobin, 'Biodiversity Prospecting Contracts: The Search for Equitable Agreements' in Sarah Laird (ed), *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (London, Earthscan, 2002) 287; and T Young and M Tvedt, *Drafting Successful Access and Benefit-sharing Contracts* (Leiden, Martinus Mijhoff, 2017).
[35] United Nations Conference on Trade and Development (UNCTAD), *The Convention on Biological Diversity and the Nagoya Protocol: Intellectual Property Implications* (Geneva, UN, 2014), at 156.
[36] R Andersen and T Winge, 'The Access and Benefit Sharing Agreement on Teff Genetic Resources: Facts and Lessons' (FNI Report 6/2012. Lysaker, FNI, 2012), at 60-63.

Given the central role of MATs in the implementation of the Protocol, the private law dimension of the Protocol is quite evident, as is the potential for different contracts to offer a diversity of meanings to international obligations concerning benefit-sharing. For one thing, the Protocol does not require countries explicitly to entrust or limit contractual freedom with respect to ensuring fairness and equity, contributing to environmental sustainability and respecting human rights.[37] The Nagoya Protocol provisions concerning MAT are invariably of a procedural character,[38] with some reference to substantive guarantees only transpiring in the Protocol provision on States supporting the development by indigenous peoples and local communities of minimum requirements securing fairness and equity for MAT negotiations[39] and providing capacity-building.[40] This may be considered a missed opportunity, as contractual practice concluded prior to the conclusion of the Nagoya Protocol already provided an indication of the challenges and drawbacks encountered in that regard.[41]

As a mechanism in the 'global ordering of private disputes,'[42] private international law underscores the need to create the legislative preconditions at the domestic level. At this level, the operation of private international law in facilitating equitable sharing of benefits is prevalent in two, related respects. The first scenario arises from the inequality of bargaining power between providers (or their representatives) and users of genetic resources. Even where foreign parties could enjoy equal access to domestic courts in a certain jurisdiction, there is broad understanding that further measures are needed for those parties who wish to bring legal action before a court of a State other than that in which they are based.[43] This may be particularly the case of providers of genetic resources or traditional knowledge that is party to a MAT, who can be presumed to lack the resources and knowledge of the relevant legal system to bring a case, probably of a long duration, in another country, where the R&D on their genetic resources is occurring, in order to obtain redress from a user that has allegedly breached MATs. As the next section will consider, parties to a MAT may specify which court has jurisdiction to interpret the MAT or hear a dispute relating to it. It could be argued that there should be an exclusive jurisdiction clause in favour of the provider of the genetic resources and traditional knowledge as the weaker MAT party, with a choice of their local law, as a protective measure, in an analogous way to consumer protection under EU rules on jurisdiction and choice of law.[44] It remains to be seen, as discussed below, whether MATs may be negotiated so as to privilege access to the courts of the provider. The second scenario is the use of contractual devices to limit claims for breach of the ABS contract, which consequently makes it difficult for weaker parties to MATs to access justice and enforce rights. Here, the particular objective is to address procedural challenges for individual providers and users situated in different countries[45] arising from situations of breach of contractual obligations.[46]

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[37] These are notably those of indigenous peoples and local communities: NP Arts. 5-7 and see Morgera et al (n 24), at 117-130, 145-156 and 170-177.
[38] NP Articles 5, 6(3)(g), 15 and 18.
[39] NP Article 12(3)(b).
[40] NP Article 22.
[41] S Bhatti, S Carrizosa, P McGuire and T Young (eds), *Contracting for ABS: The Legal and Scientific Implications of Bioprospecting Contracts* (Gland, IUCN, 2009).
[42] H Muir Watt and F Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford, Oxford University Press, 2014); Gillies in Gillies and Mangan (n 8).
[43] H Isozaki, 'Enforcement of ABS Agreements in User States' in E Kamau and G Winter (eds), *Genetic Resources, Traditional Knowledge, and the Law Solutions for Access and Benefit Sharing* (London, Earthscan, 2009) 439, at 442.
[44] Regulation 1215/2012 Brussels I Bis, Articles 17-19; Regulation EC 593/2008 Rome I Regulation on Contractual Obligations, Article 6.
[45] L Glowka and V Normand, 'Nagoya Protocol on Access and Benefit-sharing," in Morgera, Buck and Tsioumani (n 27), at 36.
[46] The breach of MAT has been termed 'misuse,' in contrast to 'misappropriation' which generally refers to the appropriation of genetic resources and traditional knowledge in violation of the applicable domestic requirements, ie,

2.1 The Interface between the Nagoya Protocol and Private International Law

As MATs are concluded by parties in different jurisdiction, the Nagoya Protocol is notable among multilateral environmental agreements for providing an explicit link with private international law narrowly construed.[47] It includes an article specifically devoted to three aspects of private international law: jurisdiction, applicable law, and mutual recognition and enforcement of foreign judgments and arbitral awards.[48] As will be discussed, private international law has an important role to play in providing a balance of parties' interests and rights in agreeing MATs on the one hand, and in ensuring the principles of comity and respect for human rights are maintained at the point of enforcing MATs, on the other.

2.2.1 Choice of jurisdiction

With regard to the opportunity to seek recourse, the Nagoya Protocol aims to ensure opportunities to seek recourse in any party's legal systems in case of cross-border dispute arising from MAT.[49] This may be particularly complicated as domestic rules may vary on (and possibly prevent) standing for foreign government entities or for non-incorporated collective entities, such as indigenous peoples or local communities that are parties to MAT.[50] The Protocol arguably aims to ensure that some remedies against breaches of MAT will be made available in all jurisdictions independently of the nationality of the claimant,[51] taking into account *de facto* barriers such as costs and differing requirements about the entitlement to bring legal actions before foreign courts.

In effect, the Protocol underlines the importance to identify the relevant providers and users to, or associated with, the MAT. Providers may prefer to bring an action for breach of MAT in the jurisdiction of the user, with a view to obtaining a judgment that can be directly enforced against the user in his/her own jurisdiction.[52] From a private international law perspective, this may be effected in a number of ways. The first option is to establish jurisdiction on the basis of an exclusive jurisdiction agreement in the MAT. In essence, the MAT should explicitly state which jurisdiction a dispute arising from MAT will be brought. [53] The second option is to sue a user where they are domiciled according to the procedural laws of the forum. The third option is to sue in the jurisdiction where the place of performance of the obligation in the MAT occurs or is to occur. [54]

Provided that the jurisdiction to which dispute resolution processes will be subjected is expressly stipulated in the MAT, the decision on which court will have competence will be made on the basis of domestic norms applicable in the given country, which are often influenced by an international or regional instrument on judicial cooperation.[55] Two examples are instructive. First, the Hague Convention on Choice of Court Agreements 2005, currently in force between Mexico, Singapore and

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generally without PIC and MAT. See C Chiarolla, 'Role of Private International Law under the Nagoya Protocol' in Morgera, Buck and Tsioumani (n 27), 423, at 427-428.

[47] NP Article 18; see Chiarolla (n 46); and also M Tvedt, 'Beyond Nagoya: Towards a Legally Functional System of Access and Benefit-Sharing' in Oberthür and Rosendal (n 28), 158, at 172.

[48] NP Article 18.

[49] NP Article 18(2); Glowka and Normand (n 45), at 36.

[50] C Godt, 'Enforcement of Benefit-Sharing Duties in User Countries' in Kamau and Winter (n 43), 419, at 422.

[51] T Greiber et al. *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-Sharing* (Gland: IUCN, 2012), at 186.

[52] Gurdial Singh Nijar, *The Nagoya Protocol on ABS: An Analysis* (Kuala Lumpur: CEBLAW, 2011), at 12.

[53] NP Art 18; and Chiarolla (n 46), at 430.

[54] Ibid.

[55] Greiber et al (n 51), at 185.

EU Member States, provides a basis by which parties may select a court of a State "for the purposes of deciding disputes which have arisen or may arise in connection with a particular legal relationship."[56] This provides that the parties to a contact may specify which court has jurisdiction, the effect of which if valid renders such agreement exclusive and "independent of the other terms of the contract".[57] The role of jurisdiction agreements is important since the Nagoya Protocol itself does not provide guidance on how the courts should decide whether they have jurisdiction over MAT-related disputes.[58] Chiarolla suggested interpreting the expression, in the Nagoya Protocol, 'consistent with applicable jurisdictional requirements' of the party concerned as an acknowledgement or a safeguard clause that the availability of recourse to courts will depend on applicable rules on the choice of jurisdiction, as established in contracts and accepted by the named court, or in their absence by [the] private international law of the seized forum.'[59] Accordingly, the Protocol places a duty on State Parties to provide parties to MAT opportunities to seek recourse in an agreed place. Arguably to ensure that when such recourse is provided, the seized forum 'should assert jurisdiction unless the complaint is apparently based on dubious, speculative or vexatious grounds (eg, where none of the parties to the MAT have real connection with the forum).'[60] This may reflect rules designed to protect the role of the chosen court in the situation where there is a *lis pendens* in breach of that agreement; that is, when a claimant brings prior proceedings in another court before the chosen court's jurisdiction can be established. The 2005 Hague Choice of Court Convention requires that a court which is not the parties' chosen court must suspend or dismiss proceedings unless there is an issue with the agreement, its creation or its negative effect on the parties or the court seised.[61]

Second, if the parties have not agreed the jurisdiction of any subsequent dispute, legal uncertainty may arise as to whether a national court in a given country where legal action has been brought will deem to have international jurisdictional competence to determine a dispute arising from MATs. The consequences may be that the rule of the user's domicile would prevail as the general rule. If the parties have not selected an exclusive jurisdiction agreement in MAT, an alternative connecting factor is the domicile of the defendant. Domicile is generally determined according to the conflict of laws rules of the court seised. In the case of businesses, this is usually their principal place of business, central administration or statutory seat. In the case of individuals, their subjective intention and objective residence contribute to determining domicile.

Alternatively, a special ground of international jurisdiction may apply. To establish an alternative basis of jurisdiction, it will be necessary to establish the characteristic function or purpose of the MAT. The Bonn Guidelines on ABS,[62] an international soft-law instrument that was adopted before the Nagoya Protocol and continues to provide helpful guidance for its application,[63] suggest that it is possible to characterise MATs as equivalent in broad purposes to an international commercial contract. It should be noted that seeing MATs, as well as other environmental contracts, as international commercial contracts has been considered problematic by public international environmental lawyers, as it provides an indication that limited efforts have been made to shape a contractual agreement around its specific subject-matter (a global environmental objective, rather than the object of a transnational sale). In other words, public international environmental lawyers

[56] Article 3(a), Hague Choice of Court Convention 2005.
[57] Eg Article 25 of EU Regulation 1215/2012 (Brussels I Bis Regulation).
[58] Chiarolla (n 46), at 431.
[59] Ibid, 432. See also Greiber et al (n 51), at 186.
[60] Chiarolla (n 46), at 432.
[61] Hague Choice of Court Convention 2005, Article 6. At EU level, Article 31 of Brussels I Bis confirms that if an exclusive jurisdiction agreement exists, 'any other court must decline jurisdiction in favour of that court.'
[62] Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, COP 6, Decision VI/24, paras 16(a)(ix) and 36(f), Appendix II.
[63] CBD Decision X/1 (2010), preambular para. 6, indicates that the Bonn Guidelines continue to be part of the 'international regime' on ABS, after the adoption of the Nagoya Protocol.

have identified the risk of undermining the protection of the public value at stake and bypassing the opportunity to resolve specific legal issues that do not normally arise in the context of common commercial transactions.[64] From a private international law perspective, however, seeing MATs as international commercial contracts may serve for the purposes of establishing international special jurisdiction. For example, in the European Union (EU) Regulation 1215/2012 (Brussels I Bis Regulation), a matter relating to contract is one where an obligation is freely provided by one party towards the other. This Regulation enables special jurisdiction to be established in the courts of the Member State where the place of performance [65] of the contractual [66] obligation[67] in question occurs. The place of performance as a basis for establishing the jurisdiction is where the characteristic contractual obligation (the obligation underpinning the contract) is to be performed.[68] If an ABS deal is compared to a sale of goods, it could be argued that the provision of genetic resources is the characteristic obligation of MATs. If an ABS deal is compared to the provision of a service, it could be equally argued that providing access to genetic resources or traditional knowledge would make the provider the characteristic performer; or that sharing benefits would make the user the characteristic performer. If instead we consider an ABS transaction as a contract that aims to realize an international environmental treaty objective, then the user should be seen as the characteristic performer and sharing benefits arising from the use of genetic resource or traditional knowledge as the characteristic obligation of MATs.

2.2.2 Choice of applicable law

Whilst the Nagoya Protocol reinforces the need for parties to specify their chosen jurisdiction, it also underscores the importance to identify in MATs the substantive law to be applied to resolve any dispute.[69] The question of applicable law is particularly complex. The domestic court may have to make a choice, on the basis of private international law norms and taking into consideration the interest of the parties, between two different sets of law, such as for instance its own domestic law or the law of another country, or it may decide that different questions in a given case may be governed by different countries' law.[70] The Hague Conference's Principles on Choice of Law in International Commercial Contacts 2015, which are a soft-law instrument, may offer general guidance to parties to international commercial contracts. Where adopted, and in order to determine the applicable law of MATs, the Principles give guidance on the operation of an express or implied choice of law agreement.[71] If proceedings are brought before the courts of an EU Member State, the Rome I Regulation provides that parties may choose the applicable law governing their contractual obligations.[72] This choice may apply to the whole or part of a contract (depecage), subject to the choice being demonstrated with reasonable certainty.[73] Such choice may be dis-applied if it does not appear "manifestly incompatible with the public policy (ordre public) of the forum".[74] The choice could refer to non-State law, such as the customary laws of the provider indigenous or local community's habitual residence.[75]

Absent an applicable law clause, legal uncertainty may arise as the determination of the law that will

[64] Affolder (n 6), at 25.
[65] Brussels I Bis, Article 7(1). C 12/76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473; C-440/97 *GIE Groupe Concorde v The Master of the Vessel "Suhadiwarno Panjan,"* [1999] ECR I-6307.
[66] C 14/76 *De Bloos Sprl v Bouyer SA* [1976] ECR 1497.
[67] C-288/92 *Custom Made Commercial Ltd Stawa Matallbau GmbH* [1994] ECR I-2913.
[68] MATS 'are closer and more similar to licenses and loan agreements, than to sales contracts': UNCTAD (n 35) at 156.
[69] NP Article 18(1).
[70] Godt (n 50), at 423.
[71] Introduction, paragraph 1.12; however the Principles do not apply to the law determining the jurisdiction of a MAT (Article 1(3)(b)).
[72] EC Regulation 593/2008.
[73] Article 3(1).
[74] Article 21. The choice is subject to Article 9 (below).
[75] See for example *Halpern v Halpern* [2007] EWCA Civ 291. We are grateful to Alex Mills for the point.

govern the dispute, which would be left to the domestic court where legal action has been brought, on the basis of the domestic norms on private international law in its jurisdiction. For this reason, it is necessary to establish the characteristic performer of the MAT, since it is the law of that party's habitual residence which will apply.[76] As argued above, the characteristic performer is that party whose performance is regarded as fundamental to the purpose of the contract and from a public international law perspective, it could be the *user* of the genetic resources or traditional knowledge that is the characteristic performer of benefit-sharing.

Whether the parties have specified a choice or not, the applicable law is subject to overriding mandatory rules, which are laws which "cannot be derogated from by agreement."[77] Overriding mandatory provisions of a country could be those regarded as crucial for safeguarding public interests.[78] In the context of MATs, public interests may include the local or customary protections in place for providers such as indigenous communities and their representatives. The circumstances upon which this might apply are two-fold, but both are likely to have limited effect. The first is where the applicable law is subject to the overriding mandatory rules of the forum.[79] The protection for the provider of the genetic resource or traditional knowledge is likely to differ between jurisdictions. The second is where the mandatory rules of the place of performance render performance unlawful.[80] However, this may point towards the mandatory rules of the user's habitual residence, as the party undertaking the fundamental purpose of the contract. The utility of these provisions depends on the purpose of the relevant mandatory rule. In addition, it can also be argued that the public policy of the forum should be upheld if those earlier provisions are deemed manifestly incompatible with the forum's public policy objectives.[81] The potential consequences of a jurisdiction agreement are therefore significant for providers also in terms of applicable law, and should be noted if the jurisdiction specified is not that of the provider to the MAT.

2.2.3 Access to justice and Recognition of foreign judgments

With regard to access to justice and recognition of foreign judgments, the Nagoya Protocol requires the development of domestic measures on access to justice and utilisation of mechanisms of mutual recognition and enforcement of foreign judgments and arbitral awards,[82] with a view to supporting providers that usually do not have easy access to courts in third countries. It has been noted that this requires *unilateral* development of domestic measures, rather than the *multilateral* development of harmonised requirements.[83] It may also serve to underline that both Parties that see themselves as mostly users' countries or providers' countries have to develop such domestic measures. The Nagoya Protocol further obliges Parties to take effective measures, as appropriate, regarding access to justice.[84] It has thus been argued that human rights standards may be used as a yardstick to ensure that access to justice has been provided in a specific case under the Protocol.[85] State Parties also have an obligation to adopt effective measures addressing the *utilization* of mechanisms for the recognition and enforcement of foreign judgments and arbitral decisions.[86] In other words, they are to support participation in existing mechanisms or establish new ones if they do not exist.[87] Recognition of

[76] The Rome I Regulation, for instance, contains rules which determine the applicable law in the absence of choice: Article 4(2).
[77] Dicey, Morris and Collins, *The Conflict of Laws* (15th ed, Sweet and Maxwell, 2017) at 32R-082.
[78] Eg overarching objective of Article 9(1) of Rome I Regulation.
[79] Article 9(2).
[80] Article 9(3).
[81] As Articles 9(1) and (3) may require to be considered in the light of Article 21.
[82] NP Article 18(3). Glowka and Normand, (n 45), at 36.
[83] Greiber et al (n 51), at 187.
[84] NP Article 18(3)(a).
[85] A Savaresi, 'The International Human Rights Law Implications of the Nagoya Protocol' in Morgera, Buck and Tsioumani (n 27), 72.
[86] NP Article 18(3)(b).
[87] Chiarolla (n 46), at, 445.

foreign judgments remains a complex matter.[88] Where the parties have agreed a choice of jurisdiction, the 2005 Choice of Court Convention establishes an obligation to recognize or enforce a judgment from such a court.[89] There are protections, however, where recognition may be refused such as the right to a fair trial, where 'the judgment is incompatible with fundamental principles of procedural fairness.'[90] By contrast, the recognition of foreign arbitral awards may be considered 'generally easier' as a high number of countries are Parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[91] There is also the possibility for Parties to conclude an ex post arbitration arrangement.[92]

In sum, as a key principle of dispute resolution concerning MATs, the Nagoya Protocol facilitates *to a degree* the autonomy of parties to MAT in selecting the jurisdiction and applicable law. State Parties to the Protocol, however, continue to have two important contributions. The first is through the application of private international law in the absence of choice by MAT parties. The second is to protect the provider of genetic resources or traditional knowledge, who is usually the weaker party to the MAT, from standard choice of law clauses, by subjecting the latter to overriding mandatory provisions or the operation of the public policy exception.

2.2.4 Alternative Dispute Resolution

The Nagoya Protocol highlights the possibility for parties to MAT to agree up-front to settle disputes through alternative dispute resolution (ADR) mechanisms rather than domestic courts.[93] This may be useful when such non-judicial means entail higher flexibility, simpler procedures and lower costs than judicial mechanism.[94] The provision explicitly mentions mediation or arbitration, but does not exclude that parties to MAT may also agree to have recourse to other mechanisms, including community-based dispute resolution systems or an international institution that may facilitate the resolution of the dispute. State parties' obligation to encourage parties establishing MAT to include alternative dispute resolution mechanisms as options should be interpreted and implemented taking in due consideration indigenous peoples and local communities' customary laws and procedures, when these communities are concerned by the ABS transaction.[95] There may be an advantage in applying non-State law through such mechanisms. The Protocol, however, glosses over the complexity of utilising alternative dispute resolution mechanisms generally used in commercial law disputes for the purposes of achieving fair and equitable benefit-sharing, although it cannot be excluded that guidance on this aspect could be developed by the Protocol's governing body at a later stage.[96]

The Nagoya Protocol does not specify which measures must be taken by State Parties, but qualifies the obligation by reference to 'as appropriate,' thereby leaving flexibility to State Parties in its implementation. Parties can thus choose among various ways to facilitate access to courts or the 'option'[97] for alternative dispute resolution mechanisms for foreign users or providers. Insofar as indigenous peoples and local communities are parties to MAT, consideration must be given to their

[88] CBD Working Group on ABS, "Report of the expert meeting on compliance," UNEP/CBD/WG-ABS/7/3. For a discussion based on the case of Japan, see Isozaki, (n 43), at 443-444.
[89] Article 8.
[90] Article 9(e). The grounds are broadly similar to those in Articles 36, 37 and 29 of EU 1215/2012.
[91] Chiarolla, (n 47), at 444.
[92] Ibid.
[93] NP Article 18(1). See for instance Article 8 of the ITPGRFA SMTA which provides for the following steps on dispute resolution: amicable dispute settlement, mediation and arbitration.
[94] Isozaki (n 43), at 446.
[95] Nagoya Protocol Article 12(1): see Morgera et al (n 24) at 217-222.
[96] Young (n 30), 451, at 488. See Morgera et al (n 24) at 335-336.
[97] Article 18(1)(c).

customary laws and procedures,[98] in accordance with relevant international human rights norms and standards.[99] In that regard, it has been recommended that States ensure the best means to attain access to justice in line with indigenous peoples' self-determination and related rights to participate in decision-making affecting them.[100] States are also expected to work with indigenous peoples and local communities to address the underlying issues that prevent them from having access to justice on an equal basis with others, and facilitate their access to legal remedies including by supporting their capacity development in making use of legal systems.[101]

In private international law terms, ADR measures have been given recognition by courts and increasingly referred to in recent international private law instruments.[102] A range of concerns, however, surround the recourse to ADR. From a public international law perspective, ADR (particularly arbitration) may well be more costly and less transparent than access to national courses,[103] as arbitral awards are usually confidential. In addition, arbitrators are likely to be more familiar with (and therefore more inclined to give weight to) commercial law than international environmental law dimensions of the dispute. From a private international law perspective, a principled objection can also be identified: as discussed elsewhere in this volume,[104] arbitration essentially 'takes away from States altogether" their regulatory authority over the private law questions at hand, and with that – we add – also the regulatory authority over the underlying public international law objectives. There is therefore a risk in diverting disputes from courts, as public bodies may be better entrusted to pursue public objectives. The risk consists in exposing parties to power imbalances in the resolution of the dispute, and the lack for similar standards of justice than those presumed to be inherent in courts.[105] This flexible approach should be thus subject to three related conditions, which have already been identified in the previous discussion about the role of private international law under the Nagoya Protocol. First, recourse to ADR should not restrict access to a court and an appropriate remedy in line with international human rights law. Second, it should ensure private international law support the principle of comity, by treating foreign laws in an equivalent manner and providing for the mutual enforcement of foreign judgments. Third, the option in the Protocol for alternative dispute resolution should support the provider of genetic resources or traditional knowledge, if that is the weaker party to the MAT. These considerations call for further discussion at inter-governmental level on the role of protective jurisdiction and choice of law rules, as well as ADR, in resolving disputes arising from MATs.

2.3 Preliminary observations

In sum, as a key principle of dispute resolution concerning MATs, the Nagoya Protocol facilitates party autonomy in selecting the jurisdiction and applicable law. It remains doubtful, however, whether it is feasible to achieve the fairness and equity objectives of the Nagoya Protocol through

[98] Nagoya Protocol Article 12(1). See Morgera et al (n 24) at 217.
[99] See Morgera et al (n 24) at 31-42.
[100] Human Rights Council, "Expert Mechanism Advice No 5 Access to justice in the promotion and protection of the rights of indigenous peoples," (2013), accessed 30 November 2013, <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session6/A-HRC-EMRIP-2013-2_en.pdf>, Annex, paragraph 4.
[101] Ibid, paragraphs 8 and 10.
[102] For example, the English High Court in *Cable and Wireless Plc v IBM United Kingdom Ltd* [2002] All ER (Comm) 1041; Recital 12 Regulation EC1215/2012, Hague Conference's Principles on Choice of Law in International Commercial Contacts 2015 at para 1.20.
[103] While to date there has been nearly no national litigation on MAT, see: T ten Kate, L Touche and A Collis, "Benefit-sharing Case Study: Yellowstone National Park and the Diversa Corporation – Submission to the Executive Secretary of the Convention on Biological Diversity" (22 April 1998) at 17-18.
[104] Mills (n 3).
[105] L McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *European Journal of International Law* 607, at 609.

contractual negotiations in the context of documented disparities in bargaining power among likely parties. From a public law perspective, one potential avenue to assessing this may be the multilateral Compliance Committee created under the Protocol.[106] This non-adversarial Committee could assess the extent to which States exercise control over contractual negotiations and the degree of inter-State cooperation in ensuring access to justice and the recognition and enforcement of foreign judgments, with a view to provide advice to Nagoya Protocol Parties. From a private law perspective, State Parties to the Protocol continue to have two important contributions. The first is to determine the application and effectiveness of private international laws to determine jurisdiction and applicable law in the absence of party choice. The second is to protect providers of genetic resources or traditional knowledge, who is usually the weaker party to a MAT, from standard choice of law clauses. By subjecting the latter to overriding mandatory provisions or the operation of the public policy exception, preference is given to the laws and courts of the providers of genetic resources or traditional knowledge. However, this is subject to the overriding mandatory provision of the forum.

The preceding analysis from a private law perspective has also identified a series of questions that have not yet received sufficient attention under the Nagoya Protocol: the role of human rights standards of access to justice in connection with the option of ADR and the characterisation of MATs as international commercial contracts, which has implications for establishing an international special jurisdiction. The Nagoya Protocol Compliance Committee could therefore potentially provide clarifications both on the broadly conceived private dimensions of the Nagoya Protocol, as well as on these technical questions arising from a narrow understanding of private international law, that also have a bearing on realising the equity objective of the treaty.

3 STANDARDIZED CONTRACTUAL CLAUSES UNDER THE INTERNATIONAL TREATY

The International Treaty has as its objective the conservation and sustainable use of plant genetic resources for food and agriculture, as well as the fair and equitable sharing of benefits arising from their use, in harmony with the CBD, for sustainable agriculture and food security. Under the ITPGRFA, a multilateral system of access and benefit-sharing facilitates access to, and exchange of, a specified list of crops[107] that are under the management and control of State Parties and in the public domain, as well as those held by a network of collections 'in trust for the benefit of the international community.'[108] The specified crops are then held in a common pool of plant genetic resources for food and agriculture that had been identified on the basis of criteria of food security and interdependence,[109] called the Multilateral System. The crops in the Multilateral System are then exchanged according to the terms of the standard Material Transfer Agreement (SMTA), which is a standardised contract that was intergovernmentally negotiated and adopted by the Treaty's Governing Body.[110]

Under the International Treaty, therefore, recourse is had to standard contractual clauses for the realisation of the treaty objective of fair and equitable benefit-sharing. This could in principle ensure that private contracts are drafted in a way that clearly contributes to the treaty objective. As opposed to ad hoc private contractual negotiations under the Nagoya Protocol, the Treaty's multilateral

[106] NP Art. 20; and Decision NPI-1.
[107] ITPGRFA Annex I. This section draws on E Tsioumani, "Exploring Fair and Equitable Benefit Sharing from the Lab to the Land (Part I): Agricultural Research and Development in the Context of Conservation and the Sustainable Use of Agricultural Biodiversity" (SSRN 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524337.
[108] Agreement with FAO to Place the International Agricultural Research Centres of the Consultative Group on International Agricultural Research In-Trust Collections of Plant Genetic Resources under the Auspices of FAO (1994); and CGIAR Principles on the Management of Intellectual Assets (2012), articles 5-4: Tsioumani, 'Beyond Access and Benefit-sharing: Lessons from the Law and Governance of Agricultural Biodiversity' (SSRN, 2016).
[109] ITPGRFA Article 11(1) and preamble.
[110] ITPGRFA Governing Body Resolution 2/2006 (2006).

benefit-sharing system provides a more direct line of accountability to achieve equity as it is intergovernmentally adopted. In other words, States, who are bound to achieve treaty objectives, are responsible for devising contractual clauses such as to ensure that a private law instrument can achieve a public international law objective. To the authors' knowledge, however, no study has been undertaken to assess whether and to what extent multilaterally standardised contractual clauses effectively serve to achieve equity, or to determine the relative advantages and shortcomings of bilateral and multilateral benefit-sharing approaches vis-à-vis realising equity.

3.1 The interface between the International Treaty and private international law

The private law dimension of the International Treaty lies in its reliance on standard contractual clauses in the SMTA that provide a choice between two mandatory monetary benefit-sharing options: a default scheme, according to which the recipient will pay 1.1 percent of gross sales to the Treaty's benefit-sharing fund in case of commercialization of new products incorporating material accessed from the Multilateral System and if its availability to others is restricted; and an alternative formula whereby recipients pay 0.5 percent of gross sales on all products of the species they accessed from the Multilateral System, regardless of whether the products incorporate the material accessed and regardless of whether or not the new products are available without restriction.[111] Those that make their products available for further research and breeding without restriction, however, are exempted from mandatory payments. Notwithstanding the limited transaction costs associated with a standard contractual approach as opposed to the ad hoc one under the Nagoya Protocol, the SMTA is only used to a limited extent and no monetary benefits have been accrued yet.[112] A process is underway under the International Treaty to develop an upfront subscription system (as fees for access to materials in the Multilateral System)[113] that may replace or complement the current payment obligations after commercialisation. The proposed system is expected to further reduce transaction costs (as it would save the costs of tracking genetic resources up to the point of their commercialisation), and increase legal certainty.[114] These negotiations are therefore expected to lead to an amendment of the standard contractual clauses.[115]

Regardless of its current or likely future form, the standardised contractual approach of the International Treaty may be capable to manage the risk, identified at the start of this chapter, arising from the delegation of responsibility to realize a treaty objective to private parties to a private contract. First, this is done through an express choice of law clause in the SMTA, which refers to 'General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004, the *objectives and the relevant provisions of the Treaty* and, where necessary for interpretation, the decisions of the Governing Body' (emphasis added).[116] This shows that a standardised contract allows to make a clearer, explicit connection with the public international law dimension of an ABS transaction, by making reference to the treaty objectives and provisions as terms of reference for the interpretation of the contract.[117]

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[111] See the ITPGRFA Standard Material Transfer Agreement, articles 6(7) and 6(11).
[112] Tsioumani (n 108).
[113] IT/GB-6/15/6 Add.1 and Rev.1 (2015).
[114] S Gagnon et al., "Summary of the Sixth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture" (2015) 9:565 *Earth Negotiations Bulletin.*
[115] That is expected in 2019: see Governing Body resolution (2017).
[116] Art 7 SMTA
[117] C Chiarolla, 'Plant Patenting, Benefit Sharing and the Law Applicable to the Food and Agriculture Organisation Standard Material Transfer Agreement' (2008) 11 *Journal of World Intellectual Property* 1, observes 'The reference to "the objectives and the relevant provisions of the Treaty" (i.e. truly international standards) reflects the important public interest functions discharged by the SMTA.'

If a dispute has been referred to arbitration, the arbitral tribunal would apply the UNIDROIT Principles. The 2004 Principles state that the applicable law is still to be determined by reference to the private international law rules of the forum.[118] The clause, therefore, does not necessarily exclude the applicability of national law, as discussed by Chiarolla. National laws may have a supplementary role in addressing issues that are critical for the implementation of the SMTA, including 'the validity of the method of expressing acceptance of the SMTA to the enforceability of third party beneficiary's rights, from the scope of intellectual property right protection, which can be claimed by recipients over a derivative product, to the enforcement of their benefit-sharing obligations.'[119] Questions of applicable law are quintessentially a technical matter of private international law and the resulting balance between non-national, international and national standards in the context of the SMTA may end up having a significant influence on the realisation of equity in this context.[120] In other words, notwithstanding the careful management of the risks arising from the reliance on private contracts through a standardised approach, State Parties continue to play a significant role in the realisation of the treaty objective.

Second, to 'ensure that the SMTA is interpreted and applied in a uniform manner across different jurisdictions, the recourse to national courts should be almost entirely excluded for any dispute concerning the SMTA.'[121] In effect, under the International Treaty, the observance of the contractual terms and conditions of the SMTA by individual providers and recipients is guaranteed by the UN Food and Agriculture Organization (FAO) acting as the 'Third Party Beneficiary,' in accordance with the terms and conditions of the SMTA. FAO is the entity designated by the Treaty Governing Body to act on its behalf to request information to SMTA parties, initiate dispute settlement procedures regarding rights and obligations of SMTA parties, and in the context of dispute settlement, the right to request that the appropriate information, including samples as necessary, be made available by SMTA parties, regarding their obligations. FAO may receive and use information on cases of non-compliance from SMTA parties or any other person. Where FAO has received such information, it may request additional information from SMTA parties. If the information so gathered leads FAO to believe that a possible case of non-compliance might have occurred, FAO may trigger amicable negotiations through an initial notice to the parties to the SMTA. If the dispute cannot be resolved by negotiation, FAO shall commence or encourage SMTA parties to commence mediation proceedings.[122] If the dispute has not been resolved by mediation within six months of the commencement of the mediation or if it otherwise appears that the dispute cannot be resolved within twelve months after the issuance of initial notice, FAO may submit the dispute to binding arbitration.[123] As explained by Chiarolla, SMTA parties are free to choose the arbitrators and the lex arbitri; but if they do not do so, 'the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.'[124] Because of the reliance of the Treaty SMTA on alternative dispute resolution, the point made above is valid also in the Treaty context: ADR should not prejudice the right to have recourse to standard dispute resolution, in order to ensure access to a court and a remedy in light of international human rights standards. This point is supported by the updated UNIDROIT Principles 2010.[125] There may, thus, be a tension between ensuring the treaty objective of equity through mandatory ADR under the Treaty and the need to balance also international human rights law considerations related to access to justice and a remedy, if the ADR provided for under the Treaty do

[118] UNIDROIT Principle of International Commercial Contracts 2004, Preamble 4(a), at p.3.
[119] Chiarolla (n 117).
[120] Ibid.
[121] Ibid.
[122] http://www.fao.org/plant-treaty/areas-of-work/the-multilateral-system/operationalization/en/.
[123] http://www.planttreaty.org/content/what-third-party-beneficiary; SMTA article 8.4(c). The WHO PIP Framework includes in its Standard Material Transfer Agreements with private companies the same provision on settlement on disputes than the International Treaty.
[124] Chiarolla (n 117).
[125] UNIDROIT Principle of International Commercial Contracts 2010, Preamble 4(a).

not provide similar standards than those presumed to be inherent in courts.[126] In addition, private international law continues to play a role in this connection: State Parties must ensure comity – the equivalence of acts and judgments, and the enforcement of arbitral awards.

3.2 Comparative Observations

Compared to the Nagoya Protocol and its bilateral benefit-sharing approach relying on ad hoc contractual arrangements, the International Treaty and its multilateral benefit-sharing approach relying on standardized contractual approaches offer specific opportunities, both in terms of applicable law and access to justice, to ensure a coherent interpretation of the equity objective of the treaty. As States, who are bound to achieve treaty objectives, are to devise and agree upon contractual clauses, they play a direct role in ensuring that a private law instrument can achieve a public international law objective. As a result, the SMTA specifically calls for interpreting contractual clauses in light of the treaty objective. In addition, it excludes disputes in national courts in different jurisdiction, thereby maximising the chances of applying the contractual clauses in a uniform manner thanks also to the role of FAO as the third party beneficiary acting in the interests of the providers. Even in this context, however, the operation of private international law is not excluded and the considerations made from that perspective in the analysis of the Nagoya Protocol have some bearing, notably the continued equivalence of acts and judgments and enforcement of judgments via a multilateral agreement or through comity. [127] In addition, the applicable law is still to be determined by reference to the private international law rules of the forum,[128] and recourse to ADR cannot exclude access to standard dispute resolution if so required by relevant international human rights standards related to access to justice.

These considerations are not only relevant by way of contrast with the ad hoc contractual approach of the Nagoya Protocol. They may also be relevant *de lege ferend*a, if the Parties to the Nagoya Protocol decide to internationally endorse model contractual clauses,[129] whether generally or as a 'predetermination of enforceability' that would enable Parties to ensure their automatic recognition in domestic courts.[130] This development could lead to a re-universalising experience of what was delegated to the contractual level to realise international treaty objectives.[131] Specifically, the Nagoya Protocol creates a best-endeavor obligation for all Parties to support the development, update and use of model contractual clauses for MAT.[132] This obligation can be undertaken unilaterally by State Parties establishing 'default' or 'standard' MAT for specific categories of genetic resources under their jurisdiction or for specific cases.[133] Such default MAT would likely have to be accepted by a user upon applying for access to genetic resources and/or traditional knowledge, or could apply automatically unless different MAT are negotiated. [134] Parties could also implement this obligation collectively in the context of bilateral or regional ABS frameworks,[135] and at the multilateral level. This should be read in conjunction with the obligation for Parties to endeavour to support, as appropriate, the development by indigenous and local communities of model contractual clauses for

[126] McGregor (n 105), at 609.
[127] Chiarolla (n 14).
[128] UNIDROIT Principle of International Commercial Contracts, Preamble 4(a), at 3.
[129] NP Art. 19(2).
[130] Young, (n 30), 493. Such endorsement could be undertaken on the basis of Nagoya Protocol Article 26(4)(f).
[131] The authors are grateful to Alex Mills for this comment during the first workshop organized in connection with this book project.
[132] NP Article 19(1).
[133] Morgera et al (n 24), at 144.
[134] See for instance the standard conditions that apply to bioprospecting activities with non-commercial purpose on Commonwealth territories in Australia: "Permits for Non-Commercial Purposes," Government of Australia, accessed 30 November 2013, <www.environment.gov.au/node/14465>.
[135] See Morgera et al (n 24), at 93.

benefit-sharing arising from the utilisation of traditional knowledge associated with genetic resources.[136] On this basis, the Protocol's governing body is to periodically 'take stock' of the use of standardised contractual clauses.[137] seeking to tap into normative activities undertaken by various ABS stakeholders such as the research community, the private sector, indigenous peoples and local communities, and NGOs at the national (but also sub-national and transnational) levels as a bottom-up source of inspiration for multilateral discussions on ways to facilitate implementation of and compliance with the Protocol.[138] In doing so, State Parties to the Nagoya Protocol would be well advised to take into account the private international law-related challenges arising from a standardised approach.

4 OVERALL REFLECTION

There is a significant, and growing, trend in international environmental law of relying on private contracts for the contextual realisation of treaty objectives related to equity. This is particularly the case in relation to access to genetic resources for research and development, but it is also true in the specific area of deep seabed mining.[139] That said, the type of decision-making (consensus or other) and the representation of different States in the decision-making body tasked with the development of standard contractual clauses varies from one framework to another. In addition, the degree to which these clauses are open, if at all, to negotiations varies from one framework to another.[140] Different examples can also be found and include, for instance, the use of private international contracts in the area of climate change,[141] as part of a project-based mechanism to assist developed countries to achieve their emission reduction commitments and contribute to sustainable development.[142]

Experiences under international treaties that set out multilateral benefit-sharing systems seem to indicate that the international community can draw multilaterally a private contract that may limit risks in coherently pursuing a treaty objective related to equity. Whether the contracts are left to bilateral negotiations or to intergovernmental multilateral standardisation, however, the sheer technical complexity of the subject-matter makes it difficult to predict which contractual clauses can in practice contribute to achieve such a treaty objective.[143] In informal sectors (open-access seeds) where experimentation has been made on using contracts for proactively contribute to global goals, huge difficulties have been encountered in making contracts justiciable. Fear of potential intellectual property litigation (due to uncertain outcome, costs and protracted procedures) generally inhibits small-scale users from enforcing contractual obligations of a proactive nature.[144] Thus, even when standardised, contractual arrangements in practice disadvantage private parties with less means and knowledge. The need to couple reliance on standard contractual clauses with the provision of appropriate capacity building and other support from States in a treaty can thus be quite significant. In addition, reliance on private contracts and alternative dispute resolution techniques for the

[136] NP Article 12(3)(c). See Morgera et al (n 24), at 216.
[137] NP Article 19(2).
[138] E Morgera, M Buck and E Tsioumani, 'Introduction' in Morgera, Buck and Tsioumani (n 27), at 10.
[139] A separate discussion, however, is warranted for the contracts used by the International Seabed Authority under the UN Convention on the Law of the Sea, given the role of the International Tribunal for the Law of the Sea in that connection.
[140] Under WHO and ISA, the international organization engages in negotiations with private operators.
[141] Emission Reduction Purchase Agreements.
[142] Under the Kyoto Protocol Article 12: Clean Development Mechanism (CDM). A successor to this Mechanism is currently being developed under the Paris Agreement (Article 6).
[143] We are grateful to Elsa Tsioumani for this observation.
[144] E Tsioumani, M Muzurakis, Y Ieropoulos and A Tsioumanis, 'Following the Open Source Trail Outside the Digital World: Open Source Applications in Agricultural Research and Development' (2016) 14 *tripleC* 145.

realization of international treaty objectives also raise challenges in balancing confidentiality and the necessary degree of transparency linked to the pursuance of a global objective.[145]

Not enough literature has engaged with the rationale underlying this trend, its potential and pitfalls for the functioning and legitimacy of international cooperation. This chapter has identified several questions that require further consideration, through a dialogue among public and private international lawyers. Granted, such a dialogue would require, first of all, building a certain level of familiarity with (or interest in) highly technical international regimes such as those on ABS that may be difficult to achieve, particularly in those countries where legal capacity is a scarce resource to start with. Equally, such a dialogue requires that public international lawyers engage with very detailed and complex questions of private international law that are quite unfamiliar to them, to get to critical underlying policy choices. Nevertheless, such a dialogue is needed, as it is on the minute and complex details of these bodies of law that opportunities for realizing equitable outcomes depend in practice.

From a public international law perspective, the first question is whether and under which conditions private law contracts are appropriate instruments to realise international treaty objectives and whether they may lead to undue divergence in the interpretation and application of international treaty provisions. Under the Nagoya Protocol on Access to Genetic Resources and Benefit-sharing, a bilateral approach to the matter (i.e. leaving discretion to individual parties as to whether and to what extent regulate private contractual negotiations) certainly has the greatest potential for misuse and divergent approaches, in consideration of the documented power imbalances among likely parties. Under the International Treaty on Plant Genetic Resources for Food and Agriculture, where a multilateral approach to benefit-sharing has been adopted, intergovernmentally adopted standard clauses may support coherence in interpretation but they may also prevent bottom-up practices that may be better suited to a particular reality of context. This is an opportunity, instead, that the Nagoya Protocol could seize with regular stocktaking exercises of practices on the ground. Connected to this discussion, another point that has not received sufficient thought is the potential role of multilateral compliance committees to ascertain opportunities and risks for different contracts to offer a diversity of meanings of international obligations.

From a private international law perspective, more discussion is necessary to understand the role of the doctrine of comity as a bridge between self-interest and common objectives in ensuring equivalence, recognition of party autonomy and the application of mandatory rules protecting the weaker party to a contract. This is necessary to ensure that States' reliance on private contacts to implement international environmental obligations does not shield them from the responsibility to create the necessary legislative preconditions at the domestic level, including through private international law, for the realization of the underlying public international law objectives. Specifically, private international law questions related to access to justice should be further discussed, including when recourse is made to alternative dispute resolution, in light of international human rights standards on access to an appropriate remedy. These considerations also have a bearing on the determination of the characteristic performance of ABS contracts, with a view to realizing the equity objective pursed by relevant public international law, rather than by reference to prevalent transnational commercial practice.

[145] These questions have arisen in the specific context of the International Seabed Authority, but could be relevant in other treaty settings. See ITLOS, 2011 Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area", paras 225. We are grateful to Duncan French for drawing our attention to these points at the first workshop.