Article 9. Contribution to Conservation and Sustainable Use

The Parties shall encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components.

1 Overview

This provision¹ aims to ensure a coherent interpretation and integrative implementation of the CBD three objectives in the context of the Nagoya Protocol, by placing an obligation on Parties to encourage individual users and providers to direct benefits arising from the utilization of genetic resources towards conservation and sustainable use.

The obligation may not appear very demanding, as Article 9 limits itself to require Parties to ‘encourage’, but not necessarily to ‘ensure,’ directing benefits to conservation and sustainable use, or adopt specific measures in this regard. Arguably, it may simply be interpreted as an obligation for Parties to create incentives to that end, but not necessarily enshrining such incentives in domestic law. Nonetheless, Parties could possibly be found in non-compliance with this obligation if, for instance, their domestic ABS frameworks (or other relevant legislation)² created obstacles or disincentives, or made it otherwise impossible, for private users and providers to direct benefits towards conservation and sustainable use. To that extent, it cannot be excluded that compliance

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- 1 Note that this is one of the provisions that was not subject to textual negotiation: it was first incorporated in the Cali Draft, draft article 7 and remained unchanged until the very end of the negotiation in Nagoya, when the final words ‘...direct benefits arising from the utilization of genetic resources towards the conservation and sustainable use of *biological diversity in support of the objectives of the Convention*’ were replaced by ‘*its components*’ (emphasis added).
 - 2 Young identifies a series of domestic laws that will affect the effective functioning of domestic ABS frameworks, such as general environmental law, social-welfare law, property law, administrative law, commercial law, contract law, etc.: Young, “An International Cooperation Perspective,” op. cit., 462–463.

with this provision could be assessed under the Protocol's compliance mechanisms and procedures.³

The following sections will discuss the contribution of Article 9 to the coherent interpretation of the three CBD objectives, the means for this provision's implementation, and questions arising from Article 9 in relation to indigenous and local communities.

2 Contribution to a Coherent Interpretation of the Three CBD Objectives

Article 9 encapsulates the idea that ABS can function as a source of funding or non-monetary incentives for the achievement of the other two objectives of the Convention at the level of individual providers and users of genetic resources.⁴ It has been suggested that Article 9 aims to address real-life situations in which users and providers may not have an interest in, or be aware of, conservation and sustainable use efforts in need of support.⁵ That being said, Article 9 should be read in conjunction with Article 1, which makes the Convention's first and second objectives part and parcel of the Protocol's objective of fair and equitable benefit-sharing.⁶ Parties should therefore take this obligation seriously with a view to effectively contributing to the realization of the Protocol's objective.

It can also be noted that Article 9 can be seen as a complement to the possible establishment of a global multilateral benefit-sharing mechanism, through which benefits arising in specific circumstances⁷ will be directed to support conservation and sustainable use globally.⁸ In comparison, Article 9 applies to a significantly wider range of circumstances (as it covers potentially any instance of ABS transaction related to genetic resources), and it focuses on the

3 See *contra* Wolff, "Nagoya Protocol and the Diffusion," *op. cit.*, 136. See this commentary on Article 30.

4 The idea was already reflected in the Bonn Guidelines, paragraph 48, last sentence, which reads: 'Benefits should be directed in such a way as to promote conservation and sustainable use of biological diversity.' See comments on Article 9 in this regard by Wolff, "Nagoya Protocol and the Diffusion," *op. cit.*, 134.

5 Greiber et al., *Explanatory Guide*, *op. cit.*, 125.

6 See this commentary on Article 1, section 4.

7 Namely, benefits arising from the use of genetic resources and traditional knowledge that occur in transboundary situations (see also this commentary on Article 11), or for which it is not possible to grant or obtain PIC.

8 See this commentary on Article 10, section 4.

private relations between individual users and providers, rather than on the relations between Parties to the Protocol.

3 Means of Implementation

The wording of Article 9 leaves a wide margin of discretion to Parties in choosing the specific means through which to implement their obligation. This therefore opens the door for voluntary measures as well as regulatory approaches at the national level. On the one hand, therefore, individual Parties could limit themselves to implement Article 9 through the provision of capacity-building (as explicitly foreseen by the Protocol),⁹ the deployment of awareness-raising activities,¹⁰ the development of model contractual clauses,¹¹ or the encouragement of voluntary instruments.¹² On the other hand, national ABS legal frameworks could include a general obligation on users and providers to consider ways to contribute to conservation and sustainable use, more specific requirements or incentives in that regard, or specific mechanisms such as national funds.¹³ National ABS laws could also implement this provision in the context of their rules on minimum requirements for MAT.¹⁴ Bilaterally, Parties could also explore ways to encourage users and providers to contribute to conservation and sustainable use through technology transfer.¹⁵ Finally, Parties could multilaterally engage in an exchange of ideas and experiences with regard to the implementation of Article 9 through the Protocol's governing body,¹⁶ including on the basis of information that may be included in the future in the ABS Clearinghouse.¹⁷ Implementation of Article 9 could also be discussed

9 Article 22(5)(h), See this commentary on Article 22.

10 See this commentary on Article 21: in particular, it could be argued that this is implicitly referred to in Article 21(a), which makes reference to Article 1 of the Protocol.

11 See this commentary on Article 19.

12 See this commentary on Article 20.

13 Singh Nijar "An Asian Developing Country's View," op. cit., 263; and Lago Candreira and Silvestri, "Challenges in the Implementation of the Nagoya Protocol," op. cit., 290.

14 Nagoya Protocol Article 6(3)(g). See this commentary on Article 6, section 7.

15 See this commentary on Article 23, where reference is made to enabling the development and strengthening of a sound and viable technological and scientific base for the attainment of the objectives of the CBD and the Nagoya Protocol.

16 Nagoya Protocol Article 26(4)(a). See this commentary on Article 26, section 2.

17 Greiber et al., *Explanatory Guide*, op. cit., 126. See this commentary on Article 14, sections 3–4.

by the Protocol's governing body in the context of its consideration of model contractual clauses and voluntary instruments.¹⁸

Article 9 does not specify whether preference should be accorded to monetary or non-monetary benefits, although elsewhere the Protocol specifically clarifies that both types of benefits are relevant in this regard. The Protocol's Annex, in fact, singles out special fees to be paid to a trust fund supporting conservation and sustainable use; and the transfer of technology, or access to scientific information, including biological inventories and taxonomic studies, that are relevant for conservation and sustainable use.¹⁹

4 Benefits for Indigenous and Local Communities

In case genetic resources are held by indigenous or local communities,²⁰ particular attention should be paid by Parties to encourage these communities as providers to direct benefits to conservation and sustainable use in a way that respects their entitlements under the Protocol in light of applicable international human rights law.²¹ Thus, at a minimum, States should not unduly interfere with the terms of these communities' PIC, which may already express preference with regard to the channeling of benefits to specific uses that may be culturally appropriate in the specific instance and respect the objectives of the Protocol. In addition, States should implement Article 9 so as to actively contribute to channeling benefits towards indigenous or local communities' traditional practices that contribute to conservation and sustainable use, according to their preferences.²²

It should be finally remarked that there is no reference to the sharing of benefits arising from the use of traditional knowledge in this provision. This may be motivated by the negotiators' desire to leave indigenous and local communities to decide on the direction of the benefits arising from the use of traditional knowledge without any State interference. It is worth recalling that numerous decisions adopted by the CBD COP have provided indications on how benefit-sharing from traditional knowledge should be operationalized,

¹⁸ Nagoya Protocol Articles 19(2) and 20(2).

¹⁹ Nagoya Protocol Annex, paragraphs 2(f) and (k). See this commentary on Article 5, section 6.

²⁰ Nagoya Protocol Articles 5(2) and 6(2).

²¹ See Introduction to this commentary, section 4.

²² Human Rights Council, "Report of the Special Rapporteur on indigenous peoples' rights," A/HRC/24/41, paragraphs 75–77.

and some of them may be directly applicable in relations between individual providers and users.²³ This is the case of the integration of traditional knowledge and community concerns in management plans, the setting-up of benefit-sharing mechanisms when revenue is accrued by outside investors, the provision of livelihood-based mitigation and compensatory measures, payments for ecosystem services, as well as the re-investment of benefits in the protection of traditional knowledge and traditional sustainable practices.²⁴ These options seem to reflect the assumption that the maintenance of traditional knowledge, lifestyles and sustainable customary practices of indigenous and local communities already contribute to the conservation and sustainable use of biodiversity.

23 See Introduction to this commentary, section 3; and this commentary on Articles 5 and 7.

24 Morgera and Tsioumani, "Evolution of Benefit-Sharing," *op. cit.*, 167–168 and sources cited therein.