Article 4. Relationship with International Agreements and Instruments

1. The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.

2. Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.

3. This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.

4. This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.

1 Overview

Article 4 is a complex provision seeking to clarify the relationship of the Protocol with existing and future international agreements. First, it encapsu-
lates the implied compromise reached by CBD Parties that the Nagoya Protocol will not serve as a comprehensive framework,\(^2\) in the global governance of ABS transactions. As it will be argued below, it indicates (although not very clearly) that the Protocol will address ABS issues when and to the extent to which these are not addressed by other international ABS instruments. It will not subsume previous ABS agreements or subordinate to the Protocol rules future ABS agreements.\(^3\) Vis-à-vis these instruments, the Protocol thus establishes a residual regime.

Nonetheless, this provision aims to limit the discretion of Protocol Parties in negotiating new international instruments, by reference to mutual supportiveness with the objective of the CBD and the Protocol.\(^4\) In that connection, it is significant that the question of the relationship of the Protocol with other international instruments is addressed in the operative part of the Protocol, rather than in its preamble. This placement would make Article 4 a ‘substantive standard of conduct incumbent upon State Parties,’ rather than just an aid to contextual interpretation.\(^5\) The provision’s convoluted language, however, complicates interpretation and may well prevent the Article from realizing...

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\(^2\) Note the proposed preambular language that did not make it into the final text of the Protocol ‘noting that this Protocol will be the comprehensive protocol on access and benefit-sharing and that WIPO should use this Protocol as a basis for its ongoing work’, emphasis added, CBD Working Group on ABS, “Report of the third part of the ninth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing” (17 October 2010) UN Doc UNEP/CBD/COP/10/5/Add.5, 8.

\(^3\) This is also reflected in the CBD COP decision adopting the final text of the Nagoya Protocol (CBD Decision 10/1, 6th preambular recital, where CBD Parties recognized ‘that the International Regime is constituted of the Convention on Biological Diversity, the Nagoya Protocol . . ., as well as complementary instruments, including the International Treaty on Plant Genetic Resources for Food and Agriculture and the Bonn Guidelines . . .,’ emphasis added).

\(^4\) The role of the Protocol as a regime that applies by default (when and to the extent to which other international ABS instruments do not apply) also explains the provisions on ‘special considerations’ in Article 8. See this commentary on Article 8.