Article 18. Compliance with Mutually Agreed Terms

1. In the implementation of Article 6, paragraph 3(g)(i) and Article 7, each Party shall encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:
   (a) The jurisdiction to which they will subject any dispute resolution processes;
   (b) The applicable law; and/or
   (c) Options for alternative dispute resolution, such as mediation or arbitration.
2. Each Party shall ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms.
3. Each Party shall take effective measures, as appropriate, regarding:
   (a) Access to justice; and
   (b) The utilization of mechanisms regarding recognition and enforcement of foreign judgments and arbitral awards.
4. The effectiveness of this article shall be reviewed by the Conference of the Parties serving as the meeting of the Parties to this Protocol in accordance with Article 31 of this Protocol.

1 Overview

Specific conditions for the utilization of genetic resources\(^1\) or the utilization of traditional knowledge must be set out in MAT, which are normally contracts governed by private law.\(^2\) As already discussed,\(^3\) MAT are normally established upon access (and can possibly be (re)negotiated at a later stage)\(^4\) and must

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\(^1\) See this commentary on Article 2, section 2.
\(^2\) See Introduction to this commentary, section 1.3; and Greiber et al., *Explanatory Guide*, op. cit., 184.
\(^3\) Nagoya Protocol Articles 5(1–2) and (5) and 6(3)(g). See this commentary on Article 5, section 5, and Article 6, section 7.
\(^4\) See Introduction to this commentary, Section 1.3 and fn. 81.
primarily include conditions for benefit-sharing, as well as address dispute settlement, third-party use and change of intent. Against this background, Article 18 aims to create the legislative preconditions at the domestic level in order to address procedural challenges for individual providers and users that are located in different countries arising from situations of non-compliance with MAT — that is, violations of contractual obligations. This may be critical, for instance, for situations in which the user's intent changes, particularly if the MAT allowed only non-commercial research. In these instances, the MAT may create a contractual obligation for users to re-negotiate MAT as soon as commercial research starts, in the absence of which the provider is entitled to obtain contractual penalties or damages.

Article 18 addresses two issues related to compliance with MAT through three obligations. First, it complements Parties’ obligation to detail the minimum content of MAT in domestic ABS frameworks, by establishing a qualified obligation for Parties to ‘encourage’ (i.e., at least to remove barriers to, and/or create incentives for) the inclusion in MAT of provisions on dispute resolution. Second, it aims to support users’ compliance with MAT by establishing an obligation for Parties to ‘ensure’ an opportunity to seek recourse for disputes on MAT; and a qualified obligation to take domestic measures on access to justice and on the recognition of foreign judgments and arbitral awards. The Protocol, however, does not provide any guidance on how national courts


6 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, i.e., generally without PIC and MAT. See Chiarolla, “Role of Private International Law,” op. cit., 427–428; and fn. 14 in this commentary on Article 15.

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

8 Nagoya Protocol Article 8(a). See this commentary on Article 8, section 2.

9 That is, ‘research and development’ for the purposes of the Protocol definition of ‘utilization’: see Article 2(c) and this commentary on Article 2, section 2.


11 Nagoya Protocol Article 6(3)(g).

12 On the obligation to encourage, see this commentary on Article 9, section 1.