Article 15. Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-sharing

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party.

2. Parties shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.

3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.

1 Overview

Article 15 is the first of a series of provisions on compliance, that as a whole address both the development of domestic measures in provider and user countries and forms of international cooperation. These can be considered the ‘most far-reaching innovations of the Protocol…with a view to ensuring PIC and benefit-sharing’. Together with the creation of an international compliance committee under the Protocol, Articles 15–18 form the compliance pillar of the Protocol. They are aimed to address long-standing concerns about the difficulty for provider countries alone to prevent, detect or obtain

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1 See also Nagoya Protocol Articles 16–18.
2 Glowka and Normand, “The Nagoya Protocol on Access and Benefit-sharing,” op. cit., 3.
3 See this commentary on Article 30.
4 CBD Access and Benefit-sharing Friends of the Co-Chairs Meeting, “Paper on selected key issues submitted by the Co-Chairs” (26–29 January 2010), paragraphs 10–14.
remedy from breaches of their domestic ABS measures related to their genetic resources when they are utilized in another country.\(^5\)

Article 15 focuses on compliance with domestic ABS frameworks on genetic resources, whereas compliance with domestic ABS frameworks on traditional knowledge is addressed in a separate, similarly worded provision.\(^6\) Both are aimed at achieving the Protocol’s objective, i.e. ensuring fair and equitable benefit-sharing,\(^7\) by creating obligations for Parties with users in their jurisdiction to take measures to support compliance with PIC and MAT established in the provider country.\(^8\) Specifically, Article 15 creates three sets of obligations for State Parties (be they predominantly user or provider countries) with respect to compliance by individual users: 1) an obligation to adopt domestic measures to ‘provide’ for the respect of provider countries’ national ABS measures related to PIC and MAT; 2) an obligation to enforce the user countries’ domestic measures providing for the respect of provider countries’ national ABS measures related to PIC and MAT; and 3) an obligation to cooperate with other States in addressing the violation of provider countries’ national ABS measures.

The following sections will first clarify which specific instance of ‘compliance’ is addressed by Articles 15 and 16, and then address each obligation under Article 15 in turn, discussing key interpretative questions. These include the details of the obligation to enact domestic measures; the practical implications of the obligation to enforce these measures; and the situations in which international cooperation may be needed.

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5 Glowka and Normand, “The Nagoya Protocol on Access and Benefit-sharing,” op. cit., 34. See also on national measures to support compliance with PIC, CBD Working Group on ABS, “Measures to support compliance with prior informed consent of the contracting party providing genetic resources and mutually agreed terms on which access was granted, in contracting parties with users of such resources under their jurisdiction” (2 December 2005) UN Doc UNEP/CBD/WG-ABS/4/INF/1; and on claims of misappropriations, CBD Working Group on ABS, “Analysis of claims of unauthorised access and misappropriation of genetic resources and associated traditional knowledge” (22 December 2005) UN Doc UNEP/CBD/WG-ABS/4/INF/6.

6 See this commentary on Article 16.

7 See this commentary on Article 1, section 2.

8 Glowka and Normand, “Nagoya Protocol on Access and Benefit-sharing,” op. cit., 35.
2 ‘Compliance’ under Articles 15 and 16: Context and Responses to Conceptual Challenges

It should be preliminarily emphasized that the Nagoya Protocol refers to ‘compliance’ not only in the traditional sense under international environmental law of State Parties’ respect for their international obligations, but also to address the case of users’ compliance with domestic ABS requirements and private-law contractual arrangements (MAT) – where users will most likely be private individuals or entities. Therefore, as opposed to the Protocol provision on a multilateral system to address cases of non-compliance with international ABS obligations by State Parties under Article 30, Articles 15–18 extend the bilateral approach to ABS transactions to issues of compliance with domestic ABS requirements and contractual arrangements. In other words, the Protocol promotes the creation of ‘direct lines of communication between a Party providing genetic resources and a Party with users in its jurisdiction that may have violated the former’s ABS requirements,’ rather than requiring a harmonized approach to compliance among all Parties. Against this background, under Articles 15 and 16, the Protocol focuses on a specific case of lack of compliance with domestic ABS frameworks and MAT, namely, misappropriation – the

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9 The term has been used to avoid the diplomatically more ‘explosive’ term ‘violation’ of international environmental law: Jan Klabbers, “Compliance Procedures,” in The Oxford Handbook of International Environmental Law, ed. Daniel Bodansky, Jutta Brunnée and Ellen Hey (Oxford: Oxford University Press, 2008), 997, 1007.

10 See ENB, “Summary of the First Meeting of the Intergovernmental Committee for the Nagoya Protocol to the Convention on Biological Diversity: 5–10 June 2011,” vol. 9 no. 551, 13 June 2011, 12; and discussion in Elisa Morgera, “First Meeting of the Intergovernmental Committee for the Nagoya Protocol,” op. cit., 247; and Young, “An International Cooperation Perspective,” op. cit., 459.

11 Lago Candeira and Silvestri, “Challenges in the Implementation of the Nagoya Protocol,” op. cit., 292.

12 Glowka and Normand, “Nagoya Protocol on Access and Benefit-sharing,” op. cit., 35.

13 Lago Candeira and Silvestri, “Challenges in the Implementation of the Nagoya Protocol,” op. cit., 292.

14 Chiarolla, “Role of Private International Law,” op. cit., 424. The terms ‘misappropriation’ and ‘misuse’ were referred to in the negotiations of the Protocol CBD, “Report of the eighth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing” (20 November 2009) UN Doc UNEP/CBD/COP/10/5/Add.2, paragraphs 84–86; and draft article 1 in the Cali Draft. While these two terms were not included in the final text of the Protocol, they continue to be used in ABS literature: see Glowka and Normand, “Nagoya Protocol on Access and Benefit-sharing,” op. cit.; Chiarolla, “Role of Private International Law,” op. cit., and Young, “International Cooperation Perspective,” op. cit.
violation by a user of the requirements of a provider country for obtaining and respecting PIC at the time of access\textsuperscript{15} and establishing contractual arrangements in accordance with domestic ABS frameworks.

Articles 15 and 16, therefore, seek to address a series of conceptual difficulties arising in the context of ABS under the CBD. The first conceptual difficulty concerns the fact that while benefit-sharing according to the CBD rests on an inter-State approach, in practice it is mostly private actors that manage transactions of genetic resources and produce benefits to be shared.\textsuperscript{16} The second, consequent difficulty is that PIC is normally issued as an administrative decision governed by domestic public and/or administrative law, whereas MAT are normally set out in contracts under private law that are governed, to differing extents, by contractual freedom and by, in situations involving more than one jurisdiction, private international law.\textsuperscript{17} Matters may be further complicated when the authority to grant PIC is attributed to non-State entities such as research institutes, in which case PIC is embodied in a private-law act and possibly combined with MAT; and when public authorities may include in their PIC certain standard contractual clauses, so that MAT are to some extent embodied in the administrative decision issuing PIC. The CBD reflects these conceptual challenges by providing for an obligation of means for all States to take measures ‘with the aim of’ benefit-sharing,\textsuperscript{18} while clarifying that concrete benefit-sharing arrangements must be set out in MAT.\textsuperscript{19} Beyond this, however, the CBD is silent on the specific measures or the mix of specific measures that

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\item Note that the reference to ‘accessed in accordance with prior informed consent’ in Nagoya Protocol Article 15(1) can be interpreted as an obligation to carry out a substantive check of whether the content of PIC has been complied with at the time of access. On the other hand, there seems to be no requirement under the Protocol for a substantive check of compliance with the content of PIC after the time of access.
\item Glowka, Burhene-Guilmin and Synge, Guide to the Convention on Biological Diversity, op. cit., 82; and Buck and Hamilton, “Nagoya Protocol,” op. cit., 48.
\item See generally Chiarolla, “Role of Private International Law,” op. cit.; and also Tvedt, “Beyond Nagoya,” op. cit., 172.
\item CBD Article 15(7).
\item Concrete benefit-sharing arrangements in MAT are thus linked to decision-making on access by Parties providing genetic resources: see CBD Articles 15(4–5). As discussed in the Introduction to this commentary, section 1.3 and fn. 81 and this commentary on Articles 5, section 5, and 6, section 2, however, MAT may entail two contractual negotiations (at the time of access and possibly at a later stage, if the benefit-sharing clauses need to be adjusted because the value of the genetic resources has become clearer as a result of research).
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must be taken by Parties to ensure compliance with domestic requirements and contractual clauses on benefit-sharing.

Such specific measures have, however, been identified by the Bonn Guidelines in a non-exhaustive manner:

- mechanisms to provide information to potential users on their obligations regarding access to genetic resources;
- measures encouraging the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge in applications for IPRs;
- measures aimed at preventing the use of genetic resources obtained without the PIC of the Party providing such resources;
- cooperation between Parties to address alleged infringements of ABS agreements;
- voluntary certification schemes for institutions abiding by ABS rules;
- measures discouraging unfair trade practices; and
- measures encouraging users to comply with their contractual obligations set out in MAT.20

As ‘virtually none of the user-side legislative requirements set out in the Bonn Guidelines have been adopted in any country,’21 there was little relevant experience at the time of the negotiations of the Protocol.22 As a result, the Protocol leaves considerable flexibility to Parties in deciding which domestic measures will be necessary to implement Articles 15 and 16.23 Nonetheless, in practice there is an underlying need to achieve inter-operability among Parties’ respective domestic ABS frameworks with a view to ensuring that ‘individually tailored national measures’ work together to support a coherent and functioning international ABS framework.24 Thus, although nothing in the Protocol requires coordination among Parties in the development of domestic ABS measures, exchange of information and consideration of other countries’

20 Bonn Guidelines, paragraph 16(d).
21 Tvedt and Young, Beyond Access, op. cit., 129; and CBD Secretariat, “Overview of recent developments at national and regional levels relating to access and benefit-sharing” (30 August 2007) UN Doc UNEP/CBD/WG-ABS/5/4, paragraph 3.
22 CBD Working Group on ABS, “Report of the meeting of the group of legal and technical experts on compliance in the context of the international regime on access and benefit-sharing” (10 February 2009) UN Doc UNEP/CBD/WG-ABS/7/3.
23 Greiber et al., Explanatory Guide, op. cit., 163.
24 Glowka and Normand, “Nagoya Protocol on Access and Benefit-sharing,” op. cit., 37.
domestic ABS frameworks will likely occur. These exchanges may be facilitated by the Protocol’s governing body, but may also arise in the context of bilateral negotiations among Parties, including in the context of capacity-building activities.

3 Obligation to Adopt Domestic User-side Measures

Article 15(1) obliges Parties to the Protocol to take domestic user-side measures. The reference to ‘each Party’ in that regard serves to underline that all countries should take such measures in recognition of the fact that no Party is uniquely a provider or user country. In addition, this reference also indicates that a Party that waives its right to PIC remains subject to this obligation, in order to support the measures adopted in another Party.

Under Article 15(1), user countries’ obligations relate only indirectly to the breach of the provider countries’ domestic ABS frameworks. That is, the obligation is to adopt domestic user-side measures that will relate to a breach of domestic provider-side measures on PIC and MAT. In practice, however, the breach of the domestic user-side measures is inherently linked to the ‘original’ breach of provider-side measures – that is, the misappropriation of genetic resources in violation of the PIC requirement and the requirement to establish MAT in accordance with provider countries’ domestic ABS frameworks. The following sub-sections will first discuss the meaning of the obligation to ‘provide’ for the respect for provider-side domestic ABS frameworks, including interpretative difficulties arising from the text of Article 15(1), and then discuss means of implementation.

3.1 The Obligation to ‘Provide’

Article 15(1) establishes a procedural obligation to ‘provide for’ the respect of provider countries’ domestic ABS frameworks. Instead of requiring Parties to

25 We are grateful to Tomme Young for drawing our attention to this point.
26 Article 26(4)(a). See this commentary on Article 26, section 2.
27 Young, “An International Cooperation Perspective,” op. cit., 496–498. See this commentary on Article 4, section 3.
28 The Protocol provision on capacity-building specifically mentions the need for assistance in developing domestic ABS measures, Nagoya Protocol Article 22(5)(a). See this commentary on Article 22.
29 See Introduction to this commentary, section 1.3.
30 Greiber et al., Explanatory Guide, op. cit., 160. On State PIC, see Nagoya Protocol Article 6(1) and this commentary on Article 6, section 3.1.
ensure users’ compliance with provider countries’ measures, the obligation to provide can be interpreted as a procedural duty to confirm that users have complied with PIC at the time of access and established MAT in accordance with the provider countries’ ABS framework. It does not create an obligation for each Party to recognize and apply in its jurisdiction the ABS laws of another Party where genetic resources had been acquired, and sanction breaches of domestic legislation of other Parties by users in its jurisdiction. Although such an approach is not excluded by the letter of the Protocol, it would in practice be quite difficult for Parties to enforce a variety of different approaches to ABS transactions regulated by different provider countries making use of the flexibility for national implementation built into the Protocol. Against this background, the Protocol arguably requires at a minimum the adoption of domestic user-side measures that would task user countries to check the formal issuance of PIC and the formal establishment of MAT in another Party. This would, as a first step, entail that user countries check the existence of the internationally recognized certificate of compliance in the ABS Clearinghouse. This could also possibly entail more than simply requiring users to provide a declaration to that end without any form of verification by the provider country, particularly as Article 15(1) refers to ‘accordance with’ PIC (whereas it refers only to the existence, i.e. the establishment, of MAT). Rather, Parties to the Protocol need to exercise due diligence in order to confirm that

31 Negotiators considered and eventually decided against using the term ‘ensure’; Cali Draft, draft Article 12(1), paragraph 98. Agreement on the final wording ‘to provide’ was reached in July 2010: see Montreal I Draft, draft article 12(1), 27. Note, however, that the French and Spanish versions of the Protocol (that are equally authentic: Nagoya Protocol Article 36) use the terms ‘garantir’ and ‘asegurar’, both of which can be translated as ‘to guarantee’ in English. We are grateful to an anonymous reviewer for drawing our attention to this point.

32 See fn. 15 above.

33 See CBD Working Group on ABS, “Report of the eighth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing” (20 November 2009) UNEP/CBD/WG-ABS/8/8, Annex, paragraphs 60–61; Tvedt, “Beyond Nagoya,” op. cit., 173, noting that the Protocol does not make the law of a provider country ‘directly enforceable’ under the jurisdiction of the user country.

34 CBD Working Group on ABS, “Report of the expert meeting on compliance”, UNEP/CBD/WG-ABS/7/3, paragraphs 16 ff.; ENB 9/527, “Summary of the Resumed Ninth Meeting of the Working Group on ABS”, 9–10.

35 Greiber et al., Explanatory Guide, op. cit., 163.

36 See this commentary on Article 14, section 3, and on Article 17, section 3.

37 See Conclusions to this commentary, section 3.
the users under their jurisdiction respected the applicable domestic framework of the provider country.

That being said, although the Protocol does not require user-side measures for the direct extraterritorial enforcement of domestic ABS frameworks of other Parties, these could still be given some extraterritorial application. It has in fact been argued that in as far as instances of non-compliance with PIC and MAT requirements have to be determined in the user-country jurisdiction, provider-country Parties’ domestic ABS frameworks would need to be applied in user-country courts to qualify the disputed facts on the merit.38

Three other interpretative questions arise in the context of Article 15(1). One interpretative difficulty arises from the difference in wording between the provider country’s domestic ABS measures mentioned in Article 15(1) (‘legislation or regulatory requirements’), which reflects the expression used in Article 6(1), and those that are to be adopted under Article 6(3) (‘legislative, administrative or policy measures’).39 While in principle these two sets of provisions speak to the same set of domestic measures that require PIC and MAT in the provider country prior to access to genetic resources, Article 6(3) allows Parties to adopt not only legislative, but also administrative or policy measures. Articles 6(1) and 15(1) in turn appear to refer only to ABS legal requirements established by parliament or the administration. A literal interpretation could lead one to understand that only in the case in which the provider country has adopted legislation, will it be able to benefit from the user compliance measures under Article 15(1).40 In other words, policy or administrative measures on ABS would not trigger user countries’ international obligations concerning their individual users’ compliance under Article 15. A systematic and effectiveness-oriented interpretation, however, leads to consider that administrative or policy measures adopted under Article 6(3) could amount to ‘regulatory requirements’ for the purposes of Article 15(1) as long as they are properly publicized, understandable, internally coherent and containing clear indications about the need to obtain PIC and establish MAT (both in writing), and on benefit-sharing.41

In that regard, even if a Party encounters difficulty in passing legislation on ABS immediately following the entry into force of the Protocol, it would be

38 Chiarolla, “Role of Private International Law,” op. cit., 440.
39 The same terminological discrepancy can be found when comparing Nagoya Protocol Articles 16 and 7 on PIC and MAT for access to traditional knowledge: see this commentary on Article 16, section 2.
40 Greiber et al., Explanatory Guide, op. cit., 169.
41 In that regard, the ABS Clearinghouse could be used to publicize the measures, according to Nagoya Protocol Article 14(2)(a).
well advised to establish policy or administrative measures that are publicized, clear and comprehensive, with a view to benefitting from the compliance provisions of the Protocol. A good-faith interpretation of Articles 6 and 15 also leads to this conclusion, in particular in consideration of the explicitly acknowledged capacity issues of developing countries in developing domestic ABS measures. The absence of any domestic measure amounting to domestic ‘regulatory requirements’ on ABS would deprive provider countries of their possibility to trigger user countries’ international obligations on their users’ compliance under Article 15.

Another element of Article 15(1) in need of clarification is the reference to ‘the other Party’, as opposed to the expression used elsewhere in the Protocol ‘the Party providing [genetic] resources that is the country of origin or a Party that acquired genetic resources in accordance with the Convention’. It has been argued that the expression ‘the other Party’ refers ‘the Party that factually provided the material and issued PIC’. This would suggest that Parties where genetic resources are utilized must accept PIC decisions of other Parties and internationally recognized certificates of compliance at their face value. In other words, unless there are indications to the contrary, user countries would not be expected to check whether sovereign claims of provider countries over the genetic resources at stake are well founded. The potential for this interpretation to lead to contradictory results has, however, been highlighted. It may allow a Party to be in compliance with the Protocol even if it only takes measures to ensure compliance with domestic ABS requirements of intermediary countries regardless of whether the genetic resources have been legally acquired by such countries. The provision may further be interpreted so that possible disputes about sovereignty claims over genetic resources would

42 Singh Nijar, “An Asian Developing Country’s View,” op. cit., 254.
43 The Nagoya Protocol specifically acknowledges these challenges in Article 22(4)(c).
44 Tvedt, “Beyond Nagoya,” op. cit., 164, who notes that ‘the main regulatory burden is left with the provider country.’
45 See this commentary on Article 5, section 2. The same expression also appears in Nagoya Protocol Articles 6(1) and 23, while ‘the other Party’ only appears in Article 16(1); Greiber et al., Explanatory Guide, op. cit., 163. Note that a reference to ‘country of origin’ appeared in draft article 12 in the Nagoya Draft. The reference was deleted in the final negotiation of the Protocol.
46 As reported by Chiarolla, “Role of Private International Law,” op. cit., 442; see also reference in Nagoya Protocol Article 17(3) to ‘the Party providing’ PIC.
47 Greiber et al., Explanatory Guide, op. cit., 163–164. See this commentary on Article 6, section 3.
48 Chiarolla, “Role of Private International Law,” op. cit., 443.
need to be settled between the States claiming sovereign rights over the same genetic resource.

Third, Article 15(1) focuses on genetic resources ‘utilized’ within user countries’ jurisdiction, based on the definition of ‘utilization of genetic resources’ in the Protocol.\(^{49}\) It can be argued that the flexibility inherent in the definition of utilization may lead Parties to adjust or possibly expand measures taken under Article 15(1) in response to new forms of research and development on gene sequences and naturally occurring biochemicals. In addition, Article 15(1) applies to the ‘utilization’ of genetic resources – i.e., on research and development. Article 15(1) in effect does not mention ‘subsequent applications and commercialization’ of genetic resources, although these are explicitly covered by the general, inter-State benefit-sharing obligation in Article 5(1). A combined reading of Article 15(1) and Article 5 would support the argument that obligations related to providing for users’ compliance with provider countries’ domestic ABS frameworks should be extended so as to correspond to the obligation to ensure benefit-sharing also from subsequent application and commercialization. This argument may be backed up by practical considerations: regulating only activities intended for research and development, which mostly occur as internal processes within private companies that are often covered by confidentiality, and distinguishing them clearly from further utilization and commercialization is very difficult in practice.\(^{50}\) On the other hand, it can be contended that Protocol negotiators discussed, and eventually decided against, referring to ‘subsequent application and commercialization’ in Article 15,\(^{51}\) because of practical enforcement challenges and concerns about possible implications for international trade. This may suggest that non-compliance issues related to the final phase of the genetic resource value chain should be addressed on the basis of contractual claims in the context of the Protocol’s provision on compliance with MAT.\(^{52}\) Ultimately, in the absence of an explicit exclusion of subsequent application and commercialization from the definition of ‘utilization’ in Article 2 and from Article 15(1), Parties have discretion to extend their implementing measures under Article 15(1) also to subsequent application and commercialization of genetic resources, particularly where – in their respective domestic context – this seems necessary to

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49 See this commentary on Article 2, section 2.
50 We are grateful to Tomme Young for drawing our attention to this point.
51 ENB, “Summary of the Interregional Negotiating Group on Access and Benefit-sharing: 18–21 September 2010”, 2–3.
52 Greiber et al., *Explanatory Guide*, op. cit., 162. See this commentary on Article 18.
effectively implement their obligation to ensure benefit-sharing also from subsequent application and commercialization.53

3.2 **Means of Implementation**

The reference in Article 15(1) to ‘appropriate, effective and proportionate’ measures implies that user-side measures should be fit for the purpose of contributing to compliance with provider countries’ measures and of ensuring the realization of the Protocol’s objective of fairly and equitably sharing benefits. That being said, such measures could also be understood as being reasonable, workable and not excessively burdensome,54 taking into account the actual implementation and enforcement capacities of different countries. The reference to ‘appropriate, effective and proportionate’ user-side measures has also been interpreted in a more expansive way, so as to argue that domestic user-side measures would ‘fall short of meeting [these requirements] unless the concerned Parties provide that an opportunity to seek recourse is available under their legal system in case of disputes arising from non-compliance with such user measures.’55

It should be emphasized, however, that there is a scarcity of examples of user-side measures.56 Possible measures could include requiring users to prove that the genetic resources were accessed legally according to the provider country’s domestic ABS framework at the time of import of the genetic resources, or at the time of seeking an authorization to develop and/or place on the market products based on genetic resources.57 Some countries have interpreted this as obliging all users of genetic resources to exercise due diligence so that applicable ABS requirements in provider countries have been respected.58

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53 Nagoya Protocol Article 5(1). See this commentary on Article 5, section 2.
54 Greiber et al., *Explanatory Guide*, op. cit., 161.
55 Chiarolla, “Role of Private International Law,” op. cit., 434 and 439.
56 Tvedt, “Beyond Nagoya,” op. cit., 164; one exception is Norwegian law, discussed by Morten W. Tvedt and Ole K. Fauchald, “Implementing the Nagoya Protocol on ABS: A Hypothetical Case Study on Enforcing Benefit Sharing in Norway,” *The Journal of World Intellectual Property* 14 (2011): 383, 392–398.
57 Tvedt, “Beyond Nagoya,” op. cit., 164.
58 EU draft regulation, draft article 4(1), which reads: ‘Users shall exercise due diligence to ascertain that genetic resources and traditional knowledge associated with genetic resources used were accessed in accordance with applicable access and benefit-sharing legislation or regulatory requirements and that, where relevant, benefits are fairly and equitably shared upon mutually agreed terms.’
It is also noteworthy that, as opposed to the access standards outlined elsewhere in the Protocol with a view to guiding provider countries, Article 15(1) does not provide any standard for user-side measures. In particular, it does not address whether user countries should also assess the content of MAT and the extent to which benefit-sharing requirements contained in MAT correspond to the notions of fairness and equity.

4 Obligation to Enforce

Article 15(2) creates an obligation for Parties to establish domestically how breaches of domestic user-side measures on their users’ compliance with provider countries’ domestic ABS frameworks will be identified and sanctioned. Put differently, the remedies and sanctions provided for in the law of the user country will be enforced against the user, for breaching user-side measures on compliance with PIC and MAT requirements of the provider country. Conversely, Article 15(2) does not imply that the remedies and sanctions provided for in the law of the provider country will be applied in user countries.

Appropriate, effective and proportionate enforcement measures will vary from case to case depending on the type of domestic measure violated, the gravity of the breach, and also on whether measures are applied by the public administration or by domestic courts of a Party. As the Protocol leaves an ample margin of discretion to Parties, sanctions may include: revocation of IPRs and market approvals; obligation on the user to seek PIC and establish MAT from the legitimate provider as a precondition for continuing utilization; in case economic benefits have already been accrued, obligation to negotiate benefit-sharing arrangement with the legitimate provider; obligation to pay a fixed amount to the legitimate provider, irrespective of MAT; monetary fines or the criminalization of certain acts and the prohibition of using genetic resources when obligations have been violated. It has been suggested that

59 Nagoya Protocol Article 6(3)(a–b) See this commentary on Article 6, section 6.
60 Tvedt, “Beyond Nagoya,” op. cit., 165.
61 Ibid. See also Nagoya Protocol Articles 6(3)(g) and 18; and this commentary on Article 6, section 7 and on Article 18, section 1; and Conclusions to this commentary, section 3.
62 Chiarolla, “Role of Private International Law,” op. cit., 440, note 53.
63 These and other ideas were proposed in the negotiation: see, on disclosure requirement and tools to enforce compliance, CBD Working Group on ABS “Report of the seventh meeting,” UNEP/CBD/WG-ABS/7/8, Annex, 51–53.
64 Greiber et al., Explanatory Guide, op. cit., 164.
sanctions should be at least as serious and costly as the implications arising from MAT, to avoid creating a disincentive for users to adhere to the rules of the providing country.\textsuperscript{65} Against this backdrop, the Protocol’s governing body may initiate a process to consider best practices in implementing Article 15(2) and possibly provide some guidance on this matter in the future.\textsuperscript{66}

Article 15(2) in effect presupposes that Parties will actively detect instances where users within their jurisdiction are in a situation of non-compliance, in particular through the information gathered by checkpoints\textsuperscript{67} and internationally recognized certificates of compliance in the ABS Clearinghouse, particularly if (some) Parties determine that issuance of the certificate is mandatory.\textsuperscript{68} Additional information may be provided by users themselves, either on the basis of voluntary due diligence or mandatory reporting and auditing procedures. Factual, administrative and judicial findings by responsible authorities of provider countries may also serve as a useful source of evidence for relevant authorities in user countries. Although findings from provider countries will not be the only determinant factor in triggering user countries’ enforcement measures, complete disregard for these determinations in the provider country may be considered as proof of lack of good faith in implementing Article 15(2).\textsuperscript{69} Particularly in the case of third-party transfers – i.e., in cases when the person/entity misappropriating the material is not the one utilizing it, information from the provider country may be especially useful. Other sources that may contribute to detecting instances of users’ non-compliance include media reports or communications from other Parties to the Protocol.

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Obligation to Cooperate

The third obligation under Article 15 concerns an obligation to cooperate in cases of alleged violation of the ‘other’ countries’ domestic ABS framework. Thus, as opposed to Article 15(1)–(2), the obligation is triggered in a broader set of instances, namely violation of the provider country’s ABS legislation

\textsuperscript{65} Tvedt, “Beyond Nagoya,” op. cit., 165.
\textsuperscript{66} See this commentary on Article 26.
\textsuperscript{67} Nagoya Protocol Article 17(2–4). See this commentary on Article 17, section 2.
\textsuperscript{68} Nagoya Protocol Article 17(1). See this commentary on Article 17, section 3.
\textsuperscript{69} It should be noted that questions related to the legal recognition and enforcement of foreign administrative or judicial decisions in the jurisdiction of Parties where genetic resources are utilized are addressed under Nagoya Protocol Article 18(2)(b). See this commentary on Article 18, section 3.
in general, and not necessarily limited to specific requirements on PIC and MAT. Clearly, violations of domestic ABS frameworks may occur even if PIC was granted and MAT were established. So the scope of application of Parties’ obligation to cooperate could cover other instances, such as disregard for minimum requirements for MAT in provider country’s legislation or failure to provide required information on bioprospecting activities to be included in national registries in provider countries.

Article 15(3) obliges all Parties (whether provider and user countries) to cooperate on specific cases of alleged violations of domestic ABS frameworks. According to general international law, the obligation to cooperate requires States to enter into coordinated action under a legal regime so as to achieve its specific goal.70 In this specific case, the obligation entails that Parties exert good-faith efforts to identify potentially concerned Parties and engage them with a view to reaching agreement on coordinated action in the investigation of and/or follow up on alleged non-compliance by users.71 Such cooperation can either involve the provision of information from user countries to provider countries trying to ascertain whether a violation of their own domestic ABS frameworks has occurred, or from provider countries to user countries trying to ascertain whether a violation of other Parties’ domestic ABS frameworks has occurred. As Article 15(3) is broadly framed, cooperation with other Parties that were not involved in the potential situation of non-compliance72 and on a multilateral (rather than merely bilateral) basis is also possible.

The choice of the means to identify and engage other concerned States is left to each Party (‘as far as possible and as appropriate’), but the qualified language of this provision does not leave discretion for a Party to decide against cooperation.73 Therefore, lack of any reasonable effort to identify and engage potentially concerned States would be in violation of this due diligence obligation. If agreement cannot be reached, the Protocol does not impede States from making unilateral decisions, but it creates the expectation that such decisions will be made taking into consideration other States’ and, where relevant, indigenous and local communities’ interests, in realizing the objective of the Protocol in relation to fair and equitable benefit-sharing.74 It may also entail the obligation for Parties to address persistent or recurring difficulties in

70 For a discussion, see this commentary on Article 11, section 2.
71 Greiber et al., _Explanatory Guide_, op. cit., I64.
72 Greiber et al., _Explanatory Guide_, op. cit., I65.
73 See Introduction to this commentary, section 5 and fn. 227. See contra Greiber et al., _Explanatory Guide_, op. cit., I64.
74 See this commentary on Article 1, section 2.
implementing Article 15(3) by progressively developing the legal regime estab-
lished by the Nagoya Protocol.75 The reference to ‘alleged’ violations implies
that there is no requirement to prove that there has been an actual violation in
order for Parties to seek collaboration with each other.76

The obligation, as is customary in international treaties, also leaves Parties
discretion in determining which administrative entity will be responsible for
such cooperation. The point of first contact in this regard is likely to be the
national ABS focal point,77 which could then also support the channeling
of cooperation requests to the political, administrative or judicial authority
responsible for appropriate follow-up. This, however, is more likely to func-
tion as an initial, informal contact between Parties. Diplomatic processes must
likely be followed to formalize the cooperation.78 Depending on the design-
ated authority, powers in carrying out such cooperation may vary.

75 This argument is developed in this commentary on Article 11, section 2.
76 Greiber et al., Explanatory Guide, op. cit., 164.
77 Nagoya Protocol Article 13(1); see this commentary on Article 13, section 2.
78 We are grateful to Tomme Young for drawing our attention to this point.