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STUDY INTO CRITERIA TO IDENTIFY A SPECIALIZED INTERNATIONAL ACCESS AND BENEFIT-SHARING INSTRUMENT, AND A POSSIBLE PROCESS FOR ITS RECOGNITION

Note by the Executive Secretary

1. At its second meeting, the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol requested the Executive Secretary, in the context of Article 4, paragraph 4, of the Protocol "to conduct a study into criteria that could be used to identify what constitutes a specialized international access and benefit-sharing instrument, and what could be a possible process for recognizing such an instrument, and to refer the study for further consideration by the Subsidiary Body on Implementation before consideration by the Conference of the Parties serving as the meeting of the Parties at its third meeting" (decision NP-2/5, para. 3).

2. Accordingly, and with financial support from the European Union, the Executive Secretary commissioned a research team at the Strathclyde Centre for Environmental Law and Governance, University of Strathclyde, to carry out the study.

3. The study is presented below in the form and language in which it was received by the Secretariat of the Convention on Biological Diversity. Any views expressed in the study are those of the authors or the sources cited in the study and do not necessarily reflect the views of the Secretariat.

* CBD/SBI/2/1.

STUDY INTO CRITERIA TO IDENTIFY A SPECIALIZED INTERNATIONAL ACCESS AND BENEFIT-SHARING INSTRUMENT, AND A POSSIBLE PROCESS FOR ITS RECOGNITION

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EXECUTIVE SUMMARY

1. The objective of this study is to explore criteria that could be used to identify what constitutes a specialized international access and benefit-sharing (ABS) instrument in the context of Article 4(4) of the Nagoya Protocol, and what could be a possible process for recognizing such an instrument. The study was requested by the Conference of the Parties serving as the Meeting of the Parties (COP/MOP) to the Nagoya Protocol in 2016 (decision NP-2/5), to be considered by the Subsidiary Body on Implementation, before consideration by the Nagoya Protocol COP/MOP at its third meeting.

2. This study is structured as follows. It first analyzes Article 4(4) from a textual, contextual and teleological point of view (Section 2). It then discusses the relevance of the concept of "*lex specialis*" in general international law and of the work of the International Law Commission (ILC) on fragmentation of international law, and of mutual supportiveness as a broader concept that applies beyond international treaties (Section 3). These considerations substantiate a series of possible *criteria* to identify a specialized international ABS instrument (Section 4). The study then explores relevant international practices and academic theories on regime interaction, with a view to providing elements of a possible *process* to recognize such instruments (Section 5). Finally, it explores three scenarios involving the recognition of a specialized international ABS instrument (Section 6). The study relies on general international law, including the law of treaties, general principles of international law, and theories on international law-making and regime interaction.

3. Article 4(4) does not refer to the recognition of specialized instruments. It does, however, point towards the following: 1) an **assessment** needs to be conducted of specialized instruments vis-à-vis the objectives of the CBD and the Protocol (Section 2.3); and 2) the **consequence** of a positive assessment is the disapplication of the Protocol for Parties to the specialized agreement in respect of the specific genetic resources covered by and for purpose of the specialized instrument.

4. The analysis suggests that **criteria** for the recognition of a specialized instrument pursuant to Article 4(4) concern the specialization of an instrument, and the principle of mutual supportiveness. A specialized instrument would: (1) be intergovernmentally agreed upon; (2) be binding or non-binding; and (3) apply to a specific set of genetic resources and/or traditional knowledge associated with genetic resources, which would otherwise fall under the scope of the Nagoya Protocol; or (4) apply to specific uses and for objectives the attainment of which requires a specialized approach.

5. The principle of mutual supportiveness would imply: (1) consistency with biodiversity conservation and sustainable use objectives; (2) fairness and equity in the sharing of benefits; (3) legal certainty with respect to access to genetic resources or traditional knowledge and to benefit-sharing; (4) contribution to sustainable development, as reflected in internationally agreed goals; and (5) other general principles of law including good faith, effectiveness and legitimate expectations.

6. The analysis indicates that international law does not offer clear-cut solutions to the relationship between international agreements. Application of the above criteria would require reasoned discussion in the context of each specific case, calling for pragmatic solutions based upon increased cooperation. In addition, the analysis shows that regime interaction may provide opportunities for continuous learning

and fruitful collaborations which are mutually beneficial to the implementation of various international instruments. The recognition of specialized instruments under Article 4(4) would be but one step in an ongoing management process to ensure the continuing supportiveness of relevant instruments with the Convention and Protocol objectives. It would not exhaust the need to consider the management of interactions with other international instruments, which generally require ongoing information-sharing and cooperation efforts to ensure synergistic outcomes. Attention should thus be devoted to maximizing opportunities for mutual learning among regimes.

7. Three scenarios are envisaged with regard to the recognition of specialized ABS agreements: (1) recognition by the Nagoya Protocol COP/MOP; (2) recognition by other multilateral fora; or (3) recognition by a Party or group of Parties. These scenarios are not mutually exclusive, but represent possible real-life situations that could overlap and ideally complement each other. To a varied degree, all three scenarios would require diplomatic efforts to address legal uncertainties. An optimal **process** is thus suggested for consideration by the COP/MOP to maximize the opportunities for mutual supportiveness and mutual learning among regimes, including steps such as: (1) consideration of necessary information, including information on potential or actual initiatives by other regimes or Parties, and advice from its own subsidiary bodies, under its agenda item on international cooperation; (2) encouragement of a series of steps to ensure mutual supportiveness and learning in the development of specialized international ABS instruments (including a negotiating mandate seeking coherence with the Nagoya Protocol in light of the criteria above; keeping the COP/MOP informed of progress in negotiations; drafting provisions in a new instrument that will specifically cater to mutual supportiveness; and instituting forms of inter-Secretariat collaboration); (3) a decision on whether to recognize an international instrument as a specialized ABS agreement and/or take note of the implications of the recognition made by other fora or Parties; and (4) a decision to set up an ongoing process for regime interaction to ensure coherence and synergy at the decision-making, institutional, and implementation levels. Such a process may involve the establishment of joint reporting, joint sessions of subsidiary bodies or governing bodies, and/or the establishment of a permanent platform for dialogue and coordination.

8. For this process to be effective, Nagoya Protocol Parties should ensure, at the domestic level, that relevant authorities (potentially in different sectors) follow the mutually supportive approach proposed by the COP/MOP in the context of negotiations, interpretation and implementation efforts in other fora and under other specialized international instruments. This would require Parties' efforts to bring the criteria to the attention of relevant authorities that may be negotiating, interpreting or implementing a specialized ABS instrument, as well as to establish a regular dialogue geared towards mutual supportiveness and mutual learning at the domestic level.

1. Introduction

9. During the second meeting of the Conference of the Parties serving as the meeting of the Parties (COP-MOP) to the Nagoya Protocol (4-17 December 2016, Cancun, Mexico), the Parties adopted decision NP-2/5 on "cooperation with other international organizations, conventions and initiatives." In the decision, the Parties requested the Executive Secretary, in the context of Article 4(4) of the Nagoya Protocol, to conduct a study into criteria that could be used to identify what constitutes a specialized international access and benefit-sharing (ABS) instrument, and what could be a possible process for recognizing such an instrument, for further consideration by the Subsidiary Body on Implementation before consideration by the COP-MOP at its third meeting.

10. Article 4 of the Protocol addresses the relationship of the Nagoya Protocol with other international agreements and instruments. Paragraph 4 of the Article provides that; "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."

11. The study commences in section 2 by offering a textual, teleological and contextual analysis[1] of Nagoya Protocol Article 4(4), as well as examining the more general object and purpose of the Nagoya Protocol. In section 3, the study discusses the relevance of the international law concept of "*lex specialis*," for Nagoya Protocol Article 4(4). The related work of the International Law Commission (ILC) on fragmentation of international law is also discussed, before attention is turned to mutual supportiveness, which is an emerging general principle of international law. The utility of this principle as a broader concept applicable beyond international treaties will be articulated, and its relevance to Nagoya Protocol Article 4(4) examined. In section 4, a series of possible criteria for identifying a specialized international ABS instrument are developed based upon the analysis set out in the previous sections. On that basis and with a view to providing elements on a possible process to recognize such instruments, in section 5 the study turns to review the relevant international practices and academic theories on regime interaction. In section 6, the study explores three scenarios involving the recognition of a specialized ABS instrument, and proposes an optimal process in this regard.

2. How does the Nagoya Protocol address relationships with other agreements?

12. Article 4 of the Nagoya Protocol seeks to clarify the relationship between the Protocol and existing, as well as future, international agreements and instruments. This section will first analyze Article 4(4) from a textual perspective, as well as in the context of relevant provisions of the Protocol (contextual interpretation), including the objective of the Nagoya Protocol (teleological interpretation). This section demonstrates that the Protocol: is a general instrument that can provide a residual regime for ABS; does not apply in the case of application of a specialized ABS instrument under certain conditions; and places qualifications on Parties' ability to negotiate specialized ABS instruments in light of the objectives of the Convention on Biological Diversity (CBD) and the Nagoya Protocol. The objectives of the CBD and the Nagoya Protocol can thus provide a basis for the development of criteria for the identification of specialized ABS instruments.

2.1 Understanding Article 4(4)

13. The first sentence of Article 4(4) indicates that; "This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention." The Nagoya Protocol is hence the *general* framework[2] that addresses ABS issues for the purposes of the CBD. The phrasing of the second sentence in Article 4(4) indicates that the Nagoya Protocol does not subsume other ABS agreements, but rather functions as a *residual* regime operating in the absence of specialized ABS instruments that meet certain conditions: "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." In other words, the Nagoya Protocol remains applicable to State Parties that are Party to other ABS instruments; 1) when the specialized international ABS instruments are not consistent with the objectives of the Convention and the Protocol; 2) and with regard to genetic resources that are not covered by the specialized agreement or are used for purposes other than those of the specialized instrument.[3] Conversely, specialized ABS instruments that are consistent with the CBD and Protocol objectives will be considered *lex specialis* (see Section 3.1 below) vis-à-vis the Protocol for those Parties that are Party to both instruments. In such an instance, the provisions of the specialized ABS instruments will apply, rather

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1 These are the general rules of treaty interpretation contained in Vienna Convention of the Law on Treaties (VCLT) Art. 31, which are considered customary international law (i.e. applicable to all states, regardless of whether they are party to the VCLT): ICJ *Libya and Chad* (1994), para. 41.

2 E Morgera, E Tsioumani and M Buck, *Unraveling the Nagoya Protocol: A Commentary of the Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Martinus Nijhoff, 2014), at 85.

3 C Chiarolla, S Louafi and M Schloen, 'An Analysis of the Relationship between the Nagoya Protocol and Instruments Related to Genetic Resources for Food and Agriculture and Farmers' Rights,' in E Morgera, M Buck and E Tsioumani (eds.), *The 2010 Nagoya Protocol on Access and Benefit-Sharing in Perspective* (Martinus Nijhoff, 2013) 83, at 102.

than the more general ones of the Nagoya Protocol, in respect of the specific genetic resources covered by, and for the purpose of, the specialized instrument.

14. The Protocol preamble provides a few indications of the areas that could be relevant for the purposes of Article 4(4), although it should not be considered to provide an exhaustive list. With regard to genetic resources for food and agriculture, for example, the Protocol preamble recognizes the special nature of agricultural biodiversity, its distinctive features and the need for distinctive solutions. It acknowledges the fundamental role of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and recalls that its Multilateral System of ABS was developed in harmony with the CBD.[4] CBD COP Decision X/1 on ABS and adoption of the Nagoya Protocol, in its preamble, further recognizes the ITPGRFA as part of the international regime on ABS.[5] In addition, the Protocol preamble acknowledges the fundamental role of the FAO Commission on Genetic Resources for Food and Agriculture, which is continuing work to support national law-making activities in relation to ABS for different subsectors of genetic resources for food and agriculture.[6] Such developments can be viewed in light of preambular and operative paragraphs acknowledging ongoing work in other fora.[7]

15. In addition, the Protocol preamble also refers to the WHO International Health Regulations (IHR) (2005) and to the importance of ensuring access to human pathogens for public health preparedness and response purposes.[8] The PIP Framework, adopted through a non-binding WHO Assembly resolution,[9] applies to transfers of influenza viruses with pandemic potential that are covered by the Framework's binding contractual clauses (standard material transfer agreements[10]), which contain benefit-sharing obligations.[11] The seventieth World Health Assembly has reaffirmed the importance of the Pandemic Influenza Preparedness Framework and has emphasized its critical function as a specialized international instrument.[12]

16. Overall, Article 4(4) does not address the recognition of specialized instruments, but points towards the following: 1) an **assessment** needs to be made of specialized instruments vis-à-vis the objectives of the CBD and the Protocol (see Section 2.3 below); and 2) the **consequence** of a positive assessment is the disapplication of the Protocol for Parties to the specialized agreement in so far as the specific genetic resources covered by and the purpose of the specialized instrument are concerned.

2.2 Placing Article 4(4) in the broader context of Article 4

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4 Nagoya Protocol 15th, 16th and 19th preambular recitals.

5 Decision X/1, 6th preambular recital.

6 The Commission and the FAO Conference have "welcomed" Elements to facilitate the domestic implementation of access and benefit-sharing (ABS) measures for different subsectors of genetic resources for food and agriculture; CGRFA 15 Report (19-23 January 2015), para. 22; Report of the Conference of FAO, 39th session (6-13 June 2015), para 53.

7 Nagoya Protocol 16th and 18th preambular recitals. See also Art. 4(3).

8 Nagoya Protocol 17th preambular recital. Revision of the WHO International Health Regulations (Geneva, 23 May 2005, in force 15 June 2007).

9 World Health Organization (WHO), Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits, WHO Doc. WHA64.5, 24 May 2011.

10 Included in an Annex to the Framework. See generally M Wilke, 'A Healthy Look at the Nagoya Protocol—Implications for Global Health Governance' in Morgera et al (n 3) 126.

11 World Health Organization, 'Pandemic influenza preparedness framework for the sharing of influenza viruses and access to vaccines and other benefits' (2011), available at http://www.who.int/influenza/pip/en/. See also World Health Organization, 'Implementation of the Nagoya Protocol and pathogen sharing: Public health implications – Study by the Secretariat of the World Health Organization' (2016) available at http://www.who.int/un-collaboration/partners/Nagoya_Full_Study_English.pdf.

12 Decision WHA70(10), para 2; in full, "to reaffirm the importance of the PIP [Pandemic Influenza Preparedness] Framework in addressing present or imminent threats to human health from influenza viruses with pandemic potential, and emphasize its critical function as a specialized international instrument that facilitates expeditious access to influenza viruses of human pandemic potential, risk analysis and the expeditious, fair and equitable sharing of vaccines and other benefits."

17. Article 4(2) places an additional condition upon Nagoya Protocol Parties when negotiating specialized ABS agreements. It provides that they must ensure that these agreements, "are supportive of and do not run counter to the objectives of the Convention and of the Protocol." Thus, Parties need to ensure *not only* that specialized ABS agreements do not undermine these objectives, but *also* that they contribute to their realization.13

18. This is in line with the understanding of the emerging general principle of mutual supportiveness (Section 3.2),14 which, in effect, underpins the operation of the whole of Article 4. Mutual supportiveness builds upon the idea of international law as a 'system' so that international rules should be applied and more generally understood as supporting each other.15 It has two implications for the conduct of States.16 First, it guides States' *interpretation* so that States 'disqualify' solutions to tensions between competing regimes involving the subordination of one regime to the other (which is relevant for Nagoya Protocol Article 4(1) and 4(3)). Second, it requires that States exert good-faith efforts to negotiate and conclude instruments clarifying the relationship between potentially competing regimes.17 This latter dimension is relevant for Nagoya Protocol Article 4(4) and 4(2).

19. It should be noted that mutual supportiveness is a broader concept than the general rules of treaty interpretation, because it also addresses law-making (hence, it is not limited to interpretation) and because it is not limited to treaties, but can apply to international "*instruments*" other than treaties (see Section 3). In this connection, Article 4(4) refers to "instruments," thus covering (binding) treaties as well as other, formally non-legally binding international agreements that have been intergovernmentally approved in the context of a treaty framework (for instance, under the aegis of an international organization created by treaty). The term 'instrument' is generally understood to refer to a written legal document which is evidence of, for example, rights, duties, entitlements, or liabilities, and may have to be interpreted by the courts.18 It is not a term of art in international law, but it can be argued that such a term can cover both binding and non-binding instruments of an intergovernmental nature.19 The references to "Parties" to an instrument and to instruments being "applied" seem to support the argument about intergovernmental adoption. This is further supported by the fact that the Nagoya Protocol addresses elsewhere (and provides a process to consider) stakeholder instruments, namely Articles 19 to 20.

20. Article 4(3) is also linked to mutual supportiveness. Article 4(3) mandates Parties to implement the Protocol in a mutually supportive manner with other 'relevant' international instruments. It implicitly expects Parties to identify, monitor and take into account international instruments that may not necessarily focus on ABS, but directly or indirectly relate to it. Article 4(3) does not provide, however, specific guidance on how to resolve any conflict that may arise between the Protocol and other international agreements, but rather reflects Parties' "awareness of the potential for conflict and their aspiration that any such conflict be resolved in a manner that respects both instruments."20 Article 4(3) further encourages, "due regard … 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" in implementing the

13 Indeed, Nagoya Protocol, Art. 4(2) explicitly points the negative and positive side – "supportive of and do not run counter to the objectives of the Convention and [the] Protocol". See R Pavoni, 'The Nagoya Protocol and WTO Law,' in Morgera et al (n 3) 185, at 207.

14 See generally R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?,' (2010) 21 *European Journal of International Law* 649.

15 Ibid, 650.

16 Ibid, 650-651.

17 Ibid, particularly 661-669.

18 B Garner (ed) *Black's Law Dictionary* (West publishing, 2009) at 869; E Martin (ed) *Oxford Dictionary of Law* (Oxford University Press, 2003) at 256.

19 On the basis, for instance, of UN General Assembly Resolution 69/292 (2015) calling for the development of an "international legally binding instrument" on the conservation and sustainable use of marine biodiversity in the area beyond the limits of national jurisdiction. We are grateful to Prof. Robin Churchill for pointing this out.

20 As was noted in the context of the Biosafety Protocol: see R Mackenzie et al, *Explanatory Guide to the Cartagena Protocol on Biosafety* (IUCN, 2003) at 27.

Protocol. The expression "ongoing work and practices"[21] arguably includes not only negotiations of treaties but also other instruments of a soft law nature. It may also refer to negotiations of other (technical) documents or to activities on the ground undertaken in the context of international agreements or under the auspices, or with the technical support, of intergovernmental institutions. The reference to "useful" under Article 4(3) arguably conveys an understanding that such a process can provide opportunities for fruitful exchanges and mutual learning, which is a feature that characterizes regime interactions in other areas of international law (Section 5 below).

2.3 Reading Article 4(4) in light of the objectives of the Protocol

21. Throughout Article 4 and for the specific purposes of Article 4(4), the objectives of the Protocol and of the Convention are a key interpretative reference point. This is in line with general international law, according to which the object and purpose of a treaty is one of the main criteria for interpretation: it can serve to "maintain the balance of rights and obligations created by the treaty,"[22] providing a substantive limit to the Parties' interpretative and law-making discretion in the application of a treaty. It is therefore essential to fully understand the objectives of the Protocol (and their relation to the objectives of the Convention) for the purposes of Article 4(4).

22. The opening provision of the Nagoya Protocol clarifies that **fair and equitable sharing** of benefits arising from the utilization of genetic resources is the objective – the "essential goal"[23] – of the Protocol. It further indicates three means for its realization – access to genetic resources, technology transfer, and funding.[24] The preamble confirms that the Protocol aims to implement the third objective of the CBD,[25] by spelling out the steps for the operationalization of CBD Article 15 on access to genetic resources,[26] with a view to further supporting the effective implementation of the ABS provisions of the Convention.[27] The preamble also points to providing legal certainty with regard to access and promoting equity and fairness in negotiations between users and providers of genetic resources.[28]

23. **Fairness and equity** are thus part and parcel of the object and purpose of the Protocol, but they are not further clarified under the Protocol. Fairness can be understood as encapsulating both the need for legitimacy (the degree to which rules are made and applied in accordance with what the participants perceive as the right process) and for justice (the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits).[29] Equity as a general principle of international law serves to balance competing rights and interests[30] with a view to integrating ideas of justice into a relationship regulated by international law.[31] Its value-added is its capacity to provide, "new perspectives and potentially fresh solutions to tricky legal problems" to the benefit of all, not just to the advantage of the powerful.[32] While the Nagoya Protocol does not clarify how fairness and equity will operate in practice,[33] it may be helpful to consider fairness and equity as the search for genuine

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21 The expression, "ongoing work in other international forums relating to access and benefit-sharing" can also be found in the Nagoya Protocol 18th preambular paragraph, which does not shed further light on the matter.

22 VCLT, Art. 31(1). M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, 2009) 118.

23 D Jonas and T Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods,' (2010) 43 *Vanderbilt Journal of Transnational Law* 565, 567.

24 Morgera et al (n 2) at 48.

25 Nagoya Protocol 2nd preambular recital, which reiterates the relevant wording of CBD, Art. 1.

26 The latter is specifically recalled in Nagoya Protocol 4th preambular recital.

27 Nagoya Protocol 12th preambular recital.

28 Nagoya Protocol 9-10th preambular recitals.

29 T Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995) 7.

30 C Burke, *An Equitable Framework for Humanitarian Intervention* (Hart, 2014) at 197–198.

31 R Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2013), at 130.

32 Burke (n 30), at 250–251.

33 F Francioni, 'Equity,' in R Wolfrum, *Max Planck Encyclopedia of Public International Law* (Open University Press, online edition, 2012), para 25.

partnerships among actors whose relationship is characterized by power asymmetries.[34]

24. The concept of **legal certainty** is also central to the object and purpose of the Nagoya Protocol. It is referred to in the text of the Protocol with regard to access and benefit sharing,[35] and is a general notion in international law that is linked to the promotion of the rule of law[36] and good governance.[37]

25. A broad notion of **sustainable development** can also be identified as part of the object and purpose of the Nagoya Protocol.[38] The preamble of the Protocol contains several references to sustainable development: it indicates that the Protocol is expected to contribute through fair and equitable benefit-sharing to the achievement of poverty eradication and environmental protection and the realization of the Millennium Development Goals.[39] Reference is also made to technology transfer and cooperation, as a means of benefit-sharing, that can build research and innovation capacity for adding value to genetic resources in developing countries and thus contribute to sustainable development.[40] In addition, the Protocol preamble recognizes the importance of genetic resources for food security, public health, and climate change mitigation and adaptation.

26. Two other notable features of Article 1 of the Protocol should be highlighted for the purposes of interpreting Article 4(4). Firstly, the explicit link established between benefit-sharing and the other two objectives of the CBD – **conservation and sustainable use**. The Nagoya Protocol emphasizes that the third objective of the CBD, which is the objective of the Protocol, is not to be pursued in isolation from the broader framework established by the CBD.[41] This idea is more concretely pursued in several operational provisions.[42] On that basis, fair and equitable benefit-sharing under the Protocol can be expected to contribute to, *inter alia*, the selection and management of protected areas and species, the restoration of degraded ecosystems and the protection and promotion of traditional knowledge.[43] Finally, it should be borne in mind that according to the preamble of the Convention, biodiversity conservation is considered a common concern of humankind.[44] This concept is understood in international law scholarship to indicate that Parties are accountable to the international community (as, for instance, embodied in the CBD COP and Nagoya Protocol COP/MOP) for the way they exercise their respective national sovereignty in complying with their obligations and cooperating with one other.[45] Thus, the concept conveys the international duty to cooperate with a view to recognizing the supremacy of matters

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34 E Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit-sharing,' (2016) 27 (2) *European Journal of International Law* 353. For this and other research findings from the BENELEX project ("Benefit-sharing for an equitable transition to the green economy - the role of law" 2013 –2018), we gratefully acknowledge funding from the European Research Council: https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/benelex/.

35 Preambular paragraph 9 and Art. 6.

36 S Chesterman, 'Rule of Law,' in Wolfrum (n 33), specifically section C, 'Promotion of the Rule of Law Through International Forums.'

37 E Brown Weiss and A Sornarajah, 'Good Governance,' in Wolfrum (n 33) 516 - 528.

38 Morgera et al (n 2) at 372-374.

39 Nagoya Protocol 7th preambular recital. The Millennium Development Goals were contained in UN General Assembly, "United Nations Millennium Declaration" (8 September 2000) UN Doc A/RES/55/2, and were intergovernmentally approved at the 2005 UN Summit, "World Summit Outcome," paragraph 17. See: "Millennium Development Goals and Beyond 2015," UN, accessed 30 November 2017, <www.un.org/millenniumgoals/>. They have been superseded by the Sustainable Development Goals, adopted as part of the 2030 Sustainable Development Agenda (UN General Assembly Resolution A/RES/70/1, 25 September 2015).

40 Nagoya Protocol 5th preambular recital.

41 As already highlighted in the Bonn Guidelines, paragraph 48.

42 Morgera et al (n 2) at 133, 179, 193, 207, 224, 303.

43 CBD, Arts. 8-10. E Morgera and E Tsioumani, 'The Evolution of Benefit-Sharing: Linking Biodiversity and Community Livelihoods' (2010) 20 *Review of European Community and International Environmental Law* 150-173, 155-158.

44 CBD Preamble.

45 P Birnie, A Boyle and C Redgwell. *International Law and the Environment* (3rd edn, Oxford University Press, 2009) 129-130.

of common concern over individual State interests, through transparent and inclusive decision-making.[46]

27. Secondly, although **traditional knowledge** is not mentioned in Article 1 of the Protocol, it is a key component of the regime created by the Protocol. As the object and purpose of a treaty are also to be deduced from its preamble and other programmatic articles,[47] attention should be drawn to several substantive provisions of the Protocol that are wholly or significantly devoted to traditional knowledge associated with genetic resources,[48] as well as to several references to traditional knowledge in the preamble,[49] including its importance for the conservation and sustainable use of biodiversity. In addition, the reference in Article 1 to "taking into account all rights over those resources and technologies," could be interpreted as referring also to the rights over traditional knowledge associated with genetic resources.[50] It can therefore be asserted that benefit-sharing related to the use of traditional knowledge associated with genetic resources[51] is part and parcel of the objective of the Protocol. This interpretation appears confirmed by the express provision of the Protocol on scope, which extends to traditional knowledge.[52] Consequently, the interpretation and operationalization of Article 4(4) should also take into account the role of the Protocol in relation to traditional knowledge associated with genetic resources for the conservation and sustainable use of biodiversity.

28. The various layers of the object and purpose of the Nagoya Protocol outlined above can provide a basis upon which to develop criteria for the identification of international specialized ABS agreements and instruments under Article 4(4) (Section 4 below).

3. Review of international practice on "lex specialis" in international law

29. This section places Nagoya Protocol Article 4(4) within general international law debates on the concept of "*lex specialis*" in the context of the work of the International Law Commission (ILC) on the fragmentation of international law, and on mutual supportiveness. It illustrates how general international law is inconclusive in addressing conflicts between general and specialized norms. Instead, it privileges a pragmatic solution to harmonizing what may appear as a conflict, through the adoption of new rules or the coordination of practice, generally via decisions of treaty bodies and interactions among different international regimes. It also shows that while legal interpretation may not provide clear-cut solutions to potential conflicts, it helps structure the debate in order to arrive at a *reasoned* conclusion that fosters *increased cooperation*.[53] This would be the role of the criteria discussed in Section 4 below.

3.1 Analysis of the work of the International Law Commission on fragmentation of international law

30. The work of the International Law Commission (ILC) on fragmentation of international law offers potentially relevant observations for the purposes of this study. This work includes the ILC Study

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46 L Horn, 'Globalisation, Sustainable Development and the Common Concern of Humankind' (2007) 7 *Macquarie LJ* 53; M Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in M Fitzmaurice, D Ong and P Merkouris (eds.), *Research Handbook on International Environmental Law* (Edward Elgar, 2010) 493; J Brunnee, 'Common Areas, Common Heritage, and Common Concern' in D Bodansky, J Brunnee and E Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 550; J Murillo, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 *Macquarie Journal of International and Comparative Environmental Law* 133; D French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in M Bowman et al. (eds.), *Research Handbook on Biodiversity Law* (Edward Elgar, 2016), pp. 334.

47 E.g. R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), 196.

48 Morgera et al (n 2) at 127, 170-177, 216-228, and 264-270.

49 Preambular recitals 20-24th.

50 We are grateful to Prof. Riccardo Pavoni for pointing this out.

51 Unless otherwise specified, the rest of the commentary will always refer to 'traditional knowledge' as "associated with genetic resources."

52 Morgera et al (n 2) at 75-76.

53 E Franckx, 'The Protection of Biodiversity and Fisheries Management: Issues Raised by the Relationship between CITES and LOSC' in D Freestone, R Barnes and D Ong (eds.), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 210, at 231-232 (albeit focused on *lex posterior* rather than *lex specialis*).

Group's analytical study (ILC study), finalized by its Chairman Martti Koskenniemi,[54] and the 42 conclusions,[55] which were taken note of by the UN General Assembly in Resolution 61/34 of 4 December 2006.

31. The ILC study was motivated by the concern that the expanding scope of international law may challenge the coherence of the international legal system due to normative conflicts. According to the ILC, the expansion of international law,

> has taken place in an uncoordinated fashion, within specific regional or functional groups of States. Focus has been on solving specific problems rather than attaining general, law-like regulation. … It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.[56]

32. The fragmentation of international law has hence arisen due to the emergence of specialized sets of rules of international law pertaining to particular subject-areas, such as human rights, the environment, or trade. Normative conflicts may emerge as a result of this plurality of rules. A conflict can arise between a specialized set of rules and general international law; or between two specialized sets of rules.

33. The second type of conflict is relevant for the purposes of this study. On the one hand, the Nagoya Protocol is a specialized agreement, in the sense that it regulates one of the areas covered by the Convention: in other words, the Nagoya Protocol does not contain general international law rules and principles,[57] but acts as *lex specialis* by setting a more detailed normative standard than the general law on ABS contained in the Convention. On the other hand, the Nagoya Protocol builds a regulatory framework generic enough to provide for the development or recognition of *additional specialized* ABS agreements, if certain conditions are met (Sections 2.1 and 2.2 above). From the latter perspective, the Nagoya Protocol provides general treaty law, and *additional specialized* ABS agreements will act as *lex specialis* in order to deal with a specific issue within the generic category addressed by the Nagoya Protocol.

3.2 Lex specialis

34. The ILC points to the *lex specialis* doctrine to settle the relationship between two sets of rules: "a special rule prevails over a general rule (*lex specialis derogat legi generali*)."[58] The *lex specialis* doctrine is widely accepted because a special rule is considered to regulate the subject-matter more effectively. However, it is difficult in practice to distinguish between "general" and "special" rules (most rules are "general" or "special" if viewed in relation to other rules, which are more "general" or "special"), and to identify when two rules relate to the same subject-matter. These two questions cannot be answered in the abstract, but only in context and through interpretation based on the understanding of international law as a system.[59] On the question of subject-matter,[60] the ILC study notes that "terms such as 'human rights

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54 International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682, 2006 (thereafter ILC study).

55 International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, available at: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_9_2006.pdf&lang=EF.

56 ILC study, para. 5.

57 Although it has been argued in the literature that fair and equitable benefit-sharing from the use of genetic resources has evolved into a rule of customary international law (R Pavoni, 'Biodiversity and Biotechnology: Consolidation and Strains in the Emerging International Legal Regimes', in F Francioni and T Scovazzi (eds.), *Biotechnology and International Law* (Hart, 2006), 29) or a general principle of international law (E Morgera, 'Fair and Equitable Benefit-sharing: history, normative content and status in international law' BENELEX Working Paper No 12 (SSRN, 2017)).

58 M N Shaw, *International Law* (Cambridge University Press, 2008) 124.

59 ILC study, para. 119.

60 VCLT, Art. 30.

law,' 'trade law' or 'environmental law' and so on are arbitrary labels related to forms of professional specialisation."[61] Such qualifications do not link to the *nature* of the instrument but to the *interest* from the perspective of which the instrument is assessed by the observer. Thus, identifying the same subject-matter does not mean "dealing with the same subject," or States would be allowed to deviate from their obligations simply by qualifying a novel treaty in terms of a novel subject. Accordingly, the positioning of the Protocol in its normative environment,[62] in light of an understanding of its object and purpose (Section 2.3 above), is critical to the process of ascertaining the criteria for recognizing a specialized ABS instrument.

35. Legal interpretation, and thus legal reasoning, is therefore required to apply the *lex specialis* rule, from an initial assessment to the final conclusion. Legal reasoning builds systemic relationships between rules, by envisaging them as parts of some human effort or purpose. This mandates those applying the law to ensure their decisions cohere with the preferences and expectations of the community whose law they administer.[63] Even when "conflict clauses" have been included in treaties, such as those provided for in Article 4 of the Nagoya Protocol, thereby indicating a willingness to seek a mutually supportive interpretation (Section 2.2 above), States transfer the decision on what should be done in case of conflicts to the law-applier.[64] These could be either the Meeting of the Parties or the national government implementing the agreement.

36. Overall, the ILC study supports the view that in a fragmented world, conflicts between specialized regimes may be overcome by law, "even as the law may not go much further than require a willingness to listen to others, take their points of view into account and to find a reasoned resolution at the end."[65] While legal interpretation will not necessarily provide clear-cut answers, it can help distil criteria that provide a legal benchmark allowing an appreciation of whether certain conduct or a specific instrument can be considered reasonable in specific circumstances.[66]

37. In addition to legal interpretation, "it is the business of diplomacy to avoid or mitigate conflict"[67] by negotiating and finding a pragmatic solution to maintain or re-establish harmony, rather than applying conflict-rules to establish relationships of priority among different sets of rules (this idea is already reflected in Nagoya Protocol Article 4(1): see Section 2.2 above). Because there is no higher authority in international law, a pragmatic solution would entail either the adoption of a new rule to settle the conflict, or coordination of practice to avoid it. As the ILC puts it, international law offers the structure for coordination and cooperation, either between States or between regimes and institutions, but does not contain rules on which a global society's problems would be resolved, so "[d]eveloping these is a political task."[68] Mechanisms for regime interaction to enhance coordination and cooperation are further explored below (Section 5).

3.3 Techniques for conflict avoidance and resolution in international law – mutual supportiveness

38. Decisions on how to avoid and resolve potential conflicts in international law are to be made in accordance with the customary rules of treaty interpretation as enshrined in the Vienna Convention on the Law of Treaties. Among them, the ILC promoted the principle of "systemic integration" – the need to take into account, "any relevant rules of international law applicable in the relationships between the parties" (VCLT Article 31(3)(c)). In this connection, the ILC study underscored the need to find a reasonable way to apply different international instruments with minimal disturbance to the operation of

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61 ILC study, para. 254.
62 ILC study, para. 121.
63 ILC study, para. 35, quoting R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).
64 ILC study, para. 280.
65 ILC Study, para. 488.
66 R Pound, *Social Control through Law* (Yale University Press, 1942) at 44-49; J Basdevant (ed), *Dictionnaire de la Terminologie du Droit International* (Sirey, 1960) 581; R Dworkin 'Is Law a System of Rules?' in R Dworkin, *The Philosophy of Law* (Oxford University Press, 1977) 38, 43.
67 ILC study, para. 37.
68 ILC study, para. 488.

the legal system,[69] thereby preserving the unity of the international legal order.[70] Well-worn legal pathways such as legitimate expectations, good faith and the principle of effectiveness would also be taken into account (see section 4 below).[71]

39. That said, the systemic integration approach reflected in the VCLT, strictly speaking, applies only to treaties and other binding sources of international law, whereas, as discussed above (section 2.2), Nagoya Protocol Article 4(4) refers to international "instruments", which could also include international soft-law instruments. The general principle of mutual supportiveness thus comes into play to promote coherence not only between treaties, but also between the outcomes of their governing bodies (e.g. decisions adopted by Meeting of Parties).[72] These decisions may represent "different ways of dealing with a problem" but can still "lead to mutually supportive outcomes,"[73] thereby paving the way for "fruitful interactions" between the two regimes.[74] Mutual supportiveness (Section 2.2) could therefore come into play in the interpretation of different decisions of different governing bodies, as well as in the negotiations of decisions of governing bodies, to clarify the relationship between competing regimes.[75] In addition, mutual supportiveness has been considered an essential interpretative corollary of sustainable development,[76] which is also part of the object and purpose of the Nagoya Protocol (Section 2.3 above). Finally, mutual supportiveness is inter-linked to the above-mentioned legal principles of good faith, effectiveness, and legitimate expectations (see Section 4 below). Accordingly, criteria for the identification of specialized instruments can be derived from general international law considerations around mutual supportiveness, as well as from the objective of the CBD and Nagoya Protocol (see Section 2.3 above).

4. Potential criteria to identify a specialized international access and benefit-sharing instrument

40. For the purposes of this study and in the context of Article 4(4) of the Protocol, two sets of criteria may be identified: those related to the *specialization* of the ABS instrument under consideration; and those related to its *supportiveness* of the Convention and Protocol objectives, in order to assess the instrument's objective and provisions against the CBD and Protocol objectives (Section 2.3 above) and in light of mutual supportiveness (Section 3.2 above).

Specialization:

1. **An instrument under consideration would be intergovernmentally agreed upon;**
2. **An "instrument" may be either binding or non-binding;**
3. **An instrument would apply to a specific set of genetic resources and/or traditional knowledge associated with genetic resources, which would otherwise fall under the scope of the Nagoya Protocol;**
4. **An instrument would apply to specific uses of genetic resources and/or traditional knowledge associated with genetic resources, which would require a differentiated and hence specialised approach; and**

Supportiveness:

5. **Consistency with biodiversity conservation and sustainable use objectives;**
6. **Fairness and equity in the sharing of benefits;**

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69 ILC study, para. 410.
70 R Wolfrum, 'General International Law (Principles, Rules and Standards)', in Wolfrum (n 33), para. 63.
71 ILC study, para. 414.
72 ILC Study para. 493.
73 H van Asselt, F Sindico and M Mehling, "Global Climate Change and the Fragmentation of International Law", (2008) 30 *Law and Policy* 423, at 430.
74 M A Young, 'Climate Change and Regime Interaction', (2011) 5 *Carbon and Climate Law Review* 147, at 147.
75 Pavoni (n 14) at 661 – 669.
76 Ibid, at 661 – 662.

7. **Legal certainty with respect to access to genetic resources or traditional knowledge and to benefit-sharing;**
8. **Contribution to sustainable development, as reflected in internationally agreed goals;**[77] **and**
9. **Other general principles of law including good faith, effectiveness and legitimate expectations.**

41. While the first set of criteria, focused as they are on *specialization*, are self-evident in terms of how they should be considered and/or applied, the second set of criteria on *supportiveness* require further explanation. Criterion five on consistency with biodiversity conservation and sustainable use objectives (discussed above at Section 2.3) relates to the extent to which the instrument in question contributes to *in situ* and *ex situ* conservation, and sustainable use of biodiversity components, in accordance with CBD Articles 8-10. Criteria 6 to 9 may appear very general and abstract, but they offer flexible legal concepts that can help structure a pragmatic debate in order to arrive at a *reasoned* conclusion that fosters *increased cooperation* (Sections 3 and 3.2 above).

42. **Fairness and equity** (Section 2.3 above) are seen as a reflection of the principle of good faith (see below).[78] They are filled with content by establishing a linkage with different international legal sub-systems through mutual supportiveness.[79] It is instructive to consider, for instance, the evolution of the similarly worded notion of fair and equitable treatment in international investment law,[80] for which the meaning of 'fair and equitable' was not clarified in the relevant treaties but through international adjudication which relied on international human rights standards such as due process, non-discrimination, and proportionality.[81] International human rights bodies have also increasingly engaged with the notion of fair and equitable benefit-sharing (in relation with indigenous peoples' rights to natural resources) as an iterative process of consensus- and partnership-building.[82] This could provide a helpful basis to reflect on the object and purpose of the Protocol in relation to traditional knowledge (Section 2.3 above) and could be related to the idea of a global partnership enshrined in the Rio Declaration on Environment and Development (a heightened level of cooperation among States and non-State-actors inspired by a vision of public trusteeship.[83])

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77 See discussion on the reference to the MDGs in the Nagoya Protocol preamble, and the relevance of the SDGs in Section 2.3 and (n 39) above.

78 See generally R Kolb, *Good faith in international law* (Hart Publishing, 2017).

79 F Francioni, 'Equity' (n 33). Mutual supportiveness would thus provide some objective basis for discussing notions of fairness or equity, as opposed to subjective notions such as those alluded to as "decisions to be taken ex aequo et bono" in the Statute of the International Court of Justice 1945, 1 UNTS 993, Art. 38(2).

80 The suggestion to draw on the evolution of fair and equitable treatment to better understand fair and equitable benefit sharing was put forward by F Francioni, 'International Law for Biotechnology: Basic Principles', in F Francioni and T Scovazzi (eds.), *Biotechnology and International Law* (2006) 3, at 24.

81 J E Dupuy and P-M Vinuales, 'Human Rights and Investment Disciplines: Integration in Progress', in M Bungenberg *et al*. (eds.), *International Investment Law: A Handbook* (Nomos Verlagsgesellschaft, 2015) 1739.

82 Special Rapporteur Anaya, Report on the situation of human rights and fundamental freedoms of indigenous peoples, UN Doc. A/HRC/12/34, para. 51-53 (2009); and Special Rapporteur Anaya, Study on Extractive Industries and Indigenous Peoples, UN Doc. A/HRC/24/41, para. 88 (2013); UN Expert Mechanism, Advice no. 4: Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries, UN Doc. A/HRC/21/55 (2012), Annex, para. 28. E Morgera, 'Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities related to Natural Resources' BENELEX Working Paper 10 (SSRN, 2016).

83 Rio Declaration on Environment and Development 1992, 31 ILM 874 (1992), preamble and principles 7 and 2; J E Dupuy, 'The Philosophy of the Rio Declaration', in J Vinuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 65, at 69, 71-72. See generally R Wolfrum and C Kojima (eds.), *Solidarity: A Structural Principle of International Law* (Springer, 2010); P H Sand, 'Cooperation in a Spirit of Global Partnership', in Vinuales, Ibid, 617, who refers as a concrete example to the ITPGRFA. This paragraph draws on Morgera (n 34).

43. In the context of the Nagoya Protocol, **legal certainty** (Section 2.3 above) has been understood as referring to providing an unambiguous basis on which to determine whether actions (particularly related to access) are lawful and thereby protecting against arbitrary use of State power.[84]

44. The **principle of good faith** as a general principle of international law has implications in terms of a duty to cooperate, a duty to negotiate, a duty to perform international obligations and as a cardinal principle of treaty interpretation.[85] Good faith has been labelled, "a guardian of the common interests of humanity",[86] which can be related to the objective of biodiversity conservation as a common concern of humankind (Section 2.3 above), and, "as a means of cross-fertilization and coherence of international legal system,"[87] which can be related to the role of mutual supportiveness (Section 2.2 above). According to the International Court of Justice (ICJ), "(o)ne of the basic principles governing the creation and performance of legal obligations…is good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential."[88] With regard to the duty to cooperate, good faith entails the need to show third countries individually and the international community as a whole respect for the international legal order,[89] by protecting/taking into account the reasonable interests and legitimate expectations of other States[90] in a predictable manner[91] so as to show trustworthiness and predictability.[92] Demonstrating good faith thus necessitates systematic respect for multilateral norms as well as reliance on multilateral institutions that are essential to the effective, objective and even-handed promotion and protection of the international community's interests.[93] It also necessitates the creation of opportunities for, and the pursuance of, sincere negotiations with other countries with a "genuine intention to achieve a positive result."[94]

45. With regard to treaty interpretation, good faith calls for avoiding excessively strict literal interpretations when they would allow a Party to obtain an unfair advantage, disregard **legitimate expectations**, or exercise rights in a way that would be damaging to another Party.[95] In other words, good faith aims to protect the object and purpose of an instrument against frustration by unilateral acts of some State(s). In this sense, "[l]egitimate expectations and non-unilateralism to defeat the common enterprise are here the essence of the applicable principle of good faith."[96]

46. Good faith may also be linked to the principle of **effectiveness**, which calls upon states to engage in interpretations that contribute to give *coherent* meaning and ensure *full* effect of the treaty.[97] The ICJ in *Gabčíkovo-Nagymaros* found that the good faith requirement in VCLT Article 26[98] meant that: "…the

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84 T Greiber et al., *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-Sharing*, (2012) IUCN Environmental Policy and Law Paper No. 83, 102.

85 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc A/RES/25/2625 and VCLT, Arts. 26 and 31. For an overview, see generally M Kotzur, 'Good Faith' in Wolfrum (n 33).

86 R Kolb, 'Good faith in international public law', (1998) 31(2) *Revue Belge De Droit International*, 661-732.

87 Ibid.

88 *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Report 253, 46.

89 Kotzur (n 85).

90 M Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 *American Journal of International Law* 130. See also Kotzur (n 85), para. 4 and 26.

91 S Litvinoff, 'Good Faith,' (1997) 71 *Tulane Law Review* 1645, 1664.

92 Ibid. Predictability can also linked back to legal certainty; Section 2.3 above.

93 B Simma, 'From Bilateralism to Community Interests in International Law' (1994) IV (250) *Recueil des Cours* 217, 319. The whole paragraph draws on E Morgera, 'Justice, Equity and Benefit-Sharing Under the Nagoya Protocol to the Convention on Biological Diversity', (2015) *Italian Yearbook of International Law* 113-141.

94 ICJ, *Gulf of Maine case*, [1984] ICJ Rep 246, para 87.

95 Villiger (n 22) at 116-117; A Orakhelashvili, 'Treaty Interpretation: Effectiveness and Presumptions', in A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) at 415.

96 Kolb (n 78) at 43.

97 M Fitzmaurice, 'The Law of Treaties,' in *International Law*, M N Shaw (ed) (6th edn, Oxford University Press, 2008), 810, 832-838.

98 VCLT, Art. 26 setting out the *pacta sunt servanda* principle.

purpose of the Treaty, and the intentions of the Parties in concluding it, …should prevail over its literal application. The principle of good faith obliges the Parties to apply the relevant provision in a reasonable way and in such a manner that its purpose can be realised."[99] This also underscores the link between effectiveness and legal certainty. In other words, effectiveness serves to ensure that none of the provisions in the treaty are deprived of meaning and that the treaty is effective in achieving its objectives (Section 2.3) with a view to having an impact on the ground. So, effectiveness does not mean supporting any effective approach in terms of common sense, but choosing among the interpretative options available to secure actual results from a treaty on the basis of its agreed text and its object and purpose.[100] It may also lead to "rejecting results that maintain an uncertain position or the perpetuation of disagreements,"[101] and rather privileging an approach aimed at, "better protection or implementation of universal values, and in addition (ensure) international institutions are involved to monitor or steer the process."[102]

5. International regime interaction

47. With a view to providing elements on a possible ***process*** to recognize specialized ABS instruments, this section explores the relevance for Nagoya Protocol Article 4(4) of international practices and growing academic debates on how international regimes interact.[103] It provides an overview of the practical and innovative techniques[104] international regimes have used to deal with areas of potential conflict or overlap, and draws attention to the growing awareness that the so-called fragmentation of international law (Section 3 above) should not be viewed as inherently negative.[105]

48. Research on regime interactions[106] has demonstrated that far from always being conflictual in nature, many such interactions are actually synergistic.[107] In fact, although the open-endedness of mutual supportiveness (transferring decisions that cannot be made at the time of negotiation to successive interpretation) may be seen as a weakness (Section 3.1 above), leaving undetermined how one regime coheres with another may allow for gradual learning (see Section 5.1 below). This is pertinent to the present analysis as it demonstrates that the relatively broad drafting of Article 4(4) may actually allow for

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99 ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project*, 79.

100 A Orakhelasvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) at 398.

101 Ibid, at 395.

102 S Zappalà, 'Can Legality Trump Effectiveness in Today's International Law?" in A Cassesse (ed), *Realizing Utopia* (Oxford University Press, 2012) 105.

103 See, for example, J Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence' (2001) 33 *Geo Wash Int'lL Rev* 979; V Lowe, 'The Role of Law in International Politics', in M Byers (ed), *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?* (Oxford University Press, 2000); S Ranganathan, Strategically Created Treaty Conflicts and the Politics of International Law (Cambridge University Press, 2014) 57-144.

104 See discussion in A Peters, 'The refinement of international law: From fragmentation to regime interaction and politicization' (2017) 15 (3) *International Journal of Constitutional Law* 671, at 672. In a similar vein, international lawyers have also shifted away from a narrow focus on the decisions of international courts and tribunals when analyzing regime interactions and instead have sought to broaden their analysis to review how o verlapping regimes actually interact in practice; see J L Dunoff, 'A New Approach to Regime Interaction' in M A Young (ed), *Regime Interaction in International Law* (Cambridge University Press, 2012) 136, 137

105 See discussion in Peters, Ibid, at 681. See also, for example, Sir C Greenwood, 'Unity and Diversity in International Law' in M Andenas, and E Bjorge, (eds.) *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015) 37 – 55, challenging the 'assumption' that fragmentation and the 'increased diversity of international law' must be seen as a problem. For a useful summary of the fragmentation debate, see M A Young, 'Fragmentation or interaction: the WTO, fisheries subsidies, and international law' (2009) 8 (4) *World Trade Review* 477 – 515.

106 Dunoff (n 104) at 138.

107 See, for example H van Asselt, 'Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes,' (2012) 44 (4) *New York University Journal of International Law and Politics*, 1205, at 1208, examining the, "question of how different regimes and norms could work to support each other, or, in other words, how to achieve *synergies*."

increased knowledge and hence the development over time of enhanced capacity to achieve shared governance goals through regime interaction.

5.1 Incompletely theorized agreements

49. If a treaty does not specify the terms of its relationship with other regimes, this may be the result of the fact that it was not possible to secure consensus on the matter during treaty negotiations. Research on the concept of an *incompletely theorized agreement* has, however, indicated that these occurrences should not be necessarily seen in a negative way. Incompletely theorized agreements,

> play a pervasive role in law and society. It is rare for a person, and especially a group, to theorize any subject completely -- that is, to accept both a highly abstract theory and a series of steps that relate the theory to a concrete conclusion. In fact, people often reach *incompletely theorized agreements on a general principle*. Such agreements are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases.[108]

50. The incompletely theorized agreement therefore provides a useful conceptual frame to understand more fully that the absence of *complete* theorization on a particular issue is not necessarily the result of poor drafting. This is because fuller theorization may prove to be overly contentious and/or may be, in practical terms, impossible. By extension, an agreement which is completely theorized may be *unable* to accommodate changes in values or facts over time.[109] Instead, an incompletely theorized agreement can provide legal space for parties to return to a particular issue at a future date and may therefore act as a 'staging post' to further discussions on contentious issues. A staged approach may also help to remove the 'heat' from contentious discussions. Finally, a phased approach to securing agreement may provide the necessary adaptive space to respond to future developments - technological or societal - and allow for addressing gaps of knowledge at the time of adoption.[110]

51. Even more importantly, international negotiations are generally conducted in an environment of incomplete or hidden information,[111] so recourse to a phased agreement can provide a rational response[112] to not only garner more information but also to harness the positive cognitive and psychological effects associated with learning and gradual compromise. An example of this approach may be found in Article 20 of the WTO Agreement on Agriculture which contains a 'built in' agenda mandating Members to return to negotiations one year after the implementation of their obligations under the Agreement on the basis of, *inter alia*, "the experience to that date from implementing … commitments."[113] This provision underlines the importance of learning and reflecting upon past experience in the development of new provisions. In the case of the Nagoya Protocol, it can also point to the opportunities to engage in learning on ABS issues over time.[114] Progressive learning about specialized ABS areas of practice could also be expected to occur through regime interaction. After explaining what is meant by 'regime complexes' and 'institutional complexes' (section 5.2), concrete examples of regime interaction are discussed with a view to identifying options for establishing systematic and ongoing processes to ensure coherence and synergy, at the decision-making, institutional,

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108 C R Sunstein, Incompletely Theorized Agreements', (2005) 108 (7) *Harvard Law Review* 1733, at 1739.

109 C R Sunstein, 'Incompletely Theorised Agreements in Constitutional Law', John M. Olin Law and Economics Working Paper No. 322 (2D Series) Public Law and Legal Theory Working Paper No 147, (2007), at 14, to the effect that such agreements allow for "moral evolution and even progress over time."

110 For more on the application of Sunstein's work on incompletely theorised agreements to international law, see generally S Switzer, 'Liminal Spaces: Special and Differential Treatment as an Incompletely theorised agreement' (2018) *Manchester Journal of International Economic Law* (forthcoming 2018).

111 On the role of incomplete/hidden information in the negotiations of international agreements, see generally S Switzer, 'A Contract Theory Approach to Special and Differential Treatment' (2017) 16 (3) *Journal of International Trade Law and Policy* 126.

112 O Ben-Shahar, '"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts' (2004) Michigan Law and Economics Research Paper 04-002, available at URL http://papers.ssrn.com/sol3/papers.cfm?abstract_id=496183 (last accessed 24 July 2017) 14.

113 This insight was derived from discussions with Prof Joe McMahon.

114 Nagoya Protocol, Arts. 19-20; Morgera et al (n 2) at 293-300.

and implementation level, between different instruments (section 5.3), as well as with a view to distilling key considerations about constructive regime interaction arising from academic research that can provide useful ideas for a *process* under Article 4(4).

5.2 Regime and Institutional complexes

52. International relations scholars have coined the term 'regime complex' to allude to the presence of "partially overlapping and non-hierarchical institutions governing a particular issue-area;"[115] and the 'institutional complex' which may be defined as a, "set of two or more international institutions that are interdependent and as such interact to co-govern a particular issue area in international relations."[116] For our purposes, it is notable that the governance of ABS has been recognized in academic literature as an institutional complex consisting of the Nagoya Protocol, the CBD and approximately a dozen international institutions and processes.[117] The CBD and the Nagoya Protocol are undoubtedly at the center of this institutional complex[118] but various ABS sub-complexes each have different dynamics and logics of interaction.[119] One of these sub-complexes is concerned with "sectoral differentiation,"[120] which may be related to the notion of specialized international instruments under Article 4(4).

53. Institutional complexes are not (in general) inert and unchanging structures. Indeed, such complexes are clearly shaped by what has been referred to as 'interplay *management*.' The emphasis upon the term management is intentional and refers *not* to passive linkage claims[121] whereby one regime may be said to be relevant (and hence link) to another.[122] It rather refers to, "the conscious efforts by relevant actors or groups to address and improve institutional interaction and its effects, usually in pursuit of collective objectives as enshrined in the institutions in question."[123]

54. Overall, both research on incompletely theorized agreements and on institutional complexes seem to indicate that the recognition of specialized international instruments under Article 4(4) is but one step required in an ongoing management process to ensure the continuing *supportiveness* of relevant instruments with the Convention and Protocol objectives, and further opportunities to garner additional information and learning on complex areas.

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115 K Raustiala and D G Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 (2) *International Organization* 277, 279.

116 S Oberthür and J Pozarowska, 'Managing Institutional Complexity and Fragmentation: The Nagoya Protocol and the Global Governance of Genetic Resources' (2013) 13 (3) *Global Environmental Politics* 100, at 102.

117 In full, "Leaving aside regional and bilateral arrangements, the institutional complex of ABS governance consists of about a dozen international institutions and pro- cesses acknowledged in the Nagoya Protocol negotiations, including through decisions of the Conference of the Parties to the CBD. The following regimes and processes form, with the CBD, international ABS governance: the FAO and in particular its Commission on Genetic Resources for Food and Agriculture (FAO Commission) and the ITPGR; the WTO, including in particular the Agreement on Trade-related Aspects of Intellectual Property Rights (WTO-TRIPS); WIPO and its conventions and treaties; the International Union for the Protection of New Varieties of Plants (UPOV) administering the UPOV Convention; UNCLOS and related UN processes addressing marine GRs; the AT system; the WHO; the International Plant Protection Convention (IPPC), the World Organization for Animal Health (OIE) and a number of human-rights instruments…" in Oberthür and Pozarowska, Ibid at 106.

118 Oberthür and Pozarowska, Ibid, at 106.

119 Ibid, at 106 - 108.

120 Ibid, at 108.

121 O S Stokke, 'The Interplay of International Regimes: Putting Effectiveness Theory to Work' (2001) FNI Report 14/2001, available at, https://www.fni.no/getfile.php/132044/Filer/Publikasjoner/FNI-R1401.pdf 11 noting that, "(m)ore generally, interplay management refers to deliberate efforts by participants in tributary or recipient regimes to prevent, encourage, or shape the way one regime affects problem solving under another. This distinction underlies the differentiation between clustered and overlapping regimes and that between political and functional linkages."

122 On linkage, see D W Leebron, 'Linkages' (2002) 96 (1) *American Journal of International Law* 5.

123 Oberthür and Pozarowska (n 116) at 103. Indeed, "[a]s the international legal system becomes more and more complex, the need for interplay management increases;" see M Axelrod, 'Savings Clauses and the "Chilling Effect" - Regime Interplay as Constraints on International Governance' in S Oberthür and O S Stokke (eds.), *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (MIT Press, 2011) 87, 89.

5.3 Relevant international practice

55. There are several practical examples of institutional interaction that can provide inspiration for the implementation of Nagoya Protocol Article 4(4), including in other areas of international law.

56. First, **the negotiations of a new instrument can be managed** from the start in a mutually supportive manner by, for example, setting a negotiating mandate that seeks coherence with an existing instrument, keeping the governing body of an existing instrument informed of progress in negotiations, and/or drafting the provisions of a new instrument that will specifically cater to mutually supportiveness. Such is the case of the ITPGRFA,[124] which was specifically negotiated to be in harmony with the CBD, as is reflected in ITPGRFA Article 1. Cooperation between the two instruments was already envisioned at the negotiation and drafting stage of the Treaty: the CBD COP has repeatedly taken note of the progress in the negotiations for the revision of the International Undertaking that led to adoption of the ITPGRFA, taking varied action. It has, for example, requested the FAO to keep it informed of deliberations;[125] has welcomed the close cooperation established between the two Secretariats, urging the momentum in the intergovernmental negotiations to be maintained with a view to their timely conclusion;[126] and has affirmed its willingness to consider a decision by the FAO that the International Undertaking become a legally binding instrument with strong links to both the FAO and the CBD, calling upon Parties to coordinate their positions in both fora.[127] This strong collaboration is explicitly reflected in the ITPGRFA provisions, regarding both their governing bodies[128] and the Secretariats.[129]

57. The above example thus illustrates the law-making dimension of mutual supportiveness (Sections 2.2 and 3.2 above). With the adoption of the Nagoya Protocol, the COP decided that the ITPGRFA is part of the international ABS regime as a "complementary instrument."[130] Cooperation was further facilitated via administrative arrangements between the Secretariats. A Memorandum of Cooperation was first signed between the CBD and the FAO in 2005, and then a Memorandum with the ITPGRFA was signed in 2010, aiming to "enhance cooperation … in areas of mutual interest and within the respective mandates."[131] Finally, the agenda of the meetings of the governing bodies of the respective instruments includes a standing item on cooperation, providing an opportunity for sharing of information on activities of relevance. Operationally, cooperation has materialized as: joint capacity-building initiatives aiming at the harmonious and mutually supportive implementation of the CBD, Nagoya Protocol and ITPGRFA, including support for developing country parties; and information systems and knowledge management. The latter has been enabled in particular by the ITPGRFA provision stipulating that, "(I)n developing the Global Information System, cooperation will be sought with the Clearing House Mechanism of the Convention on Biological Diversity."[132]

58. Further examples of other regimes speaking to the CBD COP, and *vice versa*, include the World Intellectual Property Organisation (WIPO) in the context of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore;[133] and the ongoing negotiations on marine biodiversity in areas beyond national jurisdiction under the UN General Assembly. For instance, on the latter, the CBD COP has recognized the central role of the UN General Assembly in addressing issues related to biodiversity conservation and sustainable use in marine areas

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124 Most recently reflected in ITPGRFA, *Report on Cooperation with the Convention on Biological Diversity*, FAO Doc IT/GB-7/18/19 (August 2017) and CBD, *Report of the Secretariat of the Convention on Biological Diversity on Cooperation with the International Treaty*, FAO Doc IT/GB-7/17/Inf.13 (August 2017).
125 COP Decision III/11, *Conservation and Sustainable Use of Agricultural Biological Diversity*, para. 18.
126 COP Decision IV/6, *Agricultural Biological Diversity*, para. 8.
127 COP Decision V/5, *Agricultural biological diversity: review of phase I of the programme of work and adoption of a multi-year work programme*, para 12.
128 ITPGRFA, Art. 19(3)(g) (l) and (m).
129 ITPGRFA, Art. 20(5).
130 Decision X/1, preamble.
131 https://www.cbd.int/doc/agreements/agmt-itpgrfa-2010-10-28-moc-web-en.pdf
132 ITPGRFA, Art. 17(1).
133 See e.g. WO/GA/31/8 (23 July 2004) and COP decision X/1, para. 6.

beyond national jurisdiction; while deciding to submit information on ecologically or biologically significant marine areas prepared by the Convention's Subsidiary Body on Scientific, Technical and Technological Advice.[134]

59. Other examples of regime interaction can be found in processes of **periodic joined-up stocktaking or reporting.** For instance, the annual resolutions of the UN General Assembly (UNGA) on sustainable fisheries and on the law of the sea provide a means to keep tabs on relevant international developments and their interplay with the UN Convention on the Law of the Sea (UNCLOS). The interplay can be based on UNCLOS provisions that "incorporate by reference" international standards deriving from more specific international instruments[135]. It can also be based on subsequent agreements not falling within specific reference or saving clauses under UNCLOS, such as in the case of ocean dumping. In all these cases, the approach has been that of "creating a culture of consistency" with 'special agreements,' "allowing for the dynamic evolution of sectoral specific regulation of marine pollution … to occur within the ambit of [UNCLOS] flexible framework."[136]

60. A comparable recourse to periodic joined-up reporting or stocktaking can be found in the area of international human rights. On the one hand, special procedures have been put in place to assess developments across a variety of international human rights instruments. A notable case of cross-fertilization is that of the human rights of indigenous peoples to lands and natural resources, which has emerged through a "global discursive practice of mutual learning"[137] by global and regional human rights bodies in light of UN treaties of a more general nature,[138] as well as in light of CBD COP decisions.[139] Some of these developments have then been captured in the annual reports of UN Special Rapporteurs.[140] Another example is the Universal Periodic Review, which is a process held under the auspices of the Human Rights Council for individual States to assess their implementation across a number of general and specialized international human rights treaties seen as a whole.

61. In addition, other creative ways have been devised to ensure **regular dialogue** among general as well as more specific treaties and instruments. One such instance is the Sustainable Ocean Initiative (SOI) Global Dialogue with Regional Seas Organizations and Regional Fisheries Bodies on Accelerating Progress Towards the Aichi Biodiversity Targets. It arose from an initiative of the CBD Secretariat and has become a regular process that aims to facilitate the exchange of experiences, to identify options and opportunities to enhance cross-sectoral collaboration towards internationally agreed goals, and to discuss the need for specific tools, guidelines or other initiatives to strengthen collaboration.[141] A further example of the facilitation of regular dialogue between intergovernmental regimes can be found in the

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134 Decision XIII/12, *Marine and Coastal Biodiversity: ecologically or biologically significant marine areas*, preamble and para 2 (December 2016).

135 UNCLOS, Arts. 61(3) and 119(1)(a).

136 C Redgwell, 'From Permission to Prohibition: the 1982 Convention on the Law of the Sea and the Protection of the Marine Environment' in D Freestone et al (eds.), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006) 180, at 191 (although note that the debate was framed in terms of *lex posterior* rather than *lex specialis*).

137 G Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights', (2011) 22 *European Journal of International Law* 165, at 201.

138 IACtHR, *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007 and Judgment (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs), 12 August 2008; and African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya), and Minority Rights Group International, *Endorois Welfare Council v. Kenya*, Communication no. 276/2003, 25 November 2009.

139 IACtHR, Case of the Kaliña and Lokono Peoples v. Suriname, Judgment (Merits, Reparations and Costs), 25 November 2015; see Morgera (n 82).

140 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/HRC/37/59 (2018), referring to fair and equitable benefit-sharing from the use of genetic resources under Framework Principle 15 (particularly para 53).

141 https://www.cbd.int/soi/.

Inter-agency Liaison Group on invasive alien species.[142] Like the SOI Global Dialogue, the Inter-agency Group on invasive alien species arose as an initiative of the CBD Secretariat with membership extending to ten Secretariats from intergovernmental organizations including the CBD, FAO, IMO, ICAO and WTO. The regular opportunity for dialogue provided for by the Inter-agency Group is intended to "address the gaps and inconsistencies in the international regulatory frameworks for the prevention, control and eradication of invasive alien species," and aims to facilitate the development of norms and standards, as well as promote information-sharing and capacity-building.[143]

62. Finally, other examples of institutional interaction can be found in the area of international economic law. The ongoing negotiations within the World Trade Organization (WTO) to produce a set of disciplines applicable to subsidies which promote illegal, unreported, and unregulated (IUU) fishing, as well as subsidies which promote overfishing, provide useful insights into how overlapping international regimes may potentially cohere in practice. Negotiations on disciplining fisheries subsidies have been ongoing within the WTO since the launch of the 'Doha Round' of multilateral trade negotiations in 2001. However, management of fisheries and conservation issues also come within the competence of other regimes such as FAO, as well as UNCLOS.[144] Accordingly, questions of how best to manage the overlap between these regimes, particularly since membership is not congruent across all fora, have come to prominence.[145] While negotiations within the WTO are ongoing, there is clear evidence from WTO Members' submissions on the issue of reliance upon existing principles and concepts developed under the law of sea and associated fora.[146] Accordingly, the envisaged WTO disciplines on IUU fishing, "would in practice support the realisation of States' existing duties through domestic economic policy in a form that is enforceable through WTO procedures."[147] In other words, the emerging disciplines from the WTO regime may in fact *support* States' existing duties under the law of the sea.[148] Of note is that the process by which negotiations within the WTO have taken place has focused not so much on strict legal hierarchies, but rather on **deliberative strategies** designed to foster **learning and information sharing**.[149]

63. In practical terms, the above examples illustrate a variety of ways (more or less formal) in which the existence of regime overlaps can be carefully managed, to provide for synergistic outcomes, even when membership is not congruent between the relevant regimes.

5.4 Insights from academic research on regime interplay management

64. In addition to existing practices, research on regime interactions both in international law and international relations provide further ideas for possible processes for recognizing specialized international instruments under Article 4(4) of the Nagoya Protocol. Academic research has illuminated how collaboration among regimes can actually provide opportunities to address uncertainties arising from regime overlaps by enhancing implementation of two or more different sets of international obligations on the basis of "fruitful interactions" between the regimes.[150] This appears relevant to the expectation enshrined in Nagoya Protocol Article 4(3) that questions of mutual supportiveness relate to "useful" instruments (Section 2.2 above). Whether or not regime interactions are conducive to synergistic outcomes, however, "depend[s] on how actors within and outside the regimes choose to manage the

142 https://www.cbd.int/invasive/lg/.
143 https://www.cbd.int/invasive/lg/.
144 For an excellent summary, see Young (n 105) 477-515.
145 Ibid.
146 See generally, M A Young, 'The 'Law of the Sea' Obligations Underpinning Fisheries Subsidies Disciplines' (November 2017) ICTSD Reference Paper.
147 Ibid, 17.
148 Ibid.
149 See generally Young (n 105).
150 Young (n 74) at 147 and S Oberthür, 'Interplay Management: Enhancing Environmental Policy Integration Among International Institutions' (2009) 9 *International Environmental Agreements: Politics, Law and Economics* 371, 376 (hereinafter Oberthür, 'Interplay Management'). See also discussion in S Oberthür and T Gehring, 'Institutional Interaction - Ten Years of Scholarly Development' in Oberthür, and Stokke (n 123) 25 – 58.

interactions."[151] The creative facilitation of constructive regime interactions can involve, *inter alia*, a "combination of legal techniques operating under a presumption of compatibility, including instrumental cross-referencing, institutional coordination linkages and mechanisms," in order to increase the likelihood of synergistic outcomes.[152]

65. As the complexity of the international legal system increases (Section 3 above), the need for effective regime interplay management becomes more urgent.[153] Interplay management can take a number of different forms/modes: it may be *regulatory* in the sense of permitting or proscribing certain behaviour across regimes, or *enabling*, understood as aiming to create knowledge and understanding and enhance capacities to achieve shared governance goals.[154] Regulatory interplay management may include provisions setting out the process to be followed in the event of a conflict;[155] whereas enabling interplay management, focused as it is upon knowledge, communication and understanding, includes the work of expert assessments to promote learning between regimes.[156] It should, however, be emphasised that regulatory and enabling modes of interplay management are not mutually exclusive and may in fact support each other.[157] Accordingly, the text of Article 4(4) seemingly requires interplay management which is both regulatory *and* enabling.[158] Its text provides space (and hence enables) specialized international instruments which seek to enhance capacity to achieve shared goals, but at the same time it only permits such instruments to the extent they are specific and are in line with the objective of the Nagoya Protocol and the CBD (hence, regulatory).

66. Regime interplay management may be facilitated in different ways. At the international level, it can be facilitated jointly between regimes, or independently by various regimes. At regional or national levels, it can be facilitated autonomously by states and non-state actors.[159] Joint interplay management can be achieved, *inter alia*, through the creation of horizontal structures,[160] such as the the Sustainable Ocean Initiative (SOI) Global Dialogue and the Inter-agency Group on invasive alien species discussed above (Section 5.3). Efforts to promote joint interplay management, however, have been somewhat *ad hoc*[161] and have at times met with limited success due to the problem of coordinating horizontal regimes in the absence of hierarchy.[162] This is not to say that there is no potential in such approaches,[163] but rather that there may be much merit in facilitating more systematic (as opposed to *ad hoc*) opportunities for interplay management.[164]

67. Interplay management may also be facilitated at the initiative of one regime, when relevant regimes act (relatively) independently of each other to address collective action problems. The management of the relationship between the WTO and multilateral environmental agreements (MEAs) is an example of such interplay management in that interaction has been shaped largely by independent decision making on the

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151 H van Asselt (n 107) at 1242 – 1243, referring to interactions between the international climate change and biodiversity regimes.

152 See also G O'Cuinn and S Switzer, 'Ebola and the plane: The role of legal technicalities in responding to an epidemic' (2017) unpublished working paper on file with the authors.

153 M Axelrod (n 123) 87, 89.

154 Oberthür, 'Interplay Management' (n 150) at 377.

155 Ibid.

156 Ibid, at 387.

157 See generally Ibid. See also S Oberthür, 'Regime Interplay Management' in K Blome et al., (eds.) *Contested Regime Collisions: Norm Fragmentation in World Society* (2016) 88, 98 – 99 (hereinafter Oberthür, 'Regime Interplay Management').

158 For more on these modes, see Oberthür, 'Interplay Management' (n 150).

159 Oberthür, 'Regime Interplay Management' (n 157) at 96.

160 Oberthür, 'Interplay Management' (n 159). See also; Stokke (n 121) at 12.

161 H VAN ASSELT, 'LEGAL AND POLITICAL APPROACHES IN INTERPLAY MANAGEMENT' IN OBERTHÜR AND STOKKE (N 123) 59, 74.

162 Oberthür, 'Regime Interplay Management' (n 157) at 96.

163 Van Asselt (n 161) 75. .

164 See discussion Oberthür, 'Interplay Management' (n 150) at 384.

part of both regimes.[165] This is relatively common and at least in respect of the environmental policy domain, has at times served to promote stable outcomes between regimes.[166] Another example concerns the relationship between the Montreal Protocol and the Kyoto Protocol, which was largely dealt with through decisions of the respective Conference of the Parties.[167] This type of interplay management is, however, oftentimes *ad hoc* with outcomes based upon the underlying "political balance of power."[168] Concerns have hence been raised whether such management has the capacity to best promote the norms of the relevant regimes.[169]

68. A final type of interplay management relevant to this study is that facilitated autonomously by States at either a regional or national level.[170] Autonomous action on the part of one actor may help to "steer" inter-regime interactions, for instance with regard to the inclusion of climate change mitigation measures in the aviation and shipping sectors.[171] Autonomous interplay management is also manifest when a country enacts a trade restriction envisaged by an MEA but potentially in breach of WTO law in order to "provoke" a decision or response on the legality of such measures.[172] While such actions are clearly value-led, numerous commentators have drawn attention to the fact that autonomous efforts by States/non-states actors are the least conducive to "systematically and structurally improving inter-institutional"[173] *regime* coordination. They may create legal uncertainty among other States participating in the affected regimes, and possibly lead to (legal) disputes.[174] At the same time, however, there may be considerable advantages to be gained from autonomous interplay management. Such management may, for instance, serve to illustrate the potential for regimes or institutions to cohere in practice, thereby 'lighting the way' and potentially laying the foundations for action at the international level.[175] Autonomous interplay management may also provide important opportunities for e*xperimentation* and *learning* as States and other actors exploit the lack of overarching frameworks to address particular issues of inter-regime concern.[176]

69. While the debate on the fragmentation of international law has focused on legal tools to avoid and/or resolve conflict (regulatory mode), the literature on regime interactions shows that the promotion of learning and the use of information exchange may help foster mutual relationships between regimes, facilitating institutional synergies and mutual learning (enabling mode).[177] To that end, "a more

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165 Ibid, at 376.
166 Oberthür, 'Regime Interplay Management' (n 157) at 96.
167 See discussion in Oberthür, 'Interplay Management' (n 150) at 380 and accompanying literature.
168 Ibid, at 381.
169 Ibid at 381 - 382, reflecting upon how, at least in the environmental domain, there may be no inbuilt priority for the environment in respect of such unilateral interplay management. Accordingly, and by way of example, while the nature of the relationship between MEAs and the WTO has arguably evolved, WTO norms may still exert a 'chilling effect' upon other regimes.
170 Ibid, at 376.
171 B Martinez Romera, *Regime Interaction and Climate Change: The Case of International Aviation and Maritime Transport* (Routledge, 2017).
172 Oberthür, 'Interplay Management' (n 150) at 373.
173 Ibid at 376.
174 E Morgera and K Kulovesi, 'The Role of the EU in Promoting International Climate Change Standards' in Poli et al (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Brill, 2014) 304, at 329-333. CJEU, Case C-366/10, The Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., United Airlines, Inc. v The Secretary of State for Energy and Climate Change [2011] *OJ* C260/9 ('Case C-366/10'), Reference for a Preliminary Ruling from High Court of Justice Queen's Bench Division (Administrative Court) (United Kingdom) made on 22 July 2010. For a reflection in the area of ABS but not specific to the question of specialized agreements, see E Morgera, 'The EU and Environmental Multilateralism: The Case of Access and Benefit-Sharing and the Need for a Good-Faith Test' (2014) 16 *Cambridge Yearbook of European Legal Studies* 109.
175 van Asselt, (n 107) at 1274.
176 See generally discussion of S Oberthür and O S Stokke, 'Conclusions: Decentralized Interplay Management in an Evolving Interinstitutional Order' in Oberthür and Stokke (n 123) 313 – 341.
177 Van Asselt (n 107) at 1258; and Young (n 105). See also Oberthür, 'Interplay Management' (n 150).

systematic approach to make information and knowledge about other relevant institutions and the potential for synergy with them available holds the promise of a better promotion of both cognitive interaction … and synergistic interaction among overlapping institutions."[178] Thus, for complex legal problems involving a variety of overlapping legal regimes, there may be merit in focusing less on "strict legal hierarchies" and more upon processes designed to facilitate learning, including through deliberation by multiple stakeholders.[179] This is in line with the overall approach to avoiding hierarchies and ensuring mutual supportiveness called for in Nagoya Protocol Article 4(1) (Section 2.2 above), and the opportunity to implement Article 4(4) through both regulatory *and* enabling modes of interaction with other regimes. Even when the synergistic capacity of information exchange and enhanced communication between overlapping international regimes may not be obvious, policy diffusion across regimes, by building upon and cross-referencing norms from other regimes (as in the case of the CBD and ITPGRFA mentioned in Section 5.3 above), is seen to bring potential benefits.[180]

70. On a final note to this section, the recognition of an ABS instrument as a specialized international instrument is a legal pronouncement, which may not reduce per se the continuing need to facilitate positive interplay management between the Nagoya Protocol and the instrument in question. Thus, realizing the potential synergistic capacities of interactions in this domain may require thinking upon the best process to facilitate *ongoing* interactions such as information exchange, learning and deliberation, so as to prevent the *legal* recognition of an ABS instrument as a specialized international instrument under Article 4(4) from leading to a political disconnection between the instrument in question and the Nagoya Protocol. This point is also undergirded by the text of Article 4(3) with its emphasis upon paying "due regard" to "useful and relevant ongoing work or practices under such international instruments and relevant international organizations" (see Section 2.2 above). Accordingly, while Article 4(3) mainly addresses ongoing work in other fora, the process it envisages would be helpful after the recognition of an instrument as a specialized international ABS instrument pursuant to Article 4(4). By extension, the scope of Article 4(3) is such that even where an ABS instrument is not recognized as a specialized international instrument under Article 4(4), ongoing interactions may nevertheless still be fruitful. Accordingly, it should be emphasized that Article 4(4) is not the sole provision upon which the relationship or indeed interactions between different sets of ABS rules depend.

6. Considerations for a possible process for recognizing a specialized international access and benefit-sharing instrument

71. A process for recognition of specialized agreements is not foreseen or called for under Article 4(4) of the Nagoya Protocol. However, the above analysis indicates that in considering a process for recognizing a specialized instrument, one should consider that: 1) initiatives on the recognition, or (otherwise) the interaction, of specialized instruments could be taken at different levels, with different actors and bodies playing different roles; 2) recognition itself would not exhaust the need to consider the management of interactions with other international instruments, which generally require ongoing information-sharing and cooperation efforts; and 3) attention should be devoted to ensure that opportunities for mutual learning among regimes are maximized.

6.1 Different scenarios with regard to recognition

72. On that basis, three scenarios can be envisaged for the recognition (or other form of regime interaction management) of the Nagoya Protocol and specialized instruments: a) the Nagoya Protocol COP/MOP could take decisions to recognize these instruments under Article 4(4), and provide additional tools for continuous information-exchange and cooperation; b) another international organization or forum could take the initiative to recognize an instrument as specialized, possibly in light of the criteria adopted to that end by the COP/MOP (Section 4); and c) a Party or group of Parties to the Nagoya

178 Oberthür, 'Interplay Management' (n 150) at 383.
179 M Young (n 105) at 479. Though see Oberthür, 'Interplay Management' (n 150) at 382.
180 See generally Young, Ibid. On the potential of cross referencing to promote synergistic regime interactions, see generally O'Cuinn and Switzer (n 152).

Protocol could take the initiative to recognize an instrument as specialized, possibly in light of the criteria adopted to that end by the COP/MOP (Section 4). These scenarios are not mutually exclusive, but represent possible real-life situations that could overlap and ideally complement each other. Their respective pros and cons will be discussed in turn below, with reference to the criteria identified in Section 4.

a) Nagoya Protocol COP/MOP

73. As discussed above (Sections 2.2 and 5.4), a determination would arguably be more authoritatively, transparently and systematically done by Parties collectively in the context of the **COP/MOP.** The criteria identified in Section 4, notably the need to ensure fairness and equity, legal certainty and the protection of legitimate expectations, would benefit from a multilateral setting to gauge the views of different Nagoya Protocol Parties and the search of a widely accepted approach. In addition, fairness and equity, good faith and mutual supportiveness rely on international negotiations to search for solutions when legal interpretation may fall short. Furthermore, the need to ensure consistency with the Nagoya Protocol and CBD objectives related to biodiversity conservation, which is considered a common concern of humankind,[181] points to the Nagoya Protocol COP/MOP as the forum for transparent and inclusive decision-making to discuss cooperation on matters of common concern that should prevail over individual State interests (Section 2.3 above).[182] Finally, the fact that a COP/MOP decision on this issue would be adopted by consensus would confer enhanced legitimacy to the recognition of a specialized agreement, promoting consistent State practice.[183] In addition, the COP/MOP would be well placed to consider the will of all Parties to the Nagoya Protocol, and to discuss the nature of the instruments under consideration. It would also be well placed to take different views into account with regard to what would be a reasonable way to apply the instruments with minimal disturbance to the operation of the legal system, as recommended by the ILC (Section 3.2 above), and with a view to maximizing opportunities for shared learning on issues that could not be fully theorized at the time of the adoption of the Nagoya Protocol (Section 5.1 above).

74. The existing powers of the Nagoya Protocol COP/MOP would already allow it to exercise such a function, notably the power to make recommendations on matters necessary for the implementation of the Protocol, as part of its overall overview and promotion of effective implementation. In addition, the Nagoya Protocol COP/MOP could agree on any institutional developments and inter-institutional collaborative approaches with other regimes on the basis of its powers to seek and utilize the services and

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181 CBD, Preamble.

182 L Horn, 'Globalisation, Sustainable Development and the Common Concern of Humankind' (2007) 7 *Macquarie LJ* 53; L Horn, 'Climate Change and the Future Role of the Concept of the Common Concern of Humankind' (2015) 2 *Australian Journal of Environmental Law* 24; M Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in M Fitzmaurice, D Ong and P Merkouris (eds.), *Research Handbook on International Environmental Law* (Edward Elgar Publishing Ltd, 2010) 493; J Brunnee, 'Common Areas, Common Heritage, and Common Concern' in D Bodansky, J Brunnee and E Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 550; F Biermann, *Saving the Atmosphere: International Law, Developing Countries and Air Pollution* (Peter Lang, 1995); J Murillo, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 *Macquarie Journal of International and Comparative Environmental Law* 133; D French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in M Bowman et al. (eds), *Research Handbook on Biodiversity Law* (Edward Elgar, 2016) 334; D Shelton, 'Common Concern of Humanity' (2009) 39 *Environmental Policy and Law*, 83; A Jaeckel, 'Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind' (2013) 2 *Transnational Environmental Law* 167; L Horn, 'The Implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1 *Macquarie Journal of International and Comparative International Law* 233; T Cottier & K Nadakavukaren, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern, NCCR Trade Regulation' Working Paper No. 2012/29; T Cottier, 'The Principle of Common Concern and Climate Change' (2014) 52 *Archiv Des Völkerrechts*, 293.

183 J Brunnee, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1; A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press 2007) 160.

cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies, and, if need be, establish subsidiary bodies that are deemed necessary for the implementation of the Protocol.[184] These powers could thus be used to ensure information sharing between the secretariats and reporting at the meetings of relevant governing bodies, as well as for the establishment of administrative arrangements to facilitate cooperation (with a view to establishing a systematic, joint approach for ongoing regime interplay management at the international level: Section 5.4 above).

75. The drawbacks of this approach would include a potential lack of expertise of the COP/MOP on specialized subject-matters (see scenario b) below), particularly if they are considered to lie outside the environmental realm and the exchange of resources under consideration has no environmental impact; and the diplomatic sensitivity surrounding respecting the mandate of other international organizations and the autonomy of other international regimes. Differences in State membership may also pose additional challenges for decision-making in different fora.

76. In light of the above considerations, Parties to the Nagoya Protocol would be well advised to ensure, at the international level, a dialogue specifically geared towards mutual supportiveness and mutual learning between the COP/MOP and the forum in which a new instrument may be discussed. In addition, at the domestic level, it would then rest with Parties' relevant authorities (potentially in different sectors) to ensure that the proposed mutually supportive approach proposed by the COP/MOP is followed in the context of interpretation and implementation efforts in other fora and under other specialized international instruments.

b) Other international fora

77. Another scenario would be that other international fora may take the initiative. This would still provide a multilateral approach that would need to follow the criteria adopted by the Nagoya Protocol COP/MOP to substantiate the claim that the specialized instrument is in line with the objectives of the Protocol and CBD (which would be a matter of good-faith for Nagoya Protocol Parties and of mutual supportiveness for Parties and non-Parties to the Nagoya Protocol). Similarly to the considerations mentioned under scenario a), fairness and equity, good faith and mutual supportiveness rely on international negotiations for the search of solutions when legal interpretation may fall short. The main advantage of this approach would be that the more specialised forum would be well-placed to decide on a specialized ABS instrument on the basis of its mandate and the expertise of its membership. This would therefore address one drawback with the lack of expertise of the COP/MOP on specialized subject-matters discussed in respect of scenario a). Based upon adherence to the principle of mutual supportiveness, it is also possible that such a decision would aim to codify pre-existing, ABS-related, practice, in cases where such practice had not previously received a specific legal position vis-à-vis the Nagoya Protocol, possibly opening avenues of enhanced collaboration.

78. Issues of legal certainty may, however, arise from the fact that not all Nagoya Protocol Parties are part of discussions in other fora. In light of these legal considerations and uncertainties, Parties to the Nagoya Protocol involved in other fora or the intergovernmental organization under which the instrument is being developed would be well advised to bring the proposed recognition to the attention of the Nagoya Protocol COP/MOP[185] for its information and to establish arrangements to facilitate cooperation. If information is exchanged and collaboration undertaken between the two fora from an early stage of negotiations, this should facilitate the relationship between the Nagoya Protocol and the other instrument, once the latter has been concluded, and assist in avoiding difficulties.[186] Notably, a dialogue specifically

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184 Nagoya Protocol, Art. 26(3)(a)-(c) and/or (f).

185 VCLT, Art. 41 (for background, see A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2013) at 242). A useful comparison for present purposes can be drawn with UNCLOS Article 311 (3-4): see N Matz-Luck, 'Article 311' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Hart, 2017) 2009, at 2015-2016. We are grateful to Prof Riccardo Pavoni and Prof Robin Churchill for drawing our attention to this point.

186 Such as Nagoya Protocol Parties raising issues of non-compliance, including under Nagoya Protocol, Art. 30.

geared towards mutual learning between the COP/MOP and the other forum for the purposes of applying the criteria adopted by the Nagoya Protocol COP/MOP would provide the best opportunity to ensure mutual supportiveness. This dialogue could ideally start from the early stages of the negotiations, including a negotiating mandate to seek coherence between the two (see Sections 5.3-5.4 above).

79. Even in the absence of objections from Nagoya Protocol Parties, it would remain under the purview of the Nagoya COP/MOP to take note of the initiative in another forum and consider the implication(s) of the recognition under Article 4(4), namely the disapplication of the Protocol for the genetic resource and the purposes of the specialized agreement for Parties to the Protocol that are Party to the specialized instrument.

c) Initiative of a Party or group of Parties

80. It may be possible that a Party or group of Parties to the Nagoya Protocol may recognize particular specialized international instruments pursuant to Nagoya Protocol Article 4(4). As discussed above, this approach has the disadvantage that it is the least conducive to "systematically and structurally improving inter-institutional"[187] *regime* coordination. It is also the most likely to undermine legal certainty among Nagoya Protocol Parties. Parties may therefore consider raising issues of non-compliance with the Protocol.[188] On the other hand, initiatives by a Party or group of Parties may prove useful to contribute to a future multilateral initiative, by providing "a laboratory" for exploring how regimes may cohere in practice; or may even advance implementation of the Nagoya Protocol by creating ABS-related decision-making networks at the regional or sub-regional level. In this vein, the COP/MOP could perform an important information sharing and diffusion-type role, thereby providing guidance for further action either plurilaterally or multilaterally.

81. Similarly to that noted above under b), the Party or Parties taking a decision to recognize a specialized international instrument would be expected to follow the criteria adopted by the Nagoya Protocol COP/MOP to substantiate the claim that the specialized instrument is in line with the objectives of the Protocol and CBD (which would be a matter of good faith for Nagoya Protocol Parties and of mutual supportiveness for Parties and non-Parties to the Nagoya Protocol). Issues related to legal uncertainty could arise, as discussed under scenario b): Parties would thus be be well advised to bring the recognition to the attention of the COP/MOP for its consideration and to establish arrangements to facilitate cooperation. If there are any objections from Nagoya Protocol Parties, the Nagoya COP/MOP would need to consider the implication of the recognition under Article 4(4), namely the disapplication of the Protocol for the genetic resources and the purposes of the specialized agreement for Parties to the Protocol that are Party to the specialized instrument.

6.2 Elements for an optimal process concerning a specialized international access and benefit-sharing instrument

82. The following elements can be considered for a process concering international ABS instruments that could potentially be considered specialized for the purposes of Nagoya Protocol Article 4(4), drawing upon the advantages of each of the scenarios discussed in the previous section.

83. Assuming the COP/MOP has agreed to criteria for the recognition of a specialized instrument pursuant to Article 4(4), an optimal process to maximize the opportunities for mutual supportiveness and mutual learning between the Nagoya Protocol and a specialized ABS instrument could take the following steps:

1. **The COP/MOP would consider necessary information (including receiving or requesting advice from its own subsidiary bodies, and receiving or requesting information on potential or actual initiatives by other regimes or Parties) under its agenda item on international cooperation;**

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187 Oberthür, 'Interplay Management' (n 150) at 376.
188 Under Nagoya Protocol, Art. 30.

2. **The COP/MOP would encourage other intergovernmental forums and/or Parties planning to develop an international instrument that could be recognized as a specialized international ABS instrument: to set a negotiating mandate that seeks coherence with the Nagoya Protocol in light of the criteria for recognition adopted pursuant to Article 4(4); to keep the COP/MOP informed of progress in negotiations; to draft provisions in a new instrument that will specifically cater to mutual supportiveness; and to establish/strengthen inter-Secretariat cooperation (such as information-sharing, and joint capacity-building initiatives);**
3. **The COP/MOP would consider the implications of the recognition made by other fora or Parties for the Nagoya Protocol based on the criteria adopted and/or decide whether to recognize an international instrument as a specialized ABS agreement ;**
4. **The COP/MOP would decide to set up a systematic and ongoing process for regime interaction to ensure coherence and synergy, at the decision-making, institutional, and implementation levels. Various options could be considered, including the establishment of a permanent platform for dialogue and coordination (see examples in Section 5.3 above). The rationale for pursuing such options would be to allow for the harnessing of the benefits of learning as well as ensuring the ongoing effectiveness of the ABS regime complex.**

84. For this process to be effective, Nagoya Protocol Parties should ensure, at the domestic level, that relevant authorities (potentially in different sectors) follow the mutually supportive approach proposed by the COP/MOP in the context of negotiations, interpretation and implementation efforts in other fora and under other specialized international instruments. This would require Parties' efforts to bring the criteria to the attention of relevant authorities that may be negotiating, interpreting or implementing a specialized ABS instrument, as well as to establish a regular dialogue geared towards mutual supportivness and mutual learning at the domestic level.

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