

EU LEGISLATION UNDERMINES NAGOYA PROTOCOL

Comments on the impact of European Legislation to implement the Nagoya Protocol on the rights of Indigenous peoples and local communities over their genetic resources and traditional knowledge¹

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The European Union has adopted legislation implementing the Nagoya Protocol that is due to enter into force on the same day as the Protocol.² While the European legislation includes some positive measures, it seriously undermines the realisation of both the spirit and the word of the Protocol as it applies to the rights of Indigenous and local communities

The EU legislation:

1. defines protected traditional knowledge as knowledge that is the subject of an access agreement – there are no obligations relating to traditional knowledge that may be accessed without permission. This conflicts with obligations under Article 7 of the Protocol (see annex for synopsis of relevant articles of Protocol)
2. applies only to TK that is protected under the national laws of the country in which the relevant Indigenous or local communities are based. This is a misapplication of Article 16, which is complimentary to but does not limit the obligations under Article 7.
3. fails to recognise the obligation of all states to take measures to protect the rights of Indigenous peoples over their traditional knowledge and genetic resources and traditional knowledge as set out in both the Nagoya Protocol (arts 6.2 and 7) and under human rights law (UNDRIP).

¹ For a more detailed critique of the EU legislation see Brendan Tobin (2014) *Biopiracy by Law: European Union Draft Law Threatens Indigenous Peoples' Rights over their Traditional Knowledge and Genetic Resources*, *European Intellectual Property Review*, 36(2), 124–136, available at: <http://acipa.edu.au/pdfs/tobin-biopiracy-by-law.pdf> [accessed 7 Oct 2014]

² Regulation of the European Parliament and of the Council on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union, Adopted by the European Parliament 11 March, 2014. Available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=PE%20131%202013%201 NIT> [accessed 7 Oct 2014].

4. only applies to genetic resources that are regulated under national legislation in the country where they are sourced. This is contrary to the obligations under Art 6.2 of the Nagoya Protocol, which applies to genetic resources over which Indigenous and local communities have established rights. These established rights may arise under constitutional, national, international and most importantly under customary law.
5. was adopted without taking into consideration customary laws and practices of indigenous and local communities and their relationship to the protection of Indigenous and local communities rights and effective implementation of the Protocol. This is contrary to obligations under article 12 of the Protocol.

In a resolution adopted in January 2013, the European Parliament stressed the need for the European Union and its Member States to ensure that regulations on traditional knowledge “comply with international commitments on promotion of and respect for the rights of Indigenous peoples”, including the UN Declaration on the rights of Indigenous Peoples and ILO Convention 169.

Three European countries, Denmark, the Netherlands and Spain, are parties to the International Labour Organization Convention 169, which creates binding legal obligations relating to the protection of Indigenous peoples’ human rights.

Failure by the EU to provide guidance for Member states on their obligations to adopt measures as required by the Nagoya Protocol and International Human Rights Law may leave them open to actions before treaty bodies including the Human Rights Committee, the Committee on Elimination of all forms of Racial Discrimination and the Committee on Economic Social and Cultural Rights. EU Member States may also find themselves the subject of legal proceedings before the European Court of Human Rights and national courts for failure to adopt required measures to secure Indigenous peoples’ human rights, including failures to meet obligations to ensure recognition and respect for customary law.

NOTE: The Nagoya Protocol negotiations were influenced by a belief that the WIPO IGC was moving towards the development of a regime for protection of traditional knowledge. The WIPO IGC process suffered a major setback in September 2014 when the WIPO Assembly failed to grant it a new mandate. This makes it vital that the COP recognise the primary mandate of the Convention on Biological Diversity to secure the protection of traditional knowledge related to biological diversity. This will require the COP meeting on the Nagoya Protocol to address protection of TK and full implementation of the Protocol’s provisions on the rights of indigenous and local communities as a priority.

Measures to Protect Indigenous Peoples and Local Communities’ Rights

In light of the entry into force of the new European legislation and the setback in the WIPO IGC process countries wishing to protect the rights of Indigenous peoples and local communities over their genetic resources and traditional knowledge will need to take action directly.

Action may be taken at various levels

1. At the national level, States may secure the rights of their Indigenous and local communities by adopting measures that recognise that use of GR and TK of Indigenous and local communities is subject to their PIC to MAT and fair and equitable benefit sharing. This legislation need not be overly detailed as long as it clearly states that PIC procedures must comply with the laws, customs and traditions of Indigenous and local communities, must be carried on in good faith and must not involve any coercion, force, or other undue pressure.
2. States may adopt national legislation recognising that the rights of Indigenous and local communities over their genetic resources and traditional knowledge does not require any act by the state but arise from the existence of the knowledge and the relationship between Indigenous and local communities and the resources they have traditionally used, nurtured and developed. Such legislation may promote compliance with customary law as a condition for any access and use of resources and knowledge
3. States may emphasise in all relevant forums the fact that the rights of Indigenous peoples and local communities may arise not only from national access and benefit sharing laws and regulations but also from constitutional law, customary law and practices, from judicial interpretation of constitutional rights and native title.
4. States may bring pressure to bear upon the EU at the CBD and other international forums to amend EU law in order to comply with the both the word and spirit of the Nagoya Protocol
5. Action may be taken at the CBD to strengthen compliance measures to ensure enforcement of the Protocol's provisions³
 - a. Recognition that rights over TK and GR may arise under the customary and other laws, practices and traditions of Indigenous peoples and local communities, which must be fully taken into consideration in securing their rights under the Protocol
 - b. Establishment of a certificate of compliance for access to and use of traditional knowledge – should be developed in close collaboration with Indigenous peoples and local communities.
 - c. Adoption of measures calling for the implementation of a global system of disclosure of origin applying to use of GR and TK

³ For more detailed discussion of compliance issues see Brendan Tobin (2013) 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law', *Law Environment and Development Journal*, 9(2), 142–62. Available at: <http://www.lead-journal.org/content/13142.pdf> [accessed 7 Oct 2014]

6. Action may be taken at a regional level to require that all use of genetic resources and traditional knowledge of Indigenous peoples and local communities conform with International Human Rights Law and the Nagoya Protocol. Regional Economic Organizations may adopt legislation establishing the capacity to impose fines and other sanctions to states and other users of genetic resources and traditional knowledge from within their jurisdiction contrary to regional law.⁴

Annex - Synopsis of Relevant Articles of the Nagoya Protocol

1. Article 5 requires all states to take measures to ensure fair and equitable sharing of benefits with indigenous and local communities of benefits arising from the use of their GR and TK. This obligation is independent of provisions on access and is obligatory for all and any use of GR or TK covered by the Protocol.
2. Article 6.2 requires states to ensure PIC and MAT for access to GR of Indigenous and local communities
3. Article 7 requires states to ensure PIC for access to and use of TK
 - a. This is an obligation of all countries not just countries in which Indigenous peoples reside
4. Article 12 requires states to take into consideration customary law and protocols of Indigenous and local communities in implementation of the Protocol. This applies to design development, adoption and implementation of national law and policy. It also applies to the resolution of disputes in national courts
5. Article 15 requires states to take measures to provide that GR of Indigenous peoples used within their jurisdiction has been accessed with PIC of Indigenous or local communities and with MAT as required by national legislation in the country where they are based
6. Article 16 requires states to take measures to provide that TK used within their jurisdiction has been accessed with PIC and or approval of Indigenous or local communities and with MAT as required by national legislation in the country where they are based

Articles 15 and 16 are complimentary to Articles 6.2, 7 and 12, i.e. the obligations under articles 6.2, 7 or 12 are not conditional upon the existence of national ABS or other legislation in the country where relevant Indigenous peoples or local communities are based.

⁴ The example of the European Union and its application of competition law to foreign corporations whose actions affect trade within the union is salutary. In a similar vein the Andean community may conceivably seek to apply sanctions to users of GR and TK in foreign jurisdictions in contravention of the rights of Indigenous and local communities undermining their rights over it.