

# Access to Genetic Resources under the Convention on Biological Diversity

Three principal international legal instruments govern access to and utilisation of genetic resources (excluding human genetic resources) for commercial and scientific purposes. The *Convention on Biological Diversity* (CBD) and its Protocol the *Nagoya Protocol on Access to Genetic Resources and the Sharing of Benefits Arising from their Utilisation* cover the majority of non-domesticated and domesticated genetic resources. Excluded from the remit of these treaties are plant genetic resources falling within Annex 1 of the *International Treaty for Plant Genetic Resources for Food and Agriculture*, in so far as they are used for research, breeding and training for food and agriculture. (See Fact Sheet Int-6.) (International treaties are only binding on those States that have signed and ratified them.)

Both the Convention on Biological Diversity and Nagoya Protocol only apply to access and/or utilisation of genetic resources occurring after their respective entry into force.

## Objectives and scope of the CBD

One of the three objectives of the Convention on Biological Diversity is the fair and equitable sharing of benefits arising out of the utilisation of genetic resources, including by access to genetic resources and by appropriate transfer of technologies. The Convention on Biological Diversity, while recognising the sovereign right of States over their genetic resources, requires Contracting Parties to endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses.

The resources covered by the Convention on Biological Diversity are those provided by States that are countries of origin of such resources or that have acquired them in accordance with the Convention. A country of origin is defined as one in which the resources are found in-situ, and with regard to domesticated or cultivated species the country where they have developed their distinctive properties.

The Convention on Biological Diversity also regulates access to traditional knowledge relevant to the conservation and sustainable use of biological diversity and genetic resources. The Convention requires States to promote wider usage of such knowledge with the consent of Indigenous and local community custodians. States are further required to encourage the equitable sharing of the benefits arising from utilisation of traditional knowledge.

Under the Convention on Biological Diversity access to genetic resources is to be granted on mutually agreed terms and is subject to the prior informed consent of the Party providing resources. States are required to adopt legislative, administrative and policy measures to secure fair and equitable sharing of benefits, including by way of transfer of technologies. States are obliged to cooperate to ensure that intellectual property rights are supportive of and do not run counter to the CBD's objectives

Prior informed consent and mutually agreed terms are also required for access to and use of the genetic resources and traditional knowledge of Indigenous and local communities. These obligations are clearly set out in Decisions of the Conference of the Parties, the CBD's decision-making authority.

## The Nagoya Protocol

In October 2010, the Conference of the Parties to the Convention on Biological Diversity adopted the Nagoya Protocol (in force from 12 October 2014). Under the Protocol, States are obliged to take legislative, administrative and policy measures with the aim of ensuring that benefits arising from use of genetic resources are shared in a fair and equitable way with the Party providing such resources. States are also obliged to adopt measures to ensure that genetic resources utilised within its jurisdiction have been obtained subject of prior informed consent and mutually agreed terms as required by the country of origin.

## **Genetic resources and traditional knowledge of Indigenous and local communities**

Under the Nagoya Protocol, States are obliged to adopt legislative, administrative and policy measures with the aim of ensuring fair and equitable sharing with Indigenous and local communities of benefits derived from the use of genetic resources over which they have established rights under domestic law. The source of such rights may be found in national, constitutional, international and/or customary and tribal law.

States must ensure that use of genetic resources and of associated traditional knowledge of Indigenous and local communities within their jurisdiction is subject to their prior informed consent and that mutually agreed terms have been established. States are obliged to take into consideration the customary laws of Indigenous and local communities in implementing the Protocol. They are also obliged to ensure compliance with national laws in the home country of the communities providing access.

The Protocol's provisions on protection of Indigenous and local communities rights over their resources and knowledge mirror obligations in international human rights law. All States are obliged to ensure these human rights are respected, protected and fulfilled.

Commercial and scientific users will need to ensure the existence of prior informed consent and mutually agreed terms for access and use of genetic resources and traditional knowledge. Failure to do so may result in the loss of rights over the products of research and development including intellectual property rights.

## **Special considerations**

States are required to implement the Nagoya Protocol in a manner that: promotes conservation and sustainable use of biological diversity; pays due regard for the need for expeditious access in cases of present or imminent threats to human, animal or plant health; and, takes into account the importance of genetic resources for food and agriculture and their special role for food security.

*Further information is available on the CBD website at <http://www.cbd.int/abs/>.*

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*This fact sheet is for information purposes only. It is designed to assist in general understanding of legal rights and obligations: It is not tailored to any particular fact, situation or requirements and should not be relied upon for legal advice.*

*Further Fact Sheets are available on the ACIPA website <http://acipa.edu.au/fact-sheets.html>.*

## **Relationship with other international agreements and instruments**

The Nagoya Protocol excludes from its remit genetic resources covered by specific international instruments that do not run counter to its objective and those of the Convention on Biological Diversity. This applies, for example, to genetic resources covered by the *International Treaty on Plant Genetic Resources for Food and Agriculture*, in so far as they are used for the purposes set out in that Treaty. As no exclusion is provided for traditional knowledge, States are obliged to enforce the Protocol's provisions on traditional knowledge even where such knowledge is regulated by other international instruments.

## **Trans boundary cooperation and global benefit sharing**

Where genetic resources are found in situ, or where traditional knowledge is shared by Indigenous and local communities in two or more States, States are to cooperate with the involvement of Indigenous and local communities, with a view to implementing the Protocol in conformance with its objectives. The Protocol envisages the possible establishment of a global multilateral fund to share benefits derived from the use of genetic resources and traditional knowledge that occur in transboundary situations, or for which it is not possible to obtain or grant prior informed consent.

## **Monitoring utilisation and certifying compliance**

The Protocol requires States to take measures to enhance transparency about utilisation of genetic resources, including the designation of checkpoints to monitor the existence of prior informed consent and mutually agreed terms and address situations of non-compliance. It promotes the use of standardised international certificates as evidence of compliance with access and benefit sharing obligations.