



Book - Unit 2 – Major Components of the Nagoya Protocol

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Site: UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS
Course: Introductory Course to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization
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1. Access to genetic resources

Access to genetic resources is a core component of the Protocol. Considering that countries have sovereign rights over genetic resources, access is subject to prior informed consent (PIC), unless otherwise is determined by the provider country. A number of measures must be taken by all Parties requiring PIC, including:

- Providing information on how to apply for PIC;
- providing for written PIC decisions in a cost-effective manner and within a reasonable period of time;
- providing for issuance at the time of access of evidence of PIC and MAT and notification to the ABS Clearing-House;
- setting out criteria and/or processes for obtaining PIC or approval and involvement of ILCs; and
- establishing clear rules and procedures for establishing MAT.

These measures aim to create legal certainty, clarity, fairness and transparency of domestic access and benefit-sharing legislation or regulatory requirements.

In the case that indigenous and local communities (ILC) have established rights over the genetic resources, Parties shall take measures to ensure that the PIC or approval and involvement of the ILC is obtained for access to the genetic resources.

Institutional arrangements to facilitate the implementation of these access provisions include requirements to designate a national focal point who is responsible for providing information on access procedures and liaising with the Secretariat; as well as one or more competent national authorities who are responsible for granting PIC and entering into MAT. The Protocol also establishes an ABS Clearing-House (ABS CH) to share relevant information for the implementation of the Protocol.

2. Fair and Equitable Sharing of Benefits

The second core component of the Protocol – benefit-sharing – is also addressed in several articles. Benefits to be shared shall include not only those arising from the utilization of genetic resources but also benefits from subsequent applications and commercialization. Each Party is to take legislative, administrative or policy measures to implement the benefit-sharing obligation.

The identification of benefits and arrangements details shall be agreed through MAT between the user and provider. Parties can use as a guide the Protocol's Annex, which contains a list of non-exhaustive potential monetary and non-monetary benefits. Each Party shall also encourage the development, update and use of sectoral and cross-sectoral model contractual clauses for MAT and voluntary codes of conduct, guidelines and best practices and/or standards in relation to access and benefit-sharing (Articles 19 and 20). Furthermore, Parties shall encourage users and providers to direct benefits to conservation and sustainable use of biological diversity (Article 9).

If ILCs have established rights over the resources, Parties shall take measures aiming to ensure that benefits are shared based on MAT with the concerned ILCs.

The Protocol also sets the foundation for consideration of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain PIC.

3. Traditional knowledge associated with genetic resources

Regarding access to traditional knowledge associated with genetic resources, the Protocol obliges Parties to take measures, in accordance with their domestic legislation, aiming to ensure that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the PIC or approval and involvement of these communities and that mutually agreed terms are established. Parties are also required to take measures to provide that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with the ILCs holding such knowledge.

The Protocol also establishes the following obligations for Parties:

- to establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations
- to take into consideration, in accordance with domestic law, ILCs' customary laws, community protocols and procedures with respect to traditional knowledge associated with genetic resources
- to support the development by ILCs of traditional knowledge-related community protocols, minimum requirements for mutually agreed terms, and model contractual clauses
- not to restrict, as far as possible, customary use and exchange of genetic resources and traditional knowledge associated with genetic resources.

4. Access and Benefit-sharing Clearing-House

The Nagoya Protocol establishes an access and benefit-sharing clearing house in Article 14 as part of the clearing house mechanism under Article 18, paragraph 3, of the CBD. The ABS Clearing-House serves as a means of sharing information related to access and benefit-sharing. Parties to the Protocol are required to make certain information available through the ABS Clearing-House.

The information that Parties are required to make available through the ABS Clearing-House includes:

- (a) Legislative, administrative and policy measures on access and benefit-sharing;
- (b) Information on the national focal point and competent national authority or authorities; and
- (c) Permits or their equivalent issued at the time of access as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms.

Additional information that Parties may make available through the ABS Clearing-House, if available and as appropriate, may include:

- (a) Relevant competent authorities of indigenous and local communities, and information as so decided;
- (b) Model contractual clauses;
- (c) Methods and tools developed to monitor genetic resources; and
- (d) Codes of conduct and best practices.

A permit or its equivalent that is issued by a Party granting access to genetic resources and made available to the ABS Clearing-House constitutes an internationally recognized certificate of compliance. Such certificates are useful as they serve as evidence of PIC and MAT and can be provided to checkpoints.

The ABS Clearing-House has been developed as an online platform.

5. Compliance with domestic ABS measures and MAT

The Nagoya Protocol includes specific obligations to support compliance with the domestic legislation or regulatory requirements of the Party providing access to genetic resources and with contractual obligations reflected in MAT as well as a system to support monitoring of the utilization of genetic resources.

To support compliance, the Nagoya Protocol establishes a compulsory system to monitor and enhance transparency of the utilization of genetic resources (Article 17). The system requires Parties to **designate one or more checkpoints** to collect or receive information related to PIC, the source of the genetic resources, the establishment of MAT and/or the utilization of genetic resources. The information collected or received at checkpoints is to be made available to relevant national authorities, to the Party providing prior informed consent and to the Access and Benefit-sharing Clearing-House. The ABS Clearing-House has been designed to receive this information and then share it with the national focal point and CNAs from the provider country, and to the designated authority from the user country and the user in the form of a checkpoint communiqué.

The internationally recognized certificate of compliance can be used to provide the information required by a checkpoint and it serves as evidence that the genetic resources covered by the certificate have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the Party granting access.

Domestic Legislation

In addition to the provisions on monitoring the utilization of genetic resources, Article 15 of the Nagoya Protocol addresses compliance with domestic legislation and regulatory requirements on access and benefit sharing while Article 16 addresses compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources. Paragraph 1 of Article 15 requires Parties to the Protocol to take measures to provide that genetic resources utilized within their jurisdiction have been accessed with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the providing Party.

Under paragraph 1 of Article 16, Parties are required to take measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by the ABS measures of the other Party where such indigenous and local communities are located.

Parties are also required to take measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 of Articles 15 and 16 and to cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements.

Mutually Agreed Terms

Article 18 addresses **compliance with mutually agreed terms**. It obliges Parties to encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including:

- (a) The jurisdiction to which they will subject any dispute resolution processes;
- (b) The applicable law; and/or
- (c) Options for alternative dispute resolution, such as mediation or arbitration.

Each Party is to ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms. Parties are also to take measures, as appropriate, regarding access to justice and the utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards.

The effectiveness of Article 18 is to be reviewed by the Conference of the Parties serving as the meeting of the Parties to this Protocol as part of the assessment and review process provided for in Article 31 of the Protocol.

6. Compliance with the Protocol

At the international level, the Protocol foresees the development and establishment of procedures and mechanisms to promote compliance of Parties with their international obligations under the Protocol and to address cases of non-compliance (Article 30).

The first meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol (held in Pyeongchang, Republic of Korea from 13 to 17 October 2014) adopted ‘cooperative procedures and institutional mechanisms to promote compliance with the provisions of the Nagoya Protocol and to address cases of non-compliance’ in its decision NP-1/4.

The procedures and mechanisms are non-adversarial, cooperative and facilitative in nature. They establish a Compliance Committee whose functions include offering advice or assistance for Parties that may be faced with difficulties in complying with the obligations of the Protocol

7. Institutional Arrangements

The Conference of the Parties to the CBD serves as the meeting of the Parties to the Nagoya Protocol (COP-MOP) to keep under regular review the implementation of the Protocol and make, within its mandate, the decisions necessary to promote the effective implementation of the Protocol. Functions of the COP-MOP include making recommendations on any matters necessary for implementation of the Protocol, establishing subsidiary bodies necessary for the implementation of the Protocol and considering information submitted in national reports.

Any subsidiary body established by or under the Convention may also serve the Protocol, including upon a decision of COP-MOP. At its first meeting, the COP-MOP decided that the newly established subsidiary body under the Convention – the Subsidiary Body on Implementation – would also serve the Protocol.

The CBD Secretariat, administered by UNEP and located in Montreal, also serves as the Secretariat of the Protocol.

8. Financial Mechanism

The financial mechanism of the Convention is also the financial mechanism for the Protocol. The operations of the financial mechanism of the CBD, and therefore those of the Nagoya Protocol, are entrusted to the Global Environment Facility (GEF).

The Nagoya Protocol Implementation Fund (NPIF) was established in 2011 to support and accelerate the ratification and early implementation processes. It also supports existing opportunities leading to development and implementation of concrete ABS agreements with involvement of the private sector. The World Bank serves as the trustee and it is managed by the GEF. While projects funded under the NPIF are continuing, new projects are not being approved and eligible countries will have to seek capacity-building funds for implementation of the Protocol through their GEF biodiversity allocations.