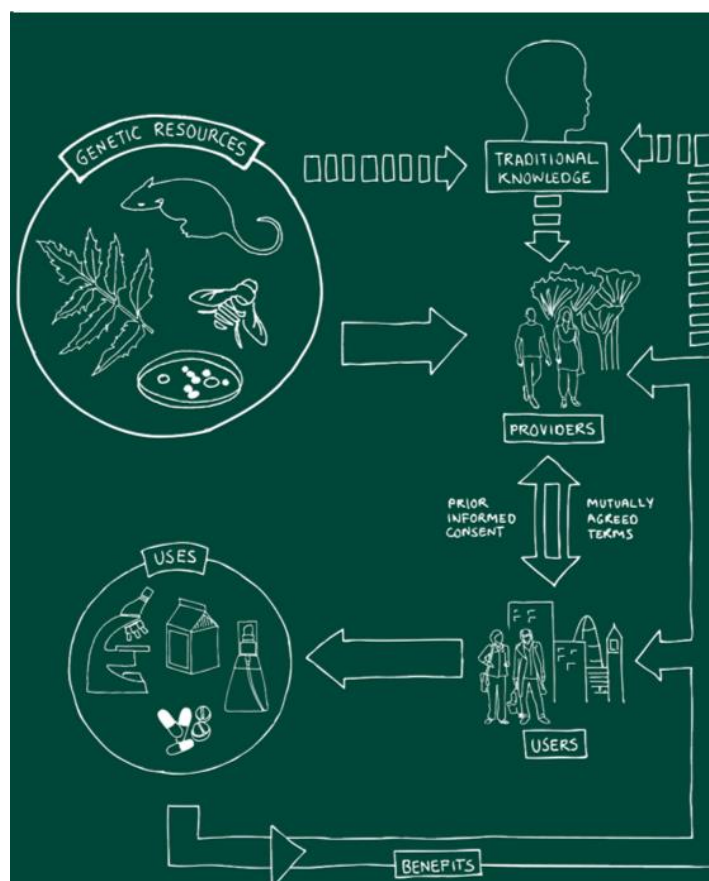


COOK ISLANDS ACCESS AND BENEFIT SHARING POLICY

The Nagoya Protocol

2018

Cook Islands National Environment Service



CONTENTS

1. Preamble	1	8. The Access & Benefit Sharing Process	4
2. Objective of the Nagoya Protocol	1	8.1 Applicants	4
3. Goals	1	8.2 Prior Informed Consent	5
4 Context	1	8.3 Mutually Agreed Terms	5
5. Key Principles	2	8.4 Traditional Knowledge	6
6 Scope	2	8.5 Other Provisions	6
7. ABS Authorities & Stakeholders	3	8.6 Non-Compliance mechanisms	6
7.1 National Focal Point	3	8.7 Transboundary Cooperation	7
7.2 Competent National Authority	3	8.6 Supportive Measures	7
7.3 Checkpoints	3	9. Acronyms	7
7.4 Publishing Authority	3	Annex 1 - Roles and Responsibilities in ABS	i
7.5 Cook Islands Research Secretariat	4	(with - Application process for ABS research)	v
(with - Flowchart of the Research Process)		Annex 2 - Glossary	xiii

1. PREAMBLE

The conservation and sustainable management of our environment and of the biological diversity of our lands and oceans, aim to provide sustainable health and food security benefits for the people of the Cook Islands. The Nagoya Protocol highlights that the Cook Islands has the potential for economic benefit from the knowledge of local ta'unga about the uses of our biological diversity, based on generations of tradition and practice. This policy details the legal authorities, mechanisms and processes that must be in place to effectively manage access by the world of science and research to our traditional knowledge. It is important that this document is translated into the languages and dialects of our Pa Enea, to ensure that ta'unga and Are Korero in the Pa Enea clearly understand what their rights are, during any approaches by interested parties and any subsequent negotiations, and where they can get assistance or advice.

2. OBJECTIVE of the NAGOYA PROTOCOL in the COOK ISLANDS:

Ensure the conservation and sustainable use of biological resources in the Cook Islands, and the fair and equitable sharing of any benefits arising from the use of its genetic resources.

3. GOALS

1. Conserve and protect the biological resources of the Cook Islands for the wellbeing of present and future generations and any traditional knowledge¹ associated with them.
2. Develop mechanisms that will ensure the sustainable use of the biological resources of the Cook Islands and the fair and equitable sharing of any benefits arising from the direct and indirect use of these biological resources and their associated traditional knowledge.
3. Guide relevant authorities to collaborate, establish and manage an efficient and effective system which will regulate Access and Benefit-Sharing (ABS) related to the use of the biological resources of the Cook Islands by interested stakeholders.

4. CONTEXT

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their utilization (ABS) was adopted by the Conference of the Parties to the Convention on Biological Diversity (CBD) in Nagoya, Japan, 2010 and came into force on 12 October 2014, after being ratified by 53 Parties to the CBD.

While the Cook Islands is a party to and has ratified the Convention on Biological Diversity², it has not yet signed the Nagoya Protocol but will do so following the endorsement of this policy.

The objectives of this Policy aim to support the expected outcomes of:

¹ Refer to definition of "traditional knowledge" in section 4 of the Traditional Knowledge Act 2013

² [CBD Country Profile – Cook Islands](#) – the CBD was ratified on 29 December 1993

- a. **the Cook Islands National Sustainable Development Plan 2016-2020³**: Goal 11.3 Protecting Diversity; Goal 14.3 Archive and Protect our Cultural Heritage; Goal 15.1 Support a sustainable population; and Goal 15.5 Improve Research on the Cook Islands.
- b. **the (Draft) Cook Islands National Biodiversity Strategy and Action Plan (NBSAP 2017)**: Biodiversity Theme 4 and Aichi Biodiversity Goal 16, which together seek to ensure that the Nagoya Protocol on Fair and Equitable Sharing of Benefits of the Convention of Biodiversity is in force and operational.

5. KEY PRINCIPLES

- 5.1 Article 15 (Compliance with the domestic legislation or regulatory requirements of ABS) of the Convention of Biological Diversity recognises the sovereign rights of States over their natural resources.
- 5.2 The Nagoya Protocol aims to ensure that those who provide access to genetic resources or related traditional knowledge can enjoy a share in the benefits that arise from their use.
- 5.3 The Protocol contains provisions aimed at ensuring that those who use genetic resources or related traditional knowledge comply with the access and benefit-sharing requirements, regulations or laws, in the providing countries.
- 5.4 The Protocol also intends to strengthen the degree of legal certainty and clarity in the use of genetic resources and related traditional knowledge. This is necessary so that international companies and science will invest in research and development in the Cook Islands.
- 5.5 In the context of the Cook Islands Traditional Knowledge Act 2013, traditional knowledge around *vairakau maori* is referred to as sacred or secret-sacred because it is believed that the rights to such knowledge were entrusted only to certain individuals (ta'unga) as a "gift from God".

6. SCOPE

In accordance with this Policy and Article 3 of the Nagoya Protocol (Protocol or NP), this Policy shall apply to genetic resources within the scope of Article 15⁴ of the Convention of Biological Diversity (CBD or Convention) and to the benefits arising from the use of such resources. This Policy shall also apply to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilisation of such knowledge⁵. In that regard, the Policy will also comply with the Cook Islands Traditional Knowledge Act 2013, and such other legislation that deals with marine and terrestrial organisms. The policy will address the establishment and development of the Are Korero which is charged (within the Traditional Knowledge Act) with dealing with traditional knowledge associated with matters that are unique to the indigenous and local communities on each of the islands of the Cook Islands. Each island aims to base the structure and membership of its Are Korero on its own island's cultural systems.

³ <https://www.adb.org/sites/default/files/linked-documents/cobp-coo-2017-2019-ld-01.pdf>

⁴ Article 15, [Access to Genetic Resources](#), Convention of Biodiversity

⁵ [Nagoya Protocol on Access and Benefit Sharing](#), Article 3 - Scope, p5.

Benefits derived from any potentially commercial research undertaken by government Ministries vary, depending on its own legislation. While benefits are generally assigned to the Cook Islands Government, the Ministry of Agriculture shares its benefits with the global community through the *International Treaty on Plant Genetic Resources for Food and Agriculture* (ITPGRFA) whose key objectives are aligned with those of the Convention and the Nagoya Protocol.

7. ABS AUTHORITIES AND STAKEHOLDERS

The government will ensure that relevant agencies are put in place to meet the core requirements of the access to genetic resources and the fair and equitable sharing of benefits as in the Nagoya Protocol.

7.1. NATIONAL FOCAL POINT

In accordance with Article 13 of the Protocol, The National Focal Point shall be responsible for:

- 7.1.1 Information on procedures for obtaining Prior Informed Consent (PIC) and establishing Mutually Agreed Terms (MAT);
- 7.1.2 Information on the Competent National Authority (CNA), Are Korero on each of the islands of the Pa Enea and Rarotonga, and other stakeholders; and
- 7.1.3 Liaising with the CBD Secretariat.

7.2. COMPETENT NATIONAL AUTHORITY

In accordance with Article 13 of the Protocol, The Competent National Authority shall be responsible for:

- 7.2.1 Granting access and issuing written evidence that access requirements have been met by the respective permit providers;
- 7.2.2 Incorporating the requirements of the Cook Islands Research Unit for interested parties to obtain a permit to carry out research in the Cook Islands; and
- 7.2.3 Providing advice (in both Cook Islands Maori and English) to ensure that both parties fully understand the applicable procedures for obtaining Prior Informed Consent and negotiating Mutually Agreed Terms.

7.3 CHECKPOINTS

In accordance with Article 17 of the Protocol, the Checkpoints shall be responsible for:

- 7.3.1 Collecting/receiving information to monitor and enhance transparency about the use of genetic resources and/or associated Traditional Knowledge in their jurisdiction, including:
 - 7.3.1.1 Fulfilling the agreements made with regards to Prior Informed Consent and Mutually Agreed Terms;
 - 7.3.1.2 Establishing the source and ownership of genetic resources and/or associated Traditional Knowledge; and
 - 7.3.1.3 Clearly establishing the use to be made of genetic resources and/or associated Traditional Knowledge.

7.4 PUBLISHING AUTHORITY

The Publishing Authority shall be responsible for implementing provisions in Article 14 of the Protocol:

7.4.1 Submitting information to the ABS Clearing House relating to details of domestic ABS institutions, measures and activities; and

7.4.2 Ensuring all information is complete and up to date with no confidential data.

7.5 COOK ISLANDS RESEARCH SECRETARIAT

The Cook Islands Research Secretariat is based with the Central Policy and Planning Office (CPPO) of the Office of the Prime Minister (OPM) and will ensure that:

7.5.1 Applications are fully compliant with Article 15 of the Convention (relating to access rights and the rights of contracting parties, as well as compliance with national legislation or regulatory requirements on Access and Benefit Sharing);

7.5.2 The commercialisation and any other use of genetic resources should not prevent traditional use of genetic resources;

7.5.3 The roles and responsibilities of contracted parties (providers and users) must be undertaken in a clear, objective and transparent manner;

7.5.4 Tracking and monitoring will be implemented by designated Checkpoints to enhance accountability and transparency on the use of genetic resources;

7.5.5. Full consideration must be given to the environmental consequences of access activities;

7.5.6 All decisions must be made available to the local communities and stakeholders, via the Are Korero of the relevant island; and

7.5.7 Local interests must be fully represented during negotiations.

INSERT RESEARCH UNIT FLOWCHART

8 THE ACCESS AND BENEFIT SHARING PROCESS

8.1 APPLICANTS to access genetic resources and/or associated traditional knowledge

8.1.1. Applicants may be any legal entity (individual, company, researcher, organisation) wishing to access genetic resources and/or associated traditional knowledge (also referred to as the **users** of the genetic resources and/or associated traditional knowledge);

8.1.2. Applicants may use their access to genetic resources and/or associated traditional knowledge for both academic and/or commercial purposes;

8.1.3 Submissions for any applications for research of genetic resources of the Cook Islands must first be made to the **source** of the resource and/or traditional knowledge (also referred to as the **providers** of the genetic resources and/or associated traditional knowledge), via the **Are Korero** of the appropriate island, for Prior Informed Consent (and Mutually Agreed Terms) in conjunction with and approval of the **Cook Islands Competent National Authority**;

8.1.4 Once formal approval has been given, the **Cook Islands Research Secretariat** will then further process the application before a full research permit is approved;

8.1.5 Upon granting a permit or written evidence that access requirements have been met, the **Cook Islands Research Secretariat** will send a copy of the permit to the **National Focal Point** who will forward the permit to the **ABS Clearing House** in order to create an **Internationally Recognized Certificate of Compliance**.

The permit shall include information on the:

8.1.5.1 Issuing Competent National Authority;

8.1.5.2 Date of issuance;

8.1.5.3 Authorized provider of genetic resource and/or associated traditional knowledge;

8.1.5.4 Unique identifier of the national permit;

8.1.5.5 Contact details of the person or entity of whom prior informed consent was granted;

8.1.5.6 Subject matter or genetic resources covered by the permit;

8.1.5.7 Confirmation that prior informed consent was obtained; and

8.1.5.8 Confirmation that mutually agreed terms were established.

8.2 ESTABLISHING PRIOR INFORMED CONSENT (PIC)

Prior Informed Consent should include that:

8.2.1 Access to genetic resources should be enabled at minimum cost;

8.2.2 Conditions set for access to genetic resources should be transparent, based on legal grounds and comply with the objectives of the CBD;

8.2.3 Consent for access to genetic resources must be obtained from the right-holder/s through the Are Korero of the island concerned; and

8.2.4 Consent must be authorised by the designated Competent National Authority in the Cook Islands before the initial permit is forwarded to the Cook Islands Research.

8.3 ESTABLISHING MUTUALLY AGREED TERMS (MAT)

Mutually Agreed Terms (contractual arrangements), should include that:

- 8.3.1 Transaction costs should be kept to a minimum;
- 8.3.2 Details of user and provider rights and obligations are clear (and translated to Cook Islands Maori if required);
- 8.3.3 Benefit sharing shall be agreed between the users and providers on the kind of benefit/s (monetary and/or non-monetary) and on pre-determined milestones;
- 8.3.4 Any change of intent on the use of the genetic resource and/or associated traditional knowledge shall require a new application for prior informed consent and the establishment of new mutually agreed terms, where applicable;
- 8.3.5 Mutually agreed terms should be negotiated efficiently and within a reasonable period of time; and
- 8.3.6 Mutually agreed terms should be set out in a written agreement (and translated into Cook Islands Maori).

8.4 TRADITIONAL KNOWLEDGE Associated with Genetic Resources

- 8.4.1 Application of traditional knowledge in the development of any Mutually Agreed Term shall be in accordance with the Traditional Knowledge Act 2013 and any other legislation, customary laws, and community protocols and procedures with respect to traditional knowledge;
- 8.4.2 Are Korero on each island will provide the mechanism to support effective participation of local communities to grant prior informed consent and to establish mutually agreed terms for the use of their traditional knowledge associated with genetic resource;
- 8.4.3 Are Korero shall be responsible for registering the traditional knowledge of the ta'unga (or other experts) on their island and granting the right of the ta'unga to register their information as secret or sacred-secret⁶; and
- 8.4.4 This policy will not restrict the customary use and exchange of genetic resources and its associated traditional knowledge within and between local communities.

8.5 Other provisions under this Policy

- 8.5.1 Disputes about ownership of traditional knowledge should be settled by Are Korero of the island/s concerned, according to a set of guidelines for arbitration;
- 8.5.2 In the case of the application of intellectual property rights, the provider shall have joint ownership of relevant intellectual property rights, unless waived by the provider;
- 8.5.3 Any potential applications for patents in relation to the research of any genetic resource by the user must be included in discussions relating to Prior Informed Consent and any agreements will be included into the Mutually Agreed Terms between the parties;
- 8.5.4 Periodic reports will be provided by the user on the status and progress of the accessed genetic resource and/or associated traditional knowledge, as requested by the Competent National Authority;
- 8.5.5 The user party will also provide information on Prior Informed Consent, Mutually Agreed Terms, source of genetic resource, and use of genetic resources and/or associated traditional knowledge as requested by the Checkpoint;

⁶ Traditional Knowledge Act 2013, section 12 - prohibits the use of registered sacred or sacred-secret knowledge by anyone who is not a rights-holder.

- 8.5.6 No third party shall have access to the genetic resource and/or associated traditional knowledge including information derived from the said resource and/or knowledge; and
- 8.5.7 A portion of benefits arising from the utilization of genetic resources and/or associated traditional knowledge shall be directed towards the conservation and sustainable use of the biological diversity of the Cook Islands.

8.6 NON-COMPLIANCE MECHANISMS

- 8.6.1 In case of non-compliance by legal entities in the Cook Islands, the Competent National Authority must cooperate in cases of alleged violation of ABS legislation or this policy, including in the dispute resolution process relating to cases where disputes may arise from mutually agreed terms; and
- 8.6.2 The Competent National Authority must cancel the permit upon a final decision being made relating to non-compliance with ABS legislation or this Policy, including mutually agreed terms. The Competent National Authority must inform the National Focal Point for appropriate action.

8.7 TRANS-BOUNDARY COOPERATION

- 8.7.1 In instances where the same genetic resources are found *in situ* (in the natural place or locally or on site) within the Cook Islands, the ABS authorities shall endeavour to cooperate with Are Korero and their local communities with a view to implementing the Protocol; and
- 8.7.2 Where the same traditional knowledge associated with genetic resources is shared by one or more local communities in Cook Islands, Are Korero and their communities shall endeavour to cooperate, with a view to implementing the objective of the Protocol.

8.8 Supportive Measures

- 8.8.1 Take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources in accordance with Article 21 of the Protocol;
- 8.8.2 Build capacity to support key aspects of implementation based on Cook Islands' assessment of national needs and priorities; and
- 8.8.3 Promote and encourage the development of model contractual clauses and voluntary codes of conduct, guidelines and best practices or standards.

9 ACRONYMS

ABS	(Full title) The Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising from their Utilisation to the Convention on Biological Diversity
CBD	Convention on Biological Diversity
CNA	Competent National Authority
CPPO	Central Policy and Planning Office
MAT	Mutually Agreed Terms
NBSAP	National Biodiversity Strategy and Action Plan
NP	Nagoya Protocol
OPM	Office of the Prime Minister
PIC	Prior Informed Consent

**Annex 1: ROLES AND RESPONSIBILITIES IN ACCESS AND BENEFIT SHARING
PURSUANT TO ARTICLE 15 OF THE CONVENTION ON BIOLOGICAL DIVERSITY⁷**

Contents

A. National Focal Point	i
B. Competent National Authority	i
C. The Traditional Knowledge Act	i
D. Responsibilities	ii
a) Contracting Parties	ii
b) Users	ii
c) Providers	iii
d) Contracting Parties with Users	iii
E. Participation of Stakeholders	iv
F. The Access and Benefit Sharing Process	iv
(Flowchart – application process for ABS research)	v
a) PIC1 – Prior Informed Consent	v
b) PIC2 – Competent Authority Granting Prior Informed Consent	vi
c) PIC3 – Timing and Deadlines	vi
d) PIC4 – Specification of Use	vi
e) PIC5 – Procedures for Obtaining Prior Informed Consent	vi
f) PIC6 – Process	vii
g) MAT1 – Mutually Agreed Terms	vii
h) MAT2 – Indicative List of Typical Mutually Agreed Terms	viii
i) MAT3 – Benefit Sharing	ix
j) MAT4 – Monetary and Non-Monetary Benefits	ix
k) MAT5 – Timing of Benefits	x
l) MAT6 – Distribution of Benefits	x
m) MAT7 – Mechanisms for Benefit Sharing	x
G. Other Provisions	xi
a) Incentives	xi
b) Accountability in Implementing ABS Arrangements	xi
c) National Monitoring and Reporting	xi
d) Means for Verification	xi
e) Settlement of Disputes	xii
f) Remedies	xii
H. Suggested Elements for Material Transfer Agreements	xii
a) Introductory Provisions	xii
b) ABS Provisions	xii
c) Legal Provisions	xiii

⁷ Secretariat of CBD. (2002). Bonn Guidelines. pp4-20

A. NATIONAL FOCAL POINT

The Cook Islands will designate one NATIONAL FOCAL POINT for access and benefit-sharing and make such information available through the ABS clearing-house mechanism⁸ as well as some notification of the processes and systems involved at national level on the Nagoya Protocol section of the Cook Islands Biodiversity Clearinghouse website. The NATIONAL FOCAL POINT shall inform applicants for access to genetic resources on procedures for acquiring prior informed consent and MUTUALLY AGREED TERMS, including benefit-sharing, and on competent national authorities, relevant indigenous and local communities and relevant stakeholders.

B. COMPETENT NATIONAL AUTHORITY

A COMPETENT NATIONAL AUTHORITY, should be established in accordance with applicable national legislative, administrative or policy measures, and be responsible for granting access and be responsible for advising on:

- a. The negotiating process;
- b. Requirements for obtaining PRIOR INFORMED CONSENT and entering into MUTUALLY AGREED TERMS;
- c. Monitoring and evaluation of access and benefit-sharing agreements;
- d. Implementation/enforcement of access and benefit-sharing agreements;
- e. Processing of applications and approval of agreements;
- f. The conservation and sustainable use of the genetic resources accessed;
- g. Mechanisms for the effective participation of different stakeholders, as appropriate for the different steps in the process of access and benefit-sharing, in particular, indigenous and local communities;
- h. Mechanisms for the effective participation of indigenous and local communities while promoting the objective of having decisions and processes available in a language understandable to relevant indigenous and local communities.

C. The TRADITIONAL KNOWLEDGE ACT

The Traditional Knowledge Act details the rights of rights-holders of registered traditional knowledge and the role of the Are Korero in the registration of traditional knowledge.

In this Act, traditional knowledge refers to knowledge that has been transmitted from generation to generation and originates from a traditional community, or was created or developed for traditional purposes (S4). The Act covers traditional knowledge of any cultural practice that forms part of the traditional way of life of the Cook Islands people. Cultural practice could involve any traditional process or recipe for making or preparing any drink, food or medicine, or any substance intended to be applied to the body (S6). This can be *vairakau maori* which is also considered sacred or sacred-secret because it is believed that the ta'unga has been especially chosen to receive and use this "gift from God" for the benefit of their people.

The Act states that only the rights-holder of registered traditional knowledge has the right to use or develop the knowledge in any way, or to receive any commercial returns from the use of the development of their knowledge (S7) and that no one who is not a rights-holder shall do anything in

⁸ [ABS Clearinghouse](#)

relation to that knowledge without first obtaining the written authorisation of a rights-holder of the knowledge (S8). However, use can be made without the consent of the rights-holder if the knowledge is to be used for an educational purpose and as long as it is in accordance with customary laws, practice and rituals of that community (S9).

Registering traditional knowledge and *vairakau maori* by a *ta'unga* must first be done through the Are Korero of his/her respective island (S19). This will enable the Are Korero to discuss and confirm that the applicant is the only rights-holder of that particular knowledge (S20). The Are Korero can also resolve any disputes relating to the holding of rights to a particular knowledge (S21).

Any applications for access to the traditional knowledge and plant or animal resources of a particular *ta'unga* must be made through the Are Korero of the *ta'unga's* respective island. With regards to the ABS Policy, any discussions about PIC and MATs will be done initially with the Are Korero of the island and with the *ta'unga* concerned, as part of the research permit allocation process.

D. RESPONSIBILITIES

Recognising that Parties and stakeholders may both be users and providers (hereby as referred to as the Contracting Parties), the following balanced list of roles and responsibilities provide the key elements that should be acted upon:

a) CONTRACTING PARTIES

Contracting Parties which are from the countries of origin of the genetic resources, or other Parties which have acquired the genetic resources in accordance with the Convention, should:

- i. Be encouraged to review their policy, administrative and legislative measures to ensure they are fully complying with Article 15 of the Convention;
- ii. Be encouraged to report on access applications through the clearing-house mechanism and other reporting channels of the Convention;
- iii. Seek to ensure that the commercialization and any other use of genetic resources should not prevent traditional use of genetic resources;
- iv. Ensure that they fulfil their roles and responsibilities in a clear, objective and transparent manner;
- v. Ensure that all stakeholders take into consideration the environmental consequences of the access activities;
- vi. Establish mechanisms to ensure that their decisions are made available to relevant indigenous and local communities and relevant stakeholders, particularly indigenous and local communities;
- vii. Support measures, as appropriate, to enhance indigenous and local communities' capacity to represent their interests fully at negotiations.

b) USERS

In the implementation of MUTUALLY AGREED TERMS, USERS should:

- i. Seek INFORMED CONSENT prior to access to genetic resources, in conformity with Article 15, paragraph 5, of the Convention;
- ii. Respect customs, traditions, values and customary practices of indigenous and local communities;

- iii. Respond to requests for information from indigenous and local communities;
- iv. Only use genetic resources for purposes consistent with the terms and conditions under which they were acquired;
- v. Ensure that uses of genetic resources for “unanticipated” purposes⁹ or purposes other than those for which they were acquired, only take place after new PRIOR INFORMED CONSENT and MUTUALLY AGREED TERMS are given;
- vi. Maintain all relevant data regarding the genetic resources, especially documentary evidence of the PRIOR INFORMED CONSENT and information concerning the origin and the use of genetic resources and the benefits arising from such use;
- vii. As much as possible endeavour to carry out their use of the genetic resources in, and with the participation of, the providing country;
- viii. When supplying genetic resources to third parties, honour any terms and conditions regarding the acquired material. They should provide this third party with relevant data on their acquisition, including PRIOR INFORMED CONSENT and conditions of use and record and maintain data on their supply to third parties. Special terms and conditions should be established under MUTUALLY AGREED TERMS to facilitate taxonomic research for non-commercial purposes;
- ix. Ensure the fair and equitable sharing of benefits, including technology transfer to providing countries, pursuant to Article 16 of the Convention arising from the commercialization or other use of genetic resources, in conformity with the MUTUALLY AGREED TERMS they established with the indigenous and local communities or stakeholders involved.

c) PROVIDERS

PROVIDERS should:

- i. Provide a clear understanding of the local accepted definition of “traditional knowledge” associated with “genetic resources”. A definition of terms section should be within the agreement;
- ii. Only supply genetic resources and/or traditional knowledge when they have the legal authority to do so; that is, the rights of the genetic resources may be vested with the national government, a landowner or indigenous and local communities or their trustee;
- iii. Provide information within the agreement about the genetic resource that is being collected, that is, the type of genetic resource, its taxonomical determination and common name, the quantity of the material and the parts of the organism, if applicable;
- iv. Pre-empt and accommodate future change in the composition of the Parties by including the successors in title of the parties to the contract;
- v. Strive to avoid imposition of arbitrary restrictions on access to genetic resources.

d) CONTRACTING PARTIES WITH USERS

Contracting Parties with users of genetic resources should take appropriate legal, administrative, or policy measures, as appropriate, to support compliance with PRIOR INFORMED CONSENT of the Contracting Party providing such resources and MUTUALLY AGREED TERMS on which access was granted. These countries could consider, inter alia, the following measures:

⁹ The ABS Capacity Development Initiative, The BS Agreement, Key elements and commentary. Purpose and scope of utilisation p5

- i. Mechanisms to provide information to potential USERS on their obligations regarding access to genetic resources;
- ii. Measures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights;
- iii. Measures aimed at preventing the use of genetic resources obtained without the PRIOR INFORMED CONSENT of the Contracted Party providing such resources;
- iv. Cooperation between Contracting Parties to address alleged infringements of access and benefit-sharing agreements;
- v. Voluntary certification schemes for institutions abiding by rules on access and benefit-sharing;
- vi. Measures discouraging unfair trade practices;
- vii. Other measures that encourage users to comply with provisions under subparagraph (b) above.

E. PARTICIPATION OF STAKEHOLDERS

Involvement of relevant stakeholders is essential to ensure the adequate development and implementation of access and benefit-sharing arrangements. However, due to the diversity of stakeholders and their diverging interests, their appropriate involvement can only be determined on a case-by-case basis.

Relevant stakeholders shall be consulted, and their views taken into consideration in each step of the process, including:

- a. When determining access, negotiating and implementing MUTUALLY AGREED TERMS, and in the sharing of benefits;
- b. In the development of a national strategy, policies or regimes on access and benefit-sharing.

To facilitate the involvement of relevant stakeholders, including indigenous and local communities, appropriate consultative arrangements, such as national consultative committees, comprising relevant stakeholder representatives, should be made.

The involvement of relevant stakeholders should be promoted by:

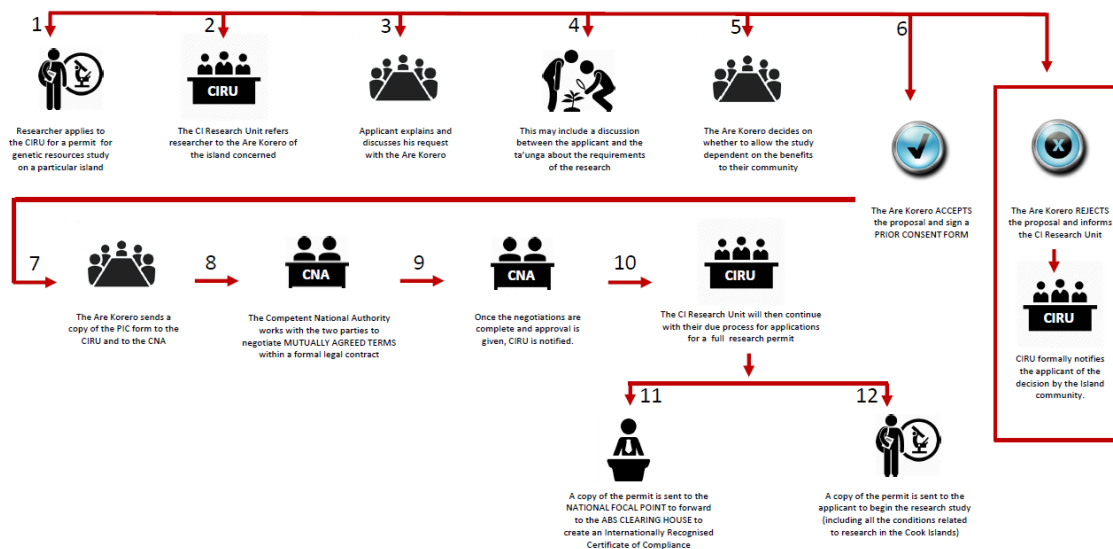
- a. Providing information, especially regarding scientific and legal advice, in order for them to be able to participate effectively;
- b. Providing support for capacity-building, in order for them to be actively engaged in various stages of access and benefit-sharing arrangements, such as in the development and implementation of MUTUALLY AGREED TERMS and contractual arrangements.

The stakeholders involved in access to genetic resources and benefit-sharing may wish to seek the support of a mediator or facilitator when negotiating MUTUALLY AGREED TERMS.

F. THE ACCESS AND BENEFIT SHARING PROCESS

The steps involved in the process of obtaining access to genetic resources and sharing of benefits may include activities prior to access, research and development conducted on the genetic resources, as well as their commercialization and other uses, including benefit-sharing.

Application process for ABS research



a. PIC1 -PRIOR INFORMED CONSENT

Article 15, paragraph 5, states that access to genetic resources shall be subject to PRIOR INFORMED CONSENT (PIC) of the contracting Party providing such resources

The basic principles of a **PRIOR INFORMED CONSENT System** should include:

- Legal certainty and clarity.
- Access to genetic resources should be facilitated at minimum cost.
- Restrictions on access to genetic resources should be transparent, based on legal grounds and not run counter to the objectives of the CBD.
- Consent of the designated competent national authority in the Cook Islands and consent of relevant stakeholders appropriate to the circumstances and subject to local laws, should be obtained¹⁰.

Elements of a **PRIOR INFORMED CONSENT System** may include:

- The Competent Authority granting or providing for evidence of PRIOR INFORMED CONSENT;
- Timing and deadlines;
- Specification of use;
- Procedures for obtaining PRIOR INFORMED CONSENT;
- Mechanism for consultation of relevant stakeholders;
- Process.

¹⁰ Secretariat of the CBD. Bonn Guidelines. 2002 (S26 and S27, p9)

b. PIC2 - COMPETENT AUTHORITY GRANTING PRIOR INFORMED CONSENT

PRIOR INFORMED CONSENT for access to in situ genetic resources shall be obtained from the Contracting Party providing such resources, through its Competent National Authority, unless otherwise determined by that Party.

In accordance with national legislation, PRIOR INFORMED CONSENT may be required from different levels of Government. National requirements for obtaining PRIOR INFORMED CONSENT shall be specified.

National procedures shall facilitate the involvement of all relevant stakeholders from the community to the government level, aiming at simplicity and clarity.

Respecting established legal rights of the people of the Cook Islands who are associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the PRIOR INFORMED CONSENT of the indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices shall be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.

For ex situ collections, PRIOR INFORMED CONSENT shall be obtained from the competent national authority and/or the body governing the ex situ collection concerned as appropriate.

c. PIC3 - TIMING AND DEADLINES

PRIOR INFORMED CONSENT is to be sought adequately in advance to be meaningful both for those seeking and for those granting access. Decisions on applications for access to genetic resources should also be taken within a reasonable period of time.

d. PIC4 - SPECIFICATION OF USE

PRIOR INFORMED CONSENT should be based on the specific uses for which consent has been granted.

While PRIOR INFORMED CONSENT may be granted initially for specific use(s), any change of use including transfer to third parties may require a new application for Prior Informed Consent.

Permitted uses should be clearly stipulated and further PRIOR INFORMED CONSENT for changes or unforeseen uses should be required.

Specific needs of taxonomic and systematic research as specified by the Global Taxonomy Initiative should be taken into consideration.

PRIOR INFORMED CONSENT is linked to the requirement of MUTUALLY AGREED TERMS.

e. PIC5 - PROCEDURES FOR OBTAINING PRIOR INFORMED CONSENT

An application for access could require the following information to be provided, in order for the competent authority to determine whether or not access to a genetic resource should be granted. This list is indicative and should be adapted to national circumstances:

- i. Legal entity and affiliation of the applicant and/or collector and contact person when the applicant is an institution;
- ii. Type and quantity of genetic resources to which access is sought;
- iii. Starting date and duration of the activity;
- iv. Geographical prospecting area;
- v. Evaluation of how the access activity may impact on conservation and sustainable use of biodiversity, to determine the relative costs and benefits of granting access;
- vi. Accurate information regarding intended use (e.g. taxonomy, collection, research, commercialization);
- vii. Identification of where the research and development will take place;
- viii. Information on how the research and development is to be carried out;
- ix. Identification of local bodies for collaboration in research and development;
- x. Possible third-party involvement
- xi. Purpose of the collection, research and expected results;
- xii. Kinds/types of benefits that could come from obtaining access to the resource, including benefits from derivatives and products arising from the commercial and other utilization of the genetic resource;
- xiii. Indication of benefit-sharing arrangements;
- xiv. Budget;
- xv. Treatment of confidential information.

Permission to access genetic resources does not necessarily imply permission to use associated knowledge and vice versa.

f. PIC6 - PROCESS

Applications for access to genetic resources through PRIOR INFORMED CONSENT and decisions by the competent authority to grant access to genetic resources or not shall be documented in written form.

The competent authority could grant access by issuing a permit or licence or following other appropriate procedures.

A national registration system could be used to record the issuance of all permits or licences, on the basis of duly completed application forms.

The procedures for obtaining an access permit/licence should be transparent and accessible by any interested party.

g. MAT1 - MUTUALLY AGREED TERMS

Article 15, paragraph 7, states that each Contracting Party shall “take legislative, administrative or policy measure, as appropriate, with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon MUTUALLY AGREED TERMS”. Guidelines should assist Parties and stakeholders in the development of MUTUALLY AGREED TERMS to ensure the fair and equitable sharing of benefits.

The basic principles or requirements that could be considered for the development of **MUTUALLY AGREED TERMS**, include:

- a. Legal certainty and clarity
- b. Minimisation of transaction costs, by, for example:
 - i. Establishing and promoting awareness of the Government's and relevant stakeholders' requirements for PRIOR INFORMED CONSENT and contractual arrangements
 - ii. Ensuring awareness of existing mechanisms for applying for access, entering into arrangements and ensuring the sharing of benefits
 - iii. Developing framework agreements, under which repeat access under expedited arrangements can be made
 - iv. Developing standardised material transfer agreements and benefit-sharing arrangements for similar resources and similar uses.
- c. Inclusion of provisions on user and provider obligations
- d. Development of different contractual arrangements for different resources and for different uses and development of model arrangements
- e. Different uses may include, inter alia, taxonomy, collections, research, commercialisation
- f. MUTUALLY AGREED TERMS should be negotiated efficiently and within a reasonable period of time
- g. MUTUALLY AGREED TERMS should be set out in a written agreement.¹¹

The following elements could be considered as guiding parameters in contractual agreements. These elements could also be considered as basic requirements for MUTUALLY AGREED TERMS:

- a. Regulating the use of resources in order to take into account ethical concerns of the particular Parties and stakeholders, in particular indigenous and local communities concerned;
- b. Making provision to ensure the continued customary use of genetic resources and related knowledge;
- c. Provision for the use of intellectual property rights include joint research, obligation to implement rights on inventions obtained and to provide licences by common consent;
- d. The possibility of joint ownership of intellectual property rights according to the degree of contribution.

h. MAT2 - INDICATIVE LIST OF TYPICAL MUTUALLY AGREED TERMS

The following provides an indicative list of typical MUTUALLY AGREED TERMS:

- a. Type and quantity of genetic resources, and the geographical/ecological area of activity;
- b. Any limitations on the possible use of the material;
- c. Recognition of the sovereign rights of the Cook Islands;
- d. Capacity-building in various areas to be identified in the agreement;
- e. A clause on whether the terms of the agreement in certain circumstances (e.g. change of use) can be renegotiated;
- f. Whether the genetic resources can be transferred to third parties and conditions to be imposed in such cases, e.g. whether or not to pass genetic resources to third parties without ensuring that the third parties enter into similar agreements except for taxonomic and systematic research that is not related to commercialization;

¹¹ Secretariat of the CBD. Bonn Guidelines. 2002 (p12)

- g. Whether the knowledge, innovations and practices of indigenous and local communities have been respected, preserved and maintained, and whether the customary use of biological resources in accordance with traditional practices has been protected and encouraged;
- h. Treatment of confidential information;
- i. Provisions regarding the sharing of benefits arising from the commercial and other utilization of genetic resources and their derivatives and products.

i. MAT3 – BENEFIT-SHARING

MUTUALLY AGREED TERMS could cover the conditions, obligations, procedures, types, timing, distribution and mechanisms of benefits to be shared. These will vary depending on what is regarded as fair and equitable in light of the circumstances.

j. MAT4 - MONETARY AND NON- MONETARY BENEFITS

1. Monetary benefits may include, but not be limited to:

- a. Access fees/fee per sample collected or otherwise acquired;
- b. Up-front payments;
- c. Milestone payments;
- d. Payment of royalties;
- e. Licence fees in case of commercialization;
- f. Special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;
- g. Salaries and preferential terms where mutually agreed;
- h. Research funding;
- i. Joint ventures;
- j. Joint ownership of relevant intellectual property rights.

2. Non-monetary benefits may include, but not be limited to:

- a. Sharing of research and development results;
- b. Collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the provider country;
- c. Participation in product development;
- d. Collaboration, cooperation and contribution in education and training;
- e. Admittance to ex situ facilities of genetic resources and to databases;
- f. Transfer to the provider of the genetic resources of knowledge and technology under fair and most favourable terms, including on concessional and preferential terms where agreed, in particular, knowledge and technology that make use of genetic resources, including biotechnology, or that are relevant to the conservation and sustainable utilization of biological diversity;
- g. Strengthening capacities for technology transfer to user developing country Parties and to Parties that are countries with economies in transition and technology development in the country of origin that provides genetic resources. Also, to facilitate abilities of indigenous and local communities to conserve and sustainably use their genetic resources;
- h. Institutional capacity-building;

- i Human and material resources to strengthen the capacities for the administration and enforcement of access regulations;
- j Training related to genetic resources with the full participation of providing Parties, and where possible, within such Parties;
- k Access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;
- l Contributions to the local economy;
- m Research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in provider countries;
- n Institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities;
- o Food and livelihood security benefits;
- p Social recognition;
- q Joint ownership of relevant intellectual property rights.

k. MAT5 - TIMING OF BENEFITS

Near-term, medium-term and long-term benefits should be considered, including up-front payments, milestone payments and royalties. The time-frame of benefit-sharing should be definitely stipulated. Furthermore, the balance among near-term, medium-term and long-term benefit should be considered on a case-by-case basis.

l. MAT 6 - DISTRIBUTION OF BENEFITS

Pursuant to MUTUALLY AGREED TERMS established following PRIOR INFORMED CONSENT, benefits should be shared fairly and equitably with all those who have been identified as having contributed to the resource management, scientific and/or commercial process. The latter may include governmental, non-governmental or academic institutions and indigenous and local communities. Benefits should be directed in such a way as to promote conservation and sustainable use of biological diversity.

m. MAT7 - MECHANISMS FOR BENEFIT-SHARING

Mechanisms for benefit-sharing may vary depending upon the type of benefits, the specific conditions in the country and the stakeholders involved. The benefit-sharing mechanism should be flexible as it should be determined by the partners involved in benefit-sharing and will vary on a case-by-case basis.

Mechanisms for sharing benefits should include full cooperation in scientific research and technology development, as well as those that derive from commercial products including trust funds, joint ventures and licences with preferential terms.

G. OTHER PROVISIONS

a. INCENTIVES

The following incentive measures exemplify measures which could be used in the implementation of the guidelines:

- i. The identification and mitigation or removal of perverse incentives, that may act as obstacles for conservation and sustainable use of biological diversity through access and benefit-sharing, should be considered;
- ii. The use of well-designed economic and regulatory instruments, directly or indirectly related to access and benefit-sharing, should be considered to foster equitable and efficient allocation of benefits;
- iii. The use of valuation methods should be considered as a tool to inform users and providers involved in access and benefit-sharing;
- iv. The creation and use of markets should be considered as a way of efficiently achieving conservation and sustainable use of biological diversity.

b. ACCOUNTABILITY IN IMPLEMENTING ACCESS AND BENEFIT-SHARING ARRANGEMENTS

Parties should endeavour to establish mechanisms to promote accountability by all stakeholders involved in access and benefit-sharing arrangements.

To promote accountability, Parties may consider establishing requirements regarding:

- i. Reporting; and
- ii. Disclosure of information.

The individual collector or institution on whose behalf the collector is operating should, where appropriate, be responsible and accountable for the compliance of the collector.

c. NATIONAL MONITORING AND REPORTING

Depending on the terms of access and benefit-sharing, national monitoring may include:

- i. Whether the use of genetic resources is in compliance with the terms of access and benefit-sharing;
- ii. Research and development process;
- iii. Applications for intellectual property rights relating to the material supplied.

The involvement of relevant stakeholders, in particular, indigenous and local communities, in the various stages of development and implementation of access and benefit-sharing arrangements can play an important role in facilitating the monitoring of compliance.

d. MEANS FOR VERIFICATION

Voluntary verification mechanisms could be developed at the national level to ensure compliance with the access and benefit-sharing provisions of the Convention on Biological Diversity and national legal instruments of the Cook Islands providing the genetic resources.

A system of voluntary certification could serve as a means to verify the transparency of the process of access and benefit-sharing. Such a system could certify that the access and benefit-sharing provisions of the Convention on Biological Diversity have been complied with.

e. SETTLEMENT OF DISPUTES

As most obligations arising under mutually agreed arrangements will be between providers and users, disputes arising in these arrangements should be solved in accordance with the relevant contractual arrangements on access and benefit-sharing and the applicable law and practices. In the Cook Islands there is provision for arbitration under the Arbitration Act for redress in the courts.

In cases where the access and benefit-sharing agreements consistent with the Convention on Biological Diversity and national legal instruments of the Cook Islands of genetic resources have not been complied with, the use of sanctions could be considered, such as penalty fees set out in contractual agreements.

f. REMEDIES

Parties may take appropriate effective and proportionate measures for violations of national legislative, administrative or policy measures implementing the access and benefit-sharing provisions of the Convention on Biological Diversity, including requirements related to PRIOR INFORMED CONSENT and MUTUALLY AGREED TERMS.

H. SUGGESTED ELEMENTS FOR MATERIAL TRANSFER AGREEMENTS

Material transfer agreements may contain wording on the following elements:

a. INTRODUCTORY PROVISIONS

- i. Preambular reference to the Convention on Biological Diversity
- ii. Legal status of the provider and user of genetic resources
- iii. Mandate and/or general objectives of provider and, where appropriate, user of genetic resources

b. ACCESS AND BENEFIT-SHARING PROVISIONS

- i. Description of genetic resources covered by the material transfer agreements, including accompanying information
- ii. Permitted uses, bearing in mind the potential uses, of the genetic resources, their products or derivatives under the material transfer agreement (e.g. research, breeding, commercialization)
- iii. Statement that any change of use would require new PRIOR INFORMED CONSENT and material transfer agreement
- iv. Whether intellectual property rights may be sought and if so under what conditions
- v. Terms of benefit-sharing arrangements, including commitment to share monetary and non-monetary benefits
- vi. No warranties guaranteed by provider on identity and/or quality of the provided material
- vii. Whether the genetic resources and/or accompanying information may be transferred to third parties and if so conditions that should apply
- viii. Definitions
- ix. Duty to minimize environmental impacts of collecting activities

c. LEGAL PROVISIONS

- i. Obligation to comply with the material transfer agreement
- ii. Duration of agreement
- iii. Notice to terminate the agreement
- iv. Fact that the obligations in certain clauses survive the termination of the agreement
- v. Independent enforceability of individual clauses in the agreement
- vi. Events limiting the liability of either party (such as act of God, fire, flood, etc.)
- vii. Dispute settlement arrangements
- viii. Assignment or transfer of rights
 - a. Assignment, transfer or exclusion of the right to claim any property rights, including intellectual property rights, over the genetic resources received through the material transfer agreement
 - b. Choice of law
 - c. Confidentiality clause
 - d. Guarantee

Annex 2: GLOSSARY (for definitions of words in Cook Islands Maori, except for technical terms or titles where there may not be a word in Cook Islands Maori for that term)

ABS	ABS
ABS Clearinghouse	ABS Clearinghouse
ABS Institutions	
Academic purpose	
Access	
Aichi (Goal)	Aichi (Goal)
Alleged violation	
Arbitration	Arbitration
Archive	
Article	
Benefit-sharing	
Assessment	
Biological diversity	
Biological resources	
Build capacity	
CBD Secretariat	CBD Secretariat
Change of intent	
Checkpoint	Checkpoint
Commercial purpose	
Commercialisation	
Competent National Authority	Competent National Authority
Compliance	
Components	
Confidential	
Conservation	
Contracting parties	
Contractual clauses	
Convention	
Customary Use	
Derived	
Dispute settlement/resolution	
Domestic	
Efficiently	
Endeavour	
Endorsement	
Equitable	
Establishment	
Genetic (resources)	
Implementation/implementing	
Indigenous Peoples	
In accordance with	
Institutional	
Intellectual Property	
Issuance	

Jurisdiction	
Legal certainty and clarity	
Legal entity	
Legal grounds	
Legislation	
Marine resources	
Mechanisms	
Predetermined milestones	
Monetary/non-monetary	
Mutually Agreed Terms (MAT)	Mutually Agreed Terms (MAT)
National Focal Point	National Focal Point
Negotiate	
Non-compliance	
Operational	
Organisms	
Periodic reports	
Policy	
Prior Informed Consent (PIC)	Prior Informed Consent (PIC)
Priorities	
Procedures	
Protocol	Protocol
Provisions	
Publishing Authority	Publishing Authority
Ratified	
Regulations	
Relevant	
Research Secretariat	Research Secretariat
Security	
Sovereign rights	
Stakeholders	
Sustainable	
Take measures	
Taxonomy	Taxonomy
Terrestrial resources	
Third party	
Traditional knowledge	
Transaction	
Transparent	
Unique identifier	Unique identifier
Utilisation	
Voluntary	
Waived	