**Access to Genetic Resources and Benefit Sharing in the Cook Islands**

**COMMUNITY CONSULTATIONS – AITUTAKI**

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**Constraints:**

The decision relating to the trip to Aitutaki to begin community consultations left only a limited timeframe for our consultancy team to be as well prepared as we would have liked. However, it was timely to at least have one outer island under our belt and to be able to prepare for consultations in other outer islands. After the Xmas break, Rarotonga will also have to be a priority, with visits to the Ministries and other connected agencies. However, this first outer island visit gave us some insight into islanders’ concerns and expectations about this new topic and how these can be met in our resultant document.

The time spent with the Island Government was also limited as this meeting was organised at their end of year, and was their first introduction to ABS, so that key concepts such as ACCESS, GENETIC RESOURCES AND BENEFIT-SHARING required considerable explanation in Maori in order for them to understand what the Nagoya Protocol was about. The videos on the Nagoya Protocol and ABS were also helpful for potential providers to get some understanding of what is happening in the world of ABS and how a policy such as is being established will affect and ultimately benefit them. However, this preparatory information took up valuable time that we needed in order to adequately meet our own information needs. Being introduced to it earlier, would have given them a chance to internalise it and given them time to discuss and construct questions that could have better clarified the whole process for them and helped us to provide them with an appropriate process that matched their own processes.

The same situation eventuated with the Vainetini which was gathered at short notice, many thanks to Koi Bishop (wife of the Mayor, so that many of them were just as mystified about the requirements of the Protocol, and really, how it might impact them. A second visit will be required, and by then hopefully we will have a clearer picture of the document, and will incorporate some of the issues which will have been raised during our brief consultations.

Fortunately for Aitutaki, Mathilda who is resident there, will be able to go over any issues of concern with them so that they are more aware and will be able to more fully understand the implications of the key components of the policy document. Having had an explanation in Maori, other conversations can be carried out in English, as 90% of them are more than adequate English speakers anyway.

Nevertheless, it will be important that the policy is written in both English and Cook Islands Maori in order for all local stakeholders to truly understand their rights under the protocol and subsequently under this policy. Another draft accompanies this report, based on the feedback received.

Key issues that were raised by the Island Government, and again by the Vainetini, were:

1. **Who are the owners of the plants, if they come from my garden?** It was explained that common plants that have special local uses but on a general basis by the wider public would thus be seen to belong to all. However, if there is a particular family remedy which is widely known to stand apart from what is common usage and was used for a specific purpose because of what they knew, then it would be important for that family to register the ingredients of this remedy with the Ministry of Culture’s Traditional Knowledge Register and database. This would not necessarily require quantities which could hold the secret of the formula produced, but registering would protect the family’s interest in the particular properties of the plant which others acknowledge as having a traditional use for a particular purpose or remedy.
2. **How many of the plants do they need to take for their research?** Emily showed a video which explained how a plant was studied in a laboratory, and that it was only a small quantity that was required for scientists to extract what they needed for their further research. From this, Liz then explained what “genetic resources” were in terms of a pen, with the ink being the “rito” which could be translated as “the centre” or the “essence” of the plant. I referred to it as the “DNA” but I am not sure that they completely understood this, as the concept is a very complex and technical one.
3. **By registering the knowledge that plant is used for is that like taking a patent or a copyright on the plant?** It was explained that it would be difficult to take a patent out on a plant, but that the scientists could take a patent out on what they might have found in the plant. This is not the same as copyright which is the term used by the Ministry of Culture where they take copyrights out on original works of art, song and literature - intellectual property. If they decide to give a recipe, copyright may be taken out on that as intellectual property, but as it is a biological specimen that would be used, a patent would be a different type of protection for the scientists for a certain length of time. Any patents would also have to include ownership of the resource by the providers. It would have to be noted in their agreement that any patent should not hinder the provider’s use of that plant or resource for their own traditional purposes.
4. **It was suggested that the local traditional knowledge holders should meet** to discuss the implications of what had been talked about at this meeting. It would be a good idea if Mathilda helped them with any queries that they might have. These could be reported back to me so that I can develop language which can clarify any potential misunderstandings within the document for non-fluent English speakers.

Maureen Hilyard

(13 Dec 2017)

**COOK ISLANDS NATIONAL ENVIRONMENT SERVICE**

**COOK ISLANDS ACCESS AND BENEFIT SHARING POLICY**

**2017 (DRAFT, Version #3)**

1. **VISION**

To ensure the conservation and sustainable use of biological resources in the Cook Islands, and the fair and equitable sharing of any benefits rising from the use of these resources.

1. **OBJECTIVES**
	1. To conserve and protect the biological resources of the Cook Islands for the wellbeing of present and future generations and any traditional knowledge associated with them.
	2. To develop a mechanism that will ensure the sustainable use of the biological resources of the Cook Islands and fair and equitable sharing of any benefits arising from the direct and indirect use of these biological resources and their associated traditional knowledge.
	3. To guide relevant authorities to establish and manage an efficient and effective system which will regulate access and benefit-sharing related to the use of the biological resources of the Cook Islands by interested stakeholders
2. **CONTEXT**

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (“the Nagoya Protocol”) was adopted by the Conference of the Parties to the Convention on Biological Diversity (CBD) at its tenth meeting in Nagoya, Japan, 2010. The Nagoya Protocol entered into force on 12 October 2014, following its ratification by 53 Parties to the CBD.

While the Cook Islands is a party to and has ratified the Convention on Biological Diversity (on 29 December 1993)[[1]](#footnote-1), it is not yet a party to the Nagoya Protocol.

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

1. the Cook Islands National Sustainable Development Plan 2016-2020[[2]](#footnote-2): Goal 11.3 Protecting Diversity, Goal 14.3 Archive and Protect our cultural heritage and Goal 15.1 Support a sustainable population.
2. 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.

The development of this policy affirms the Biodiversity objectives of the Cook Islands National Sustainable Development Goals 2016-2020 and complies with the Cook Islands National Policy Toolkit (2017) as well as with the CBD Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (2002).

1. **SCOPE**

In accordance with Article 3 of the Nagoya Protocol, (Protocol or NP) this policy shall apply to genetic resources within the scope of Article 15[[3]](#footnote-3) of the Convention of Biodiversity (CBD or Convention) and to the benefits arising from the utilisation 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 knowledge[[4]](#footnote-4). In that regard, the Policy will also comply with the Cook Islands Traditional Knowledge Act 2013.

This policy will consist of a number of frameworks that will facilitate access to our genetic resources by academic researchers as well as companies seeking genetic resources with potential for use in a range of market sectors. The policy will include application forms for research as well as permits for the purpose of biotrade[[5]](#footnote-5) or bio-prospecting[[6]](#footnote-6). These will require prior informed consent and mutually agreed terms relating to conditions and benefits foreseen between providers and users.

1. **USE OF TERMS**

The terms defined in the Convention shall apply to this Protocol. In addition, for the purposes of this Protocol:

1. “The Convention” refers to the Convention on Biological Diversity;
2. “The Protocol” refers to the Nagoya Protocol
3. “Utilization of genetic resources” means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention;
4. “Biotechnology” as defined in Article 2 of the Convention means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use;
5. “Derivative” means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.
6. “Fair and equitable sharing”: Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilisation of genetic resources that are held by indigenous and local communities. In accordance with domestic legislation regarding the rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities’ concerns, based on mutually agreed terms.
7. **KEY PRINCIPLES**
	1. ****Article 15 of the Convention of Biological Diversity recognises the sovereign rights of States over their natural resources.
	2. Genetic resources are essential components of biological diversity. For example, they form the basis for each plant and animal variety in agriculture, and at the same time they contain active substances for the development of medicaments and cosmetics. This means they are used in a variety of sectors, most notably in agriculture and in the pharmaceuticals, cosmetics and biotechnology industries.
	3. One of the aims of the Nagoya Protocol is 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.
	4. The Protocol also defines how access to genetic resources is to be regulated, and thus facilitates access to these resources for companies and research institutions.
	5. It contains provisions aimed at ensuring that those who use genetic resources or related traditional knowledge comply with the access and benefit-sharing regulations in the providing countries.
	6. The Protocol is also intended to strengthen the degree of legal security in the use of genetic resources and related traditional knowledge. This is necessary so that companies and science invest in research and development.[[7]](#footnote-7)
8. **KEY ROLES AND RESPONSIBILITIES**

**7.1. National Focal Point**

The National Focal Point will facilitate access and benefit-sharing and make such information available through the ABS clearing-house mechanism[[8]](#footnote-8) 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.

**7.2. Competent National Authority**

A Competent National Authority will be established in accordance with applicable national legislative, administrative or policy measures, and be responsible for granting access and be responsible for advising on:

1. The negotiating process;
2. Requirements for obtaining prior informed consent and entering into mutually agreed terms;
3. Monitoring and evaluation of access and benefit-sharing agreements;
4. Implementation/enforcement of access and benefit-sharing agreements;
5. Processing of applications and approval of agreements;
6. The conservation and sustainable use of the genetic resources accessed;
7. 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;
8. 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.

The Competent National Authority has the legal power to grant Prior Informed Consent or may delegate this power to other entities, as appropriate.

**7.3. Contracting Parties should:**

1. ensure they are fully compliant with Article 15 of the Convention;
2. access applications through the clearing-house mechanism and other reporting channels of the Convention;
3. seek to ensure that the commercialization and any other use of genetic resources should not prevent traditional use of genetic resources;
4. fulfil their roles and responsibilities in a clear, objective and transparent manner;
5. ensure that all stakeholders take into consideration the environmental consequences of the access activities;
6. ensure that their decisions are made available to relevant local communities and stakeholders;
7. support measures, as appropriate, to enhance local capacity to fully represent their interests fully during negotiations.

**7.4. Users should:**

1. seek informed consent of all relevant stakeholders prior to access to genetic resources, in conformity with Article 15, paragraph 5, of the Convention;
2. respect local customs, traditions, values and customary practices of indigenous communities
3. respond to requests for information from local indigenous communities;
4. only use genetic resources for purposes consistent with the terms and conditions under which they were acquired;
5. 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;
6. ensure that uses of genetic resources for purposes other than those for which they were originally acquired, only take place after new prior informed consent and mutually agreed terms are given;
7. endeavour to carry out their use of the genetic resources in, and with the participation of, the providing country;
8. 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;
9. 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;

**7.5. GR and ATK Providers should:**

1. register their traditional knowledge and any relevant data regarding the genetic resources, with the Traditional Knowledge Register (Ministry of Cultural Development)
2. only supply genetic resources and/or traditional knowledge when they are entitled to do so;
3. strive to avoid imposition of arbitrary restrictions on access to genetic resources.
4. take appropriate legal, administrative, or policy measures, as appropriate, to support compliance with prior informed consent agreements and mutually agreed terms on which access was granted

**7.6. Contracting Parties should consider the following measures:**

1. Mechanisms to provide information to potential users on their obligations regarding access to genetic resources;
2. 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;
3. Measures aimed at preventing the use of genetic resources obtained without the prior informed consent of the Contracting Party providing such resources;
4. Cooperation between Contracting Parties to address alleged infringements of access and benefit-sharing agreements;
5. Voluntary certification schemes for institutions abiding by rules on access and benefit-sharing;
6. Measures discouraging unfair trade practices;
7. Other measures that encourage users to comply with provisions under subparagraph (b) above.
8. **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.

**8.1 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:

1. Legal certainty and clarity.
2. Access to genetic resources should be facilitated at minimum cost.
3. Restrictions on access to genetic resources should be transparent, based on legal grounds and not run counter to the objectives of the CBD.
4. 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 obtained[[9]](#footnote-9).

**8.2**  **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:

1. Legal certainty and clarity
2. Minimisation of transaction costs, by, for example:
	1. Establishing and promoting awareness of the Government’s and relevant stakeholders’ requirements for prior informed consent and contractual arrangements
	2. Ensuring awareness of existing mechanisms for applying for access, entering into arrangements and ensuring the sharing of benefits
	3. Developing framework agreements, under which repeat access under expedited arrangements can be made
	4. Developing standardised material transfer agreements and benefit-sharing arrangements for similar resources and similar uses.
3. Inclusion of provisions on user and provider obligations
4. Development of different contractual arrangements for different resources and for different uses and development of model arrangements
5. Different uses may include, inter alia, taxonomy, collections, research, commercialisation
6. Mutually agreed terms should be negotiated efficiently and within a reasonable period of time
7. Mutually agreed terms should be set out in a written agreement.[[10]](#footnote-10)

**8.3**  **MONETARY AND NON- MONETARY BENEFITS**

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

1. Access fees/fee per sample collected or otherwise acquired;
2. Up-front payments;
3. Milestone payments;
4. Payment of royalties;
5. Licence fees in case of commercialization;
6. Special fees to be paid to trust funds supporting conservation and sustainable use of biodiversity;
7. Salaries and preferential terms where mutually agreed;
8. Research funding;
9. Joint ventures;
10. Joint ownership of relevant intellectual property rights.

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

1. Sharing of research and development results;
2. Collaboration, cooperation and contribution in scientific research and development programmes, particularly biotechnological research activities, where possible in the provider country;
3. Participation in product development;
4. Collaboration, cooperation and contribution in education and training;
5. Admittance to ex situ facilities of genetic resources and to databases;
6. 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;
7. 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;
8. Institutional capacity-building;
9. Human and material resources to strengthen the capacities for the administration and enforcement of access regulations;
10. Training related to genetic resources with the full participation of providing Parties
11. Access to scientific information relevant to conservation and sustainable use of biological diversity, including biological inventories and taxonomic studies;
12. Contributions to the local economy;
13. Research directed towards priority needs, such as health and food security, taking into account domestic uses of genetic resources in provider countries;
14. Institutional and professional relationships that can arise from an access and benefit-sharing agreement and subsequent collaborative activities;
15. Food and livelihood security benefits;
16. Social recognition;
17. Joint ownership of relevant intellectual property rights.

**Other themes to consider:**

1. **Compliance with the ABS regime of other countries**
2. **Cooperation with other countries**
3. **IPR and implications**
4. **Linkages between ABS and other sectors**
5. **IPLCs and TK**
6. **Communication, education and public awareness**
7. **Financial mechanism**
8. **Assessment and review of the policy**

**Consider specific priority actions:**

1. **Support to local communities in development of community protocols**
2. **Promote in-country R&D utilization and tech transfer and collaborative research**
3. **Apply the precautionary principles to access requests and attach conditions aimed at ensuring ecological sustainability**
1. [CBD Country Profile – Cook Islands](https://www.cbd.int/countries/?country=ck) [↑](#footnote-ref-1)
2. <https://www.adb.org/sites/default/files/linked-documents/cobp-coo-2017-2019-ld-01.pdf> [↑](#footnote-ref-2)
3. Article 15, [Access to Genetic Resources,](https://www.cbd.int/convention/articles/default.shtml?a=cbd-15) Convention of Biodiversity [↑](#footnote-ref-3)
4. [Nagoya Protocol on Access and Benefit Sharing](https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf), Article 3 - Scope, p5. [↑](#footnote-ref-4)
5. [20 years of BioTrade – connection People, Planet and Markets](http://unctad.org/en/PublicationsLibrary/ditctedmisc2016d2_en.pdf) [↑](#footnote-ref-5)
6. [Essential Medicines and Health Products information Portal - Bioprospecting](http://apps.who.int/medicinedocs/en/d/Jh2996e/6.3.html#Jh2996e.6.3) [↑](#footnote-ref-6)
7. [Nagoya Protocol, Switzerland](https://www.bafu.admin.ch/bafu/en/home/topics/biotechnology/info-specialists/nagoya-protocol.html) [↑](#footnote-ref-7)
8. [ABS Clearinghouse](https://www.cbd.int/abs/theabsch.shtml) [↑](#footnote-ref-8)
9. Secretariat of the CBD. Bonn Guidelines. 2002 (S26 and S27, p9) [↑](#footnote-ref-9)
10. Secretariat of the CBD. Bonn Guidelines. 2002 (p12) [↑](#footnote-ref-10)