Frequently asked questions about Access and Benefit-Sharing, the Nagoya Protocol, and implications for researchers

Background document for the information session on implications of the Nagoya Protocol for taxonomic collections and researchers, Royal Museum for Central Africa (RMCA), 08 June 2015.

*(This is not an official Belgian position on the implementation of the Nagoya Protocol!)*



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# General

## What is Access and Benefit-Sharing (ABS)?

“Access and benefit-sharing (ABS) refers to the way in which genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the resources (users) and the people or countries that provide them (providers). “ (SCBD, 2011)

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## What is the Nagoya Protocol?

“The Nagoya Protocol on Access and Benefit-sharing is a new international treaty that builds on and supports the implementation of the CBD, in particular one of its three objectives, the fair and equitable sharing of benefits arising from the utilization of genetic resources. The Nagoya Protocol is a landmark agreement in the international governance of biodiversity and is relevant for a variety of commercial and non-commercial sectors involved in the use and exchange of genetic resources.

The Nagoya Protocol is based on the fundamental principles of access and benefit-sharing enshrined in the CBD. These principles are based on potential users of genetic resources obtaining the prior informed consent (PIC) of the country in which the genetic resource is located before accessing the resource, and negotiating and agreeing on the terms and conditions of access and use of this resource through the establishment of mutually agreed terms (MAT). This agreement includes the sharing of benefits arising from the use of the resource with the provider as a prerequisite for access to the genetic resource and its use. Conversely, countries, when acting as providers of genetic resources, should provide fair and non-arbitrary rules and procedures for access to their genetic resources.” (SCBD, 2011)

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## Why is the Nagoya Protocol important?

“The Nagoya Protocol will create greater legal certainty and transparency for both providers and users of genetic resources. It helps to ensure benefit-sharing, in particular when genetic resources leave the country providing the genetic resources, and it establishes more predictable conditions for access to genetic resources. By enhancing legal certainty and promoting benefit-sharing, the Nagoya Protocol encourages the advancement of research on genetic resources which could lead to new discoveries for the benefit of all. The Nagoya Protocol also creates incentives to conserve and sustainably use genetic resources, and thereby enhances the contribution of biodiversity to development and human well-being.” (SCBD, 2011)

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## How will the Protocol help achieve broader conservation goals?

“The Protocol encourages Parties to direct benefits arising from the access to and utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components. It is also hoped that these benefits may help vulnerable populations that depend on genetic resources to use them sustainably. It could also help to enhance the management and establishment of protected areas that are important to conserve biodiversity.” (European Commission, 2014)

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## How does ABS work?

“Access and benefit-sharing is based on prior informed consent (PIC) being granted by a provider to a user and negotiations between both parties to develop mutually agreed terms (MAT) to ensure the fair and equitable sharing of genetic resources and associated benefits.

• **Prior informed consent (PIC)**: is the permission given by the competent national authority (CNA)[[1]](#footnote-1) of a provider country to a user prior to accessing genetic resources, in line with an appropriate national legal and institutional framework.

• **Mutually agreed terms (MAT)**: is an agreement reached between the providers of genetic resources and users on the conditions of access and use of the resources, and the benefits to be shared between both parties. These conditions are required under Article 15 of the CBD, which was adopted in 1992 and provides a global set of principles for access to genetic resources, as well as the fair and equitable distribution of the benefits that result from their use.” (SCBD, 2011)

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## What is the ABS Clearing-House (ABS-CH)?

The Access and Benefit-sharing Clearing-House (ABS-CH) is a global platform maintained by the CBD Secretariat for exchanging information on access and benefit-sharing established by Article 14 of the Protocol. Parties are to provide and update the [information required under the Protocol](https://absch.cbd.int/about/obligations) through this information-exchange system:

* Legislative, administrative and policy measures on access and benefit-sharing;
* Information on the national focal point and competent national authority or authorities;
* 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.

The ABS CH can also provide information, if available and as appropriate, on:

* Relevant competent authorities of indigenous and local communities;
* Model contractual clauses; Methods and tools developed to monitor genetic resources;
* Codes of conduct and best practices.

National focal points or the CNA are the authorities that should post on the ABS-CH the information above. A Party should also designate a publishing authority who will validate the information that the CNA and the National focal points have posted and make it publicly available.

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## What are genetic resources?

“All living organisms; plants, animals and microbes, carry genetic material that could be potentially useful to humans. These resources can be taken from the wild, domesticated or cultivated. They are sourced from environments in which they occur naturally (in situ), or from human-made collections such as botanical gardens, genebanks, seed banks and microbial culture collections (ex situ).” (SCBD, 2011)

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## What does ‘using’ genetic resources mean?

“Using genetic resources, whether from plants, animals or micro-organisms, refers to the process of researching their beneficial properties and using them to increase scientific knowledge and understanding, or to develop commercial products.” (SCBD, 2011)

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## Are any genetic resources excluded from the scope of the Protocol?

“Human genetic resources are excluded from the scope of the Protocol, as well as genetic resources for which there is a specialized access- and benefit-sharing instrument (e.g., the ITPGRFA) . Further, genetic resources obtained from areas beyond national jurisdictions (e.g. Antarctica, the high seas) are also excluded from its scope.

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## Can you give me more information about traditional knowledge?

Does it fall under the scope of the Protocol if I ask a fisherman about the name and the habitat of a fish?

No. Traditional knowledge refers to the ways on how to utilize genetic resources. “Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.“ (CBD) An example: people developing pharmaceuticals products based on the traditional use of active compounds of some plants should share the benefits of these products with the holders of the traditional knowledge.

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## Where can I find additional information on the topic?

* Website of the Secretariat of the Convention on Biological Diversity – Nagoya Protocol section: <https://www.cbd.int/abs/>
* The Access and Benefit-sharing clearing-house: <https://absch.cbd.int/>
* Country information on ABS and national focal points: <https://absch.cbd.int/countries>

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# What will it mean in practice for researchers?

## What about the status of and access to genetic resources in collections?

### Before the ratification of the Convention on Biological Diversity (1996)

Genetic resources that were added to collections before the ratification of the CBD by Belgium belong to the collections, unless they were illegally accessed in a country that already had specific provisions regulating the access to its genetic resources. Belgium has sovereign rights over non litigious genetic resources and can grant access to them as provider country.

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### After the entry into force of the Protocol (October 2014)

New additions collected after the entry into force of the Protocol should be accessed according to its provisions: PIC should be obtained first from the CNA of the provider country, and MAT should be negotiated. The certified permit of access (and any other relevant documents related to PIC and MAT) issued by the provider country serves as internationally recognized certificate of compliance, once it has been made available through the Access and Benefit Sharing Clearing-House.

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### Between 1996 and the entry into force of the Protocol (2014)

Whether or not the Nagoya Protocol applies to genetic resources accessed during this period has to be assessed case-by-case. Several situations can be envisaged:

* A genetic resource (specimen) in a collection in Belgium was obtained from country B in absence of relevant legislation in country B, and without any other mutual agreement between Belgium and B.
* This is not in compliance with the CBD
* This is not illegal as no national laws was broken
* Country B has legally no more power over the specimen in the collection (politically this can be challenged)
* Any new access to the specimen would fall under the legislation of Belgium.
* A genetic resource (specimen) in a collection in Belgium was obtained from country B in absence of relevant legislation in country B but with mutual agreement terms between collection institutes (eg: MOSAICC).
* This is in compliance with the CBD
* This is not illegal as no national laws was broken
* Any new access to the specimen is determined by the conditions in the mutual agreement terms between the collection institutes and/or the legislation of Belgium
* A genetic resource (specimen) in a collection in Belgium was obtained from country B which has relevant legislation on access and benefit sharing
* If the collection respected the national legislation, then the access was legal. Any new access to the specimen falls under the provisions of the Nagoya Protocol and is determined by the conditions (PIC and MAT) under which it was accessed in country B
* If the collection did not respect the national legislation, then the access was illegal. Any new access to the specimen falls under the provisions of the Nagoya Protocol and has to be negotiated with country B.

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## How to use genetic resources in scientific publications?

Researcher A asks for access and gets PIC and negotiates MAT with the provider country. The MAT can, for example, contain conditions regarding how the genetic information (= resources) can be published (= used). The provider country makes the MAT provisions available, through the ABS CH, for potential third users (obligation of information).

After reading Researcher A’s publication, Researcher B (second user) wants to access the same genetic resource as researcher A that has been deposited in a collection. He/she first has to refer to the MAT provisions negotiated by Researcher A. If this MAT requires it, Researcher B may have to ask for access for him/herself and negotiate new MAT (most probable) with the provider country. The MAT negotiated by Researcher A may grant open access for second users, however this is up to the provider country to decide.

The only obligation for Researcher A is to ensure that when depositing the material in the collection there is a clear reference that the material has been obtained with a PIC and MAT with the internationally recognized certificate of compliance available in the ABS-CH. In this case, Researcher A is not liable if researcher B accesses the genetic resource illegally (i. e. in breach of both the MAT of researcher A and any PIC requirements in the provider country). However the Institute that hosts the collection can be held responsible.

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## How to organize collection missions taking into account the Protocol?

#### The first step is to verify the conditions for access to genetic resources and benefit sharing in the provider country, through the ABS-CH.

Look at the ABS-CH to know the national legislation in the collecting country. Further same as [collection managers](#Collections).

### Individual collection mission

The researcher/collector must contact the CNA of the provider country and ask for access to the genetic resources. After obtaining PIC and negotiating MAT, the researcher/collector receives a certified permit (serving as internationally recognized certificate of compliance). Access to the genetic resources can only occur after obtaining PIC and MAT.

The researcher/collector has to provide all relevant information related to prior informed consent, the source of the genetic resource, the establishment of mutually agreed terms, and/or the utilization of genetic resources (including the internationally recognized certificate of compliance when available) to the relevant authority of his/her country ([art. 17 § 1](http://www.cbd.int/abs/text/articles/default.shtml?sec=abs-17)). The provider country will make it available to the ABS-CH .

### Joint collection missions with partner institutes in provider country

Even though the mission is a joint initiative, the genetic resources accessed and used may differ for each institution involved. This is what determines the accountability.

If both institutions want to access and use the same genetic resources in a common project, PIC and MAT can be obtained jointly.

What if each institute target different genetic resources (species) ? Let’s imagine a RMCA scientist goes on a collection mission in Thailand with a Thai institute (because the RMCA scientist has more expertise on collecting techniques). The Thai institute aims at collecting all kinds of amphibians but RMCA wants to collect a very specific species of frog and bring it back to Belgium for a very specific use.

In this case the RMCA scientist should ask for a separate PIC and MAT. The genetic resources collected can only be brought back to Belgium if a certified permit of access was obtained. RMCA makes all relevant information available to his/her relevant authority (see above).

All secondary accesses of the collected material is then subjected to the conditions negotiated in the MAT (see the 2 first questions above)).

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## What should I do if I receive material with request for taxonomic identification?

Belgian research institutes sometimes receive, without previous notice, specimens (genetic resources) from foreign institutes/researchers requesting their taxonomic identification.

What would be the procedure?

The first step is to refer to the provider country’s national legislation implementing the Protocol.

### Hypothesis 1: the material is accompanied by a certified permit

Ideally, the material is accompanied by a certified permit proving PIC of the provider country and a proposal of MAT. In this case, the MAT could set the limit of the request (use) and the possible compensation for the taxonomic identification. The MAT could be considered accepted by the Belgian Institute if the taxonomic identification is conducted. Before conducting the research, the Belgian Institute might renegotiate the terms of the MAT. Whether or not the specimens can be stocked in the Belgian collection for future research would be determined by the conditions set out in the MAT.

### Hypothesis 2: the material is NOT accompanied by a certified permit

After verifying the national legislation of the country in which the material was collected (country of origin/provider country) and before using the specimens, the Belgian Institute must contact the person that has sent them the material in order to:

**Case 1:** The country where the material was collected has signed and ratified the NP.
The sender must contact the CNA of the provider country and obtain official PIC and if needed MAT. The taxonomic identification can only begin when a certified permit has been issued.

**Case 2:** The country where the material was collected has not signed and ratified the NP but has national legislation in place

1. Sender collected in not EU country: the sender needs to give proof that national legislation has been respected.
2. Material from a EU country:.
	1. If coming from a recognized collection, no paperwork for PIC and MAT needed
	2. If coming from a non-registered collection, the sender needs to show that national legislation of the provider country has been respected.

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## What if I host a foreign student researcher (for example Indian) who brings genetic resources along?

The material he/she brought must be accompanied by a certified permit proving PIC of the provider country and MAT (negotiated before arrival of the student researcher). In this case, the MAT could set the limit of the use by the hosting institute. Whether or not the specimens can be left behind in the Belgian collection for future research would be determined by the conditions set out in the MAT.

The Belgian Institute can only grant access to said genetic resources (for example to a Brazilian researcher) if the MAT allows it.

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## What about the use of Genetic resources for research other than taxonomic research?

The procedure for accessing the genetic resource is not different than for taxonomic research. The concept of Prior Informed Consent entails that the purpose of the access is explained in the request. The negotiation of the MAT will greatly depend upon that purpose (use) and the benefits it could generate.

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## When transporting material through other countries, are these involved?

Except if the transit country makes use of the genetic resource in the sense of the NP, no.

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## What if we receive donation of a private collection and we cannot ascertain where the specimens came from and whether they were collected legally?

To make sure that you are in compliance with the Protocol, it should be examined. If the collection contains material that falls under the scope of the NP and is not accompanied by relevant permits, at least those elements should be refused.

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Let’s imagine that I start a collaboration with Benin. We sign a Memorandum of Understanding with the University of Cotonou, but this agreement does not mention anything about ABS permits. I try to contact the CNA but receive no answer for months. What should I do?

If there is currently no legislation and/or if the CNA did not answer, you should at least keep the e-mail to the CNA, and deposit it together with the MoU to the museum at the moment of depositing of the material. You should act following the principle of “prudent man”; if you’ve taken necessary steps to comply with national legislation of a country of origin and have not been able to do so because of a lack of reply from the authorities of that country, you cannot be held accountable.

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# Glossary

Biodiversity: Refers to the variability that exists among living organisms from all sources including among other things, terrestrial, marine and other aquatic ecosystems and the ecological complexes which they are part of. This includes diversity within species, between species and their ecosystems.

Biological resources: Includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

Competent National Authorities (CNAs): CNAs are bodies established by governments and are responsible for granting access to users of their genetic resources, and representing providers on a local or national level. National implementation measures establish how CNAs work in a given country.

Convention on Biological Diversity (CBD): Is an International Treaty which entered into force in 1993 which has three core objectives: the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

Genetic material: Means any material of plant, animal, microbial or other origin containing functional units of heredity.

Genetic resources: Refers to the genetic material from plants, animals or microbes that has actual or potential value to be used. These uses can range from basic research that seeks a better understanding of the world’s natural resources to development for commercial products.

In situ and ex situ: Genetic resources can be wild, domesticated or cultivated. “In situ” genetic resources are those found within ecosystems and natural habitats. “Ex situ” genetic resources are those found outside their normal ecosystem or habitat, such as in botanical gardens or seed banks, or in commercial or university collections.

Mutually agreed terms (MAT): Is an agreement reached between the providers of genetic resources and users on the conditions of access and use of the resources, and the benefits to be shared between both parties.

National Focal Points (NFPs): To facilitate access, users need a clear and transparent process that details who to contact and what the requirements and processes are in provider countries in order to gain access. National Focal Points are responsible for providing this information.

Prior informed consent (PIC): Is permission given by the Competent National Authority (CNA) of a country to an individual or institution seeking to obtain access to genetic resources, in line with an appropriate legal and institutional framework.

Providers of genetic resources: States have sovereign rights over natural resources under their jurisdiction. They are obligated to put in place conditions that facilitate access to these resources for environmentally sound uses. Providers agree terms, which include PIC and MAT, for granting access and sharing benefits equitably. Laws within the provider country may entitle others, such as indigenous and local communities (ILCs), to also negotiate terms of access and benefit-sharing. The participation of ILCs is necessary in instances where traditional knowledge associated with genetic resources is being accessed.

State sovereignty: The CBD recognizes the sovereign rights of States over their natural resources in areas within their jurisdiction. Therefore it is their responsibility to develop the appropriate framework to create conditions to facilitate access to their genetic resources and to ensure fair and equitable sharing of the benefits derived from their use.

Users of genetic resources: Users are responsible for sharing the benefits derived from genetic resources with the providers. They seek access to genetic resources for a wide range of purposes, from basic research to the development of new products. They are a diverse group, including botanical gardens, industry researchers such as pharmaceutical, agriculture and cosmetic industries, collectors and research institutes.

(SCBD, 2011)

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# Sources

European Commission, 2014. Questions and answers on access and benefit-sharing. <http://europa.eu/rapid/press-release_MEMO-14-411_en.htm>

Secretariat of the Convention on Biological Diversity (SCBD), 2011. ABS Information Kit. <https://www.cbd.int/abs/information-kit-en/>

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1. Competent National Authorities (CNAs): CNAs are bodies established by governments and are responsible for granting access to users of their genetic resources, and representing providers on a local or national level. National implementation measures establish how CNAs work in a given country. [↑](#footnote-ref-1)