

Office of the Minister of Foreign Affairs

Chair,
Cabinet External Relations and Defence Committee

BIODIVERSITY: NAGOYA PROTOCOL ON ACCESS AND BENEFIT-SHARING

Proposal

To report on the finalisation and adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization in the light of the Cabinet-approved New Zealand negotiating position. Given unresolved domestic policy issues relating to the Wai 262 Treaty of Waitangi claim, and ambiguity regarding the Protocol's application to the agricultural and health sectors, it is recommended that New Zealand not sign the Protocol when it opens for signature in February 2011 until these issues have been resolved or clarified.

Executive Summary

2 The Nagoya Protocol, a supplementary treaty to the Convention on Biological Diversity, was finalised and adopted at the 10th Conference of the Parties to the Convention on 30 October 2010 after six years of negotiation. Adoption of the Protocol merely confirmed the final text and has no effect on New Zealand's international obligations. The Protocol is consistent with the New Zealand negotiating objectives and principles approved by Cabinet.

3 The Protocol is as much an economic as an environmental agreement and has implications for countries, organisations and individuals that are involved in research and development using foreign genetic resources (aka flora and fauna) and/or associated traditional knowledge.

4 Given unresolved domestic policy issues relating to the Wai 262 Treaty of Waitangi claim and ambiguity regarding the Protocol's application to the agriculture and health sectors, it is recommended that New Zealand not sign the Protocol when it opens for signature in February 2011 until these issues have been resolved or clarified. It will still be possible for New Zealand to accede to the Protocol if Cabinet decides to do so in the future in accordance with the usual treaty-making process.

Background

5 The grand bargain of the Convention on Biological Diversity when it was adopted in 1992, as reflected in its objectives (Article 1), was that alongside the conservation and sustainable use of biodiversity, a third and equally important objective was "the fair and equitable sharing of the benefits arising from the

utilization of genetic resources". The absence of a mechanism to give full effect to the third objective has been a sore point for developing countries.

6 In 2004 the Parties to the Convention, including New Zealand, began negotiation of an international instrument on access to genetic resources¹ (aka flora and fauna) and traditional knowledge associated with genetic resources, and the fair and equitable sharing of the benefits arising out of their utilisation ("access and benefit-sharing") i.e. an international set of rules governing biodiscovery activities. The deadline for completing the negotiations was the 10th Conference of the Parties to the Convention held in Japan in October 2010.

North-South divide

7 The negotiations were challenging, encompassing a complex mix of scientific, legal, political, economic and indigenous rights issues that divided the Parties generally along North-South lines. Broadly speaking, developed countries wanted rules that facilitated access to foreign genetic resources for their researchers and biotechnology industries, gave greater legal certainty regarding such access, and were not overly costly and burdensome to implement.

8 Developing countries, for whom indigenous biodiversity represents a significant potential economic resource, wanted comprehensive and legally-binding rules that would provide for a fair share of any benefits arising from the use of their genetic resources by others. Benefits might include, for example, a share of the profits from the commercialisation of a drug treatment based on a plant that originated in a developing country Party developed by a foreign pharmaceutical company.

Key issues

9 Key issues included: the temporal and geographic scope of the instrument (i.e. should it apply to genetic resources acquired before entry into force of the Protocol, and to areas such as Antarctica), whether the benefits arising from products and derivatives of genetic resources should be included (e.g. biochemical compounds such as sap and venom), how to deal with pathogens (e.g. bacteria, viruses, parasites and fungi capable of causing disease), the degree of prescription regarding measures to support compliance with the instrument or relevant domestic law; the relationship between this instrument and other related instruments and processes (e.g. negotiations in the World Health Organisation and World Intellectual Property Organisation), and whether the instrument should be legally-binding.

¹ "Genetic resources" should not be confused with "genetically modified organisms" (GMOs) which are a subset of genetic resources. Genetic resources are defined within the Convention on Biological Diversity as "genetic material of actual or potential value", with "genetic material" being "any material of plant, animal, microbial or other origin containing functional units of heredity" i.e. elements such as genes or chromosomes that perform a function and may be passed from one generation to the next through replication or reproduction.

10 Another complex set of issues concerned how to deal with “access and benefit-sharing” in relation to traditional knowledge associated with genetic resources that would accommodate the diversity of national circumstances. These ranged from countries that have nationalised their genetic resources and associated traditional knowledge to a country such as New Zealand, where rights relating to genetic resources and traditional knowledge are currently the subject of a major Treaty of Waitangi claim – the Wai 262 “flora, fauna and cultural intellectual property” claim.

NZ negotiating objectives and principles

11 In September 2009, Cabinet approved the following objectives and principles to guide the New Zealand delegation in the negotiations (CAB Min (09)38/4 refers):

- (i) harnessing New Zealand’s potential as a provider of genetic resources;
- (ii) protecting New Zealand’s interests as a user of foreign genetic resources;
- (iii) maintaining the Crown’s ability to meet its obligations under the Treaty of Waitangi;
- (iv) maintaining flexibility for the Government to respond in due course to the report of the Waitangi Tribunal in the Wai 262 “flora and fauna” claim;
- (v) ensuring that genetic resources in Antarctica are regulated by the Antarctic Treaty System and not by the Convention on Biological Diversity;
- (vi) maintaining an internationally competitive research environment;
- (vii) a workable and effective regime;
- (viii) environmental sustainability in line with the objectives of the Convention on Biological Diversity;
- (ix) appropriate recognition of the relationship between “access and benefit-sharing” activities and matauranga Maori or traditional knowledge associated with genetic resources;
- (x) “access and benefit-sharing” arrangements should be based on terms that are mutually agreed between the parties concerned i.e. those seeking access to genetic resources and the recognised access provider/s;
- (xi) The consents/approvals required for “access and benefit-sharing” in relation to traditional knowledge associated with genetic resource should be covered in the terms that are mutually agreed between the parties concerned.

12 Cabinet also agreed that New Zealand should be prepared to join a consensus in favour of a legally-binding regime if that was the general mood of the negotiations but should not advocate for such a result.

13 These high-level objectives and principles reflected two particular challenges New Zealand faced in the negotiations: (i) the absence of an overarching domestic biodiscovery policy framework to guide the New Zealand negotiating position and (ii) uncertainty regarding the timing and outcome of the

Wai 262 claim which may have implications for the approach to genetic resources in New Zealand.² Accordingly, a fundamental principle was that any new international instrument should not unduly limit the Government's options vis-à-vis the development of domestic policy.

Comment

Adoption of the Nagoya Protocol

14 Parties remained divided on the key issues to the end. With time almost up before the end of COP10, Japan, President (host) of the conference, tabled a "take it or leave it" text in which the contentious paragraphs had either been deleted or replaced by shorter and more general provisions allowing for more flexible interpretation and implementation.

15 Having assessed in consultation with Wellington that the text was consistent with the Cabinet-approved negotiating position outlined in paragraphs 11 and 12 above, the New Zealand delegation joined other Parties in accepting the text. Consequently, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from Their Utilization was adopted by consensus in the early hours of 30 October.

16 Regarding objective/principle (v) above concerning Antarctic genetic resources, there is no explicit exclusion clause in the Protocol vis-à-vis Antarctica, but there is an understanding, shared by other Antarctic Treaty System claimant states, that Antarctic genetic resources are excluded from the scope of the Protocol.

17 A copy of the Protocol is attached.

Implications

18 The Protocol is as much an economic as an environmental agreement and has implications for countries, organisations and individuals worldwide that are involved in research and development using foreign genetic resources, be it for commercial or non-commercial purposes. The Protocol also has implications for countries like New Zealand with indigenous communities when their genetic resources and/or traditional knowledge associated with genetic resources are accessed and utilised.

Traditional knowledge associated with genetic resources

19 Indigenous and local communities (ILCs) have made significant strides with respect to raising the profile of traditional knowledge associated with genetic resources in a legally-binding instrument as reflected by the number of provisions

² At the time of writing, the Te Reo part of the Wai 262 report only has been released (in October 2010). The Waitangi Tribunal has not indicated when it will release the full report.

devoted to the issue. Further, each Party to the Protocol is required “to take legislative, administrative or policy measures, *as appropriate*, with the aim of ensuring that”:

- benefits arising from the utilization of genetic resources that are held by indigenous and local communities, *in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources*, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms (Article 4.1 bis);
- *in accordance with domestic law*, the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources *where they have the established right to grant access to such resources* (Article 5.1 bis);
- *in accordance with domestic law*, traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established (Article 5 bis).

20 These provisions are heavily caveated (the italicised text above refers) as the Parties wished to avoid creating new rights nor did they wish to diminish or extinguish the existing rights of ILCs. These provisions do not establish or affirm the rights of ILCs over genetic resources or associated traditional knowledge; rather they simply state that where ILCs have the right to grant access established in domestic law, they have the right to “prior informed consent”, mutually agreed terms and benefits.

21 This language is consistent with New Zealand’s position on the UN Declaration on the Rights of Indigenous Peoples vis-à-vis use of the term “prior informed consent” and Cabinet-approved negotiating objectives/principles, in particular (iii), (iv), (ix), (x) and (xi) – paragraph 11 above refers. Australia and Canada also accepted this language.

Next steps

22 Adoption of the Protocol merely confirmed the final text and has no effect on New Zealand’s international obligations. The Protocol will come into force after it has been ratified or accepted by 50 Parties to the Convention. A decision on whether New Zealand becomes a Party to the Protocol rests with Cabinet and will need to be made in due course in accordance with the usual treaty-making process.

23 The Protocol opens for signature on 2 February 2011 and remains open for signature until 1 February 2012. Signing would not bind the New Zealand Government, but it would indicate its intention to eventually become bound. New

Zealand would also have an obligation not to defeat the object and purpose of the Protocol if it became a signatory.

24 For New Zealand to become a Party, the Government would first need to implement the obligations in the Protocol including through changes to domestic law and policy as necessary. New Zealand does not yet have a domestic “access and benefit-sharing” or biodiscovery policy framework in place. This is, in large part, due to unresolved domestic policy issues relating to the Wai 262 claim. Work to develop such a policy framework is, however, underway led by the Ministry of Economic Development (MED).

25 So as not to pre-empt the outcome of the Wai 262 claim and the Government’s domestic policy options in responding to the claim or developing a domestic biodiscovery regime, it is recommended that New Zealand does not sign the Protocol when it opens for signature until these issues are resolved or clarified. It will still be possible for New Zealand to accede to the Protocol if the Government decides to do so in the future.

26 There are other issues that New Zealand would also need to clarify before a decision was taken regarding signature or ratification including ambiguity regarding the application of the Protocol to the agricultural and health sectors (e.g. the extent to which commodities in trade and pathogens are covered by the Protocol).

27 Given that the Protocol may become the international standard for “access and benefit-sharing”/biodiscovery regimes, and New Zealand researchers and biotechnology companies work internationally, it also makes sense for MED to take the Protocol into account in developing a domestic regime in order to minimise obstacles to possible accession in the future.

Consultation

28 The Ministry of Economic Development, Te Puni Kokiri, Ministry of Science, Research and Technology, Ministry of Agriculture and Forestry, Ministry of Justice, Department of Conservation, Ministry of Health and Crown Law were consulted and agree with the recommendations. The Department of Prime Minister and Cabinet has been informed.

Financial Implications

29 There are no financial implications.

Human Rights Implications

30 There are no inconsistencies with the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990.

Legislative Implications

31 There are no legislative implications at this stage.

Regulatory Impact and Business Compliance Cost Statement

32 A RIS or BCCS is not required.

Publicity

33 Officials are giving thought as to how best to disseminate information about the Protocol given the interest among Maori and the research community in these negotiations and the outcome. An information note on the Protocol's adoption has been posted on the Ministry of Foreign Affairs and Trade's website and sent to interested Maori and stakeholders. It is also proposed that this paper be publically released once it has been approved by Cabinet.

Recommendations

- 34 The Minister of Foreign Affairs recommends that the Committee:
1. note the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising out of their Utilization at the 10th Conference of the Parties to the Convention on Biological Diversity;
 2. note that adoption of the Protocol merely confirms the final text and has no effect on New Zealand's international obligations;
 3. note that a decision on whether New Zealand becomes a Party to the Protocol rests with Cabinet and will need to be made in due course in accordance with the usual treaty-making process;
 4. agree that New Zealand does not sign the Protocol (which signals an intent to become a Party) until domestic policy issues relating to the Wai 262 claim and ambiguity regarding the application of the Protocol to the agricultural and health sectors are resolved or clarified;
 5. agree that this paper be publicly released once it has been approved by Cabinet

Hon Murray McCully
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