The Implications of the Nagoya ABS Protocol for Canada

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International Treaties in Canadian Law

- Canada has a dualist legal system - it generally requires international law to be translated into domestic law before it has any effect.

- The Minister of Foreign Affairs tables all treaties in the House of Commons following signature and before Canada's expression of consent to be bound through ratification, acceptance, approval or accession.

- For treaties that require implementing legislation, the Government must allow for 21 days of debate before introducing legislation.

- Only when the legislation is adopted can the Government seek authorisation from the Governor in Council to express consent to be bound by the treaty.
Implementation of the Nagoya Protocol

● If Canada decides to sign the Nagoya Protocol, the Government will need to undertake a number of changes to existing law and introduce legislation to create new legal rights and obligations.

● The legislative changes required will be discussed as a part of this presentation. Specific legal areas affected could include:
  o Biodiversity law
  o Intellectual property law
  o Aboriginal law
  o Natural resources law
  o Environmental law
Legal Aspects of the Nagoya Protocol

- For the purposes of the Protocol, the following terms are defined:
  - **Utilization of genetic resources**: to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined below.
  - **Biotechnology**: any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.
  - **Derivative**: 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.
The fair and equitable sharing of benefits arising from the utilization of genetic resources is one of the three core objectives of the CBD.

- Art 15 provides the framework for access to genetic resources.
- Art 16 provides for access to and transfer of technology.
- Art 19 provides for the handling of biotechnology and distribution of its benefits.
- Art 8(j) provides for the protection and promotion of traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biodiversity.

The Nagoya Protocol provides greater legal detail on this benefit sharing system under the CBD.
Legal Aspects of the Nagoya Protocol

- The main rationale for the Protocol is to provide legal certainty for access to genetic resources and the fair and equitable sharing of benefits arising from their utilization.
- Certainty is important to ensure that ABS contributes to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability.
- It is also important to have certainty over the mutually agreed terms used in transfers of genetic material to promote equity and fairness in contracts between users and providers.
Legal Aspects of the Nagoya Protocol

- A second rationale for the Protocol is the recognition, affirmation and protection of the interrelationship between genetic resources and traditional knowledge, their inseparable nature for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of indigenous communities.

- A significant portion of the Protocol focuses on creating the rights and obligations which stem from this rationale.

- This rationale is grounded in Art 8(j) of the CBD and can be informed by the United Nations Declaration on the Rights of Indigenous Peoples.
Legal Aspects of the Nagoya Protocol

- Art 5 of the Protocol provides for Fair and Equitable Benefit-Sharing in accordance with Arts. 15(3) and (7) of the CBD. Specific obligations include:
  - Sharing in a fair and equitable way the benefits arising from the utilization, subsequent applications, and commercialization of GR with the provider country.
  - Taking measures with the aim of ensuring that benefits arising from the utilization of GR that are held by ILC are shared in a fair and equitable way.
  - Taking measures in order that the benefits from the use of TK associated with GR are shared in a fair and equitable way.
Legal Aspects of the Nagoya Protocol

- Art 6 of the Protocol provides for Access to GR. It institutes the following requirements:
  - Access to genetic resources for their utilization is subject to prior informed consent (PIC) of the provider country, unless otherwise determined by that Party.
  - Measures must be established to ensure that PIC or approval and involvement of ILC is obtained for access to GR where they have the established right to grant access.
  - Parties that require PIC are required to take measures to provide for legally certain and transparent rules and procedures for access, permitting and MAT.
Legal Aspects of the Nagoya Protocol

- Art 7 of the Protocol provides for Access to TK associated with GR. It requires each Party to take measures with the aim of ensuring that TK associated with GR that is held by ILC is accessed with the PIC or approval and involvement of these ILC, and that MAT have been established.

- Art 12 goes into further detail on the duties incumbent upon Parties in relation to TK associated with GR. Specifically:
  - Customary laws, community protocols and procedures must be taken into consideration during implementation
  - Education of potential users of TK associated with GR about their benefit sharing obligations
  - Support for development of community protocols, minimum requirements for MAT, and model contractual clauses.
Examples of how the Protocol tries to promote the conservation of biodiversity and sustainable use of its components:

- Art 8(a) requires Parties to create conditions to promote and encourage research which contributes to the conservation of biological diversity and sustainable use of its components.
- Art 9 requires Parties to encourage users and providers to direct benefits arising from the utilization of genetic resources towards the conservation of biodiversity and sustainable use of its components.
- Art 21 requires Parties to take measures to raise awareness of the importance of genetic resources and TK associated with GR and related ABS issues.
Legal Aspects of the Nagoya Protocol

- The final component of legal certainty is enforcement. Therefore, the Protocol dedicates a number of provisions to compliance and related activities, such as:
  - Art 15 on Compliance with Domestic Legislation or Regulatory Requirements on ABS
  - Art 16 on Compliance with Domestic Legislation or Regulatory Requirements on ABS for TK associated with GR
  - Art 17 on Monitoring the Utilization of GR
  - Art 18 on Compliance with MAT
  - Art 19 on Model Contractual Clauses
  - Art 20 on Codes of Conduct, Guidelines and Best Practices and/or Standards