

# *Apply Me Not?*

The FAO ITPGRFA and the Nagoya Protocol  
Some National Implementation  
Questions, Clarifications and Realizations

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## What's in the Nagoya Protocol relating to the ITPGRFA? (1)

Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialised access and benefit-sharing agreements,

provided that

they are **supportive of** and **do not run counter** to the objectives of the Convention and this Protocol (Art. 4.2)

## What's in the Nagoya Protocol relating to the ITPGRFA? (2)

This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialised international access and benefit-sharing instrument applies that is **consistent with**, and **does not run counter to the objectives of the Convention and this Protocol**, this Protocol does not apply for the Party or Parties to the specialised instrument in respect of the specific genetic resource covered by and for the purpose of the specialised instrument (art. 4.3)

## What's in the Nagoya Protocol relating to the ITPGRFA? (3)

In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall :

consider the importance of genetic resources for food and agriculture and their special role for food security (Art. 8.c)

## What do they all mean? (art. 4.2)

Parties to the Protocol may enter into international agreements with other countries (do they have to be Parties to the Protocol only? It seems so. As to non-Protocol parties, it's not clear if they are contemplated) and develop with them

1) relevant **international** agreements

2) including **specialized** ABS agreements

- these agreements have to be supportive of and not run counter to the objectives of the CBD and NP

## What do they all mean? (4.3)

So that the ABS protocol will not apply, the specialized international ABS **instrument** must be

a) consistent with and

b) not run counter to objectives of CBD and the NP

c) they must be within the scope of the instrument

d) they must be for the purpose of the instrument

- **all these conditions must be present so that NP will not apply**

e) Protocol does not apply to specialized international ABS instruments whenever they are consistent with and do not run counter to the objectives of the Convention and the Protocol

The Protocol does not apply to the specific GR covered by and for the purpose of the specialized ABS instrument

## What do they all mean? (8.c)

In developing and formulating ABS legislation or regulatory requirements, a Party to the Protocol can

- mention the importance of PGRFA and their special role for food security
- but they do not have to go beyond that special mention and do something about it; there's no further specification in the NP of what else they will have to do about it

## Art. 4.3 application

- recently, Philippine authorities for ITPGRFA have drafted an Executive Order on PGRFA as the implementing measure for ITPGRFA

QUESTION : Can the NP be made to apply to the Order?

ANSWER : NO, if it can be shown that the ITPGRFA is supportive of and does not run counter to NP

SAYS WHO? Since it does not say in the NP, then it can either be the agency implementing the ITPGRFA or the agency saying the NP should apply

Art. 6 – **Access to Plant Genetic Resources** – Except as provided in sec. 11 of this Order, access to PGRFA found anywhere in the Philippines, including plants acquired by purchase, barter or donation, if they are used for their genetic materials, shall be allowed only upon compliance with relevant bioprospecting laws and regulations which require, *inter alia*, that **PIC be obtained** by the resource user from the concerned indigenous communities under Republic Act 8371, local communities and management board under Republic Act 7586, or private individual or entity and if the applicant is a foreign entity or individual, **the active involvement by a local institution in the research, collection and whenever applicable and appropriate in the technological development of the products** derived from the BGR

## Applying the test of the NP

- Is the provision supportive of and do not run counter to the Protocol? What does it mean?
- FIRST OFF, what parameters are applied?
- (the test it seems is whether it supports the fair and equitable sharing benefits of the NP, COP-MOP can further elaborate this)
- SECONDLY, who sets parameters for such?  
(could be NP COP-MOP, or GB, or both? How about the national entity, for the ITPGRFA, the NP, or both?)

## Applying the test of the NP

- THIRDLY, how are the parameters applied?  
(the how can be set up along with the what)
- FOURTHLY, who applies these parameters ? (go to 2<sup>nd</sup> point above)

SEC. 8. *Farmers' Rights*. – Within one year from the effectivity of this Order, the Secretary, in consultation with civil society organizations, shall establish programs to protect and promote Farmers' Rights, particularly those of small farmers, which shall include *inter alia*:

a) respect, promotion and protection of traditional knowledge and indigenous knowledge systems in relation to plant genetic resources for food and agriculture against misappropriation or extinction. The government shall support and promote farmer-bred and traditional varieties;

b) the right to equitably **participate** in sharing benefits arising from the utilization of plant genetic resources for food and agriculture;

c) the right to participate in making decisions, at the national level, on matters related to the **conservation and sustainable use, development and protection** of plant genetic resources for food and agriculture; and

d) the right to save, use, exchange, **improve** and sell farm-saved seeds or propagating material.

Sec. 9. *Technology Transfer.*- The Department of Agriculture shall take appropriate measures to **encourage** the transfer of appropriate technology to small farmers and their organizations for the exploration, conservation, protection and sustainable use of plant genetic resources for food and agriculture.

SEC. 10. *Community Intellectual Rights.* – Within one year from effectivity of this Order, the Department of Agriculture and the Intellectual Property Office shall establish a system to recognize and protect community intellectual rights under Sec. 22.4 of Republic Act No. 8293, which shall include the rights of farming communities over plant genetic resources for food and agriculture that they developed.

## Applying the test of the NP (1)

- Is the provision supportive of and do not run counter to the Protocol?

FIRST POINT, the rights of ILCs under NP are subject to national legislation

- (it will be easy to do it all in national legislation such that all rights of farmers in ITPGRFA and ILCs in NP are all integrated)

## Applying the test of the NP (2)

- however, ILCs are not inclined to look at ITPGRFA for their rights as it is very limited, they look towards the UNDRIP to be implemented instead, it's more extensive
- The agency in charge of ITPGRFA would rather look at indigenous peoples as “farmers” (it's easier), as there is actually another government agency whose mandate is to look after “indigenous peoples”
- Looking at it positively, ILCs or farmers will have the option of looking towards ITPGRFA or NP to secure their rights

## TAKE-HOME LESSON

- Figuring out spaces for mutual supportiveness in national implementation is a difficult job;
- by the way, what does mutual supportiveness mean, especially in the determination of what is fair and equitable, who at the national level gets to finally have a say on it? Who at the international level will get to have a say on it?
- bureaucrats, farmers and ILCs cannot now just act on these things on their own without clear policy guidance

## TAKE-HOME LESSON (2)

- But they will act on their own most of the time and these gaps will be noticed only if there are sharp, unbearable disputes; if none, things will remain the same