



Confederação Nacional da Indústria
PELO FUTURO DA INDÚSTRIA

Ratification of the Nagoya Protocol

Position of the Industrial Sector

1. Position of the Industrial Sector on the ratification of the Nagoya Protocol

The industrial sector supports the ratification of the Nagoya Protocol by the National Congress as soon as possible. This will give **Brazil the right to vote on the drafting of international standards on benefit-sharing for the use of biodiversity**, which are discussed during the Meeting of the Parties to the Nagoya Protocol.

In order to attend this meeting, the country should be a Party to the Protocol no later than 90 days before the 15th Conference of the Parties to the Convention on Biological Diversity, which is expected to take place in the first half of 2021.

Brazil has an interest in establishing an international governance regime that safeguards its right to protect and access benefits arising from the use of its natural assets and that provides trade security to its agricultural products, which are largely derived from exotic species introduced into the country before the Nagoya Protocol took effect.

The entry into force of the protocol internationally, in October 2014, reinforced the need for ratification by the country, since its participation in the negotiations that will define the rules for its application will depend on it.

The Nagoya Protocol is the main international agreement governing the exchange of genetic material between countries and has already been ratified by 124 parties, including major trading partners of Brazil, such as China and the European Union.

The approval of the national legal framework (Biodiversity Law) to regulate the application of the Convention on Biodiversity in the country brought greater legal certainty to the productive sector in relation to the application of the Protocol, contributing to the favorable position regarding its ratification.

In a time where global environmental challenges require coordinated responses from the international community and mutual action, international agreements are important mechanisms in the search for sustainability. In this scenario, **commercial transactions between countries are increasingly requiring clearer compliance rules. Compliance with multilateral treaties, such as the Nagoya Protocol, has become a necessity.**

The impacts of the Brazilian ratification of the Nagoya Protocol on the national industry are directly related to knowing and fulfilling the obligations established by the country providing genetic resources and associated traditional knowledge associated whenever there is the wish to access them. On the other hand, the foreign industry will also have to comply with the obligations established in the Brazilian law to have access to genetic resources from the biodiversity of the country.



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The Protocol has the potential to eliminate any regulatory imbalances that currently exist between countries.

2. Context

The **Convention on Biological Diversity (CBD)** is a United Nations treaty and **one of the most important international environmental agreements**. Established during Rio-92, the United Nations Conference on Environment and Development held in Rio de Janeiro in June 1992, the CBD is currently the world's main forum for issues related to biodiversity conservation.

A total of 196 countries are part of the CBD. Brazil internalized the agreement to its legal framework on March 16, 1998 through the publication of Decree No. 2,519, representing one of the most important multilateral acts signed by Brazil regarding environment and biodiversity.

The **three objectives of the CBD**, which are the **conservation of biological diversity**, the **sustainable use of its components**, and the **fair and equitable sharing of benefits arising from its use**, define the pillars on which the Convention is structured. The effort to implement the **third objective has culminated in the adoption**, at its 10th Conference of the Parties in 2010, of the text of the **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization**.

The **Nagoya Protocol** is a multilateral agreement, supplementary to the Convention on Biological Diversity, which **brings together guidelines for the sustainable use of biodiversity, giving countries legal certainty in trade relations involving products derived from biodiversity**.

This international agreement is based on the premise signed by the CBD that **countries have sovereignty over the genetic resources existing in their territory**. Such resources have unquestionable value and may require compliance with requirements for sharing of benefits arising from their utilization.

Based on this, the agreement provides that the countries Party to the Protocol, whether they are providers or users, should ensure that **access** to these resources and associated traditional knowledge, and the **sharing of the benefits** arising from their utilization, are **in accordance with the legislation that each country establishes**.

In Brazil, from 2000 to 2015, access to genetic heritage and associated traditional knowledge was regulated by Provisional Decree No. 2186-16/2001. The Decree established the user's obligation to request authorization for access to a component of the genetic heritage or associated traditional knowledge from the Council for Genetic Heritage Management (CGen¹).



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Despite having filled a legal void on biodiversity by fighting bio-piracy, controlling access to genetic heritage, and providing rules for the sustainable use of biodiversity, the Provisional Decree incurred high transaction costs due to its high bureaucracy and low legal certainty.

On May 20, 2015, Brazil approved a new legal framework for biological diversity, **Law 13,123, called the Biodiversity Law**. This law **combines Brazil's international commitments to biodiversity conservation with a scenario of legal certainty for companies, allowing continuous investment in research, technological development, and innovation in the country**. These breakthroughs in the Biodiversity Law are largely due to the extensive involvement of the private sector, represented by the National Confederation of Industry, in the Council for Genetic Heritage Management.

The process of internalizing the Nagoya Protocol in Brazil has been in progress since 2012, when its text was signed and submitted to the National Congress for approval through the presidential message (MSC) No. 245². On July 8, 2020, the Chamber of Deputies unanimously approved the Draft Legislative Decree (PDL) No. 324/2020, which ratifies the Nagoya Protocol in Brazil. Subsequently, on August 6, 2020, the Senate approved PDL 324/2020, also ratifying Brazil's participation.

On August 12, 2020, Legislative Decree 136/2020 was published in the Federal Official Gazette, which represents the approval of the Protocol by the National Congress. Now, the text must have the acceptance of the President of the Republic and be passed on to the UN General Secretariat, and, after 90 days of the transfer, the Protocol will be in force and the President of the Republic must promulgate an Executive Decree.

3. Points for consideration regarding the ratification of the Nagoya Protocol

Some sensitive points regarding the Brazilian ratification of the Nagoya Protocol have been widely discussed by the productive sector and should be included in instrument of ratification deposited by the Brazilian government:

¹ Council for Genetic Heritage Management (CGen): a governmental body, chaired by the Ministry of the Environment (MMA), which is, to date, the competent authority to decide on the use of genetic heritage in Brazil.

² Available at:

https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra;jsessionid=5DBC9E5B8D591114049D1F7579FF07FF.proposicoesWebExterno2?codteor=1000094&filename=MSC+245/2012 Access on June 3, 2020.



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Non-retroactivity - According to Article 28 of the Vienna Convention³ on the Law of Treaties, regarding the application of Article 33, paragraph 2, of the Protocol⁴, the provisions of the Nagoya Protocol will not have retroactive effect for their implementation.

National Legislation - The domestic law for implementing the Nagoya Protocol should be Law No. 13,123, of May 20, 2015, regulating the access to genetic heritage, the protection of and access to associated traditional knowledge, and the benefit-sharing for conservation and sustainable use of biodiversity.

Agricultural activities - Considering the importance of agricultural biodiversity for food security and in accordance with Article 8(c) of the Protocol⁵, the economic exploitation for agricultural activities, as defined in Law No. 13,123 of May 20, 2015⁶, arising from reproductive material of species introduced into the country by human action before this Protocol took effect, will not be subject to the benefit-sharing provided for therein.

In situ conditions - Considering Article 27, combined with Article 158, paragraph 3, of the Convention on Biological Diversity (CBD), and with a view to implement Articles 5 and 6 of the Protocol⁹, species or varieties forming spontaneous populations which have acquired distinctive properties in the country, and the traditional local or creole variety or the locally

³ Vienna Convention, art. 28: "(...) unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

⁴ Nagoya Protocol, art. 33.2: " This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after the deposit of the fiftieth instrument as referred to in paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later."

⁵ Nagoya Protocol, art. 8: "In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall (...)

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

⁶ Law 13,123/2015, art. 2: "In addition to concepts and definitions set forth by the Convention on Biological Diversity (CBD) promulgated by Decree no 2,519, dated March 16, 1998, the following terms are defined for the purposes of this Law: (...)

XXIV - agricultural activities - the production, processing and trading of foodstuffs, beverages, fibers, energy and planted forests."

⁷ CBD, art. 2 "Use of terms for the purposes of this Convention (...)

"In-situ conditions" means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties."

⁸ CBD, art. 15 "Access to Genetic Resources (...)

3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention. "

⁹ Nagoya Protocol, art. 5 "Fair and Equitable Benefit-sharing" and art. 6 "Access to Genetic Resources"



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adapted or creole breed, are considered to be under in situ conditions, as defined in the internal legislation, namely in Article 2 of Law no. 13,123/2015¹⁰, fitting this country in the concept of "country of origin" of these genetic resources.

Utilization of Genetic Resources - For the purposes of the Nagoya Protocol, the term *utilization* means "to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology" (art. 2(c), of the Protocol).

The understanding on the aforementioned points is a consensus among the key players acting on the genetic resources agenda. The consideration of these points in the legal instrument for the internalization of the Nagoya Protocol will ensure the legal certainty necessary for its ratification.

4. Conclusion

Prioritize the environmental issues is a positive sign towards sustainable development, given the importance of biodiversity conservation for food security, public health, and climate change mitigation and adaptation.

We are going through a time where we need to rethink our relationship with the natural world and, despite all the technology available, maintaining natural ecosystems in balance with our demands is crucial.

Not surprisingly, many trade agreements and international organizations already provide for the promotion of biodiversity conservation and sustainable use in their guidelines. The implementation of environmental treaties such as the Nagoya Protocol is extremely strategic for Brazil, a country with the greatest biological diversity in the world and leading provider of biological resources, and ensures a better business environment for Brazilian companies that use foreign biodiversity resources.

It is unreasonable to left the main holder of global biodiversity, and a country where biodiversity resources make up more than 30% of its exports, out of the negotiation tables that are defining the rules that will be take effect in the exchange and trade of genetic materials between nations.

In view of the aforementioned points and the importance of the Nagoya Protocol for the conservation and sustainable use of Biodiversity, the industrial sector, represented by the National Confederation of Industry, expresses its support for the ratification of the Protocol by the National Congress.

¹⁰ Law 13,123/2015, art. 2: "(...) XXV - in situ conditions - conditions in which genetic heritage exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, including those forming spontaneous populations, in the surroundings where they have naturally developed their distinctive properties"