



New Zealand Ministry of
Foreign Affairs and Trade
Manatū Aorere

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Cristiana Paşca Palmer, PhD
Executive Secretary
Secretariat of the Convention on Biological Diversity
United Nations Environment Programme
413 Saint-Jacques Street, Suite 800
Montreal, Quebec
H2Y 1N9
CANADA

195 Lambton Quay
Private Bag 18-901
Wellington 6160
New Zealand

T +64 4 439 8000
F +64 4 472 9596

Dear Dr Palmer

With apologies for the late response, please find attached New Zealand's submission in response to CBD Notification 2019-025 on **Article 4, paragraph 4, of the Nagoya Protocol.**

Yours sincerely



PP Daniel Wai-Poi
New Zealand Convention on Biological Diversity National Focal Point

Encl. 1

New Zealand response to Notification 2019-025 on Article 4, paragraph 4, of the Nagoya Protocol

The Government of New Zealand thanks the Secretariat for the opportunity to submit:

- (a) Information on how specialised international access and benefit-sharing instruments are addressed in their domestic measures;
- (b) Views on the potential criteria contained in the study (summarised in the Annex to Decision NP-3/14), taking into account Article 4, paragraphs 1 to 3, of the Protocol.

New Zealand has no information to submit on question (a).

With respect to question (b), New Zealand questions the need to establish a process leading to formal "recognition" of a specialised international access and benefit-sharing instrument. There are several reasons for concern:

- the proposal raises questions about the hierarchy of international instruments and New Zealand's view is that the Parties to the Convention on Biological Diversity and its Nagoya Protocol do not have the competence to take decisions relating to other international instruments;
- there is no consensus amongst Parties to the Convention on Biological Diversity and/or the Nagoya Protocol that the establishment of a process is necessary;
- the wording of Article 4 of the Nagoya Protocol does not require such a process to be established.

New Zealand considers that the question of whether a specialised international access and benefit-sharing instrument applies, thus meaning that the Nagoya Protocol does not apply, is a matter of interpretation by the relevant Party or Parties to that specialised instrument who are also Party to the Nagoya Protocol. Any disagreement amongst Parties on the point would then be subject to normal dispute resolution under the Nagoya Protocol.

Article 4 was drafted with a view to encouraging flexibility and specialisation, recognising that particular areas may require a regime that is appropriate to its particular context (such as the WHO) and that specialised approaches should be supported by the Protocol provided they are supportive of the objectives of the Nagoya Protocol. The development of criteria runs counter to this objective, potentially undermining the rights of Parties to develop appropriately specialised regimes, and is not consistent with either the spirit of Article 4.4 or its wording.

Notwithstanding that overarching position, and in the event Nagoya Protocol Parties reach a consensus that criteria should be developed, New Zealand makes the following comments on the proposed criteria:

- If criteria were agreed, New Zealand's position is that they could only be proposed as guidance that Parties may wish to take into account but are not required to.
- With respect to paragraph 1 of the Annex, New Zealand agrees that the instrument would be developed through an intergovernmental process. New Zealand is also firmly of the view that, as a matter of interpretation of Article 4, the instrument may be binding or non-binding.
- With respect to para 2 ("Specialised") New Zealand notes that the study was clear there was an "or" between 2(a) and 2(b). New Zealand's view is that this should be reinstated.
- With respect to para 3 of the Annex, New Zealand notes that these suggested criteria are the most problematic and difficult to apply in practice, not least to a legal instrument as opposed to a set of circumstances. New Zealand notes that, while the academic debate might be interesting, the practical utility of this last set of criteria is doubtful, especially the references to "other general principles of law, including good faith, effectiveness and legitimate expectations ", in this context.

