

# ABS IN PERU

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## International rules

Peru is party to the following international treaties:

- Convention on Biological Diversity (CBD) – ratified 1993.
- International Treaty for Plant Genetic Resources for Food and Agriculture – ratified 2003.
- International Union for the Protection of New Varieties of Plants Convention (UPOV) – acceded 2011.
- Nagoya Protocol on ABS – ratified 2014.



## Overview

Peru is among the world's megadiverse countries, for its great diversity in ecosystems, species, genetic resources and culture. Biodiversity is also a pillar of the Peruvian economy: it sustains a large part of the population and plays an important role for culture, science and technology.

Peru has pioneered laws and policies to protect biodiversity, and particularly to address access to genetic resources and associated traditional knowledge (TK) and the sharing of benefits derived from their utilisation (ABS). Yet there have been challenges in putting in practice the legal and institutional framework on ABS, which for a time nearly brought authorisation procedures to a standstill. Rules on TK have been implemented only in part.

Since 2014, efforts are underway to simplify administrative procedures. For example, competent authorities are working to harmonise approaches. This is already improving how the ABS system functions. Further clarity is still needed on the responsibilities of different authorities and the parameters for negotiating benefit sharing. Moreover, there are ongoing discussions on a revised regulation on access to genetic resources.

## Andean Decision 391

Peru is bound by the regime on access to genetic resources established by Decision 391 of the Andean Community. Decision 391 establishes general principles for ABS, as well as specific requirements and procedures, which are directly applicable to Andean Member States. National regulations on ABS in Peru thus develop and specify the provisions of Decision 391.

This fact sheet was produced by the Union for Ethical BioTrade (UEBT) with the support of the Ministry of Economic Affairs of the Netherlands.  
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## ***What is the scope of ABS requirements in Peru?***

ABS requirements apply to genetic material and biochemical substances from plants, animals or other organisms that exist in the wild or, if cultivated, have developed distinctive properties in the country. These requirements also apply to the 'intangible component' associated with genetic resources; that is, the traditional knowledge.

Nominally, ABS requirements apply to genetic resources accessed for a range of research, conservation and commercial activities. Nevertheless, current interpretations focus on the utilisation of genetic resources — R&D on their genetic and biochemical composition, whether for commercial or non-commercial purposes — in line with the Nagoya Protocol.

Species listed in Annex I of the International Treaty for Plant Genetic Resources for Food and Agriculture are excluded, when used for such food and agriculture purposes. So is the extraction of non-forest timber products for nutraceuticals and functional food. This last exclusion, however, is controversial and narrowly interpreted.

ABS requirements apply to access to genetic resources whether direct (e.g. through harvest) or indirect (e.g. through a genebank). For traditional knowledge, most rules address situations of direct interaction with indigenous peoples.

### **ABS and commercial seed varieties**

Peru acceded to the 1991 Act of the UPOV Convention. Plant breeders' rights are recognised only if plant varieties meet certain conditions, including novelty. This means that protected plant varieties are considered to constitute an innovation of the plant breeder.

The use of commercial seed varieties for breeding purposes is governed by Decree 035/2011. There is no understanding that any further requirements deriving from ABS rules apply. Nevertheless, if a plant breeder wanted access to landraces or local seed varieties, that would require a contract for access to genetic resources.

## **ABS in national laws and regulations**

In Peru, ABS requirements and procedures on ABS are outlined through two main instruments:

- Supreme Decree 003-2009-MINAM on the Regulation on Access to Genetic Resources (2009)
- Law 27811 on the Collective Knowledge of Indigenous Peoples derived from Biological Resources (2001)

Other legal and regulatory instruments with relevance for ABS procedures include:

- Supreme Decree 038-2001-AG on Regulation of Protected Areas (2001)
- Law 28216 on the Protection of Access to Biological Diversity and Collective Knowledge (2004)
- Supreme Decree 035-2011-PCM on the Regulation of Plant Breeders' Rights (2011)
- Supreme Decree 018-2015-MINAGRI on the Regulation for Forestry Management (2015)



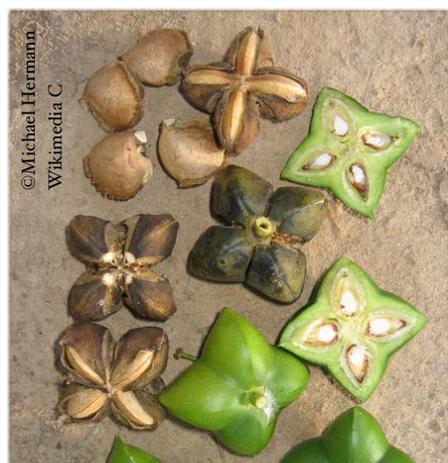
## Competent authorities

The Ministry of Environment (MINAM) is the regulatory authority on access to genetic resources, responsible for guiding and overseeing ABS procedures.

There are ongoing efforts, coordinated by MINAM, to establish a single, coordinate approach to ABS procedures. However, to date, different authorities manage access procedures, depending on the type of genetic material sought:

- The National Forest and Wildlife Service (SERFOR) has jurisdiction over access to genetic resources from wild fauna and flora.
- The National Institute of Agricultural Innovation (INIA) has jurisdiction over access to genetic resources from cultivated and domesticated species.
- The Ministry of Production (PRODUCE) has jurisdiction over access to genetic resources from hydrobiological marine and freshwater species.

Additionally, INDECOPI maintains registers on traditional knowledge, chairs the National Anti-Biopiracy Commission and serves as a checkpoint for ABS compliance.



## What are access requirements?



In general, **access to genetic resources** in Peru, whether for commercial or non-commercial purposes, requires a contract with the competent authorities (see box), subject to approval by the Ministry of Environment (MINAM).

For access to ex-situ collections, if done with non-commercial purposes, a material transfer agreement must be signed. These agreements are considered to constitute the contract for access to genetic resources. There are mandatory clauses on topics such as sharing results and the transfer of material.

Access contracts may need be supported by other agreements. For example, an ancillary contract is required with the national scientific institution that will accompany and participate in proposed R&D activities.



Authorisation from the rights-holders is required for **access to traditional knowledge** associated to genetic resources. Such authorisation is to be established through prior informed consent from

the indigenous peoples and local communities, in a bilateral process that does not involve government authorities. If the request for access is for commercial purposes, it is necessary to negotiate a license for the use of the traditional knowledge. This license must be registered in the National Institute for the Defence of Competition and Intellectual Property (INDECOPI).

## Focal point on ABS in Peru

National focal points are charged with making information available on ABS requirements and procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing.

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## *What are procedures for access to genetic resources?*

To date, access procedures differ depending on the type and location of the genetic material sought. However, it is important to note that there are ongoing efforts, coordinated by MINAM, to establish a single, coordinate approach to ABS procedures. This would include a ‘one-stop shop’ for applications to access genetic resources in Peru.

	Non-commercial	Commercial
 <p><b>Wild fauna and flora</b></p>	<p>Since 2015, SERFOR considers requests for research without commercial purposes, even if it includes genetic or biochemical analysis, through the scientific research permitting system. A contract for access to genetic resources is not required.</p> <p>Applying for a scientific research permit requires filling out a form and providing information on the proposed project, as well as letters of support from affiliated foreign and national institutions. Templates are available for all required letters and information.</p> <p>Paperwork for the application may be more complex in cases that involve traditional knowledge (where prior informed consent is required) or protected areas (where another, prior collection permit must be secured from the protected area).</p> <p>Resolutions approving scientific research take between 15 and 30 days. These resolutions are public and contain conditions for sample collection and research activities.</p>	<p>Research with commercial purposes requires a contract for access to genetic resources. SERFOR also has a list of requirements and templates for applications. However, no contract for access to commercial purposes has ever been signed. This is partly due to a limited number of applications. SERFOR is also waiting for further guidance on the procedures and parameters for assessing applications and negotiating contracts for access to genetic resources, which is currently being developed by MINAM.</p>
 <p><b>Cultivated and domesticated species</b></p>	<p>Basic research is interpreted restrictively and includes only description, identification, nomenclature, and classification of organisms. It does not require contracts for access to genetic resources, but must be approved by an INIA resolution, which takes approximately two months.</p> <p>Applying for a basic research permit requires filling out a form and providing information on the proposed project, the researchers involved and institutional letters of support. A commitment must be made to deposit samples of all genetic material collected in national research institutions. Proof of prior informed consent is required if collection will take place in lands managed by indigenous peoples or local communities.</p> <p>Access through ex-situ collections requires a material transfer agreement, which is standard and publicly available.</p>	<p>Research with commercial purposes requires a contract for access to genetic resources. Application requirements for these cases are similar, but also include ancillary contracts as may be relevant.</p> <p>The application goes through a formal review, which involves exchange with the applicants. A summary of the application is then published for public review. INIA then undertakes a technical review, establishing the conditions for access and for benefit sharing and concluding the contract. Over the past two years, MINAM has requested that all applications also go through its offices for approval.</p> <p>There are currently six applications published and pending. The process has taken two to eight months so far, with significant exchange with applicants and MINAM. It is not clear how the contract negotiation will be undertaken or how long it will take.</p>
<p><b>Hydrobiological species</b></p>	<p>To date, there have been some enquiries received by the competent authorities, but no contracts have been concluded. No particular guidance is available for access to hydrobiological species.</p>	

## What are procedures for access to associated traditional knowledge?



To access traditional knowledge for scientific, commercial and industrial purposes, it is necessary to secure **prior informed consent** to carry out the proposed activities, as per the requirements of Law 27811.

- ✦ Prior informed consent must be provided by an organisation that represents indigenous peoples that hold the traditional knowledge associated with genetic resources. This may be a federation, an association or other established organisation working at the national, regional or local level.
- ✦ If traditional knowledge is shared among diverse groups of indigenous people, it is the responsibility of the organisation that has been asked to provide its prior informed consent to inform as many others as possible of the process.
- ✦ No government involvement is required, nor does Peruvian legislation establish any specific requirements for the prior informed consent (e.g. the use of a particular template). However, prior informed consent must be obtained in a way that respects and reinforces customary laws, values, and decision-making processes.

There are several experiences with prior informed consent in Peru. For example, the

International Potato Centre (CIP) — a Lima-based research centre of the CGIAR Consortium — secures prior informed consent for its acquisition, use and diffusion of traditional knowledge linked to native root and tuber biodiversity.

In addition, to access traditional knowledge for commercial purposes, Law 27811 requires a **license agreement**. This agreement is concluded between the same parties as the prior informed consent and written in Spanish and the local language. When there is access to both genetic resources and associated traditional knowledge, this agreement may be an annex to an access contract.



License agreements incorporate the terms and conditions on the use of the traditional knowledge. Mandatory provisions include the description of the traditional knowledge covered, sufficient information on the purpose and implications of the proposed activities, reporting requirements and benefit sharing arrangements. License agreements must be registered with INDECOPI, but are not public. To date, no such license agreement appears to have been concluded.

### Ensuring compliance with access requirements

Peru has measures in place to monitor compliance with ABS requirements. Under the Nagoya Protocol, Peru has designated two checkpoints for ABS: INDECOPI and the National Commission for the Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples (or National Anti-Biopiracy Commission). Further checkpoints, including a national mechanism for the monitoring of genetic resources under MINAM, are foreseen.

- INDECOPI, which acts under Andean Decision 486, assesses applications for patent protection in Peru for possible access to genetic resources. Almost 40 patent applications have been communicated to the competent authorities.
- The National Anti-Biopiracy Commission works to identify applications for patent protection in other countries with a link to Peruvian biological resources or associated traditional knowledge. More than 15 formal oppositions to patents have been presented – four in the last year.

## *What are the requirements for benefit sharing?*

There is currently limited experience and guidance in Peru on what constitutes fair and equitable benefit sharing in relation to genetic resources. Over 80 authorisations to access genetic resources have been granted — all for non-commercial R&D activities. Benefits foreseen in these cases have been limited, and mostly focused on sharing research results and developing national capacities. In a few cases, there have been references to transfer of technologies. MINAM is currently developing guidelines for the negotiation of benefit sharing in contracts for access to genetic resources. These guidelines are expected to encourage a combination of monetary and non-monetary benefits, linked to the circumstances of the case and the rationale and objective of rules and policies on ABS and the conservation and sustainable use of biodiversity.

In relation to traditional knowledge, Law 27811 contains several provisions on fair and equitable sharing of benefits. For example, it states that license agreements for access to traditional knowledge associated to genetic resources must include an upfront payment or equivalent benefit to the providers, as well as a commitment to pay a percentage of no less than 5% of the gross turnover from products developed, directly or indirectly, from such knowledge. For access to traditional knowledge that has already been published and otherwise widely disseminated, there are also benefit sharing obligations, as long as such dissemination has taken place after 2002. In these cases, no less than 10% of the gross turnover from the resulting products must be deposited in the National Fund for the Development of Indigenous Peoples.



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