

Access and Benefit Sharing



E-Learning Series on International Frameworks that Support Indigenous Peoples, Local Communities, and Their Territories and Areas

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Module Overview

This module aims to provide an introduction to access and benefit sharing and its implications for Indigenous peoples and local communities. It explores the implications of a range of rights and responsibilities and how communities may be able to realize them in practice.

This module is part of a toolkit for community facilitators on biocultural community protocols. The complete toolkit, including additional e-learning modules, is available at: www.community-protocols.org.

Objectives

1. To gain a general understanding of the concept of access and benefit sharing;
2. To identify specific provisions in legal frameworks that relate to access and benefit sharing, including the rights and responsibilities of multiple stakeholders;
3. To highlight the opportunities and challenges that can arise from the current international framework for access and benefit sharing; and
4. To explore how communities can utilize these rights in support of local priorities and plans.

Key Concepts and Terms

Access and benefit sharing

- Fair and equitable sharing of benefits arising from the use of genetic resources.

Genetic resource

- Genetic material of plants or animals with actual or potential value (monetary or non-monetary).

Traditional knowledge, innovations and practices (also referred to collectively as traditional knowledge)

- Traditional knowledge is the intimate knowledge and understanding of a particular resource or broader landscape or seascape resulting from generations of direct interaction, observation, and learning-by-doing. It is generally linked to a particular language with certain words and concepts that cannot be translated into other languages.
- Traditional innovations are products or processes of research and application developed by communities through ongoing interactions with a particular location and resources. Examples include crop varieties, livestock breeds, and handicrafts.
- Traditional practices are patterns of behaviour and self-management that can be considered the products of traditional knowledge and innovations.

Bioprospecting

- Bioprospecting is the search for biological resources with actual or potential value for development into potential commercial applications.

Prior and Informed Consent (often referred to as 'free, prior and informed consent' or FPIC)

Prior and informed consent is a process, not a one-off event. Each word has a particular meaning and significance:

- "Prior" means being given the opportunity to collaborate with and provide consent or objections to a project or development before it takes place and with enough time to consider the information available and likely consequences.

- “Informed” means being given all information needed to make a decision about whether or not to provide or withhold consent to a project or development. The information must be current, in a language that can be understood, independent, and objective. Access to assistance (for example, technical experts) must be available.
- “Consent” means giving permission to a particular project or agreement. A community can provide or withhold consent.

Mutually agreed terms

- Terms of an agreement that have been understood and agreed upon by all parties in the negotiations.

Contracting Party

- A contracting Party to a treaty is a national government that has agreed to be bound by the terms of that treaty.

Who Is This E-learning Module Directed Towards?

This e-learning module may be useful if your community has any of the following:

- A close relationship with a particular territory, area, or resource;
- Traditional knowledge about plants or animals that may relate to genetic resources;
- Customary ownership, stewardship, or use of a particular genetic resource;
- Existing or potential interactions with external actors such as government agencies, researchers, or the private sector regarding these resources or knowledge;
- Questions or concerns about how external actors engage with your community, particularly regarding traditional knowledge and genetic resources; and/or
- Community-determined priorities and plans that relate to traditional knowledge and genetic resources.



COMMUNITIES & ACCESS AND BENEFIT SHARING

What is ‘Access and Benefit Sharing’?

Throughout history, Indigenous peoples and local communities have used traditional knowledge and biological resources to cure sicknesses, provide nourishment, and fulfill everyday livelihood needs. More recently, many people have benefitted from the use of some of this knowledge and biodiversity to develop pharmaceuticals, cosmetics, crop varieties and livestock breeds, and other products for personal use. However, the communities

- [Introductory Video on ABS](#)
(Union for Ethical BioTrade)
- [ABS Simply Explained](#)
(ABS Capacity Development Initiative)

that have nurtured the genetic diversity over thousands of years of cultivation and wild use often have not benefitted from these developments. Frequently, they are not involved in the research and development process, receive little to no compensation for their knowledge or resources, and have no access to the final products. Not only is this in violation of several rights, but it also extinguishes what could be an incentive for communities to continue conserving biodiversity and sustaining traditional knowledge systems. Overall, the vast majority of the resources and traditional knowledge used for these developments are in the Global South, while most of the benefits flow to the Global North.

Over the past couple of decades, the concept and practice of access and benefit sharing (ABS) has emerged in attempt to address these concerns at international and national levels. According to the Convention on Biological Diversity, ABS is defined as the fair and equitable sharing of the benefits arising from the use of genetic resources. International law states that states are the 'owners' of genetic resources located within their borders. Communities have both customary and recognized rights over genetic resources and traditional knowledge of those resources. Those who want to research and use traditional knowledge or genetic resources are obliged to follow certain procedures and uphold standards in collaboration with the appropriate governments and communities.

While actual experiences vary widely, ABS that concerns communities generally begins with a researcher interested in exploring the potential applications of a *genetic resource* that has traditionally been cultivated, harvested, or used otherwise for cultural purposes. One or more communities' *traditional knowledge* of the resource often provides insights into how it can be used and for what purposes. The researcher seeks the *prior and informed consent* of the community to carry out commercial or non-commercial research about its properties and potential applications. Consent is provided if the community and researcher decide on *mutually agreed terms* to guide the research, the use of any information gained, and the sharing of any benefits arising from its use.

Resources: [Introduction to Access and Benefit Sharing](#)

[Nagoya Protocol on Access and Benefit Sharing](#)

[CBD Secretariat Information Factsheets](#)

[ABS Basic Information Sheet](#) and [Nagoya Protocol Basic Information Sheet](#) (Union for Ethical BioTrade)

[Guide to Free, Prior and Informed Consent](#)

Oxfam Australia, 2010

How Does Access and Benefit Sharing Apply to Communities?

The concept of ABS arose partly from the need to ensure that communities benefit from the use of their genetic resources and traditional knowledge. Communities can benefit from 'good' ABS in a number of ways, both monetary and non-monetary. For example, they have the right to determine whether the research will happen at all. If they feel that the research will violate their customary laws or cultural or spiritual values, they have the right to withhold their consent. If they proceed with negotiating mutually agreed terms, they can ensure that the research is carried out according to their values and in support of locally defined priorities and plans. Benefits can include participating in the research and analysis, gaining technical skills and experience, contributing to local economies and livelihoods, and building capacity of local institutions.

The actual practice of ABS does not always live up to its stated aim. Communities can be excluded or even dispossessed due to conflicting claims or understandings of relationships with genetic resources and traditional knowledge. Formal negotiations are generally very difficult for communities to engage with, particularly if they are conducted in different languages and according to externally imposed

timeframes. Sometimes researchers are so concerned about violating rights or standards that they don't even attempt to engage with communities in the first place, thus excluding them from potential benefits.

Community Experiences

As ABS has emerged fairly recently, there is not yet a wide range of experiences or analysis of good practices. There are, however, some key examples that have significantly shaped ABS to date.

One case that embodies the challenges of ABS is that of the San and Hoodia. Hoodia is a desert plant traditionally used to suppress hunger on long hunting trips. An agreement was signed between a broad alliance of San communities across Southern Africa and the Council for Scientific and Industrial Research to explore the potential for diet products derived from Hoodia. The agreement was negotiated by an ad hoc coalition of San communities brought together in this way for the first time. The legitimacy of the process and the agreement itself were challenged by the Nama, another community indigenous to Southern African that also traditionally used Hoodia and shared the same knowledge. The agreement was further undermined by lack of clarity of how the financial benefits would be managed and distributed amongst the communities, with many questioning the accountability of the Hoodia Trust that was established to safeguard the funds.



Figure 1: A member of the San community pointing out Hoodia's properties in the South African Kalahari

Another example is the case of the Kani community of southern India and their knowledge of the *arogyapacha* plant's anti-exhaustion potential. The Kani shared this knowledge with researchers from the Tropical Botanic Garden and Research Institute (TBGRI). The Institute further developed the medicinal use of *arogyapacha* into a drug called *Jeevani*. It then allowed a company to manufacture and distribute *Jeevani* in exchange for royalties, half of which were paid into a fund for the Kani community. While some of this may have been positive, there have been many challenges. Only a small portion of the Kani community was consulted when the agreement with the company was made. Many elders from the community feel that their traditional knowledge, including knowledge about *arogyapacha*, is sacred and should never be shared. The *arogyapacha* plant is now considered endangered from over-harvesting.

Resources: [Community Experiences with Access and Benefit Sharing](#)

[Shifting Sands of ABS Best Practice: Hoodia from the Community Perspective](#)

Bavikatte et al., 2009

[CBD Technical Series 38: ABS in Practice: Trends in Partnerships Across Sectors](#)

Laird and Wynberg (editors), 2008

[Access and Benefit Sharing From the Indigenous Peoples' Perspective: The TBGRI-Kani 'Model'](#)

Bijoy et al., 2007 (in *Law, Environment and Development Journal*)

Guiding Questions for Self-Assessment

1. *What does ABS stand for?*
 - a) *Affirmative Billing Systems*
 - b) *Access and Benefit Sharing*
 - c) *Access to Biological Services*

2. *What is one definition of ABS?*
 - a) *Fair and equitable sharing of the benefits arising out of the use of genetic resources*
 - b) *Sharing of access and benefits to everyone who wants them*
 - c) *Fair and equitable sharing of benefits from the commercialization of any form of research*

3. *What kinds of benefits can communities gain through ABS?*
 - a) *Monetary only*
 - b) *Non-monetary only*
 - c) *Both monetary and non-monetary*

Answers: 1(b); 2(a); 3(c)

Guiding Questions for Discussion

The following questions are intended as guides only for broader discussion within your community about the issues raised so far in the e-module:

1. *What different kinds of knowledge are traditionally held by your community concerning resources such as indigenous plant varieties, livestock breeds, or medicinal plants?*

2. *How is this knowledge shared within the community? How is it shared with outsiders?*

3. *What customary laws, values or social norms influence your community's relationship with these resources?*



RIGHTS AND RESPONSIBILITIES

How Did the Legal Framework for Access and Benefit Sharing Emerge?

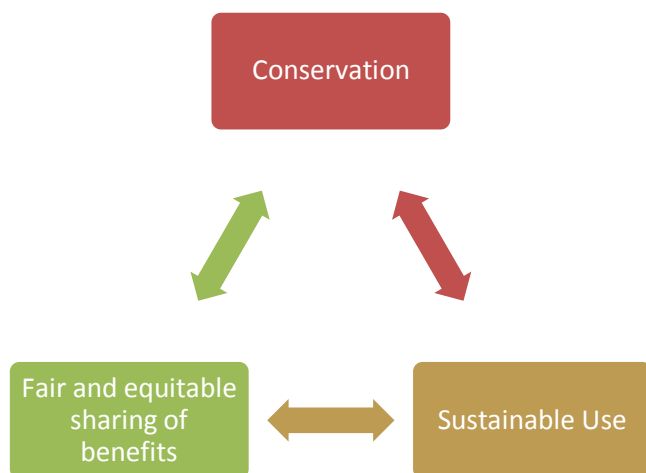


Figure 2: The three objectives of the Convention on Biological Diversity

The fair and equitable sharing of benefits arising from the use of genetic resources is one of the three objectives of the Convention on Biological Diversity. This concept (commonly referred to as ‘ABS’) emerged during the development of the Convention itself. The main reasons are due to increased consideration of the sustainable use of biodiversity and the need to ensure that *bioprospecting* and resource exploitation would not cause harm to conservation and communities. Delegates in the negotiations took into consideration the need to share costs and benefits between developed and developing countries, as well as “ways and means to support innovation by local people” (for more information, read about the [history of the CBD](#)).

There are now several international legal instruments that relate to ABS. These instruments include (with the year of adoption in brackets):

- [Convention on Biological Diversity](#) (1992);
- [Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization](#) (2004); and
- Of most relevance, the [Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization](#) (2010).

Guiding Questions for Self-Assessment

1. What was the first international legal instrument to include ABS?

- CMF
- NPA
- CBD

2. What CBD instrument addresses ABS in more detail?

- The Nagoya Protocol
- The Kiev Protocol
- The Durban Protocol

3. What year was the Nagoya Protocol adopted?

- 2011
- 2010
- 2004

Answers: 1(a); 2(a); 3(b)

What Rights and Responsibilities Do Communities Have?

Rights under the Convention on Biological Diversity

In the process of access and benefit sharing, communities have the right:

- To be consulted prior to a party obtaining access to genetic resources ([CBD Article 15\(5\)](#) and [Nagoya Protocol Article 6\(2\)](#));
- To be fully informed of the nature of access of genetic resource ([CBD Article 15\(5\)](#) and Nagoya Protocol Article 6(2));
- To give or withhold permission or consent for the sharing of the genetic resource ([CBD Article 15\(5\)](#) and Nagoya Protocol Article 6(2));
- To negotiate access to a genetic resource under mutually agreed terms ([CBD Article 15\(4\)](#) and [Nagoya Protocol Article 7](#));
- For efforts to be made to ensure that communities, as the owners of genetic resources, can fully participate in the scientific research on such genetic resources ([CBD Article 15\(6\)](#));
- To receive a fair and equitable share in the results of research and benefits that arise from the commercial (or other) use of a community's genetic resources or traditional knowledge ([CBD Article 15\(7\)](#)) based on mutually agreed terms ([Nagoya Protocol Article 5\(2\) and \(5\)](#)). Benefits can be monetary or non-monetary ([Nagoya Protocol Article 5\(3\)](#));
- To have taken into consideration their customary laws, community protocols and procedures with respect to traditional knowledge associated with genetic resources ([Nagoya Protocol Article 12\(1\)](#)); and
- Not have restricted the customary use and exchange of genetic resources and associated traditional knowledge within and amongst communities ([Nagoya Protocol Article 12\(4\)](#)).

Rights under Other Legal Instruments

Other human rights and environmental law instruments recognize the important links between Indigenous peoples and local communities and the associated rights to genetic resources and associated traditional knowledge.

[United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP, 2007)

Indigenous peoples have the right:

- To maintain, control, protect and develop their traditional knowledge including manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora (Article 31(1));
- To maintain, control, protect and develop their intellectual property over this traditional knowledge (Article 31(1));
- To determine and develop their own priorities and strategies for the development and use of their lands, territories and other resources (Article 32(1));
- To be consulted in good faith with the State, through the Indigenous peoples' own representatives, to obtain their free, prior and informed consent before the approval of any project affecting their lands, territories or natural resources, especially where this concerns the development, utilization or exploitation of mineral, water or other resources (Article 32(2));
- To have effective mechanisms provided to them for just and fair redress (including compensation) for activities affecting their lands, territories or natural resources, especially

where this concerns the development, utilization or exploitation of mineral, water or other resources as well as appropriate measures to mitigate or make less the severe any adverse environmental, economic, social, cultural or spiritual impact (Article 32(3)); and

- To have redress, by means of restitution (that is, having restored what has been lost or taken away) or compensation, for lands, territories or natural resources which they have traditionally owned or otherwise occupied or used, which have been confiscated, taken, occupied, used or damaged without their free, prior or informed consent (Article 28(1)).

[International Treaty on Plant Genetic Resources for Food and Agriculture \(ITPGRFA, 2001\)](#)

This treaty acknowledges the rights of farmers:

- To participate equitably in the sharing of benefits that arise from the use of plant genetic resources for food and agriculture (see Article 9.2(b));
- To participate in the making of decisions (at the national level) on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture; and
- To benefits that arise from the use of plant genetic resources for food and agriculture (that are shared under the Multilateral System provided for in the Treaty).

Responsibilities

In the process of access and benefit sharing, communities have the responsibility to participate in and provide access to relevant genetic resources once prior, informed consent has been given by the community (CBD [Article 15\(6\)](#)).

Guiding Questions for Self-Assessment

1. *When must a community be consulted to establish an ABS agreement?*
 - a) *It doesn't matter as long as the community is consulted*
 - b) *After research is completed and only if the researcher is going to commercialize the research*
 - c) *Prior to the researching party obtaining access to the genetic resources*
2. *True or False: Communities only have the right to negotiate HOW the benefits will be shared, not whether research can take place.*
 - a) *T*
 - b) *F*
3. *Benefits must be monetary*
 - a) *T*
 - b) *F*

Answers: 1(c); 2(b); 3(b)

Guiding Questions for Discussion

1. *Has your community ever been approached by a government or researcher interested in accessing your natural or genetic resources or associated traditional knowledge?*
2. *If so, has your community provided prior and informed consent before they accessed the resource or knowledge? What did that process involve? How were the terms of the agreement agreed upon? What*

kind of benefits did the community receive from the access or use? Do you think that these benefits are/were fair and reasonable?

3. If the answer to 1 above is no, in what situation might your community be approached by a government or researcher? If you were approached, what values and customary laws must they respect? What benefits would your community be interested in?

What Rights and Responsibilities Do Others Have?

There are different parties or stakeholders involved in the ABS process as both providers and users. The rights and responsibilities under international law for each party are discussed below.

Government

Rights include:

- The “sovereign right” over the natural resources (including genetic resources) in their territory. Individual governments (as Parties to the CBD) have the authority to decide access to genetic resources ([CBD Article 15\(1\)](#));
- To participate in the scientific research of genetic resources from their territory ([CBD Article 15\(6\)](#));
- To receive a fair and equitable share in the results of research and benefits that arise from the commercial (or other) use of a community’s genetic resources or traditional knowledge ([CBD Article 15\(7\)](#)) based on mutually agreed terms ([Nagoya Protocol Article 5\(1\)](#)). Benefits can be monetary or non-monetary ([Nagoya Protocol Article 5\(4\)](#)); and
- To be consulted prior to a party obtaining genetic resources, to be fully informed of the nature of access of the genetic resource, to give or withhold permission or consent for the sharing of the genetic resource, and for negotiations on access to genetic resources to be under mutually agreed terms ([CBD Articles 15\(4\) and \(5\)](#) and [Nagoya Protocol Article 6\(1\)](#)).

Some responsibilities include:

- Creating conditions that will assist the access to genetic resources (for purposes that contribute to conservation and sustainable use) for other parties and not impose restrictions that are against the objectives of the CBD ([CBD Article 15\(2\)](#));
- Taking appropriate measures to share in a fair and equitable way the results of research and development and the benefits arising from the commercial and/or other uses of genetic resources and traditional knowledge with the parties that have provided them (for example, communities), upon mutually agreed terms ([CBD Article 15\(7\)](#) and [Nagoya Protocol Article 5](#));
- Taking measures to make sure that the prior informed consent or approval and involvement of indigenous and local communities is sought and received for access to genetic resources ([Nagoya Protocol Article 6\(2\)](#));
- Taking appropriate measures to make sure that domestic access and benefit sharing legislation is clear, transparent and legally certain ([Nagoya Protocol Article 6\(3\)\(a\)](#)), provides for fair rule and procedures on accessing genetic resources ([Nagoya Protocol Article 6\(3\)\(b\)](#)) and provides information on how to apply for prior informed consent ([Nagoya Protocol Article 6\(3\)\(c\)](#));
- Establish clear rules and procedures for requiring and establishing mutually agreed terms ([Nagoya Protocol Article 6\(3\)\(g\)](#)) and where a decision has been made to grant prior informed consent and mutually agreed terms, the government must issue a permit (or equivalent) at time

- of access ([Nagoya Protocol Article 6\(3\(e\)\)](#));
- Set out criteria/process for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources ([Nagoya Protocol Article 6\(3\(f\)\)](#));
 - Put into place measures to make sure that traditional knowledge held by indigenous and local communities is accessed with prior informed consent or approval and involvement of the relevant communities, under mutually agreed terms ([Nagoya Protocol Article 7](#));
 - Pay regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health ([Nagoya Protocol Article 8\(b\)](#));
 - Respect, preserve and maintain knowledge, innovations (inventions) and practices of indigenous and local communities where traditional ways of life help to conserve and sustainably use biodiversity diversity and encourage the equitable sharing of benefits that arises from the use of this knowledge, innovation and practice ([CBD Article 8\(j\)](#));
 - Take into consideration the customary laws, community protocols and procedures of indigenous and local peoples, with respect to their traditional knowledge over genetic resources ([Nagoya Protocol Article 12\(1\)](#));
 - Support the development by indigenous and local communities of community protocols (with respect to traditional knowledge associated with genetic resources), minimum standards for mutually agreed terms, and model contractual clauses for benefit sharing ([Nagoya Protocol Article 12\(3\)](#));
 - Inform potential users of traditional knowledge about their obligations including fair and equitable sharing of benefits ([Nagoya Protocol Article 12\(2\)](#));
 - Providing/facilitating access and transfer to other parties, technologies that assist in the conservation and sustainable use of biological diversity ([CBD Article 16\(1\)](#)). This access/transfer of technology will be provided/facilitated under terms that are *mutually agreed under fair and most favourable terms* ([CBD Article 16\(1\)](#));
 - Taking appropriate measures (for a country that is providing genetic resources) to give access to and transfer technology which makes use of the resources (on terms that are mutually agreed by all parties) ([CBD Article 16\(3\)](#));
 - Cooperation with relevant national and international law regarding patents and other intellectual property rights (see [CBD Article 16\(5\)](#)); and
 - Take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources and related access and benefit sharing, including: organization of meetings between indigenous and local communities and relevant stakeholders; promotion of voluntary codes of conduct, guidelines and best practices/standards in consultation with indigenous and local communities and relevant stakeholders; education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit sharing obligations; the involvement of indigenous and local communities and relevant stakeholders in the implementation of the Protocol; and, awareness-raising of community protocols and procedures of indigenous and local communities ([Nagoya Protocol Article 21](#)).

The private sector (including researchers who intend to or eventually use genetic resources or traditional knowledge for profit) does not have legally binding obligations if they are not contracting parties to the relevant international laws. However, as “users” of genetic resources and traditional knowledge, businesses and researchers are referred to in the following international provisions:

Some responsibilities include:

- The sharing of benefits of genetic resources and traditional knowledge with owners and to support the conservation of biological diversity and the sustainable use of its components globally ([Nagoya Protocol Article 10](#));
- Providing information regarding prior informed consent, the source of the genetic resource, establishment of mutually agreed terms and/or utilization of genetic resources to a designated checkpoint within a host government ([Nagoya Protocol Article 17\(1\)](#)); and
- Complying with any reporting requirements as a user of genetic resources/traditional knowledge set out in mutually agreed terms ([Nagoya Protocol Article 17\(1\)\(b\)](#)).

In addition, **researchers** have further obligations through the following instruments:

- The [Tkarihwaí:ri Code of Ethical Conduct](#) to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities. This code of conduct includes general ethical principles such as:
 - Respect for existing mutually agreed settlements or agreements (paragraph 7);
 - Acknowledgement of concerns or claims to cultural and intellectual property relevant to traditional knowledge, innovations and practices related to conservation and sustainable use of biodiversity *prior* to negotiations (paragraph 8);
 - Non-discriminatory ethical guidelines including affirmative action (paragraph 9); and
 - Full disclosure (in advance) about the nature, scope and purposes of any proposed activities/interactions that may involve the traditional knowledge, innovations and practices of indigenous and local communities related to the conservation and sustainable use of biodiversity on sites traditionally linked with indigenous and local communities (paragraph 10). Any activities that do occur should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities (paragraph 11).

Resources: Additional guidance outside of the CBD
[International Society of Ethnobiology Code of Ethics](#)
[Oxfam's Guide to Free, Prior Informed Consent](#)

Guiding Questions for Self-Assessment

1. Who has “sovereign rights” over natural resources on their national territories?

- a) Researchers
- b) Companies
- c) Governments

2. Which party listed below will not be involved in an ABS agreement?

- a) Government
- b) Researchers
- c) Communities
- d) Judiciary

Answers: 1(c); 2(d)

How Does this Framework Apply To My Country?

To find out if your country is obliged to uphold the provisions of the [Convention on Biological Diversity](#), please search the [list of Parties who have ratified the Convention](#).

To find out if your country is obliged to uphold the provisions of the [Nagoya Protocol](#), please search the [list of Parties who have signed and/or ratified the Protocol](#).

What does this mean?

In order for a country to be bound by the provisions and obligations of an international treaty, it must sign the relevant treaty within a specific period of time and then either ratify or accede to it.

Signature: When a country signs on to an international treaty it does not bind the State to the provisions within the treaty, though it shows a clear intention to be bound by its provisions.

Ratification: When a country signs a treaty, it can then choose to ratify it. Ratification of a treaty is a process showing a country's approval and intention to be bound by it. Once a country ratifies a treaty it then becomes a party to it.

Accession: Accession also shows a country's approval and intention to be bound by and comply with a treaty. Accession usually comes about when a country does not sign a treaty within a specific time.



WHAT DOES THIS INTERNATIONAL FRAMEWORK MEAN FOR MY COMMUNITY?

Key Opportunities

As indicated above, there are a number of provisions related to ABS in international instruments such as the CBD, Nagoya Protocol, UN Declaration of the Rights of Indigenous Peoples, and the International Treaty on Plant Genetic Resources for Food and Agriculture. These provisions are relatively supportive of the rights of Indigenous peoples and local communities who traditionally owned, occupied, or used their traditional lands, territories, and genetic resources and associated traditional knowledge. Parties or signatories to these international instruments are obliged to respect, protect, and promote the rights of Indigenous peoples and local communities who are holders of genetic resources and associated traditional knowledge. Provisions that encourage communities' prior and informed consent and the fair and equitable sharing of benefits were purposefully developed to address the inequalities experienced by Indigenous peoples and local communities.

Communities can use these international legal frameworks at the local and national levels in a number of ways. The most important first step is for communities to educate and familiarize themselves with the rights and responsibilities in the frameworks. The resources contained in this module provide a good basis for beginning. This could be followed by focused discussions within the community and planning about how to engage strategically with external actors on the community's terms.

One of the most promising aspects of the Nagoya Protocol is the recognition of communities' customary laws and community protocols with respect to traditional knowledge associated with genetic resources. These provisions (set out in Articles 12(1), 12(3)(a), and 21(i)) oblige States to take into consideration, support the development of, and raise awareness of the customary laws, community protocols and procedures of Indigenous peoples and local communities. This is effectively the first time that these issues are recognized in international treaty law.

Key Challenges

There are a number of provisions within the CBD and Nagoya Protocol that Indigenous peoples and local communities should be particularly aware of. Two significant issues are outlined below.

Established Rights

Before engaging with ABS, communities may need to first secure other fundamental rights, including recognition of ownership over lands, territories, and natural resources that they have traditionally owned, occupied, or used. For example, in Articles 5(2) and 6(2) of the *Nagoya Protocol*, rights to prior informed consent for access to genetic resources and to fair and equitable sharing of benefits are limited to communities with established rights over resources. Thus these rights only apply to communities whose rights over genetic resources are recognized by the state. It may be difficult for a community to enforce other rights related to ABS if they have not had their rights over genetic resources officially recognized by the government. Communities should be aware of this and prepared to advocate for their rights over their lands, territories, and natural resources as well as their rights to genetic resources and traditional knowledge.

Prior Informed Consent

The CBD and Nagoya Protocol fail to insist that "prior informed consent" of Indigenous peoples and local communities include the element of "freedom". Insisting that "prior informed consent" should be "free" recognizes that Indigenous peoples and local communities must be empowered to make decisions regarding their ownership of genetic resources and associated traditional knowledge without force, pressure, intimidation, manipulation, or coercion. The omission of this element is significant.

Resources: Case Studies and Good Practice

[ABS Management Tool](#) (International Institute for Sustainable Development)

[The Access and Benefit Sharing Research Project](#) (Fridtjof Nansen Institute)

[Case Studies on ABS in various countries](#) (Bioversity International)

[ABS Good Practices](#) (Swiss Academy of the Sciences)

[ABS Capacity Development Initiative](#)

TAKING ACTION

How Can My Community Connect with Others on These Issues?

The CBD website hosts the [Traditional Knowledge Information Portal](#). The Portal has been developed to promote awareness and enhance access of Indigenous peoples and local communities to information related to traditional knowledge, innovations, and practices and customary sustainable uses of biodiversity. Other useful sources of information and opportunities for networking include the following:

- Subscribe to the [Traditional Knowledge Bulletin](#) of the United Nations University.
- Contact the [International Indigenous Forum on Biodiversity](#), the Indigenous caucus in the CBD.
- If you are interested in participating in CBD meetings or have any questions about Articles 8(j) and 10(c), contact the CBD Secretariat Programme Officer for traditional knowledge, Mr. John Scott (john.scott@cbd.int).

Discussing Our Community's Views, Priorities & Strategies

Despite the challenges discussed above, ABS is still a legal framework that communities can potentially engage with to achieve positive outcomes. It is up to Indigenous peoples and local communities and supporting organizations to advocate for the highest standards and principles of international law to be upheld in their own countries and contexts.

If the issues outlined in this e-module are of relevance to your community, you may wish to further discuss certain views, priorities, and strategies for engaging with different external actors. For example, it may be helpful to consider how your community would decide to respond to the following guiding questions:

- *How is our community organized? Who are our authorities and leaders?*
- *If our community was approached by a company, government agency, or researchers about obtaining access to our traditional knowledge or genetic resources, who should they approach?*
- *What national and international rights should we be aware of? What customary laws and values apply?*
- *What information would we want to know? What should we ask them?*
- *Depending on their answers, how would we make a decision collectively as a community?*
- *How might we like to engage with them? What terms and conditions would we place upon their engagement?*
- *If we have questions about the information we have received from them, who could we approach? Is there an independent authority or ombudsperson in our country?*
- *What sorts of benefits would be most useful within our broader development plans and visions for the future?*
- *How would we know what constitutes 'fair and equitable sharing of benefits'?*
- *How would we reflect upon the process and the impact of our decisions?*

Regardless of the situation, it would be useful to understand the relevant international provisions as well as country-specific legal frameworks. Your community may also have customary laws or values that determine how outsiders should engage with you and according to what terms and conditions. You could draw on these different laws to set out in your community protocol your rights, the responsibilities of external actors, and minimum guidelines and principles that they should adhere to when engaging with your community.

Communicating Our Views to Others

If you have been approached by any outsiders, ask them for their organization's procedures or guidelines for conducting research, impact assessments, or other forms of engagement with communities. These should complement any specific guidance you may provide in your community protocol or other community-defined procedures or customary laws.

You could utilize various tools to document and communicate your knowledge and customary uses of biodiversity. Examples include radio, audio/video, and photography.

Ideas for Advocacy & Action

- Write submissions for and participate in international negotiations. Particularly important meetings to attend are:
 - The Convention on Biological Diversity's Intergovernmental Committee on the Nagoya Protocol ([ICNP](#)) and the Working Group on Article 8(j) and Related Provisions ([WG8\(j\)](#))
 - The United Nations Permanent Forum on Indigenous Issues ([PFII](#))
 - The World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ([WIPO IGC](#))
- Meet with relevant government agencies to discuss how your community's traditional knowledge and genetic resources contribute to biodiversity conservation and sustainable livelihoods.
- Meet with your CBD National Focal Point and find out how to participate in processes such as revising the National Biodiversity Strategy and Action Plan.



SUMMARY

This module has explored the concept and practice of ABS and how communities can engage with it to support their local plans and priorities. It highlights the importance of recognizing communities' rights over genetic resources and traditional knowledge in order to fulfill the three objectives of the Convention on Biological Diversity: the conservation and sustainable use of biodiversity and the fair and equitable sharing of benefits arising from the use of genetic resources. In the context of ABS,

communities often need to be very aware of their rights and the responsibilities of others in order to realize them in practice.

Overall, communities have the right to provide or withhold free, prior and informed consent to researchers interested in their genetic resources or traditional knowledge. Researchers are obliged to reach agreement with the community about how they will carry out the research and share benefits according to mutually agreed terms.

External parties such as governments and researchers also have certain rights and responsibilities that can either support or conflict with communities' rights. Communities should be aware of these to ensure they are considered and upheld during any interactions. Realizing communities' rights in the context of ABS can be a challenge but also presents several opportunities to support local priorities, plans, and livelihoods.

Guiding Questions for Self-Assessment

- *What do you think is significant about ABS?*
- *What is a situation you can imagine where an ABS agreement would be useful?*
- *What does prior informed consent mean? What would a researcher need to do in order to obtain prior informed consent?*
- *What parties must a researcher receive consent from to have an ABS agreement? Why?*

Guiding Questions for Community Reflection

- *Does or could the ABS framework apply to your community? How?*
- *Can you identify traditional knowledge that your community has over a resource such as a particular plant variety, animal species or natural resource?*
- *Does your community have rights recognised by government (at any level)?*
- *How would you reach an agreement for the equitable sharing of benefits?*



ADDITIONAL RESOURCES

Other Relevant E-modules

There are a number of other international frameworks that relate to traditional knowledge and customary sustainable use of biodiversity. If you are interested in learning more, please visit www.community-protocols.org for the following additional e-modules (some forthcoming):

- United Nations Declaration on the Rights of Indigenous Peoples
- Other International Human Rights Instruments, including ILO 169

- Traditional Knowledge and Customary Sustainable Use
- Intellectual Property Rights
- Farmers' Rights
- Cultural Heritage

Bibliography & Further Reading

[Community Protocols and Access and Benefit Sharing](#)

Jonas et al., 2010 (in *Asian Biotechnology and Development Review*)

[Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing](#)

Bavikatte and Robinson, 2011 (in *Law, Environment Development Journal*)

[The Custodians of Biodiversity: Sharing Access to and Benefits of Genetic Resources](#)

Ruiz and Vernooy (editors), 2012

[Learning from the Practitioners: Benefit Sharing Perspectives from Enterprising Communities](#)

Suneetha and Pisupati, 2009

[Shifting Sands of ABS Best Practice: Hoodia from the Community Perspective](#)

Bavikatte et al., 2009

[Rhetoric, Realism, and Benefit Sharing: Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Suppressant](#)

Wynberg, 2004 (in *Journal of World Intellectual Property*)

[Indigenous Peoples, Consent and Benefit Sharing: Lessons from the San-Hoodia Case](#)

Wynberg et al., 2009 (NB: not open access)

Acknowledgements

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Contact & Request for Feedback

This e-learning module is part of a toolkit for community facilitators on biocultural community protocols. The complete toolkit, including additional e-learning modules, is available at: www.community-protocols.org.

We welcome any and all feedback on the content and use of the e-learning modules and toolkit. If you have suggestions for improvement, would like more information, or would like to request a hard copy of the toolkit, please contact Holly Shrumm (holly@naturaljustice.org).

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