

A business guide to access and benefit-sharing (ABS)



Compliance with South Africa's biotrade and bioprospecting legal framework

Section 1 | Introduction, executive summary, key concepts and legislation



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Introduction

This is **section one** of a six-part step-by-step guide for businesses working with biodiversity or engaging with bioprospecting and/or biotrade. It aims to ensure compliance with South African laws and regulations, in line with access and benefit-sharing principles and industry best practices.

Section one provides an overview of ABS principles and legislation, and how they apply to companies working with biodiversity.

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Glossary

Term	Definition
ABS	Access and benefit-sharing
ABSCH	ABS Clearing House
BABS	Bioprospecting, access and benefit-sharing
BAC	Bioprospecting Advisory Committee
BSA	Benefit-Sharing Agreement
Bioprospecting	Bioprospecting in relation to indigenous biological resources, means any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes (a) the systematic search, collection or gathering of such resources or making extractions from such resources for purposes of such research, development or application; (b) the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; or (c) research on, or the application, development or modification of, any such traditional uses, for commercial or industrial exploitation; or (d) the trading in and exporting of indigenous biological/genetic resources in order to develop and produce, such as medicines, industrial enzymes, food flavours, fragrances, cosmetics, colours, extracts and essential oils
Biotrade	The buying and selling of milled, powdered, dried, sliced or extracts of indigenous genetic and biological resources for commercial exploitation
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
DFFE	Department of Forestry, Fisheries and the Environment
DSI	Department of Science and Innovation
dtic	Department of Trade, Industry and Competition
IK	Indigenous knowledge means knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and includes (a) knowledge of a functional nature; (b) knowledge of natural resources; and (c) indigenous cultural expressions
IKS Act	Protection, Promotion, Development and Management of Indigenous Knowledge Act (Act 6 of 2019)
IRCC	Internationally-recognised certificates of compliance
MAT	Mutually agreed terms
MTA	Material Transfer Agreement
NEMBA	National Environmental Management: Biodiversity Act (Act 10 of 2004)
Organisations	An organised group of people with a particular and defined purpose, such as organisations representing traditional knowledge holders, organisations representing sectors, organisations who support sector development, etc.
Organised group of traditional knowledge holders	Group of traditional knowledge (TK) holders mandated to present a wider group of TK holders who are organised and recognised by other TK holders such as the National Khoi and San Council of SA or the SA San Council
PIC	Prior informed consent
SANBI	South African National Biodiversity Institute
TCE	Traditional cultural expressions are more tangible than the informal oral traditions relating to traditional knowledge, and include artefacts, folklore, myths, songs, poems, performances and handicrafts
TK	Traditional knowledge refers to the customary utilisation or knowledge of indigenous genetic and biological resources by an indigenous community or specific individual, in accordance with written or unwritten rules, usages, customs or practices traditionally observed, accepted and recognised by them, and include discoveries about the relevant indigenous genetic and biological resources by that community or individual
TOPS	Threatened or protected species

Key concepts in ABS

Access and benefit-sharing

Access and benefit-sharing (ABS) refers to principles, rules and good practices that may apply to persons or organisations working with biodiversity, from collecting plant samples for research and gathering information on their traditional uses, to producing botanical extracts and using essential oils for commercial purposes.

South Africa is committed to implementing ABS principles through international agreements such as the [Convention on Biological Diversity \(CBD\)](#) and the [Nagoya Protocol](#). It has adopted laws and regulations that convert these principles into requirements and procedures which apply to persons or organisations working with indigenous biological resources and their associated traditional or indigenous knowledge (TK/IK).

International framework

Convention on Biological Diversity

The principles of ABS were first established by the 1992 Convention on Biological Diversity (CBD) and further developed in the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

The CBD recognises the sovereign rights of countries over their natural resources and establishes that each country has the authority to determine how plants, animals or other biological resources are accessed. It sets out the conditions for their use in research and development, including the fair and equitable sharing of benefits arising from such use.

In particular, the CBD established that ABS should be based on prior informed consent (PIC) and mutually agreed terms (MAT).



Prior informed consent is the permission given by the competent national authority of a provider country to a resource user prior to accessing genetic resources, in line with national ABS requirements.

Mutually agreed terms consist of an agreement reached between the provider and user of genetic resources on the conditions of access, use of the resources and benefits to be shared with the provider.

The CBD also recognised the importance of TK/IK, and practices of indigenous peoples and local communities, to the conservation and sustainable use of biological diversity; and encouraged the equitable sharing of benefits.

Key concepts in ABS

Bonn Guidelines

The adoption of the Bonn Guidelines in 2002 was another important step towards implementation of the ABS provisions of the CBD. These voluntary guidelines were intended to help countries to effectively implement ABS. The Bonn Guidelines aim to:

- Guide countries in setting up their own national legislative, administrative or policy measures for ABS
- Assist providers and users in the negotiation of MAT, by providing examples of what elements should be included in these agreements

Nagoya Protocol

The Nagoya Protocol clarifies and builds on ABS principles established by the CBD, and clarifies the scope of application of ABS. Utilisation of genetic resources is defined as research and development on the genetic or biochemical composition of genetic resources. It requires that countries adopt clear, transparent and non-arbitrary measures to regulate access to genetic resources for their utilisation, through PIC and MAT.

An important innovation provided by the Nagoya Protocol is the obligation imposed on countries to adopt compliance measures to ensure users within their jurisdiction respect ABS requirements when accessing genetic resources in other countries for research and development.

The Protocol also aims to ensure that indigenous peoples and local communities get a fair share of benefits from the use of TK or genetic resources over which they have established rights.

ABS Clearing House

The ABS Clearing House (ABSCH) was established by the Nagoya Protocol as a mechanism for sharing information at an international level, including information on ABS national focal points, competent national authorities, and ABS laws and regulations. The ABSCH also makes available internationally-recognised certificates of compliance (IRCCs) which are generated once countries notify the issuance of national ABS permits. IRCCs provide evidence that PIC was granted, and that MAT were established.

National framework

Countries which are Party to the CBD and the Nagoya Protocol must adopt national legislative, administrative or policy measures to implement their obligations under these international agreements. Activities and resources covered by ABS requirements may vary from one country to another in light of national circumstances and interests.

South Africa is a Party to the CBD and the Nagoya Protocol, and has developed national ABS measures. Individuals or companies interested in accessing indigenous genetic or biological resources and/or TK/IK in South Africa need to follow specific ABS requirements and procedures.

The **National Environmental Management: Biodiversity Act (Act 10 of 2004)** (NEMBA) and the Bioprospecting, Access and Benefit-Sharing (BABS) Regulations, 2008, as amended, establish the national ABS requirements for access to indigenous genetic or biological resources in South Africa.

Additional documentation, including permit application forms and other resources, have been developed to guide users in obtaining bioprospecting and/or biotrade permits. The most crucial part of any application is the attachments and supporting information (see section 6). Failure to properly complete one's application will result in further requests for information from the DFFE, delaying the process significantly.

Key concepts in ABS

Traditional and indigenous knowledge

In South Africa, there are three pieces of legislation relating to TK/IK. The first is **NEMBA**; the second is the **South African Patents Act** (Act 57 of 1978); and the third is the **Protection, Promotion, Development and Management of Indigenous Knowledge Act (IKS Act)** (Act 6 of 2019). These acts contain three terms that relate to how the indigenous biodiversity is engaged with - TK, IK and traditional cultural expressions (TCE).

Dr Revel Iyer's (2021) clear explanation of the differences and interactions between these terms is useful when working with indigenous biodiversity.

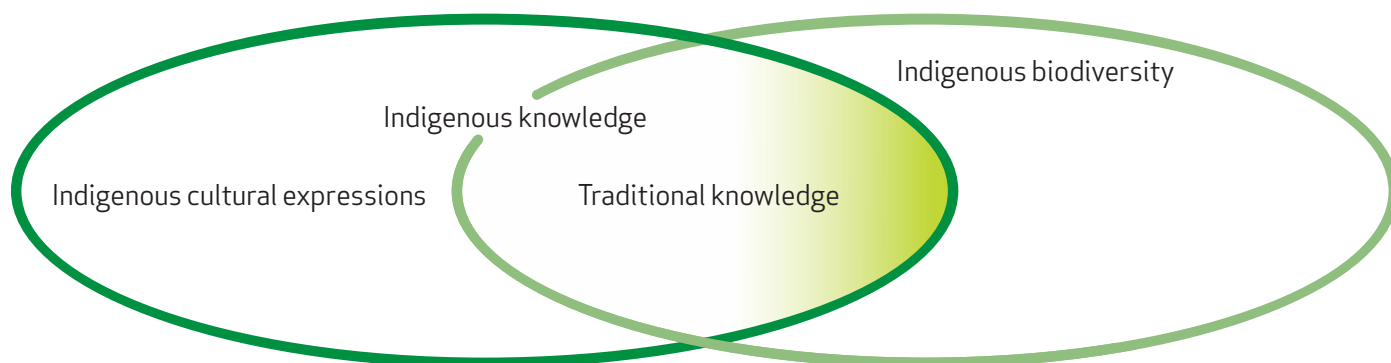
Traditional knowledge is seen as the knowledge that an indigenous community has regarding the use of an indigenous biological resource, and that is passed down in more informal ways through oral tradition. TK is mostly focused on how indigenous biological resources are used.

Traditional cultural expressions are more tangible and include artefacts, folklore, myths, songs, poems, performances and handicrafts.

TK and TCE are different and separate terms, one referring to use and the other to expression.

Indigenous knowledge means knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and includes (a) knowledge of a functional nature; (b) knowledge of natural resources; and (c) indigenous cultural expressions. This is a wide definition that includes both TK and TCE as defined above.

We can say that TK is a collective term of IK and TCE, and includes the aspects of both. Please refer to the diagram below.



Relationship between the different terms used in the field of traditional and indigenous knowledge (Iyer, R, 2021)