

Preparing Southern African communities
to understand, share and benefit from the
use of their Traditional Knowledge and
natural resources

ACCESS AND BENEFIT-SHARING TOOLKIT

Communities connected to: BUCHU





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Natural Justice

Natural Justice is an African organisation specialising in the interface between human rights and environmental law, and works for the pursuit of social and environmental justice. Natural Justice is committed to supporting the participation of Indigenous Peoples and Local Communities in the implementation of Access and Benefit-sharing (ABS) through support for the development of community protocols and other comparable tools, advice and legal assistance for negotiation of fair and equitable ABS agreements; as well as research and advice on integrating community rights into national, regional and international frameworks related to ABS and the protection of Traditional Knowledge.

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ABioSA

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In collaboration with the South African Department of Forestry, Fisheries and the Environment (DFFE) and other regional governments, the project works with 12 Biotrade value chains and plant species, including some which straddle national borders. They were identified based on criteria including Traditional Knowledge, ecological sustainability, market demand, potential for value-adding and job creation, and the participation of Indigenous Peoples and Local Communities and Small Medium Enterprises (SMEs).

To further this purpose, the partners have identified the need to promote and support the accrual of benefits and the participation of Indigenous Peoples and Local Communities in the utilisation of genetic resources and its associated Traditional Knowledge by user companies and/or research organisations. In this project, Natural Justice supported Indigenous Peoples and Local Communities connected to the resources, Marula, Buchu and *Aloe ferox*, through a stakeholder identification process in intended to lead to a Biocultural Community Protocol (BCP) or comparable instrument to support Indigenous Peoples and Local Communities to affirm and protect their rights as it pertains to these species.

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CHAPTER 1: INTRODUCTION

IN THIS CHAPTER YOU WILL:

-  Understand that Access and Benefit-sharing is a means through which Indigenous Peoples and Local Communities can bring benefits to their communities, while also protecting their natural resources and Traditional Knowledge and safeguarding it for the future.
-  Understand that the Access and Benefit-sharing process requires different actors: government to set the laws, communities who provide natural resources and Traditional Knowledge and the people who want to use these natural resources and Traditional Knowledge.

KEY CONCEPTS IN THIS CHAPTER:

-  **Access and Benefit-sharing (ABS):** Agreements between Indigenous Peoples and Local Communities and industry, researchers or outside entities, negotiating access to natural and genetic resources (or Indigenous Biological Resources) and associated Traditional Knowledge, as well as sharing of their benefits.

1.1 INTRODUCTION

The Access and Benefit-sharing (ABS) Toolkit is designed as an information and communication tool for community members and traditional leaders who steward and use resources and/or hold key Traditional Knowledge to the resources. The toolkit is designed to support communities when working with non-profit organisations, private companies, researchers and academics, and other outside actors.

We hope that by using this toolkit, you are better able to lead “Access and Benefit-sharing” processes to protect the Traditional Knowledge, land and natural resources within your community.

1.2 WHAT IS ACCESS AND BENEFIT-SHARING

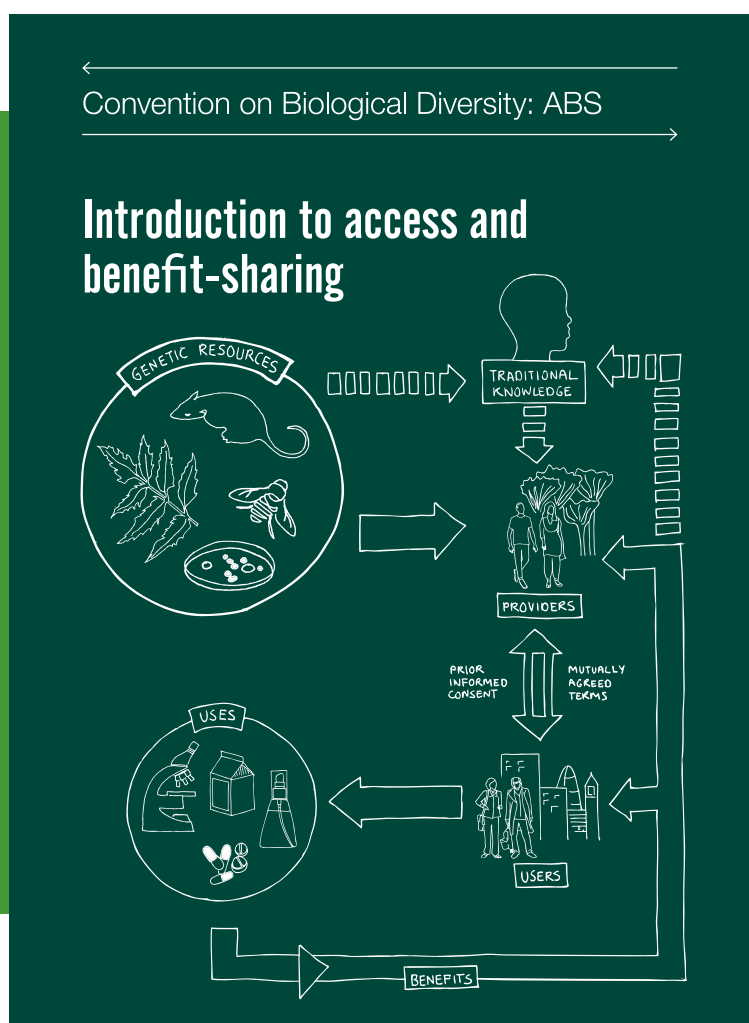
Access and Benefit-sharing refers to the way in which natural and/or genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the resources (users) and the people or countries that provide them (providers).

The benefits that can result from the use of natural or genetic resources can be monetary, such as sharing profits or royalties when the resources are used to create a commercial product, or non-monetary, such as the development of research skills and knowledge.

There are three key stakeholders involved in ABS:

- 🔑 The government, who is expected to ensure that laws around ABS are implemented and respected. In each country, there is a focal point that acts in this capacity – in South Africa this is the Department of Forestry, Fisheries and the Environment.
- 🔑 The community or individual that holds knowledge or who is the custodian of natural resources (the provider).
- 🔑 The industry, company, research or organisation etc that wants to use the provider's knowledge or natural resource (the user).

When the provider and the user make an agreement where the user gets access to the knowledge or resource and the provider gives consent and can benefit from this, then the outcome is an Access and Benefit-sharing Agreement.










A simple diagram of the ABS process taken from the Convention of Biological Diversity [pamphlet](#), "Introduction to Access and Benefit Sharing".

1.3 WHY SHOULD COMMUNITIES CONSIDER ACCESS AND BENEFIT-SHARING

A certain community living in rural area in South Africa has been using Plant X for generations, passing on the knowledge of its use from older to younger people in the community. Plant X was used for curing certain illnesses. One day, a researcher from a nearby university came to the community and asked many questions about the plants they use to cure illnesses. The community were able to tell the researcher about Plant X.

A year later, the community became aware of a company that wanted to use Plant X to develop a cough medicine. Although Plant X was found in many areas of South Africa, it had never been used by any commercial companies before. The community decided to enter into an Access and Benefit-sharing process in order to create an agreement with the company, whereby the company would create a commercial product and the community would benefit from the company using their knowledge of Plant X's medicinal properties.

There were some things they needed to consider before this process could kick off:

-  They needed to consider what other communities may have the same knowledge of Plant X.
-  They needed to consider where Plant X is found and how the company will access it.
-  They needed to think about what types of benefits they would consider getting in return for sharing their knowledge.
-  They needed to consider who from the community would represent them in negotiating with the company and how they could prepare the community for the negotiations.
-  They needed to consider if they required assistance from an organisation or lawyer.
-  They needed to consider if they could learn from other communities in the same position or who had gone through negotiations for an Access and benefit-sharing agreement.
-  They needed to consider how Plant X grows, how to sustainably use and harvest it and how they can make sure it has a future.

After the community chose its negotiating team, after consulting with other communities who also use Plant X, they began to negotiate with the company. After a period of negotiations, an Access and Benefit-sharing Agreement was established.

In Section 2, you will be introduced to the key concepts that they came to understand through this process, which has helped them to

- 1) understand their resources,
- 2) share their resources,
- 3) prepare their community for negotiations,
- 4) establish an ABS agreement for their resources and
- 5) conserve their resources.

1.4 BUCHU



Key Characteristics of the species

- ✿ Buchu's scientific names are: *Agathosma betulina* and *Agathosma crenulata*.
- ✿ Geographically, *Agathosma betulina* is endemic to the Cederberg from Niewoudtville to Grootwinterhoek Mountains. *Agathosma crenulata* is endemic from Tulbagh to Piketberg and Worcester, and southwards to the Kleinrivier Mountains in the Overberg.
- ✿ It was historically collected in the wild but has been cultivated in South Africa in selected areas of the Western Cape province, and in some selected areas in the Eastern Cape.
- ✿ It is an endemic, aromatic shrub only found in certain parts of South Africa and nowhere else.
- ✿ Buchu is used as a general health tonic and has anti-inflammatory, antioxidant, antifungal, and anti-bacterial properties.

Key Characteristics of the Use and Knowledge of the Species

- ✿ Within the Western Cape, the Khoi and San peoples are the oldest recognised Traditional Knowledge holders relating to the cultivation and use of the Buchu plant. They have influenced herbal and medicinal practices of various communities across the South African region.
- ✿ Studies show that Buchu is one of the earliest and best-known medicinal plants and export products from South Africa. His study recorded that the colonists of the Cape learned about the uses of Buchu leaves from the local Khoi people.
- ✿ Buchu is valued for its medicinal properties, and the associated spiritual connectedness to its healing properties.
- ✿ The Buchu leaf is used as a herbal tea but more commonly, as an ingredient of mixtures and as a source of essential oil used as flavouring and fragrance.
- ✿ The commercialisation of the shrub has led to a lucrative market. However, the cultivation of Buchu has played a limited role in local livelihoods, with cultivation mainly being confined to large-scale, commercial operations in the hands of wealthy farmers and private processing companies.



CHAPTER 2: CREATING A FOUNDATION FOR ACCESS AND BENEFIT-SHARING

IN THIS CHAPTER YOU WILL:

Be introduced to the **foundation of the ABS process**, and come to understand the key concepts that are involved in this. This section does not introduce the law but rather, discusses five major overlapping concepts about community resources and how you share them in such a way that you achieve equity and fairness in the ABS process. By using picture cards, many different concepts are easily explained.

2.1: UNDERSTANDING YOUR RESOURCES

In this section you will:



Understand that there are natural and genetic resources that are used by Indigenous Peoples and Local Communities.



Understand that Traditional Knowledge about the use of resources is passed down through generations and that this can be a source of knowledge for people outside of the community. Sometimes this knowledge can be used by a company who wants to develop a commercial product.

KEY CONCEPTS IN THIS SECTION:

Genetic resources: The genetic material is that part of a living thing that gets passed on to the offspring or next generation of the living thing. Living organisms carry certain genetics that can hold potential use for humans, for example, certain genetics can provide us with material to make certain colours or medicine. Our understanding of genetic resources often comes from Traditional Knowledge of the genetics by local or Indigenous communities who use the living thing and have passed on the knowledge of the attributes of that thing through generations.



In the context of ABS, the genetic components of a living thing can also be accessed and shared, and not just the entire plant/animal/organism.

Indigenous Biological Resources: Any dead or living thing, a plant or animal or organism, that is found naturally and freely in a certain area. It includes any derivative and the genetic material of such plants, animals or organisms.



This term is also used interchangeably with natural resources.

Living Things: Living things are found all around us in nature; they include things like animals and plants.

Resources or Natural Resources: A term used in this toolkit to refer to the natural, living or dead biological things (plants, animals or organisms) that are used by humans for various activities, such as eating, drinking, as medicine or building materials etc.

Traditional Knowledge: The knowledge that Indigenous Peoples, or traditional and local communities have about living things that tell us how they are grown and used. This knowledge is often passed from elders to young people. This knowledge includes cultural practices, religious beliefs, farming practices, relationships with the living things in a community, and health practices.



Also known as Local Ecological Knowledge, Indigenous Knowledge

2.1.1 NATURAL OR BIOLOGICAL RESOURCES

There are many living and non-living things in nature like plants, animals, and water that are important to a community's wellbeing and life. Communities live very close to these living and non-living things and use them for building their homes, food, clothing, creating new things, medicine and more.

These things in an ABS process are called **"Biological Resources"** or **"Genetic Resources"**. Sometimes we may refer to **"Indigenous Biological Resources"**, which should not be confused with Indigenous Peoples. All that this means is that the biological resources are found naturally in an area and were not introduced by humans. Today, we can still find Indigenous Biological Resources occurring naturally in the environment (in situ) or in areas where it is cultivated and farmed (ex situ).



The difference between a genetic and biological resources is simply that the genetics of a thing are unseen parts of a thing that give it certain characteristics – for example, the genetics of a plant will contribute to its ability to cure illnesses. The biological resource is the whole of the thing: the whole plant or animal.

Indigenous Peoples and Local Communities can be called “custodians” of a living or non-living thing, which means they are very good at protecting them, so that many people can use them for a long time. When many of living or non-living things are lost, this can make life very hard for community members. In an ABS process, it is important that Indigenous Peoples and Local Communities have a central voice in how living and non-living resources are being used by people inside a community and people outside of a community.

2.1.2 Traditional Knowledge

Indigenous Peoples and Local Communities are deeply connected to the living and non-living things that are found in their environment or on their land. Over a long time, and many generations, community members create Traditional Knowledge about how to create, grow, harvest, process or use a living or non-living thing. Furthermore, Traditional Knowledge is something which comes from the talents of Traditional Knowledge holders, which encompasses two stakeholders of Traditional Knowledge: Indigenous Peoples and Local Communities.



Community members know a lot about why a living or non-living thing is used, as well as if and how it can help solve problems within the community or contribute to food security. This type of knowledge applies to everything: from agriculture and food storage, to construction, medicines, and the preservation of biological resources and the environment. The customary laws and cultural taboos of these communities have long served to preserve this knowledge and regulate its use.

Sharing Traditional Knowledge between community members of all ages is called a “generational transfer of knowledge”. It is very important in protecting and preserving this knowledge, and your culture and heritage.

As communities keep using biological resources, they can create more knowledge or information about these living and non-living things and having access to them is also very important. This means, however, that there may be many barriers to practicing Traditional Knowledge, such as development challenges (lack of access to food, money water etc.) and threats to Indigenous and human rights (lack of access to land, biopiracy, violence, criminalisation).

Traditional Knowledge encompasses the following six aspects:

1. **Spiritual:** knowledge that not only has a useful or functional purpose but also some form of spiritual, religious, or sacred importance.
2. **Subsistence:** knowledge necessary for the basic survival of the community, including knowledge used for food production or any knowledge vital for life and survival.
3. **Economic:** knowledge with strong ties to the economic survival or benefit of the community.
4. **Traditional secret:** knowledge that is held as a secret among the community.
5. **Medicinal:** knowledge used to cure or prevent medical ailments within a community.
6. **Historic:** knowledge that is of historic importance to the community.

How is Traditional Knowledge shared?

Traditional Knowledge is collective in nature and is often considered the “property” of the entire community, not belonging to any single individual within the community. It is shared or transmitted through specific cultural and traditional information-exchange mechanisms - for example, orally through elders or specialists (breeders, healers, and so on) - and often to only a select few people within a community.

How is Traditional Knowledge transmitted?



Collective activities at communal and family level (e.g., Collection of resources, agriculture, festivals)



Use of diverse biological resources, both wild and domesticated



Communal access to sacred areas for healing, rituals etc. (e.g., forests, mountains)



Cultural and spiritual values and worldviews that underpin traditional lifestyles



Customary laws that require Traditional Knowledge transmission



Customary use/practices




Key characteristics and lessons from Traditional Knowledge

- 🔑 Traditional Knowledge is diverse and bound up in complex social and legal systems.
- 🔑 Traditional Knowledge, although passed down through generations, is not held by everyone in a community. People can become disconnected from the knowledge.
- 🔑 It can also be held by several different communities.
- 🔑 Sustaining Traditional Knowledge requires not only that it is transmitted to other generations, but that it is used and adapted to changing environmental and social conditions. This means that communities need to remain connected to the environment and resources to which the Traditional Knowledge is linked AND ensure that many of the cultural and social systems and structures of the community are sustained.
- 🔑 Traditional Knowledge is often linked to the identity of the community and the people within it.
- 🔑 Traditional Knowledge is also linked to spiritual and cultural beliefs. These beliefs help to maintain the community structures and cultural values, as well as play a fundamental role in people's livelihoods, maintain their health, and protect and replenish the environment.
- 🔑 Traditional Knowledge can have direct and indirect benefit to society more broadly, not just to the communities that hold it. Sharing your knowledge and resources is explained more in the next section.



2.2: SHARING YOUR RESOURCES AND KNOWLEDGE

IN THIS SECTION YOU WILL:

-  Understand that your resources might have different uses and that people outside of your community (users) might find value in these uses, or might develop new uses from your resources and/or Traditional Knowledge. These users might find a commercial use for the resources or knowledge of your resources, which means they can make a profit from the use of it.
-  Introduce you to the idea of a “value chain” and how your resources and knowledge can be put through different value chains in order to produce different products.
-  Introduce you to the concept of “benefit-sharing”, which means how your community can benefit from sharing resources and/or knowledge with users.

KEY CONCEPTS IN THIS SECTION:

Benefit-sharing: Benefit-sharing means that a community can participate in the value chain and get things back from people using their living things and/or Traditional Knowledge. Using a living thing can have a lot of benefits, these things need to be shared fairly and equitably.

Bioprospecting: When actors from outside of a community, such as researchers, hope to learn more about the biological resources found within a community, or they wish to develop new kinds of resources from the knowledge held by a community (usually for the purposes of Biotrade).

Biotrade: When actors, such as bio prospectors, collect plants or animals to sell commercially or process these resources to create new products.

Biopiracy: Or “misappropriation”, happens when outside users patent Traditional Knowledge without the free, prior and informed consent of the community that holds the knowledge.



2.2.1 USE AND USERS OF RESOURCES

Living things like plants and animals are important to communities and their way of life, but also to people outside of the community - they can be called “users”. Users use living and non-living things to make “products” like oils, food and medicines that can be sold.

Users may include traders, researchers, scientists, companies and more, and might be from a city, the country or around the world. If they are scientists or researchers, they may decide to collect these resources for the purposes of research, if they seek to learn more about it.

They may be bio prospectors, who are seeking to commercialize the plant or animal for profit. If they are seeking to make a profit, they are embarking in Biotrade.



Some users might be looking for Traditional Knowledge to use these things better and in new ways. Researchers might spend many years creating new products or finding new ways to use living/non-living things to sell in markets from around the world, and Traditional Knowledge helps them do this.

Communities can choose to share this knowledge or say NO. Sometimes there are cases of biopiracy, where someone outside a community “patents” knowledge (see section on Intellectual Property) without the consent of the community who holds that knowledge.

It is important that communities mostly focus on protecting the living/non-living things in their community in order to ensure their wellbeing beyond the interests of external parties such as the users etc. Anyone who wants to use these things or learn from a community’s Traditional Knowledge need to ask first and get free, prior and informed consent.

2.2.2 VALUE CHAINS

A value chain describes all the people and activities that happen in growing and using a living or non-living thing. A living thing like a plant can be used in many ways, they can be eaten, sold, or turned into other things, like oils or medicine, which can also be sold in markets.



Different actors can be involved in different stages of the value chain – from the identification of the resource, collection and access of the resource and/or Traditional Knowledge, to the processing, manufacturing and selling of the product on the market.



In a value chain, different actors use these living and non-living things in different ways, and in each step of a value chain the living/non-living thing might change. Value (for example processing, packaging, research) is added to each step of the chain and therefore, the end product is usually more expensive than the original material.



The last stage of the value chain might involve users turning a living thing into products and using or selling it all around the world.



What is important is that these developments contribute to community's livelihoods and promotes conservation of biodiversity.



Through Access and Benefit-sharing processes, communities can become involved in the value chain through, for example, harvesting, collecting samples etc. ABS processes can further ensure that communities that provide access to the resource and/or Traditional Knowledge receive something in return in the form of benefits.

Example of a value chain:

- 🔗 Harvester collecting resource (Buchu)
- 🔗 Researcher performing knowledge on the plant.
- 🔗 Processing e.g., extraction of oil.
- 🔗 Oil is exported by the Exporter in Bulk.
- 🔗 The International Buyer buys the product and packages it.
- 🔗 The final product is sold by a Retailer in e.g., a supermarket.

INNOVATION AND THE VALUE CHAIN:

	NATURE AND COMMUNITY		INGREDIENTS		CONSUMER PRODUCTS	
ACTIVITIES	ENVIRONMENTAL MANAGEMENT	INNOVATION OF PLANT SPECIES	TRADE OF RAW MATERIALS	MANUFACTURING AND TRADE OF INGREDIENTS	INNOVATION OF PRODUCTS	MARKETING AND SALE OF PRODUCTS
WHAT IS INVOLVED	Natural resources Biodiversity Environmental Management Rural development Conservation	Traditional Knowledge Scientific inquiry Intellectual Property Trials and research	Sustainable harvesting Fair and ethical trade schemes Certification (organic)	Manufacturing practices Financial administration Business operations Permits	Investments Exporting Research and Development Finding markets	Marketing Product sales Branding Business planning Trademarks
WHO IS INVOLVED	Researchers Government agencies Cooperatives/ farmers Small businesses Communities	Researchers Government agencies Small businesses Communities	Government regulatory authorities Permitting authorities Cooperatives/ farmers Communities	Businesses Traders Industry	Businesses Traders Industry	Consumers Businesses

* The Community is integrated throughout the whole value chain, in particular the highlighted areas. Communities can be involved as part of traditional communities, as farmers, collectives, businesses and cooperatives.

The Nagoya Protocol on ABS asks that value chains be transparent and follow the requirements of the protocol on accessing and utilising of genetic resources and Traditional Knowledge, whilst agreeing on benefits to be given in return. If all actors in the value chain follow the principles and requirements of the Nagoya Protocol, all stand to gain.

- ✓ Businesses has legal certainty whilst engaging in ABS;
- ✓ Communities receive monetary and/or non-monetary benefits, supporting sustainable livelihoods;
- ✓ Measures are taken to ensure that biodiversity is protected.

2.2.3 BENEFIT-SHARING

Benefit-sharing means that a community can participate in the value chain and get things back from people using their living things and Traditional Knowledge. Communities should receive fair benefits from people using their living things and Traditional Knowledge, and there are rules set by national governments and international law that set this out.



These benefits, in an “Access and Benefit-sharing Agreement”, should help the communities to solve problems that they are facing and can come in many forms. When a user asks first to use a living thing or learn about its Traditional Knowledge, communities can negotiate with them about how to fairly share what they get from using or selling the living thing.

Even if a living/non-living thing is not being sold, a community can benefit. Sometimes a community can ask a user to share some of the

- 1) money that they make from selling these things,
- 2) to receive training or knowledge,
- 3) information about what they have learned about their resources, and more.

These types of agreements can take years to conclude, so a community should be patient, and benefits (or what the community gets in return) should help them solve community problems and grow in a positive way.

After a user asks first to do this, a community can give permission through free, prior and informed consent and discuss what benefits they would like. Preparing your community for negotiations must be a consideration, which is dealt with in section 4.

2.3: PREPARING YOUR COMMUNITY FOR ACCESS AND BENEFIT-SHARING

IN THIS SECTION YOU WILL:



Understand the importance of establishing who you are as a community, how you make decisions and who represents you at a higher level.



Understand how you can use a Biocultural Community Protocol to formulate the rules of engaging with the community, and set out your rights and resources, so that you are prepared for ABS negotiations.



Understand that to give free, prior and informed consent requires you to understand what you are consenting to and is an important aspect of ABS.

KEY CONCEPTS IN THIS SECTION:

Biocultural Community Protocol: Communities have always had a set of written, but mostly unwritten, rules about how to interact with outsiders and how they want outsiders to interact with them. Using the process of drafting a community protocol, communities are able to set out these rules in an organised and structured way to support their current or preferred way of life. Sometimes known as “Biocultural Community Protocols”, a community protocol will also contain information on the community’s customary way of life, knowledge of resources and use of biodiversity. They support communities to assert their rights and duties in respect of how they govern their territories and conserve and sustainably using their natural resources.

Also known as a Community Protocol

2.3.1 COMMUNITY AND CUSTOMARY GOVERNANCE

At its simplest, “governance” refers to what rules exist, what structures (committees, leadership etc) exist, how decisions are made within a community, and how you hold different people accountable for their actions.

Many communities still have a system of customary governance. These are rules and structures that have been developed over many generations. They might coexist with the rules and structures at the country-level but are specific to the community. Without these structures, communities would be in a state of chaos and conflict.

When it comes to natural resources, there are norms and rules developed that detail when and how a resource can be used, who uses it and how often. This ensures that the resource can be used for the good of the whole community and is not depleted. These norms and rules might be adjusted when there are outside factors influencing the availability of the resource, for example, if the community loses access to the land on which the resource grows.

In ABS processes, community governance is essential for ensuring that the negotiations are fair, done for the good of the community and that the benefits that might flow are equally distributed to all community members. If governance structures are weak, this can be detrimental to the whole process, especially if it leads to exploitation of the resource, either only to benefit a few people, or if it results in the resource being depleted or going extinct.

Preparing your community to share your resources in a fair and equitable way by strengthening the governance structures may be something your community wants to consider.

The next section shows how you can prepare your community to respond to an ABS process, by setting out your identity, customary rules and how you give consent to the use of your resources or Traditional Knowledge. Developing a Biocultural Community Protocol is one good way of doing this, but you may also wish to take other routes.

2.3.2 BIOCULTURAL COMMUNITY PROTOCOLS

A Biocultural Community Protocol (BCP) is a tool that describes how your community want others to work with you, the rules they must follow about using living/non-living things and their Traditional Knowledge. This tool will help, for example, government or private companies understand how to respect a community's Traditional Knowledge and the living/non-living things that are important to them. Every BCP is different, a community can put many things in it, for example: to describe who they are, the Traditional Knowledge they want to share, what outside actors have to do if they want to use their living/non-living things.

WHAT DOES THE LAW SAY ABOUT BCPS?

BCPs are recognised in national and international law. They are also legal tools (not laws themselves, but they establish which laws relate to you and your community). They can establish rules for how people relate to a community or resource.

Biocultural Community Protocols were first recognised by the Nagoya Protocol of the Convention of Biological Diversity. Without going into too much detail, countries who are parties to the Nagoya Protocol (including South Africa) are expected to promote BCPS in their countries and help Indigenous Peoples and Local Communities to develop them. These community protocols are an emerging concept in environmental law and policy. They are specifically included in the Regulations for Bioprospection, Access and Benefit-sharing (BABS) regulations in South Africa (see next chapter).

WHY ARE BCPS GOOD FOR ABS?

While it is not essential to have a BCP before you negotiate an ABS agreement, it can help to prepare you for the process. It can also be reactionary – in other words, if your resources or Traditional Knowledge have been misappropriated (used without your consent), a BCP can assist you to establish your rights and empower you to respond.

Important information about ABS processes can be described in a BCP, specifically about how Traditional Knowledge is created and how it is spread throughout your community. This outlines the rules that people from outside of the community must follow to use living/non-living things, what they are allowed to know or use, and how these outside actors can ask first (or receive free, prior and informed consent). The BCP can include “Issues of Concern” and the way forward which describes big challenges that matter to your community and how you would like to move forward with the BCP.

This BCP can be connected to the beliefs, practices and rules of your community with the rules, beliefs and practices of outside actors like governments, and help you to best protect the living things in your community and support each other through their benefits. In the future, the BCP can help create ABS agreements and document the living things in your community. They can be further used as a legal tool to help protect Traditional Knowledge, living things and biocultural heritage that is important to you, your children and the community.

HOW CAN YOU DEVELOP A BCP?

Documenting and developing a Biocultural Community Protocol is an empowering process driven by community members themselves. Sometimes communities ask for assistance from NGOs or BCP consultants, but the important thing about the process is that the community leads it.

A number of participatory methods can be used, including group discussions, various types of mapping and illustrations, audio/video interviews, role plays, and locally-appropriate monitoring and evaluation.

A BCP will establish both local or customary laws, as well as international and national laws that relate to the community. There is the implication that laws can be combined and that communities will be open to external processes and influences.

Communities can start with setting out their community – who is part of the community, what the history is and some of their belief systems and customs. The community can map their resources (remember that there are different kinds of resources) and also specify their governance structures.
















The BCP might highlight some of the challenges faced by the community.

In terms of ABS, a BCP will also focus on:

- 🎯 Solutions and processes of resolving community problems.
- 🎯 National regulations for ABS.
- 🎯 Procedures for free, prior and informed consent.
- 🎯 Procedures for how benefits (both monetary and non-monetary) from the use of their material, spiritual and natural resources will be carried out through a developed community mechanism.







WHAT BIOCULTURAL COMMUNITY PROTOCOLS CAN PROVIDE FOR THE FOLLOWING PEOPLE:

<p>Indigenous Peoples and Local Communities</p> 	<ul style="list-style-type: none">  Helps communities to become better informed and to reaffirm their rights and obligations over genetic resources and associated Traditional Knowledge.  Bridges any gaps between customary law and community governance structures, and the national and international frameworks.  Helps to define “community”. Helps to show the cultural values that link them to their environment and that have positive impacts for the conservation and sustainable use of biodiversity in general, as well as the revitalization of associated Traditional Knowledge.  Defines or strengthens their organising, and establish the rules and conditions for granting free, prior and informed consent and benefit-sharing.  Enables people to communicate their visions and perspectives on benefit-sharing according to their priorities, but also on how they want to enhance and protect their resources and knowledge in general, rather than simply responding to an externally imposed framework (like a law over a protected area).  Reminds new members of the community of collective agreements on local rules, values and practices.
<p>USERS OF GENETIC RESOURCES AND ASSOCIATED Traditional Knowledge</p> 	<ul style="list-style-type: none">  Gives a better understanding of the community, its environment and their rights.  Provides predictability or guidance on how to request FPIC from communities and negotiate a benefit-sharing agreement with them.  Provides legal certainty by respecting the rights, procedures and protocols of communities.  Helps to establish a constructive dialogue for a long-term and sustainable partnership.
<p>GOVERNMENT AND NATIONAL ABS AUTHORITIES</p> 	<ul style="list-style-type: none">  Provides a means of guiding the procedures to be followed to ensure community FPIC.  Enables mutual learning between the national framework, on the one hand, and the community perspectives expressed through community dialogues and community protocols, on the other hand, for an applicable and efficient ABS framework.  Helps engage communities in monitoring the implementation of ABS rules in their locality as the community protocol process informs communities of their rights and obligations.

NATURE CONSERVATION AND SUSTAINABLE USE



-  Reminds the communities of the values of nature and their Traditional Knowledge linked to it.
-  Encode, strengthen and perpetuate the way of life and customary laws of communities that contribute to the conservation and sustainable use of nature.
-  Establish rules of entry and engagement with natural resources.
-  Indicates the values, norms and vision of communities in terms of nature conservation and sustainable use measures that they would like to adopt.

WHAT CAN BE USED IN PLACE OF A BCP?

If your community finds it difficult or does not have the capacity, resources or time to create a BCP, you can also use a few other tools to assert your rights. Any and all of these can also become part of the Biocultural Community Protocol in the future.

A Biodiversity Register: A document describing the biodiversity in your community and the ways in which this is farmed, used or harvested. This should be kept safe and only provided to those who require access for certain purposes that are clear to the community.

A Traditional Knowledge Register: Similar to the Biodiversity register, but for your Traditional Knowledge. Again, must be kept secret to ensure it is not misappropriated.

Recordal system: South African has a Recordal System for Indigenous Knowledge. The system aims to record, document, preserve and protect Indigenous Knowledge for the benefit of the communities of South Africa. You need to record your Indigenous Knowledge with government in order for it to become part of the recordal system. Read more: https://researchspace.csir.co.za/dspace/bitstream/handle/10204/6231/Pretorius1_2012.pdf

FPIC protocol: A document that describes how external people and users of your resources or knowledge can get free, prior and informed consent for that use. This can include how researchers can access to your knowledge.

2.3.3 FREE, PRIOR AND INFORMED CONSENT

When someone outside of the community wants to know Traditional Knowledge or wants to use a living/non-living thing, they must ask first, and the community has to give them permission. The community has the right to say NO if they feel that it may hurt them or be to their detriment. Free, Prior and Informed Consent (or FPIC) is important and means that people outside of the community have asked first to use living/non-living things and/or to learn its Traditional Knowledge.

When users from outside of a community asks to use a living/non-living thing or learn about its Traditional Knowledge, they must ask first. When they ask first, and the community gives them permission, the community has given “consent” to the user to use a living/non-living thing or learn about its Traditional Knowledge, and users show respect to the community when they ask first.






There are many rules both nationally and in South Africa that stipulate that having consent is important – but these rules might be different in each country. Indigenous Peoples and Local Communities can reach out to their government to learn about this rule and non-profit organisations such as Natural Justice can help a community learn about these rules. The consent or permissions must be:

- ✓ **Free** – the communities cannot be forced or influenced by anyone to give permission, and can say no.
- ✓ **Prior** – consent must be given before the user can use or learn about a living/non-living thing.
- ✓ **Informed** – the communities must clearly understand what the user wants to get or what they want to do.

Many communities might have Traditional Knowledge about a living/non-living thing, and in this case, all the communities have to give “consent”. The user must make sure that the community knows who they are, and what they are asking permission for. How the community gives permission, and which people or groups give consent must be a part of the Free, Prior Informed Consent (FPIC) process, and communities can use tools like BCPs to help them better understand how to get FPIC or permission. There are many opinions and views in a community, and when a decision is made it should reflect the views of everyone in the community, especially also the views of women and youth.

2.4: ESTABLISHING AN ABS AGREEMENT FOR YOUR RESOURCES

IN THIS SECTION YOU WILL:

-  Understand how to prepare for negotiations.
-  Understand that an ABS agreement is important for ensuring that you, as the provider of a resource or knowledge, have legal certainty when interacting with a user.
-  Understand that Mutually Agreed Terms will guide you in the implementation of an ABS agreement by providing the rules for each actor.

KEY CONCEPTS IN THIS SECTION:

Access and Benefit-sharing (ABS): Agreements between Indigenous Peoples and Local Communities and industry, researchers or outside entities, negotiating access to natural and genetic resources (or Indigenous Biological Resources) and associated Traditional Knowledge, with agreement on benefits that will be received in return.

Bioprospecting: When actors from outside of a community, such as researchers, hope to learn more about the biological resources found within a community, or they wish to develop new kinds of resources from the knowledge held by a community (usually for the purposes of Biotrade).

Mutually Agreed Terms (MAT): MAT are conditions and rules that are agreed on between a community and a person using that community’s knowledge or resources. MATs are found in Access and Benefit-sharing Agreements. MATs help build trust and honesty between the users of a resource or living thing and set what each actor can take and what communities get.

2.4.1 PREPARING FOR NEGOTIATIONS

On a very practical level, a community will need to consider how they will negotiate with a company, researcher, user, etc. and what these negotiations will entail. A community may decide to create a team specifically for ABS purposes to negotiate on behalf of the community. These people will be made up of different types of community representatives and they will have their own strengths and weaknesses. It is important to include different group representatives, including women and youth.

During negotiations, there are many actors and partners: including users, government representatives, local communities, lawyers and others. There can be unequal power relations between actors, due to historical reasons, which might mean that communities make compromises, or that negotiations take long periods of time.

The negotiating team will need to ensure that the information and experiences from the negotiations are fed back to the communities and decisions are made at every turn on how to proceed.

Negotiating benefits, what to think about?

Important considerations during the negotiation of a benefit-sharing agreement:

- ? What would be realistic to ask for as a benefit? What profits are they expecting?
- ? How will the community ensure that the resources are enough to be shared sustainably? How will the users access the resource, i.e., collect? How often? Who will collect? Will the community be involved? What will the impact be on the environment?
- ? How will the resources or knowledge be used?
- ? If knowledge is being used, how do we ensure that the knowledge is kept confidential or is protected?
- ? How will these benefits be shared amongst the communities? What benefits will it bring to the community? Monetary/non-monetary? What benefits will you receive from the Traditional Knowledge?
- ? Is the resource and/or knowledge shared with other communities? How will the benefits be shared with these communities?
- ? Is there is research involved: What will the research be used for? What biological resource is being researched? Where will the research take place? Budget?
- ? Will there be intellectual property rights associated to the research, innovation or product? (see Section 4.5)
- ? How will we get Prior Informed consent from the community?

The South African legislation sets out the rules on a community's role in negotiating or talking with users about what they get in return. All members of a community should be part of these discussions and should have an opportunity to give their thoughts on what they want to get from giving a user permission to take these living/non-living things.

2.4.2 THE ABS AGREEMENT

An Access and Benefit-sharing Agreement is like making a promise. It is a contract.





When a user hopes to take a living or non-living thing and its associated Traditional Knowledge from a community to eat, sell or learn about, they must ask first. If a community agrees, they can give permission that is based on Free, Prior and Informed Consent, and talk to the user about what the community gets in return. This is a negotiation or conversation that may take some time, and a written agreement must be made where the user and community members keep to their promise.

The contract may also involve other conditions to be respected when people take resources and/or Traditional Knowledge, e.g., where and how the resources or knowledge will be collected and transferred to other people in the future.

Communities should define their needs and priorities in advance of entering any negotiations. This will prevent conflicts emerging within the community.



How do we reach an agreement?

-  Clarify all interests beforehand, to bring the interests together.
-  Respect the rights of one another.
-  Agree to objective criteria on how agreement will be reached.
-  Clarify what the mutual benefits for each party are.

During negotiations, it is important that the users and government respect any relevant rules and customary practices of the local communities.

Representation is important. Communities have to consider who will speak and negotiate on their behalf and who can sign the benefit-sharing agreement.

The ABS agreement must be based on: M: Mutually; A: Agreed; T: Terms

2.4.3 MUTUALLY AGREED TERMS

Mutually Agreed Terms (MATs) are conditions and rules in an Access and Benefit-sharing Agreements that both the community and users of a living/non-living things agree to follow. Once the community gives a user Free, Prior and Informed Consent, they can discuss with them what these rules and conditions are. By agreeing to these rules and conditions, communities and people outside of a community, like private companies or researchers, can build trust and be honest with each other. After a user of a living thing asks first and is given permission by the community to use it, these rules and conditions can be created. When talking about these rules and conditions, it is important to think about the needs and strengths of everyone who is a part of the conversation. Everyone must be able to clearly understand these rules and conditions, and when a user wants to access living/non-living things, these rules and conditions can help decide what communities get in return.

RIGHTS AND RESPONSIBILITIES

USERS

- Users must make sure communities clearly understand who they are and what they want and ask first to take a living/non-living thing or learn about how to use it through the community's Traditional Knowledge.
- They must follow the rules that national legislation and regulations sets on Access and Benefit-sharing and respect and follow the rules that communities set about using their natural resources and Traditional Knowledge and about how to work with them.
- Lastly, they must keep their promise about benefits they agree to give to communities.

THE SOUTH AFRICAN GOVERNMENT

- The South African government creates and communicates the rules about these agreements that everyone must follow. The Department of Forestry, Fisheries and the Environment is tasked to tell us more about these rules.
- They also must ensure that users keep their promises.
- Lastly, they have a responsibility to help communities create tools, like BCPs, that can help them talk about rules and their needs.

INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

- Indigenous Peoples and Local Communities must focus on their needs and how to best protect the living and non-living things and their associated Traditional Knowledge for future generations.
- They should continue to learn more about ABS and reach out to other people in their community to pass on their knowledge on ABS.
- Through tools such as a Biocultural Community Protocols, the community can articulate who they are and how they want to work with people from outside their community.
- They must also talk to users about getting things in return or benefits from using the living/non-living things in their land and use these "benefits" to help their communities.




¹Source: 'Getting to Yes: Negotiating without giving in' by Roger Fisher and William Ury (1981)



2.4.4 PERMITS

An important part of any ABS process is the permitting required by bioprospectors and users of Indigenous Biological Resources and/or Traditional Knowledge. The Minister of Environment, Forestry and Fisheries issues all bioprospecting and Biotrade permits in South Africa to users, allowing them to use the natural resources and/or associated Traditional Knowledge.

Permits will only be given if:

-  The effected communities are informed of the bioprospecting, Biotrade or research activities;
-  Free, Prior and Informed Consent is given by a community; and
-  The Minister of Environment is satisfied that all conditions are met, based on South African legislation.

Some basic elements of permitting can be found in NEMBA and the BABS regulations.

-  Anyone participating in bioprospecting with Indigenous Biological Resources and/or their associated Traditional Knowledge need a permit.
-  Anyone exporting Indigenous Biological Resources for bioprospecting or research requires a permit.
-  The BABS Regulations also says that there is a difference between “the discovery phase” of a bioprospecting project, where researchers hope to find information about Indigenous Biological Resources, and a “commercialisation phase” where actors see value in Indigenous Biological Resources, like plants, to sell commercially. The “discovery phase” that is conducted in South Africa only requires a Notification to be submitted to the Minister, but the “commercialisation phase” need a permit from the Minister.

To understand more about when and which permits are required, visit: https://www.environment.gov.za/projectsprogrammes/bioprospectingaccess_benefitsharing_babs_clearinghouse

2.4.5 INTELLECTUAL PROPERTY RIGHTS

Intellectual Property (IP) means a creation of mind – such as inventions, literary or artistic works, design and symbols, names and images that are used on a product that is sold. IP is a physical product that allows its owners/creators to benefit from their own work, thereby creating an exclusive right.

It is a confusing and specialised concept; however, we hope to briefly introduce communities to the concept of intellectual property rights to create basic awareness of intellectual property and the links with Traditional Knowledge.

In ABS, registration of IP can become relevant at any stage of the process e.g., before and after certain research. IP has value and benefit outside of the ABS agreement.

What types of Intellectual Property Rights are relevant in the context of ABS?



A patent is a right granted for 20 years for an invention (like a tool, medicine or a drink). Traditional Knowledge can play an important role that gave rise to the invention, and it is important that the Traditional Knowledge is acknowledged and protected.

- Biopiracy/misappropriation happens when outside users patent Traditional Knowledge without Prior, Informed Consent and the laws that are described in this toolkit help to prevent this from happening and allow for ABS agreements.
- For an outside user, such as a company, if they want to learn about the Indigenous Biological Resources in your community, create inventions and gain a patent to sell it, they will need an ABS Agreement. During the ABS agreement negotiations, communities and users can decide how to share these benefits that come from selling a patented invention, and communities should make sure they are not excluded from the patent conditions and ask users to give information about the patent process, so they can keep selling these inventions in their local community.



A Trademark is a sign, image or word on a product that can tell us more about the inventor and can be used to tell buyers about the resources themselves and what Traditional Knowledge was used to make them. This can be registered for the resource or its compositions. When a product is trademarked, it can be protected from being falsely associated with certain communities and their Traditional Knowledge. If agreed as part of an ABS agreement, communities can receive benefits from the use and licencing of the trademark.



A copyright can protect the rights of someone's art or literature, such as books, poems, drawings and more, allowing them to choose who can copy their work for up to 50 years. Information about biological resources that are associated with Traditional Knowledge can be written down and copyrighted. A copyright owner can assign or license their work, and in an ABS agreement, there may be co-ownership of, for example, a device, where both the provider and user decide how to share the product and its benefits.



A trade secret is confidential (or secret) information that gives a knowledge holder of the information a competitive advantage.











A geographic indicator is a sign used on a product (for example a package of tea or drink) that shows that the product comes from a specific place that is called a "geographic origin". Examples of this include: Colombian Coffee that is produced in Colombia or Karoo Lamb that is Lamb from the Karoo area in South Africa.

Intellectual Property Rights considerations may arise in ABS negotiations or agreements when there will be access to and utilisation of Traditional Knowledge associated to genetic resources. When there will be Intellectual Property Rights, it is important that the parties to the ABS agreement establish clear terms for the use of IP as part of mutually agreed terms which is important for both providers and users of genetic resources. IP rights can protect both rights over genetic resources and rights over research and innovation results.

Why should we think of IP in relation to Traditional Knowledge?






Documenting Traditional Knowledge is a very important step in transforming it into a 'material form' that can be protected by way of Intellectual Property or that allows for Traditional Knowledge to be transferred from one medium to another.

Documenting it will be important for the following reasons:

-  Safeguarding and preservation for future generations
-  Protection of secret and sacred Traditional Knowledge
-  Research and Development
-  Defensive protection of Traditional Knowledge
-  Establishing positive rights for Traditional Knowledge
-  Making Traditional Knowledge available in a more systemized manner to a larger audience
-  Helping in designing BS schemes
-  Creating new IP rights through scientific validation of the Traditional Knowledge and collaborative research and development.

However, there are challenges when documenting Traditional Knowledge - documentation places the knowledge in the public domain.

Other concerns:

-  The knowledge is no longer secret.
-  A community can lose control over it.
-  This can lead to the misappropriation/biopiracy and use of Traditional Knowledge that was not permitted or intended by the Traditional Knowledge holder.
-  Therefore, it is important to ensure that Traditional Knowledge is anchored in a good intellectual property strategy.
-  As part of the IP strategy, it should be included in an ABS agreement, as it is then a recognisable right.

What is the first step in protection your knowledge through intellectual property rights? During negotiations, ask the user whether they intend to register intellectual property rights.

2.5: CONSERVING YOUR RESOURCES

IN THIS SECTION YOU WILL:



Understand that there are numerous threats to resources and Traditional Knowledge.



Realise that you and your community have been protecting resources for many generations and know how to take care of them.



Understand that the future of resources requires us to conserve them.

KEY CONCEPTS IN THIS SECTION:

Conservation and Sustainability: Protecting living things, like plants and animals, and the knowledge about how to grow and use them is most important. “Conservation” helps protect these living things from running out and being lost forever, and “sustainability” is something communities can do together both young and old, to keep using, protecting and managing living things like plants and animals for their current generation, and the future generation still to come.

2.5.1 THREATS TO RESOURCES AND KNOWLEDGE

Historically, in Africa, colonialization has done irreparable damage to Indigenous Peoples and Local Communities. They were dispossessed of land, their homes and possessions were taken from them, and their cultural practices banned. This negatively affected the communities’ Traditional Knowledge and cultural ways of life that supported the Traditional Knowledge. It also led to communities being separated from the resources which sustained them.

After independence and the birth of democracies in African countries, Indigenous Peoples and Local Communities have come to experience other types of threats – including the misappropriation of their knowledge, and the threats to land and resources due to mineral extraction, and fossil fuel and infrastructure development. Or, companies and individuals have exploited their knowledge and resources, and the communities have gained nothing from this.

In the future, many communities may find their knowledge and resources threatened by:

Laws: Laws might change which allow for development initiatives to infringe on your land rights or might lead companies to be able to exploit your knowledge and/or resources more easily.

Land access: If Indigenous Peoples and Local Communities are dispossessed of their land, they are unable to practice their cultural ways of life, they lose access to the resources that sustain them - which often impacts their identity.

Climate change: Changes to weather patterns are threatening the living things on the planet. Plants and animals might go extinct.

Exploitation and overharvesting: When the value of a plant or animal becomes known, this might lead to unsustainable harvesting practices by communities or external people coming to the area and using up all the species.

Modernization: As people choose to modernize, they often move out of their communities, move to cities or reject their culture. This can result in people losing touch with their Traditional Knowledge.

Popularity: Your knowledge might be threatened by the popularity of a plant. Certain trends in food use can either result in people using the resource more, or sometimes less. Indigenous foods went through a time of being unpopular, with many young people rejecting eating them in favour of “western” foods, but there is now a growing desire to reconnect with Indigenous foods and this might impact your community who has access to them.

The [Food and Agricultural Organisation](#), in 2019, has found that globally, 24% of wild food species are reported to be decreasing in abundance. This is due to a number of factors, but shows that our resources are under threat of going extinct.

Despite the historical threats, and even with future threats, communities hold several rights which, if they can assert them, and if they can enter into ABS agreement which see benefits going to communities, their resources and knowledge can be protected. Communities also have a recognised role to play in conservation.

2.5.2 CONSERVATION AND SUSTAINABILITY

According to the United Nations, “Indigenous Peoples are the holders of unique languages, knowledge systems and beliefs and possess invaluable knowledge of practices for the sustainable management of natural resources. They have a special relation to and use of their traditional land.”

This applies to local communities too, who may have cultural norms and practices that contribute to managing or protecting the land and resources for themselves and others.

There are many rules and activities that help a community and users protect the living things and non-living things in an environment. As mentioned before, these living/non-living things are very important for a community, and are used for everyday life as food, medicine, or sold for money. Due to this, these living/non-living things should be protected so that future generations and young people can use them later.

Communities have collected Traditional Knowledge about how to best protect these living and non-living things for a long time. In the past, conservation bodies have used scientific knowledge for setting priorities for managing and protecting resources. However, there are other sources of knowledge, in particular, Indigenous/traditional environmental knowledge, which complements and extends scientific knowledge. Using both will be beneficial.

It is very important to make sure that a living thing like a plant or animal is not overused, and that people can use them in the future for things like food, medicine clothes and more, which means that they must be protected from being used too much. A community knows many rules about “conservation” which means to protect how much of a living thing can be found in a community. To use something “sustainably” means to use it in a way that makes sure that people in the future can also use it for their daily life.



During an ABS process, communities should think about how to best protect the living and non-living things they need for their livelihoods and traditions. They can also think about benefits that might help better protect these living and non-living things.

- ✓ The community might ask for seed banks to be developed or for more access to seeds.
- ✓ They might ask for conservation and sustainable harvesting information to be shared with them so that they can make better decisions around the resource.
- ✓ They might wish to access better tools for farming the resource.
- ✓ They might wish for a cooperative to be built so that they can work together with other communities to sell their resources.
- ✓ They might ask for access to a market or to getting an organic certification and the means by which to ensure that the resources are farmed organically.
- ✓ They could ask for a sacred site or protected area to be developed to protect certain parts of the land.
- ✓ They might want to build up a tourism industry so that they can benefit in two ways from their resources – by the sale of it as a product, but also by developing an industry based on accommodating tourists.
- ✓ You may want to develop a Traditional Knowledge registry, museum or building to keep the knowledge of your community.
- ✓ You may decide to create a plant nursery to ensure that Indigenous plants are always available to people.



2.5.3 STEWARDSHIP

When you are a steward of something, it means that you look after it. This doesn't mean you or your community "own it" - however, you may have collective responsibility over it for whatever reason – perhaps you have been assigned this task, or you live nearby, or it is important to you.

The idea of "private property" is a western idea and for many thousands of years, land and resources were managed collectively by communities. In many places, this practice continues. Many communities now manage and conserve resources collectively or use certain resources in a way that benefits the entire community. They are stewarding their resources.

Stewardship is not just using a resource or using knowledge, but the responsible use and conservation of that resource or knowledge. It means doing certain things to ensure that the resource or knowledge is used sustainably – and considers the greater community when doing so. As a steward you may even consider people outside your community – your entire country, for example – and their ability to benefit from the sustainable use of the plant.




Often the cultural practices, rules and values that communities adopt will help to steward resources. This makes communities natural stewards, because they know that if they don't steward the resources, their livelihoods and well-being will be affected. They also know how to ensure the sustainable use of the resources so that their children might benefit. They understand how some species are connected to others and have a better understanding of the entire system of resources, including the living and non-living things, like water, soil, plants, minerals and animals.

In ABS, the law recognises that you as a community have knowledge and practises that make you stewards and that you can have a part to play in protecting resources for future generations. In fact, this is one of the key priorities for ABS – without the conservation and sustainable use of resources, there will be no resource in the future, nothing to share and no benefits for a community.



CHAPTER 3: ABS AND THE LAW

IN THIS CHAPTER YOU WILL:

-  Understand that the international legal framework and South African law promotes the idea that Indigenous Peoples and Local Communities have resources and knowledge that can be shared with outsiders, but that in return, these communities can gain benefits.
-  Come to know that the law protects your Traditional Knowledge and recognizes your customary practices.
-  Understand that the South African ABS context is supported by a few national laws and regulations, but also that Intellectual Property law can also support ABS.

KEY CONCEPTS IN THIS SECTION:

Intellectual Property: Is “property” or creations of the mind, something that comes from the mind. Intellectual property rights are legal rights that provide protection for these intellectual properties. This includes: trademarks, patents, copyrights, neighbouring rights, designs and integrated circuit, geographical indicators, and plant breeder rights.

3.1: INTERNATIONAL FRAMEWORK

3.1.1. Convention on Biological Diversity











The basic principles of Access and Benefit-sharing were first developed within the United Nations Convention on Biological Diversity, 1992 (CBD). The CBD has three main objectives: (1) biodiversity conservation; (2) sustainable use of biological resources; and (3) the equitable sharing of benefits arising from the use of genetic resources.

Under Article 15 of the Convention, countries providing genetic resources should benefit from commercialisation of their genetic resources, including a fair share of the profits generated, as well as non-monetary benefits, such as technology and the opportunity to participate in research. In exchange, provider countries should ensure access to their genetic resources and associated knowledge. The CBD aims at ensuring that this access is provided on “mutually appropriate terms” and is subject to the country’s prior informed consent.

“Tkarihwaie:ri” Ethical Code

At an international gathering in 2010, the CBD Conference of the Parties 10 (COP10), an ethical code of practice was adopted called the “Tkarihwaie:ri” Ethical Code and invited governments to use it to develop their own ethical codes of conduct for research, access to, use, exchange and management of Traditional Knowledge, innovations and practices to ensure respect for the cultural and intellectual heritage of Indigenous and Local Communities. The CBD Conference of the Parties suggested government departments, academic and research institutions, private sector, extractive industries and forestry bodies promote awareness of the code and its adoption in their policies and processes. This code, however, is more of a guide and is non-binding.

The Ethical Code provides a set of principles for engaging with Indigenous Peoples and Local Communities:

-  Prior, informed consent should be obtained without coercion for any activities related to Traditional Knowledge on sacred sites and traditional lands and waters.
-  There should be inter-cultural respect, including respect for spiritual values.
-  Collective and individual ownership should be understood and respected.
-  Benefit sharing should be fair and equitable within and amongst communities.
-  Traditional land tenure must be recognised, as access to land and water and sacred sites is fundamental to the retention of Traditional Knowledge.
-  Traditional resource rights and customary rules on access should be respected.
-  Communities must not be arbitrarily removed or relocated. Where consent is granted, compensation must be given.
-  Indigenous and Local Communities' responsibility for managing their traditional lands and waters and sacred sites should be respected.
-  Information should be repatriated to help recover Traditional Knowledge.
-  Indigenous and Local Communities should be supported to actively participate, e.g., in research collaborations.

See: [The Tkarihwaí:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities.](#)

3.1.2. The Nagoya Protocol

In its longform, known as the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization.

The “Nagoya Protocol” sets rules and principles for access and use of resources and associated Traditional Knowledge. This convention falls under the Convention on Biological Diversity (CBD) and includes provisions on “Community Protocols” (Article 12.2, 12.3 (a) and Article 22.6 (i)). It requires countries like South Africa who have ratified (agreed to) the Protocol to recognise “customary laws” and community protocols (or BCPs) of Indigenous Peoples and Local Communities. These “customary laws” include traditional leadership and rules that governs the biological resources in your community.

The protocol was adopted in Nagoya (Japan) in 2010 and it currently has 126 parties to the convention. This means that 126 countries have signed onto it and are expected to implement it nationally. It is legally binding.

Importance of the Nagoya Protocol:

- It creates legal certainty and transparency for providers and users of genetic resources.
- It promotes benefit-sharing.
- It allows for appropriate transfer of technology.
- Through creating legal certainty around the transfer of knowledge and benefits, it leads to more research being done on genetic resources which allows us to better understand genetic resources for the benefit of all.
- This then leads to conservation of resources and biodiversity and in return communities' livelihoods are supported through benefits.

3.1.3 Traditional Knowledge

Every country that is a party to the CBD is expected to respect, preserve and maintain knowledge, innovations and practices of Indigenous and Local Communities – in particular, knowledge that assists in the conservation and sustainable use of biological diversity. Any use of the knowledge, innovations and practices must result in benefits being shared with the holders of this as stipulated by Article 8(j) of the CBD.

3.1.4 Customary and Indigenous Rights

In various international frameworks, the status and rights of customary communities and Indigenous Peoples are recognised. The recognition of Indigenous Peoples and Local Communities, as well as their customs and knowledge, is important for ABS because it provides the community with a strong basis for negotiation.

3.1.5 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

UNDRIP is an international regulatory framework developed which prescribes rights to Indigenous Peoples. These rights were written to redress historical injustice so that Indigenous Peoples who have often marginalised, can access and enjoy the same rights as all human beings. UNDRIP addresses individual, collective, cultural and identity rights. It also recognises Indigenous Peoples rights to education, health, and language. An important element of the framework recognises Indigenous Peoples fundamental right to self-determination, which acknowledges that all people are equal and entitled to control their lives and futures, it is an individual and collective right. Importantly, this framework outlines the importance of Free, Prior and Informed Consent and promotes the right of Indigenous Peoples to participate in all decision-making processes that impact them such as research or ABS.



3.2: NATIONAL FRAMEWORK

3.2.1 The South African Constitution

The Constitution of South Africa recognises customary laws, customary institutions, and the status and role of traditional leadership, and also protects the right to belong to and participate in a cultural, religious and linguistic communities and their traditions. These rights, which are most significant to Indigenous Peoples and Local Communities are found in the Bill of Rights, Chapter 2 of the [Constitution](#).

These include a right to environment (section 24); a right to property, including an entitlement to land restitution (section 25); a right to language and culture (section 30); and a right to belong to and practice as a member of a cultural, religious, or linguistic community (section 31). In addition to these substantive rights, Indigenous and customary communities enjoy the procedural rights of access to information (section 32); just administrative action (section 33); and a right of access to the courts (section 34).

3.2.2 Access and Benefit-sharing framework

The South African Access and benefit-sharing framework provides guidance on ABS processes and includes the below elements. Indigenous Peoples and Local Communities who are involved in ABS agreements are given an amount of legal certainty over their biological resources, such as plants and animals, meaning that they can understand what rights they have in relation to their resources and how they might protect and benefit from those rights.

This exploration of biodiversity within South Africa is regulated by the [National Environmental Management: Biodiversity Act of 2004 \(NEMBA\)](#) and the Bioprospecting, Access and Benefit Sharing Amendment Regulations of 2015 (BABS Regulations). The Department of Forestry, Fisheries and the Environment (DFFE) enforces these laws and are national focal points for Access and Benefit-sharing Regulations. There are many other laws that impact bioprospecting, Biotrade and ABS. It must be noted that the ABS framework not only covers genetic resources, but also Indigenous Biological Resources (the whole plant or animal species). In other countries, the ABS may only extend to genetic resources, but in South Africa, ABS can relate to an entire living thing.




The National Environmental Management: Biodiversity Act of 2004 (NEMBA)

NEMBA is the main legal framework in South African that regulates conservation of biodiversity and sustainable use thereof by giving effect to the international agreements and instruments that the country has ratified as discussed above.







THE BIOPROSPECTING, ACCESS AND BENEFIT SHARING AMENDMENT REGULATIONS OF 2015 (BABS REGULATIONS)

The Biodiversity Act and BABS Regulations outline the following:

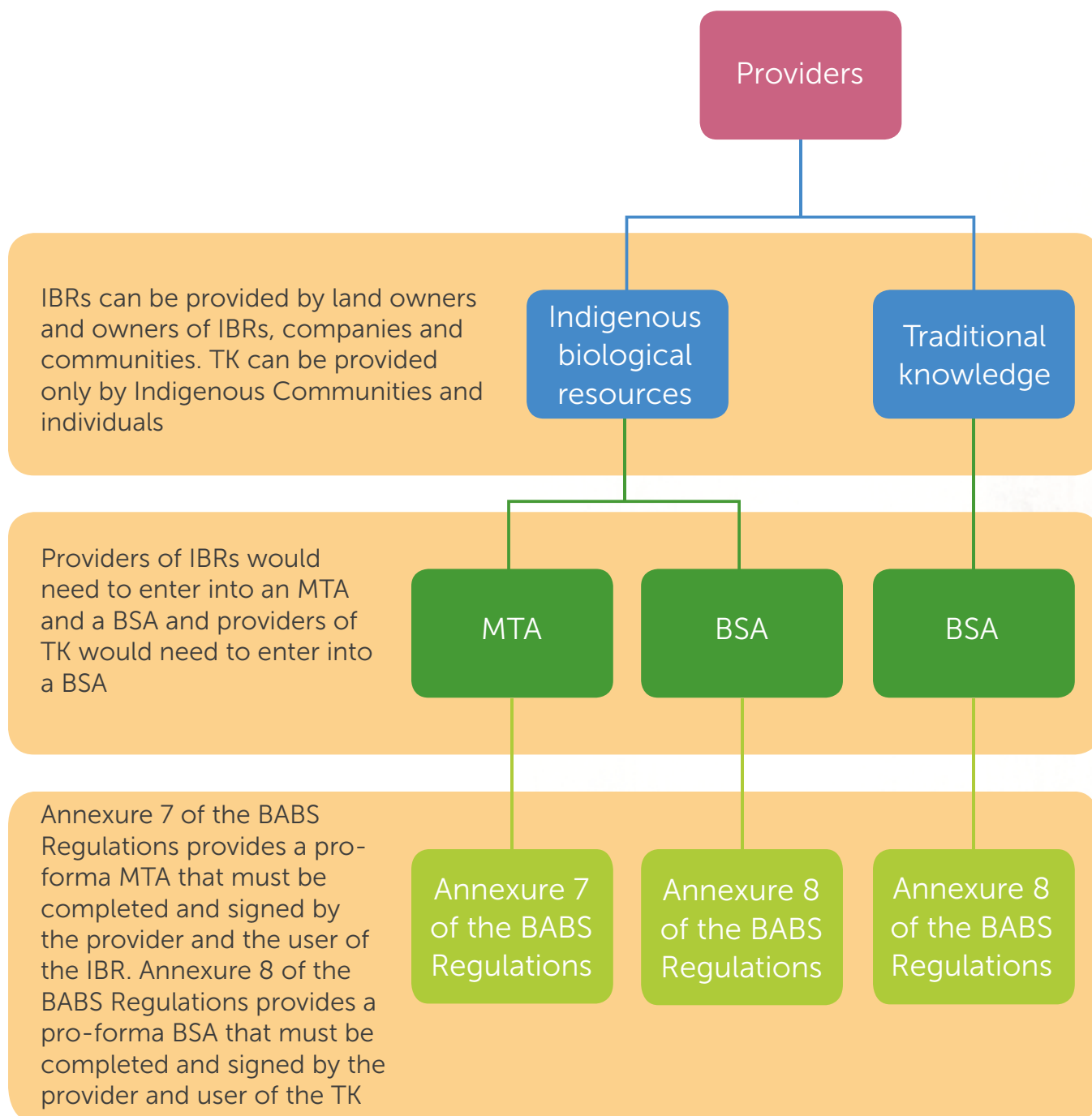
-  Anyone participating in bioprospecting with Indigenous Biological Resources (IBR) and/or their associated Traditional Knowledge need a permit.
-  Anyone exporting Indigenous Biological Resources (IBR) for bioprospecting or research requires a permit.
-  Permits will be given if stakeholders are informed of the bioprospecting, Biotrade or research activities, Free, Prior and Informed Consent (FPIC) is given by a community and if the Minister is satisfied that all conditions based on South African legislation are met.

The Act says that FPIC is given by two main actors including:

 - Providers who give access to biological resources; and
 - Indigenous Peoples and Local Communities whose Traditional Knowledge is important for using different plants and animals.
-  A Benefit-sharing Agreement is entered into by both actors and a Bioprospector (or user from outside of your community), and if you give access to IBR's like plants, then a Material Transfer Agreement also must be entered.
-  A Bioprospecting Trust Fund should also be created, and it is like a bank account where all money that comes from a Benefit-sharing Agreement will be paid.
-  The BABS Regulation also says that there is a difference between "the discovery phase" of a bioprospecting project where researchers hope to find information about Indigenous Biological Resources (IBRs), and a "commercialisation phase" where actors see value in biological resources like plants to sell commercially. The "discovery phase" does not need a permit from the Minister, but the "commercialisation phase" does.
-  The Minister of Forestry, Fisheries and the Environment issues all permits.

A Bioprospecting Trust Fund is created by DEFF who monitors the sharing of benefits as per the concluded, signed and approved benefit-sharing agreement. It is like a bank account where all money that comes from a Benefit-sharing Agreement will be paid, but it does not have administrative costs charged. (This is not a Community Trust Fund, and you can create a separate Community Trust Fund that receives monies from the Bioprospecting Trust Fund in trust of the entire beneficiary community. The Community Trust Fund outlines how decisions would be made on how to use the money received.)

ACCESS AND BENEFIT-SHARING PROCESS FLOWCHART



MTA = material transfer agreement

BSA = benefit-sharing agreement

Source - South Africa's Bioprospecting, Access and Benefit Sharing Regulatory Framework: Guidelines for Users, Providers and Regulators: Accessed from https://www.environment.gov.za/sites/default/files/legislations/bioprospecting_regulatory_framework_guideline.pdf

3.2.3 Laws protecting Traditional Knowledge

The [Framework of the African Regional Intellectual Property Organization \(ARIPO\) Indigenous Knowledge Systems Policy](#) and the [Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore](#) are important international legal instruments which protect and recognise the value of Traditional Knowledge and intellectual property rights.

Traditional Knowledge is also defined and protected under other South African laws:



[Intellectual Property Laws Amendment Act of 2013](#)



[Patent Amendment Act of 2005](#)



[Protection, Promotion, Development and Management of Indigenous Knowledge Act of 2019 \(IKS Act\)](#)

Traditional Knowledge and Intellectual Property

Article 13 of the UNDRIP prescribes the rights of Indigenous Peoples to “maintain, control, protect and develop their intellectual property”.

Currently, South Africa has a well-defined system of intellectual property rights, which includes, trademarks, patents, copyrights, neighbouring rights, designs and integrated circuit, geographical indicators, and plant breeder rights. South Africa's Patents Amendment Act of 2005 requires all applicants to state where Indigenous Biological Resources (like plant species) came from and what Traditional Knowledge was used to create it. The Intellectual Property Laws Amendment Act (2013) provides that copyright, designs and trademarks are a tool to protect names of features associated with Traditional Knowledge.

Intellectual Property Rights (IPRs) are based on individual rights. However, Indigenous Peoples tend to emphasise the holistic and collective notion of culture, where things like Indigenous Knowledge, language, spirituality, customs and rituals also factor in. Read the section on Intellectual Property to understand more key concepts around this.

Protection of Indigenous Knowledge

Within South Africa, the Indigenous Knowledge Systems Policy was adopted in 2004 and aims to recognise, affirm, develop, promote and protect Indigenous Knowledge Systems in South Africa. This knowledge includes your cultural practices, religious beliefs, farming practices, relationships with the living things in your communities, and health practices.

The Protection, Promotion, Development and Management of Indigenous Knowledge Act was further adopted in 2019 amongst others for the protection, promotion, development and coordination of Indigenous Knowledge by providing a “sui generis” protection which is: a special form of Intellectual Property protection that considers the moral and economic rights of knowledge holders like communities. The Act provides for the Department of Science and Technology to record Indigenous Knowledge. However, whilst the act has been adopted, regulations giving effect to the act is still pending.

3.2.4 Indigenous Peoples and Local Communities' Conserved Territories and Areas

In South Africa, in some instances, Indigenous Peoples and Local Communities have been involved in the management of Contract (conservation) Parks. Further to this, Indigenous and Community Conserved Areas (ICCA) have been included in National Biodiversity Strategy and

Community governance and management of ICCAs

Indigenous Peoples govern their territories, areas, and natural resources in terms of customary law, i.e., community-based systems of law “in which rights are generally relational and not held by individuals... but as members of a group and relational to the other members.” However, there has been an ongoing struggle for the statutory (formal) recognition of customary forms of tenure.

The major threat to communities’ customary forms of governance is that they do not carry the same formal legal weight as forms of governance found in legislation or the common law. How customary law is recognised in the Constitution may be the root of the problem, since the Constitution requires that the courts apply customary law when that law is applicable, but in line with the Constitution and any legislation that deals with customary law.

Therefore, when an activity authorised in terms of customary law conflicts with formal legislation, courts tend to favour legislation. For example, government regulations on hunting (together with formal land title or land belonging to the state or other private parties) have resulted in almost all of South Africa’s Indigenous Peoples being forced to give up traditional hunting and gathering.

The Communal Property Associations Act 28 of 1996 allows recipients in land reform processes to jointly own land through Communal Property Associations (CPAs). But a ministerial memorandum has since halted the transfer of title deeds to CPAs for land won through restitution and redistribution. This undermines Indigenous Peoples and Local Communities’ governance of natural resources as the formal legal recognition of their ownership – through title deeds held by a CPA – remains out of their hands.

In addition to the usual difficulties that arise from the need to balance competing and divergent interests when fertile land is set aside for conservation, the historical establishment of protected areas in South Africa resulted in dispossession of land, forced removals, and perceptions that a higher value was placed on the protection of animals and plants than on meeting the developmental needs of people. Relying on the Restitution of Land Rights Act 22 of 1994, many communities have lodged land claims in conservation areas.

Protected Areas

The South African government is constitutionally bound to protect the environment, for the benefit of present and future generations, through reasonable legislative and other measures that, amongst other objectives, promote conservation (section 24(b)).

In the democratic era, this responsibility has been exercised through the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA), which, along with the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), the Marine Living Resources Act 18 of 1998, the National Forest Act, and provincial statutes dealing with conservation, constitute the nation’s protected area framework.

NEMPAA recognises various types of protected areas, including: special nature reserves, national parks, nature reserves (including wilderness areas), World Heritage Sites, marine protected areas, specially protected forest areas, and mountain catchment areas (section 9, NEMPAA). It also allows for the declaration of protected environments to serve as a buffer zone for the protection of a special nature reserve, national park, World Heritage Site, or nature reserve, amongst other objectives (section 28(2), NEMPAA).

State agencies mandated to develop and implement laws and policies

The Department of Forestry, Fisheries and the Environment is responsible for policy and legislative development for conservation. South Africa’s leading conservation authority, however, is South African National Parks (SANParks). SANParks is a statutory body responsible for 3,751,113 hectares of protected land in 20 national parks (SANParks 2013). There are also conservation authorities in each province.

CHAPTER 4: THE ACHIEVEMENTS AND CHALLENGES OF ABS

IN THIS CHAPTER YOU WILL:



Understand that ABS can be an important way for your community to gain from sharing your resources or knowledge. These gains are not just monetary, but also include recognition, better governance, strengthening of your knowledge, livelihoods development, protection of your culture and many other benefits.



Understand that ABS may not solve all the problems in your community. It also comes with its own set of challenges.

KEY CONCEPTS IN THIS SECTION:

Associated Traditional Knowledge: Traditional Knowledge that is associated with a particular species of plant or animal.

Indigenous Peoples: In the context of this toolkit, we refer to Indigenous Peoples as those groupings of people that identify as Indigenous. This includes those that identify as “first people”. We include in this definition, people whose cultures and ways of life differ considerably from the dominant society and are facing discrimination due to their status as Indigenous Peoples. What is most important about Indigenous Peoples is their links to the natural world, and the fact that the survival of their ways of life is intimately connected to the living and non-living things they use and depend on.

UNDERSTANDING THE TERM “Indigenous”

According to the United Nations Permanent Forum on Indigenous Issues, Factsheet 1. https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

Considering the diversity of Indigenous Peoples, an official definition of “Indigenous” has not been adopted by any UN-system body. Instead, the system has developed a modern understanding of this term based on the following:



Self-identification as Indigenous Peoples at the individual level and accepted by the community as their member.



Historical continuity with pre-colonial and/or pre-settler societies.



Strong link to territories and surrounding natural resources.



Distinct social, economic or political systems.



Distinct language, culture and beliefs.



Form non-dominant groups of society.



Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

A question of identity



According to the UN, the most fruitful approach is to identify, rather than define Indigenous Peoples. This is based on the fundamental criterion of self-identification as underlined in a number of human rights documents.



The term “Indigenous” has prevailed as a generic term for many years. In some countries, there may be preference for other terms including tribes, first peoples/nations, aboriginals, ethnic groups, adivasi, janajati. Occupational and geographical terms like hunter-gatherers, nomads, peasants, hill people, etc., also exist and for all practical purposes can be used interchangeably with “Indigenous Peoples”.



In many cases, the notion of being termed “Indigenous” has negative connotations and some people may choose not to reveal or define their origin. Others must respect such choices, while at the same time working against the discrimination of Indigenous Peoples.

4.1 WHAT CAN BE ACHIEVED THROUGH ABS

Although there is a tendency for people to focus on potential “monetary benefits” of ABS, Access and benefit-sharing arrangements can have multiple benefits for communities and the environment. They can also be beneficial for conservation and the sustainable use of natural resources.

SOME OF THE WAYS THAT ABS MAY BE BENEFICIAL TO YOU, YOUR Traditional Knowledge AND YOUR RESOURCES:

Recognition: ABS processes lead to the recognition of the communities who might be associated with certain living things or natural resources, in how they access and use these things, or because these communities have historical connections to these things.

Indigenous or customary status: These processes can lead to the recognition of certain communities as “Indigenous” or “customary”. Refer to above for an understanding of the meaning of “Indigenous” and the United Nations understanding of Indigenous.

Recognition of Traditional Knowledge: These processes can recognise the Traditional Knowledge that communities hold in relation to a particular species (known as “associated Traditional Knowledge” (aTK)). An ABS process might also lead to more exchanges of Traditional Knowledge between different members of a community, thereby revitalising the knowledge and ensuring it gets passed down to future generations.

Better organised communities: Through ABS processes, communities will often organise themselves and exchange knowledge and experiences, make decisions together and elect representative leaders – which can have a positive effect on the community. It can lead them to have stronger voices and positions on certain issues that might affect the community as a whole, even those issues that might not relate to their Traditional Knowledge or living things.

Strengthens consent making: An ABS processes can strengthen a community’s knowledge of how to provide free, prior and informed consent and this can promote equity in relationships between communities (providers of a resource) and those seeking to use the resource.

Benefits: ABS agreements can lead to the distribution of benefits to communities in the form of monetary benefits, new technologies, or new knowledge and understandings of living things, specifically when researchers share scientific and other knowledge with the communities.

Livelihoods: ABS agreements that create benefits for communities can lead to livelihoods development for communities:



People from the community might contribute to the growing, hunting, gathering etc of the living thing.



When the royalties from products that are created from the living thing are shared with the community, they might use it to create jobs in the community.



The community may want to use any monetary benefits to develop other opportunities for people in their community, such as educational opportunities.

Recognises your role in conservation: The ABS process recognises the importance of communities in the conservation and protection of living things. It aspires to show how important these resources and the associated Traditional Knowledge are to the communities associated with them. It may lead to more recognition of how important it is to conserve our natural resources and ensure that there is sustainable use of them. Communities will seek to protect the areas where the resources grow, or find ways to ensure that the species can reproduce and grow further for future generations.

4.2 WHAT CAN NOT BE ACHIEVED THROUGH ABS

ABS processes need to be conducted on an “equal playing field”. This means that the communities involved in them need to understand their rights, be adequately supported by government and any organisations that might be working with them to conclude agreements, be working from a national framework that promotes equity and fairness and also be well-organised. This is not always the case. This is why it might be important to embark on a Biocultural Community Protocol (BCP) development process to strengthen community rights and put a community in a better position to negotiate. BCPs have been discussed in Section 2.3.2.

There may be no significant monetary benefits: ABS processes do not always lead to monetary benefits or to significant monetary benefits. It is important not to only focus on monetary benefits, nor overestimate the amount that might be received. Even if there are monetary benefits received, this money needs to be properly managed and the distribution of these benefits needs to be transparent and open. Communities can set up a non-profit entity or trust to which the funds can be transferred to, however the setting up of a trust to administer a fund can be complicated and expensive, and the administration costs of the trust are ongoing.

ABS does not solve all issues: ABS processes do not lead to the immediate return of land or access to land where the living things are found. Many communities are no longer connected to their historical territories but ABS is not a means through which to gain rights to this land.

4.3 KEY CHALLENGES IN ABS

All communities experience challenges in ABS processes. Some of these are listed below:

Knowing your rights: In order for an ABS process to be fair and equal, it is important that communities have knowledge of their rights, including their rights over their Traditional Knowledge and their rights as Indigenous Peoples, and have understood what free, prior and informed consent entails. The systems of rights and how they relate to you and your community can be complex to understand.

Providing consent: Another key challenge is related to free, prior and informed consent and who provides this. It is not feasible for a person who wants to use knowledge or resource to gather an entire community of thousands of people, but will need to approach the correct decision-making structure. How do we ensure that they approach the correct structure, that the process is fair and transparent and that the structure is truly representative of the community?

Respecting customary rights: When it comes to customary laws and the customary institutions that a community ascribes to, the challenge lies in ensuring that these are integrated into the ABS process – which means respecting them, including decision-making structures and customary laws related to the use of resources.

Who negotiates: When it comes to ABS negotiations, which are usually conducted by a small body of community members, who might be assisted by an organisation or lawyer, the challenge is deciding who should make up that negotiating body, who might have the community's interests at heart, and how they ensure that the process is relayed back to the community. They may need to acquire training on negotiating or may need to get outside assistance.



HELPFUL RESOURCES

Biocultural Community Protocols: Toolkit for Community Facilitators (Part II): <https://naturaljustice.org/publication/biocultural-community-protocols-toolkit-for-community-facilitators-part-ii/> (for download)

Community Protocols - <https://naturaljustice.org/community-protocols/>

Convention on Biological Diversity: Introduction to Access and Benefit Sharing <https://www.cbd.int/abs/infokit/brochure-en.pdf>

South African Department of Forestry, Fisheries and the Environment: The Access and Benefit-Sharing (BABS) Clearing House of the Republic of South Africa https://www.environment.gov.za/projectsprogrammes/bioprospectingaccess_benefitsharing_babs_clearinghouse

South Africa's Bioprospecting, Access and Benefit-Sharing Regulatory Framework: https://www.environment.gov.za/sites/default/files/legislations/bioprospecting_regulatory_framework_guideline.pdf

South African National Recordal Process: https://researchspace.csir.co.za/dspace/bitstream/handle/10204/6231/Pretorius1_2012.pdf

The Tkarihwaíé:ri Code of Ethical Conduct: The Tkarihwaíé:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities. <https://www.cbd.int/decision/cop/?id=12308>



