

ABS IN SOUTH AFRICA

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International rules

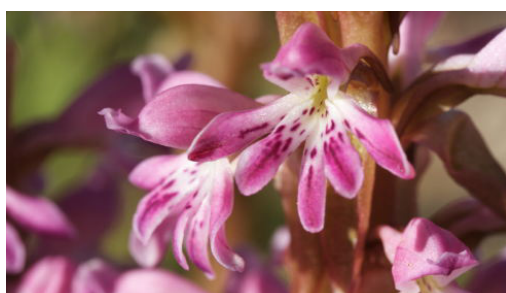
South Africa is party to the following international treaties relevant for ABS principles and rules:

- Convention on Biological Diversity (CBD) since 1996.
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) since 2014.

South Africa has signed, but not yet ratified, the International Treaty for Plant Genetic Resources for Food and Agriculture.

This fact sheet was produced by the Union for Ethical BioTrade (UEBT), with the support of the ABS Capacity Development Initiative.

Disclaimer: This document is for information purposes only. It does not constitute legal advice. UEBT aims to ensure its accuracy, but provides no guarantees in this regard. Official information on laws and regulations on ABS is available through national focal points or the ABS Clearing House (<https://absch.cbd.int/countries>).



Overview

South Africa is the third most biodiverse country in the world, in terms of species diversity and endemism. For example, the smallest yet richest of the floral kingdoms, the Cape Floral Kingdom, falls entirely within the country.

The wealth of biodiversity is recognized as an opportunity to support national sustainable development goals. Legal, policy and other measures approach the sustainable use of biodiversity and fair and equitable benefit sharing as ways to support local livelihoods, as well as providing business and job creation opportunities.

Rules on access to and use of indigenous biological resources and associated traditional knowledge – also referred to as access and benefit sharing or ABS – are established in the 2004 Biodiversity Act and its 2008 implementing regulations. These rules engage and recognize the rights of the providers of indigenous biological resources and associated traditional knowledge. At the same time, these rules have been found difficult to navigate, including for the broad range of covered activities and the multiple permits required along value chains.

What activities require ABS-related permits in South Africa?

ABS requirements apply not only to research and development, but also to collecting, growing, processing, researching, exporting, developing and manufacturing inputs, ingredients and products using South African biodiversity. This is due to the broad definition of ‘bioprospecting’, as well as the inclusion of ‘biotrade’ in the ABS rules.

On the other hand, ABS rules in South Africa only apply to native species and varieties and exclude the ‘discovery’ phase of bioprospecting.



Bioprospecting refers to any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation. This definition covers the range of activities to bring new ingredients and products to the market. For example it would cover research to develop extracts or oils as ingredients, research to find new applications for known ingredients and development of new formulations or products with known ingredients.

The ‘discovery’ phase of bioprospecting (for example, a company collecting or screening various biological resources for their commercial potential) does not require a permit. However, competent authorities must be notified.



Biotrade refers to processing and trade of indigenous biological resources for further commercial exploitation. The concept is focused on initial processing activities such as drying, milling, distilling and purifying biological resources. In practice, biotrade and bioprospecting activities often overlap.

Indigenous biological resources

ABS rules in South Africa apply to plants, animals or other organisms occurring naturally within South Africa, as well as their genetic information and derivatives, whether collected, cultivated or accessed through another source.

Exotic plants, animals or other organisms, introduced in South Africa because of human activities are excluded. Also excluded are crops and forages covered by the International Treaty on Plant Genetic Resources for Food and Agriculture.

The South African National Biodiversity Institute (SANBI) manages a database with information on South African native plants, available at <http://newposa.sanbi.org/>.

Traditional knowledge

In South Africa, ABS rules cover the use or knowledge of indigenous communities or individuals relating to indigenous biological resources, in accordance to customary rules or practices. That is, indigenous communities whose traditional knowledge contributes bioprospecting must provide prior informed consent and secure a benefit sharing agreement prior to the issuance of ABS permits.

The contribution of traditional knowledge to bioprospecting is not assessed on a case-by-case basis - that is, by determining whether a company used such knowledge. Rather, competent authorities consider whether traditional knowledge exists in relation to indigenous biological resources and whether it historically provided leads on their properties or uses. If so, permit applications for those resources must be accompanied by the prior informed consent and benefit sharing agreement with the holders of the associated traditional knowledge.

How can ABS-related permits be obtained?

Applications must be submitted to the Department of Environmental Affairs (DEA), which is designated as the Competent National Authority with the responsibility of granting ABS-related permits and advising on prior informed consent and mutually agreed terms. The application form is available in Annex 5 of the BABS Regulations. The form requires information on the proposed activities, as well as on the providers and recipients of the biological resources and associated traditional knowledge.

The application for ABS-related permits must be accompanied by the following documents:

- Prior informed consent from providers of biological resources and associated traditional knowledge
- Material transfer agreement with the providers of the biological resources
- Benefit-sharing agreement with the providers of biological resources and associated traditional knowledge

Types of permits

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Different types of permits, with similar requirements, may authorize activities linked to collection, trade, processing, research, export and development of inputs, ingredients, products using South African biodiversity:

- Biotrader permits
- Bioprospecting permits
- Integrated biotrader and bioprospecting permits

ABS focal point

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The ABS focal point is responsible for providing information on ABS, including informing potential users of the procedures that are to be followed in applications for ABS-related permits.

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ABS in South African laws and regulations

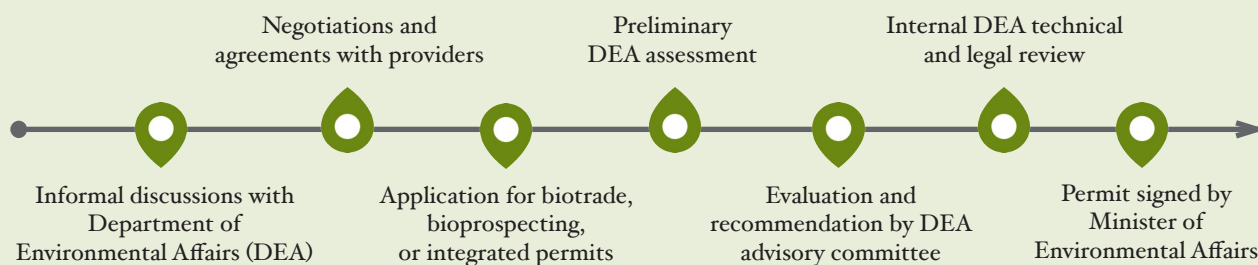
In South Africa, ABS requirements and procedures are outlined through:

- The National Environmental Management (NEM): Biodiversity Act (No. 10 of 2004), which came into force in 2006.
- The Regulations on Bioprospecting, Access and Benefit Sharing (BABS), which entered into force originally in 2008. The BABS Regulations have since been amended: the latest version came into force on 19 May 2015.

In addition, provincial ordinances regulate harvesting of indigenous biological resources and prescribe permits for research other than bioprospecting. Since 2016, the South African Parliament is considering a bill on 'indigenous knowledge systems', which would create a sui generis approach to the protection of traditional knowledge as intellectual property.

What are procedures and timelines for ABS-related permits?

Procedure for ABS-related permits in South Africa



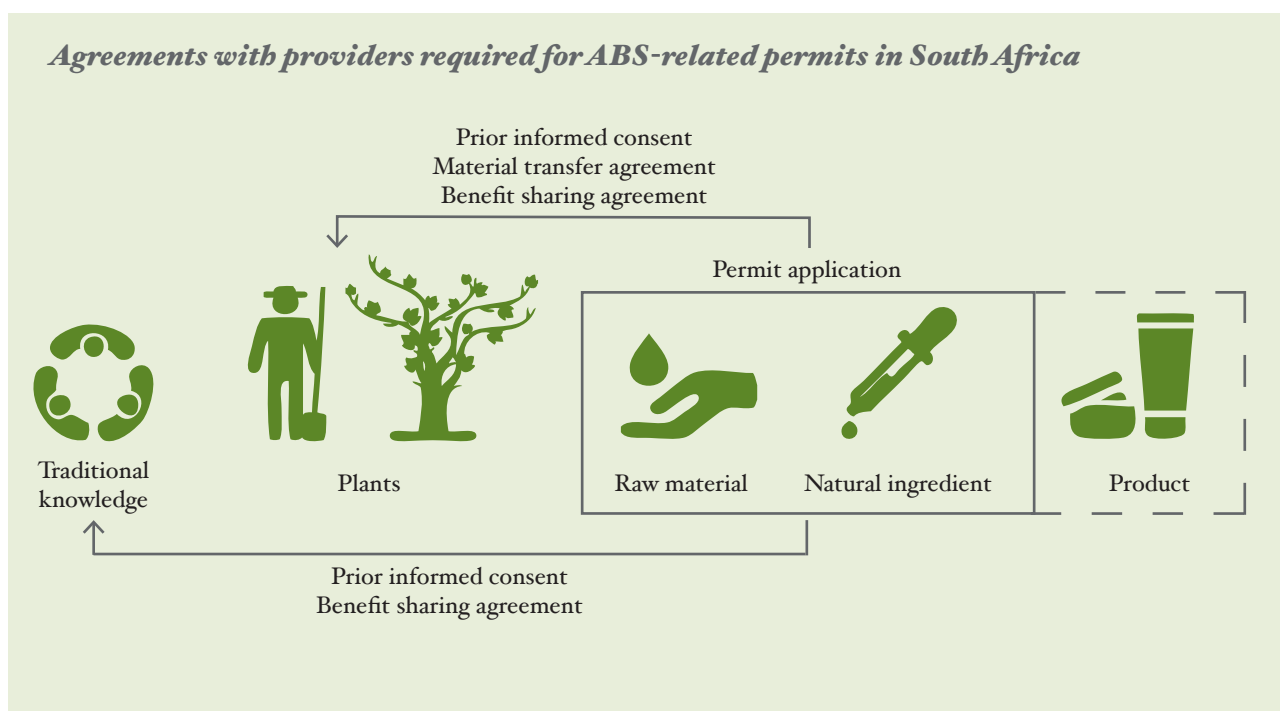
ABS rules in South Africa indicate that competent authorities must decide on applications for ABS-related permits in a period of 120 working days, with a possible, extension of 30 working days. Delays in the permitting process may arise in relation to clarification and additional information required from the applicant; the meetings of the DEA advisory council, which take place only every three months; and internal processes within the DEA. Nevertheless, the length and complexity of securing ABS-related permits is mainly linked to the prior negotiations with the providers of biological resources and associated traditional knowledge.

Negotiations with providers of biological resources

In South Africa, the State is entrusted with the conservation and sustainable use of biodiversity, but has not ownership over biological resources - other than those occurring on state land. As a result, ABS-related permits are only issued subject to the prior informed consent of and fair and equitable sharing of benefits with provider of indigenous biological resources – the owner of the land where these resources are cultivated or collected.

- If cultivation or collection is on land owned by one of the companies applying for a permit, no prior informed consent or benefit sharing agreement is required.
- If the biological resources are sourced from several farmers, agreements are required with each individual farmer.
- If the biological resources are wild collected from communal land, prior informed consent from the indigenous communities is required.

In general, benefit sharing with providers of biological resources focuses on improving their livelihoods and building their capacities. For example, agreements may include equitable prices, premiums or training activities. Other benefits may refer to support for conservation or social projects in the communities.



Negotiations with providers of traditional knowledge

Under South African ABS rules, individuals, groups of practitioners or indigenous communities more broadly are considered the holders of traditional knowledge associated to biological resources, according to customary rules and practices. As a result, ABS-related permits are only issued subject to the prior informed consent of and fair and equitable sharing of benefits with provider of the traditional knowledge associated to the indigenous biological resources used for biotrade or bioprospecting activities.

Points to consider in negotiations with providers of traditional knowledge include:

- Many of the indigenous biological resources currently being sourced and used as natural ingredients have traditional knowledge associated to their properties and applications.
- If necessary, competent national authorities may support applicants in identifying and engaging with providers of traditional knowledge. For example, the National Khoisan Council represents over 30 Khoi and San communities and has the official recognition of the South African government.
- Prior publication or other dissemination of traditional knowledge does not impact the need to secure prior informed consent or to share benefits.

The benefit sharing approach with traditional knowledge tends to be different than with biological resources. Agreements generally focus on monetary benefits – establishing a percentage of price of the ingredients or profits of the final product. Benefits are paid through the Bioprospecting Trust Fund, which is managed through the competent national authorities.

Ongoing revision of ABS rules in South Africa

Discussions are ongoing towards the revision of the Biodiversity Act and the BABS Regulations. The revision of ABS rules in South Africa would respond to several aims, from ensuring compatibility with the Nagoya Protocol to supporting the implementation of the Biodiversity Economy Strategy (BES). The drafting of the new rules is expected to be finalised in 2018 and the legislation adopted in 2019.



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