

business .2020



A MAGAZINE ON
BUSINESS & BIODIVERSITY

Secretariat of the Convention on Biological Diversity

SPECIAL FOCUS ON ACCESS AND BENEFIT-SHARING

Helping businesses implement the Nagoya Protocol

COLLABORATING TOGETHER TO BUILD MUTUAL TRUST

Nagoya Protocol and ABS regulation in Brazil: The view of Brazilian industry

NEW LEGISLATION BOOSTS SUSTAINABLE USE OF BIODIVERSITY

Community protocols: Bridging the stakeholder divide

ENABLING FAIR AND EQUITABLE ACCESS TO GENETIC RESOURCE



business .2020

NOVEMBER 2015
Volume 10 — Issue 1

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www.cbd.int/business/newsletter.html

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Front cover image: szefei/iStock

Back cover image courtesy of Veronica Lo

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ISBN: 92-9225-631-9 (web)

Business.2020 - November 2015, v. 10, is. 1

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PREFACE

The Nagoya Protocol and business

by **Braulio Ferreira de Souza Dias** •

Executive Secretary, Convention on Biological Diversity

Welcome to the latest edition of *business.2020*. It has been over one year since the coming into force of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization during the twelfth meeting of the Conference of Parties (COP 12) to the Convention on Biological Diversity held in Pyeongchang, Republic of Korea.

It has also been five years since the Protocol was adopted at COP 10 in Nagoya, Japan, and over seven years since we last dedicated an issue of *business.2020* or its forerunner to this topic (see: *business.2010* January 2008 (Volume 3, Issue 1) www.cbd.int/doc/newsletters/news-biz-2008-01-low-en.pdf). We therefore felt that it was high time to shine a spotlight on this issue for the business community and discuss the various opportunities and challenges that face us in implementing this important Protocol.

We are currently seeing a rising level of awareness by businesses on the topic of sustainability and, more specifically, biodiversity and ecosystem services. The need for such awareness is reflected in a number of international agreements related to sustainability, including the Strategic Plan for Biodiversity 2011–2020 and the 2030 Agenda for Sustainable Development. These agreements and action plans take into account the importance of engaging the business community so as to ensure their success. However, the process of implementation vis-à-vis business is often challenging, with businesses often uncertain of their role, and the regulatory environment remaining unclear in certain areas.

The Nagoya Protocol represents the concrete expression of one of the three objectives of the Convention, namely “the fair and equitable sharing of the benefits arising from the utilization of genetic resources”. The Protocol sets up a series of binding obligations which will result in smooth, more transparent and more equitable



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partnerships between users and providers of genetic resources and associated traditional knowledge. Progressive businesses will have the opportunity to be proactive and help shape this new paradigm as well as seizing the early benefits that will accrue from this emerging regime.

The work of the Secretariat of the Convention on Biological Diversity and our many partners in the area of business engagement has been to encourage businesses to understand their dependencies and impacts on biodiversity and ecosystem services, and to mainstream efforts to mitigate the negative effects. The entry into force of the Nagoya Protocol represents an important opportunity for the business sector to show progressive leadership in this area. The Secretariat will continue to play a supportive role in these endeavours and, through such programmes as the Global Partnership for Business and Biodiversity, can ensure that the necessary information and tools are provided to maximize the effectiveness of business.

The articles in this edition of *business.2020* will help companies and other readers to better understand the provisions, opportunities and obligations inherent in the Nagoya Protocol. I hope you will find the articles interesting and informative. Should you have any comments or questions, please write to: business@cbd.int. ♣

The Nagoya Protocol and the business community

THIS ARTICLE PROVIDES AN OVERVIEW OF THE PROVISIONS OF THE NAGOYA PROTOCOL AS WELL AS THE OPPORTUNITIES AND RESPONSIBILITIES THAT RELATE TO ITS IMPLEMENTATION.

by **Valérie Normand** ●

Senior Programme Officer, Access and Benefit-Sharing, Convention on Biological Diversity

One year after the entry into force of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, 68 Parties to the Convention have ratified the Protocol, and we are confident that it will have well over 100 Parties by the second meeting of the Conference of the Parties serving as the meeting of the Parties to the Nagoya Protocol on Access and Benefit-sharing (COP-MOP 2) in December 2016.

Building on lessons learned since the entry into force of the Convention, the Nagoya Protocol, thanks to its innovative provisions, creates a new enabling environment which can contribute to building trust between users and providers of genetic resources and associated traditional knowledge, and therefore build a sound foundation for future ABS partnerships and new business opportunities.

OPPORTUNITIES FOR THE PRIVATE SECTOR

A number of countries are currently revising or developing their national ABS legal frameworks in order to meet their obligations under the Nagoya Protocol. This period of transition is a good opportunity to establish better linkages and understanding between the private sector and governments which can then lead to the establishment of regulatory frameworks conducive to the creation of new win-win ABS-based partnerships.

However, accomplishing this is not without its challenges. Many governments have a limited understanding of the scientific, technological and commercial realities of biodiscovery and the factors that influence corporate behavior. Compounding this is the fact that industry engagement with ABS and the CBD process as a whole still varies both across and within sectors, and thus means that many companies lack a basic understanding of the issue.

Organisations such as the Union for Ethical Biotrade, Phytotrade Africa and the ABS Capacity-development Initiative are working together to support the establishment of ABS partnerships by working with various partners, as noted in the articles that follow.

HOW WILL THE NAGOYA PROTOCOL SUPPORT THESE OPPORTUNITIES?

The Nagoya Protocol responds to the concerns of users by requiring that governments establish clear rules for access to genetic resources and associated traditional knowledge.

Under this new regime, countries that require prior informed consent (PIC) in order to allow access to their genetic resources must also provide for the legal certainty, clarity and transparency of their domestic ABS requirements. In addition, these countries must provide information on how to apply for PIC, provide for a clear and transparent written decision in a reasonable period of time, and provide for the issuance of a permit as evidence that PIC was granted and mutually agreed terms established. They must also enact clear rules and procedures for the establishment of ABS agreements. Governments also have the obligation to establish national focal points in order to provide information on the national procedures for ABS and they are obligated to establish competent national authorities with the responsibility for granting access to genetic resources.

The implementation of these requirements can contribute to the minimization of transaction costs and provide a sound basis for the establishment of partnerships.

The Protocol also establishes a number of requirements for governments to establish clear national processes for persons or entities interested in accessing the traditional knowledge associated with genetic resources. For example, Parties are to encourage the development by indigenous peoples and local communities of community protocols, minimum requirements for mutually agreed terms and model contractual clauses for benefit-sharing.

The key innovative provisions of the Nagoya Protocol are those related to compliance. These provisions require governments to adopt measures that ensure that users within their jurisdiction respect the ABS requirements of provider countries. It also provides for the monitoring of genetic resources once they have left the provider country through the establishment of checkpoints and of an internationally recognized certificate of compliance. The implementation of this monitoring system will address the concerns of provider countries regarding misappropriation or misuse of their genetic resources and thus reduce the need for the development of more stringent or restrictive ABS measures.



Model contractual clauses, codes of conduct, guidelines, best practices and/or standards

The Nagoya Protocol recognizes that sectors may use genetic resources for different purpose and thus apply different ABS practices. As such, the development of model contractual clauses, codes of conduct, guidelines, best practices and standards is encouraged by the Protocol.

The development of these tools can be a way for businesses to inform governments of their practices, to demonstrate their willingness to respect the principles of ABS and the Nagoya Protocol, and to provide practical approaches to access and benefit-sharing in line with their needs and the particular requirements of their work.

ABS Clearing-House

The ABS Clearing-House was established under the Nagoya Protocol as a means for sharing information related to access and benefit-sharing. As set out in the Protocol, Parties have the obligation to make available to the ABS Clearing-House information on their national focal points, competent national authorities and relevant national ABS measures. In addition, Parties must inform the Clearing-House in a timely fashion about permits that they have issued. Non-Parties to the Protocol are also encouraged to share all relevant ABS information through the Clearing-House.

The ABS Clearing-House has been developed as a website and has been fully functional since the entry into force of the Protocol in October 2014, and countries have already begun to publish their information on it. The Clearing-House also includes procedures to ensure that national information has been duly validated by the government and is up-to-date. Those seeking access to genetic resources and associated traditional knowledge will find reliable information on national contacts and requirements in the ABS Clearing-House in a standardized and organized manner.

The ABS Clearing-House also supports legal certainty for users accessing genetic resources. When a provider country grants access to a genetic resource and publishes the information on the

permit or its equivalent in the ABS Clearing-House, the Clearing-House automatically generates an internationally recognized certificate of compliance that is then sent to the user. The certificate provides evidence that the genetic resource has been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the ABS measures of the provider country

In addition, the ABS Clearing-House hosts a variety of resources and information relevant to ABS, including capacity-building tools, videos, reports and articles, and is a repository for easy access to model contractual clauses, codes of conduct, guidelines, best practices and standards. Businesses and research institutions can contribute to the ABS Clearing-House by submitting these types of tools as well as other relevant resources and materials. More information is available at: <https://absch.cbd.int/>.

RESPONSIBILITIES

Parties to the Protocol, such as the European Union, Norway and Switzerland, have already adopted measures to ensure that users within their jurisdiction respect ABS requirements. These new measures will require users from both the business and research communities to adapt their current practices to these new obligations.

This new international reality is an opportunity for the business sector to be creative and forward looking, and to propose approaches to implementation of ABS that balances their requirements with the principles of equity and fairness established by the Convention on Biological Diversity and further elaborated by the Nagoya Protocol. By engaging in dialogue with policy makers and making constructive proposals on the best route to implementation, the business community can help ensure that the international system being set up is functional, minimizes transaction costs and contributes to building trust for the establishment of ABS partnerships that can bear fruit for both users and providers in the years to come. ↗



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Implementing the Nagoya Protocol in the European Union: State of play, challenges and opportunities

THIS ARTICLE OUTLINES THE REGULATION PUT IN PLACE VIS-À-VIS ACCESS AND BENEFIT-SHARING BY A PARTY TO THE PROTOCOL (IN THIS CASE THE EUROPEAN UNION) AND OUTLINES HOW IT WILL IMPACT BUSINESSES AND OTHER STAKEHOLDERS.

by **Matthias Leonhard Maier**

Policy Officer, European Commission, Directorate-General for Environment, Brussels, Belgium

In the European Union (EU), as in other parts of the world, many organisations – collections, university institutes, businesses from various sectors – use genetic resources for research and development purposes. For some, this is a very important part of what they do. Many EU countries and regions are also important providers of genetic resources in their own right. The EU as a whole has a strong interest in a fair, transparent and workable legal framework for access and benefit-sharing (ABS). Accordingly, EU actors played a key role in negotiating the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, and in April 2014, by decision of its Council (the representation of member state governments), the EU became a Party to the Protocol.

In parallel to the Protocol's ratification, the Council and the European Parliament – jointly constituting the EU legislator – adopted the “EU ABS Regulation” (*Reg. (EU) No. 511/2014*) which transposes into European law the compliance “pillar” of the Nagoya Protocol. It became applicable with the Protocol’s entry into force in October 2014, and is binding in all 28 Member States, whether or not they are also Parties to the Protocol. Meanwhile, measures for the regulation of access to genetic resources in EU countries may be established by individual Member States. The division of competences between the EU and its Member States means that the EU as such does not legislate on access measures.

The core obligation stemming from the EU ABS Regulation is for those dealing with genetic resources, (i.e. most typically researchers and businesses), to exercise “due diligence” in ascertaining that the genetic resources and the associated traditional knowledge they use has been accessed in accordance with applicable legal requirements. “Due diligence” is a multi-faceted tool with significant leverage, which is also applied in other strands of EU environmental policy, such as on the international trade in timber. By putting this concept at the heart of the ABS Regulation, the EU recognises that different ways of using genetic resources come with different challenges, and that users – individually or jointly, in particular through their respective professional associations – are well placed to identify appropriate responses within the overall legal framework. In other words, the legislation is about fostering and spreading a sense of responsibility for the full set of ethical, environmental and socio-economic implications of working with genetic resources and associated traditional knowledge.

CHECKPOINTS

The EU ABS Regulation provides for two different “checkpoints” in the value chain: when funding for research is received (from public or private sources); and at the final stage of product development. At both of these points users are required to exercise due diligence and to provide relevant information to competent authorities in the Member State(s) concerned. This can be done either by referring to an internationally recognised certificate of compliance, or by submitting alternative information as specified in the Regulation. The information must also be kept for a certain minimum period of time and transferred to any subsequent users.

In order to facilitate and enhance compliance, the ABS Regulation provides for a register of collections to be established and maintained by the European Commission (the EU’s executive branch). Users obtaining genetic resources from one of the registered collections will be considered to have exercised due diligence with regard to the seeking of relevant information. In addition, the Regulation encourages associations of users or other interested Parties to jointly put forward suitable tools and measures for the exercising of due diligence, and to apply to the Commission for the recognition of these measures as “best practices”. Implementation of a recognised best practice is to be taken into account by Member State authorities in their checks on user compliance.

Some of the ABS Regulation’s provisions need to be further specified to become fully operational. This will be achieved through an Implementing Regulation prepared by the European Commission, after having consulted the Member States, and due to be adopted in October 2015. With regard to the monitoring of user compliance, the Implementing Regulation specifies when and how the due diligence declarations are to be made, taking into account that different approval or authorisation processes apply for different sectors and types of products. It also specifies the procedure for a collection to be included in (or removed from) the register and the checks on collections to be carried out by Member State authorities, as well as determining the procedure for recognition (or withdrawal thereof) of best practices.

Applying the new legislative framework inevitably requires analysis and the occasional adaptation of pre-existing routines in research and development as well as in public administration. In this collective learning process, researchers, businesses and policy-makers across the world have every interest to exchange ideas and experiences with each other. The European Commission is facilitating this process within the EU, and we are keen to engage also at forthcoming multilateral meetings of the Parties, so as to promote widespread and effective implementation of the Nagoya Protocol. ♦



COURTESY OF THINKSTOCK

Nagoya Protocol and ABS regulation in Brazil: The view of Brazilian industry

THE NATIONAL CONFEDERATION OF INDUSTRY IN BRAZIL HAS BEEN FOLLOWING THE ISSUE OF ABS VERY CLOSELY. WHILE BRAZIL HAS YET TO RATIFY THE PROTOCOL, THIS ARTICLE HIGHLIGHTS KEY ELEMENTS OF THE NEW ABS LAW.

by **Elisa Romano Dezolt** ●

Policy and Industry Specialist, National Confederation of Industry, Brazil

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is a binding agreement that aims to establish rules for signatory countries on the access of genetic resources and its derivatives as well as to associated traditional knowledge, and the sharing of benefits resulted from its use, therefore implementing the third objective of Convention on Biological Diversity. The Nagoya Protocol was adopted in October 2010 at the tenth meeting of the Conference of the Parties (COP 10), in Nagoya, Japan, and entered into force in October 2014. It recognizes that biodiversity has economic value and that fair and equitable benefit sharing is an incentive to its conservation as well as to the sustainable use of genetic resources.

The Nagoya Protocol shows that progress has been made, especially with regard to legal certainty, towards the fair and sustainable use of genetic resources. However, a number of questions remain on how it will actually operate in practice. Its level of comprehensiveness allows for different interpretations and an array of regulatory models. Its implementation will therefore depend on the clarification of some uncertainties, as well as on detailing parts of the text.

BRAZILIAN ABS LEGISLATION

Although Brazil has not yet ratified the Nagoya Protocol, in May 2015 new legislation on access and benefit-sharing was approved, which should help boost the sustainable use of biodiversity by the industrial sector. At the same time, this new legislation provides for indigenous peoples and local communities and the proper sharing of benefits.

From the point of view of the business sector, the main improvements brought by the law are: i) the reduction of bureaucracy for the use of genetic resources, with the establishment of a simplified management system; ii) establishment of clear rules for the access of genetic resources and traditional knowledge; and iii) a favorable environment for the regularization of activities.

The simplification of the management system for registration of research dealing with genetic resources has long been pledged by all players. With the system working properly, companies and researchers, both for scientific and economic purposes, shall be encouraged to increase their efforts in learning about, and utilizing, Brazilian biodiversity. The system will also allow for traceability and transparency in regard to prior informed consent, in the case of traditional knowledge, and the benefit sharing agreements.

Another important aspect of the law is the definition of clear criteria for benefit sharing. According to the text, the benefits acquired with the economic use of biodiversity can be made in both monetary and non-monetary forms, on a basis of a one per cent share of the net annual revenue from the economic exploitation of finished products¹. Considering this approach, it is explicit that benefit sharing will be applied to the final link in a value chain (finished products), and shall be exempted from other links (intermediates). Thus, it suits the specificities of the multiple productive chains, and should incentivize innovation, inhibit economic barriers to the economic use of biodiversity, and increase the competitiveness of national products derived from biodiversity. The value owed will be deposited to the Brazilian government, in a Benefit Sharing Fund that aims at biodiversity conservation, so as to ensure that communities, local farmers and indigenous peoples get their share.

An innovative approach brought by the law is the inclusion of agricultural activities with a different perspective in terms of benefit sharing. Not only does it define which agricultural activities will be targeted by the law, but it also considers the marketing of reproductive material for the calculation of the benefit share owed.

It is important to mention that traditional knowledge related to genetic resources is also protected by the new law, especially concerning prior informed consent and benefit sharing. In this case,

¹ Finished product is that product which does not require any additional production process, derived from access to genetic resources or associated traditional knowledge, in which the component of the genetic resource or associated traditional knowledge is a key element to add value to the product, which is fit for use by final consumers, whether natural or legal person



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there is differentiated treatment made depending on whether traditional knowledge is considered identifiable or not, which brings greater legal certainty to the users.

These and other advances under the new law represent an important step for Brazil to progress as a player in the global bioeconomy market. As a mega-biodiverse country, it is essential for Brazil to learn the economic potential of its heritage as a way to encourage the conservation of its biodiversity, and to ensure the sustainability of business based on its use.

Nonetheless, it is also necessary to ensure an adequate implementation of the law for the achievement of the expected results, respecting the balance between incentives to research and stimulus for economic activity using biodiversity, and its conservation.

With the new legislation in place, the ratification of the Nagoya Protocol in Brazil becomes a priority, as it should also open up future opportunities for Brazilian industry. Whether the country is

“With new legislation in place, the ratification of the Nagoya Protocol in Brazil becomes a priority, as it should also open up future opportunities for Brazilian industry.”

the provider or the user of genetic resources, it can benefit from industry based on the sustainable use of biodiversity. Working for the sustainable use of the biodiversity is an opportunity that can have positive effects on the country's productive structure, involving innovative models for businesses of all sizes.

Since different but interconnected variables will shape the future, it is essential to support, and participate in, the implementation of national legal frameworks to ensure not only that it brings legal certainty to all stakeholders, but also that it encourages the sustainable use of biodiversity, thus incentivizing investments in research and innovation and strengthening domestic enterprises to become more competitive in foreign markets. ♦

ABS implementation in Japan: Guidelines and complementary tools for the transitional period under the Nagoya Protocol

THE JAPAN BIOINDUSTRY ASSOCIATION DEMONSTRATES ITS INNOVATIVE APPROACH TO INFORMING USERS OF GENETIC RESOURCES ABOUT THE OBLIGATIONS AND RESPONSIBILITIES RELATED TO ABS AND THE NAGOYA PROTOCOL.

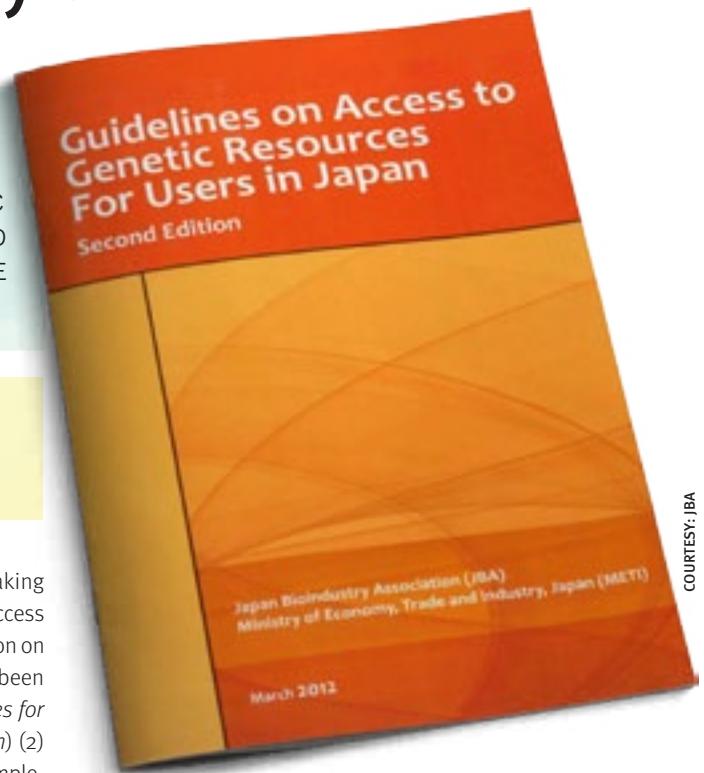
by Seizo Sumida ●

Technical Advisor, Research Institute of Biological Resources, Japan Bioindustry Association

The Japan Bioindustry Association (JBA) has been making strong efforts (1) in supporting the implementation of access and benefit-sharing (ABS) provisions since the Convention on Biological Diversity (CBD) entered into force in 1993. We have been implementing the *Guidelines on Access to Genetic Resources for Users in Japan Second Edition (Japan Guidelines 2nd Edition)* (2) as a transitional measure since 2012, in order to support the implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (3).

“The Protocol needs to be implemented in a way that is beneficial to all stakeholders.”

The *Japan Guidelines 2nd Edition* emphasizes the users' responsibility in ABS. The basic premise is that users of genetic resources and associated traditional knowledge are to comply with legal or regulatory requirements of providing countries and to develop a contract with the counterpart accordingly, and, that if such legal or regulatory requirements are not in place, users are to develop a contract with the counterpart bearing in mind the relevant provisions of the Convention, the Bonn Guidelines and the Nagoya Protocol. The *Japan Guidelines 2nd Edition* aims to help both providers and users to build win-win relationships and to minimize the risk of encountering problems, while encouraging maximal business flexibility.



COURTESY: JBA

In combination with the *Japan Guidelines 2nd Edition*, we employ a number of “complementary tools” to support users. These include:

- Awareness-raising seminars
- Information exchange with providing countries: We invite or visit CBD officials/ experts of providing countries for an exchange of information on national ABS policy, laws and regulation. Thus far, we have conducted such bilateral exchanges with more than 16 countries
- ABS Website: Developed in order to disseminate ABS-relevant information, particularly on policy, laws and regulations of different providing countries
- Help Desk: Based on our experience and knowledge accumulated since 1993, we give advice to users, free of charge and on a confidential basis, mostly by one-on-one consultation. As of this writing, over 550 consultations have taken place.

We became aware about the need for such “complementary tools” sometime in 2004 through the following experience: During 2002 through 2004, we were actively disseminating the Bonn Guidelines by holding public seminars in major cities across the country. As the Bonn Guidelines became better understood, some users of genetic resources provided us with the following feedback; *“The Bonn Guidelines are fine with us, but we wonder how we could comply with ABS principles when information on ABS procedures in most countries is not available”*. JBA’s single-minded recommendation of “ABS principles” without any ‘practical’ assistance seemed to be inadvertently forcing users to stay away from the genetic resources of other countries.

In taking this issue into consideration, the JBA and the Ministry of Economy, Trade and Industry developed a system in 2005 composed of the following elements: (a) user-specific guidelines (*Japan Guidelines 1st Edition*) consistent with the Bonn Guidelines; and (b) ‘complementary tools’ (of the same kind as described for *Japan Guidelines 2nd Ed*) so to facilitate users’ access to information on relevant laws and regulation of providing countries. We implemented the system methodically from 2005 through 2011. In 2012, we updated the system on the basis of our experiences and the adoption of the Nagoya Protocol in 2010 (4), and we have continued implementation up to the present day.

Thirteen years have passed, since we started implementing ABS in 2002. In October 2014 the Nagoya Protocol entered into force, and we now find ourselves in a new era. However, the Nagoya Protocol

is still in its infancy. Its success will depend on how wisely each Party implements the following principles of the Protocol domestically and how constructively the Parties cooperate internationally:

- 1.** User country measures: The Protocol stipulates each Party’s obligation to put in place measures for compliance with the ABS legislation or regulatory requirements of the providing country (Articles 15, 16 and 17)
- 2.** Providing country measures: The Protocol also stipulates the obligation of each Party requiring prior informed consent to put in place measures (Article 6(3)) and to make the information on these measures available at the ABS Clearing-House (Article 14(2)).

The implications of the Protocol for users of genetic resources and associated traditional knowledge are not straightforward, because there is such a diverse range of users. The Protocol needs to be implemented in a way that is beneficial to all stakeholders. Ongoing support from the business sector and the scientific community will be essential to its success. ↗

Notes

1. Refer to: Seizo Sumida, Environmental Policy and Law, 44/4, 380-383 (2014)
2. Available in pdf format at www.mabs.jp/eng/docs/index.html
3. Japan signed the Nagoya Protocol on 11 May 2011. In September 2012, the Ministry of the Environment created “Expert Group on the Framework of Domestic Measures for the Nagoya Protocol” for discussion at experts’ level. The Group completed its task in March 2014. Work is currently in progress within the government towards ratification of the Nagoya Protocol.
4. www.cbd.int/abs/text/



Helping businesses implement the Nagoya Protocol

THE INTERNATIONAL CHAMBER OF COMMERCE DEMONSTRATES THE IMPORTANT ROLE BUSINESS PLAYS IN THE DEVELOPMENT AND IMPLEMENTATION OF AN EFFECTIVE ABS REGIME, AND HIGHLIGHTS THE ASSISTANCE PROVIDED BY THE ICC IN THIS PROCESS.

by **Daphne Yong-d'Hervé** ●

Senior Policy Manager, Intellectual Property, International Chamber of Commerce (ICC)

Small and large businesses across a wide range of sectors work with genetic resources in diverse ways to create innovative products and technologies that respond to societal needs and challenges.

Having experienced the practical difficulties of working with fragmented national access and benefit-sharing (ABS) regimes, businesses saw the opportunity of creating an international framework which would provide the transparency and the legal certainty necessary to encourage and facilitate the sustainable use of genetic resources to the benefit of all actors. Businesses therefore actively engaged in the negotiation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, contributing their experience and knowledge of working with genetic resources on the ground. This business engagement was coordinated by the International Chamber of Commerce (ICC), a global business organization with

a broad membership of companies and associations of all sizes from diverse sectors across all regions.

SUPPORTING BUSINESS AWARENESS AND ACTION

ICC continues to coordinate and assist businesses—both large and small—in the current implementation process, when all ABS stakeholders are striving to make the Nagoya Protocol a workable reality. It does this in four main areas: awareness-raising; information exchange; coordination of business input; and acting as a focal point with governments, the Convention on Biological Diversity and other stakeholders.

As in other ABS constituencies, much work remains to be done in the business community to raise awareness of ABS—and, by extension, to help individual companies implement ABS practices. A great deal of work is currently being done by ICC and its members to spread information within the different sectors, and within companies.

Many companies and sectors are working actively on best practices and guidelines concerning the sourcing and use of genetic resources. Companies and sectorial associations exchange lessons learned, and share experiences and initiatives in this area through ICC. The ICC platform is also used to exchange information on new rules and developments in different countries and regions stemming from national implementation of the Nagoya Protocol—information not always easy for companies to obtain.

IMPORTANCE OF PUBLIC-PRIVATE DIALOGUE

Governments are also feeling their way on how best to implement the Nagoya Protocol in their national context. The experience of businesses, which work with genetic resources on a daily basis, provide a valuable resource to help policy makers create ABS frameworks which support the sustainable use of genetic resources for innovation. If this practical perspective is not taken into account, implementation of the Protocol is likely to result in unworkable ABS regimes that will not achieve the Protocol's goals. Lessons can also be drawn from the success or failures of existing ABS frameworks. ICC is uniquely positioned to help channel cross-sectorial and global business perspectives and experiences to policy makers—helping ensure that implementation results in ABS frameworks that will work in practice to create benefits for all stakeholders.

An example of ICC's role as a platform for dialogue and information exchange is its conference on the EU ABS Regulation, which is intended to help both companies and policy makers work through



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the implementation of the European Union user compliance rules, a new area of regulation in which both governments and genetic resources users are still feeling their way. An important finding of the previous conference was the need expressed by all users for more guidance on how to comply with the new requirements.

One important effect of the Protocol is that it has encouraged more dialogue between the different actors in the ABS ecosystem, several of whom are increasingly working together to ensure that the links between the different parts of the chain work smoothly. Businesses, for instance, are collaborating closely with collections and other actors in the supply chain to develop smooth interfaces for genetic resources transactions in the light of new requirements arising from the Protocol. Many businesses which source *in situ* also continue to have long-term collaborations with local institutions and communities, providing opportunities for sharing of expertise, skills and monetary and non-monetary benefits.

GOING BEYOND REGULATION

The Protocol offers the opportunity to build an international framework which can not only promote the conservation of biodiversity, but also encourage the sustainable use of genetic resources for developing innovative solutions to the many challenges faced by society. Businesses play a key role in this process: they are the risk-takers and investors who transform genetic resources into value-added products and solutions through their innovative activities. To play this role, businesses need ABS frameworks which are efficient, transparent and user-friendly and provide legal security. Experience indicates that ABS regimes that do not take into account this practical perspective are less likely to create value for all stakeholders.

Successful implementation does not depend only on appropriate regulatory frameworks. The building of necessary skills and expertise in local biodiversity, as well as infrastructure and institutions

“The Protocol offers the opportunity to build an international framework which can not only promote the conservation of biodiversity, but also encourage the sustainable use of genetic resources for developing innovative solutions to the many challenges faced by society.”

to facilitate sourcing, will be an important element in encouraging businesses to invest in genetic resource research and development in different countries.

BUILDING AN INTERNATIONAL SYSTEM BENEFICIAL TO ALL STAKEHOLDERS

The Nagoya Protocol provides the opportunity to create an internationally coherent system, an important element given the global nature of global resource flows and the cross-jurisdictional mechanism of the user compliance measures which all members of the Protocol have to put in place. For the moment, the great divergence in national approaches to the implementation of the Protocol seen so far show a tendency towards the opposite direction.

We are at an important crossroads in the implementation of the Protocol. To build a smooth functioning international framework that benefits all Parties and stimulates the creation of knowledge and benefits from research and development on genetic resources, all stakeholders in the ABS ecosystem—including governments, businesses, researchers, local and indigenous communities, and collections—have to work together in collaboration and build mutual trust.

ICC looks forward to continuing to facilitate business participation in this process and help businesses contribute to the implementation of the Nagoya Protocol. ♦



FEATURE INTERVIEW

SUHEL AL-JANABI, Co-Manager, ABS Capacity Development Initiative and, TOBIAS DIERKS, Communication and Knowledge Management, ABS Capacity Development Initiative

THE ABS CAPACITY DEVELOPMENT INITIATIVE WAS ESTABLISHED IN 2006 TO SUPPORT THE DEVELOPMENT AND IMPLEMENTATION OF NATIONAL REGULATIONS ON ACCESS AND BENEFIT-SHARING (ABS). THE GUIDING PRINCIPLES OF THE ABS INITIATIVE'S APPROACH ARISE FROM THE THIRD OBJECTIVE OF THE CONVENTION ON BIOLOGICAL DIVERSITY AND THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION. SUHEL AL-JANABI AND TOBIAS DIERKS OF THE ABS CAPACITY DEVELOPMENT INITIATIVE PROVIDE SOME INSIGHT INTO THEIR WORK IN BUILDING PARTNERSHIPS AND HELPING TO IMPLEMENT THE NAGOYA PROTOCOL.

***business.2020:* Could you describe some of the work that you have been doing with businesses to encourage their understanding and implementation of ABS?**

ABS Capacity Development Initiative: The ABS Initiative has, since its foundation in 2005, engaged with the private sector as it is an important ABS stakeholder group. During the negotiations of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, for instance, we facilitated initial exchanges between African negotiators and the business community at the margins of the ABS working group meetings. One milestone was certainly the 2009 Business Dialogue Forum on ABS held in South Africa and organized jointly with UEBT, PhytoTrade and the International Chamber of Commerce. This event fostered mutual understanding between the private sector and African negotiators on issues such as their opposing views on business community confidentiality requirements and disclosure claims of the providing countries.

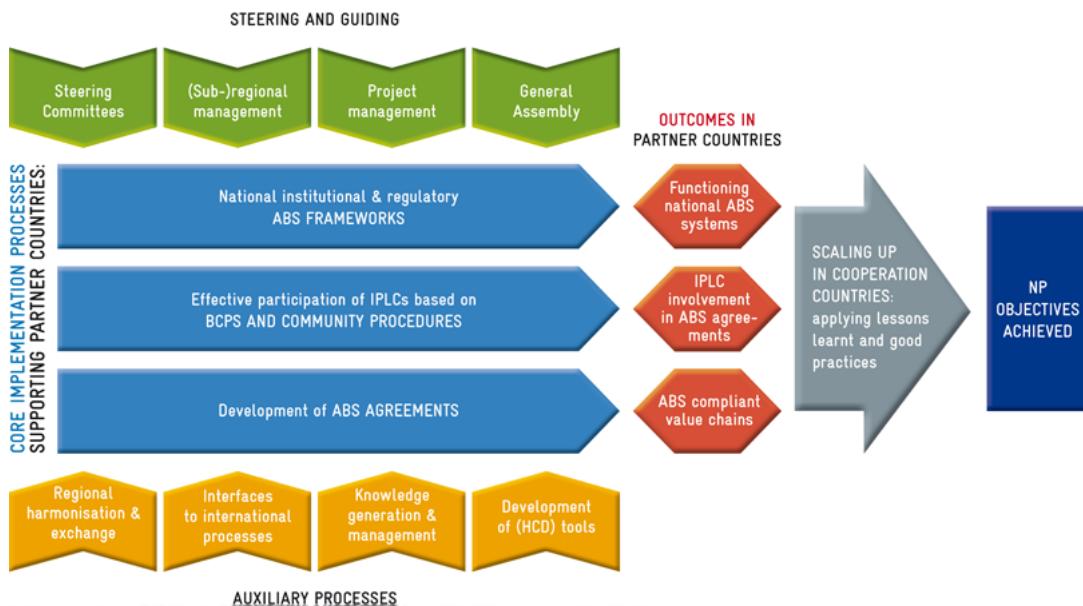
The South African Business Dialogue was the starting point for the now institutionalized and highly successful ABS Business Dialogue

series. This format, hosted annually in Copenhagen by the Danish Ministry of Environment since 2010, encourages exchange beyond technical concepts. It is also a forum within which to develop visions and concrete concepts for equitable partnerships between North and South, ultimately leading to functioning ABS agreements.

The ABS Initiative supports users on a technical level in addition to offering an exchange platform and related training. This may include establishing contacts with government officials, NGOs and development projects in provider countries or translating political ABS documents into business terms. Jointly with People and Plants International and the University of Cape Town we are currently developing six infographic-based briefs on the specificities of different ABS relevant industrial sectors. This support is not limited to the development sector. Private companies also directly request the ABS Initiative to support the development of ABS compliant value chains, resulting in the signing of “post-Nagoya” ABS agreements, for example in Central Africa. The fact that we are often invited to provide input to business related events – organized for instance by the Secretariat of the Convention on Biological Diversity, GEF or the Brazilian Chamber of Industry and Commerce – indicates the

BROCHURE
ABS
Initiative





value of ABS Initiative's role as facilitator and knowledge broker when it comes to integrating business into the ABS system.

business.2020: Please describe your strategic partnership with UEBT and PhytoTrade and explain how it will contribute to ABS implementation and the establishment of ABS compliant value chains.

ABS Capacity Development Initiative: This new strategic partnership was officialized in June 2015. It supports three major groups concerned with ABS: users, providers and regulators of genetic resources and associated traditional knowledge. Companies (users) engaged in biodiversity-based R&D and procurement need to comply with ABS regulations established in an ever-rising number of countries. Increasingly, many are adapting their production process to include buying decisions based on ethical and sustainability criteria. This new reality changes the conditions under which companies access and deal with genetic resources.

Legislators and policy makers (regulators) on the other hand have to develop or amend ABS laws while carefully considering the consequences of these new regulations for commercial users, academia and national providers. In return, the providers, such as indigenous peoples and local communities, cooperatives, small and medium sized enterprises or collections, must become aware of the challenges related to negotiating ABS, including potential benefits.

Each of these indispensable stakeholders has its own particular set of concerns and needs. The ABS Initiative, UEBT and PhytoTrade Africa aim to address all relevant subsets based on their expertise and networks rooted in many years of experience with ABS. Together we provide legal, technical and to a certain extent financial support for making ABS work and, ultimately, for establishing ABS compliant value chains. We facilitate mutual understanding between the three key stakeholder groups – a prerequisite for valid and sustainable ABS contracts or mutually agreed terms (MAT). Based on a quite successful cooperation, the ABS Initiative, UEBT

and PhytoTrade have recently entered into a formalized partnership. When ABS stakeholders contact one organization they get comprehensive support drawing on the specific expertise of all three.

business.2020: Could you explain the role of the private sector in implementing ABS and give us some practical examples of these?

ABS Capacity Development Initiative: The growing number of ABS regulations, including those in “traditional” user countries, force companies to integrate ABS into their standard operational procedures. This increasing interest in obtaining access permits to genetic resources on the user side triggers relevant political engagement in ABS on the provider side. In this regard, addressing companies’ practical concerns and needs assists regulators to create practice-oriented regulatory concepts. This is one reason why pioneer-value-chains inform the process of developing workable ABS regulations. The ABS Initiative draws on insights gained from cooperating with the private sector, feeding it into the development of national ABS regulation processes.

“With the Nagoya Protocol in force and a steadily growing number of countries ratifying it, the concept of ABS is high on the agenda worldwide.”

A major challenge users face is the possible over-burdening of prior informed consent and MAT processes with administrative regulations. In this regard, we provide general advice to streamline administrative processes in order not to discourage private sector and research entities from engaging in ABS, but it is only of limited use. We see that actual ABS negotiations often trigger reflections on efficiency criteria and timeframes, as companies report that they can only bear a limited amount of transaction costs.

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Making ABS Work for You

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In one case, even respective regulators strongly advocated vis-à-vis other Ministries to keep the administrative burden as low as possible. Of course, countries need to create regulations which protect the rights of their people, in particular indigenous and local communities. Balancing these rights with the commercial interest of the private sector can result in fair and non-arbitrary laws. At the same time, the private sector gains valuable experience and better understanding of what to expect and how to adapt approaches to the specific circumstances. Therefore, we strongly encourage the private sector to engage in pioneer ABS activities which will benefit providers, users and regulators alike.

business.2020: How do you see things progressing in this area in the run up to 2020 and beyond?

ABS Capacity Development Initiative: The outcome document of the post-2015 development agenda has several direct and indirect references to ABS. With the Nagoya Protocol in force since last year and a steadily growing number of countries ratifying it, the concept of ABS is high on the agenda worldwide. ABS laws and strategies are currently being developed and revised in many countries and regions. Two recent examples are the African Union's adoption of ABS Guidelines and the EU's ABS regulations. At the same

time, the ABS concept is becoming increasingly integrated into a growing number of development cooperation projects combining environmental protection with socio-economic development. Undoubtedly, there is an ABS friendly environment newly in the making, favorable to companies whose customer base is asking for ethically produced products.

But will the "Nagoya euphoria" last? Yes, it most likely will. On an international level, the political will to make ABS work has been clearly expressed. On a national level, however, it will take a while to develop and implement laws and regulations which ensure viable administrative procedures and functioning ABS agreements. For instance, the time from the expressed interest in a specific genetic resource to the actual signing of MAT and PIC should be reduced.

For many years to come, international development cooperation will implement projects aiming at the establishment of ABS-compliant value chains. All relevant ABS stakeholders need to seize the opportunity and jointly develop long-time strategies and implement sustainable ABS procedures with a view to generate a triple win situation between users, providers and regulators. From a pragmatic point-of-view we need to document some of the strongest ABS cases to serve as best practices. Related experiences will inform and thus accelerate ABS processes in other countries and regions. ♦



The Nagoya Protocol and the potential of BioTrade as a vehicle to promote ABS compliant value chains

THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT UNDERLINES SOME OF THE CHALLENGES INHERENT IN FULLY IMPLEMENTING THE NAGOYA PROTOCOL, PARTICULARLY WITH REGARD TO BUSINESS INTERESTS INVOLVED IN BIOTRADE. ECHOING OTHER ARTICLES IN THIS EDITION, IT NOTES THE IMPORTANCE OF COOPERATIVE APPROACHES AND GETTING THE PRACTICAL APPLICATIONS OF ABS RIGHT.

by **David Vivas-Eugui and Mariona Cusi**

United Nations Conference on Trade and Development
(UNCTAD)

HIGHER DEMAND FOR LEGAL ACCESS

The entry into force of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity on October 12, 2014 was an historic event and a milestone for multilateralism. The Nagoya Protocol is a state-of-the-art multilateral environmental agreement that provides a solid legal platform for consolidating and expanding modern biodiversity-based business. It is expected that the Protocol will have important implications for the flow of genetic resources, research and development (R&D) based on genetic resources and natural biochemicals, and in the trade of products that are either biodiversity-based or derived from it.

“The entry into force of the Protocol can contribute to a higher demand for legal access to genetic resources and is generating reinvigorated expectations on benefit sharing in many biodiversity-rich countries.”

It is important to note that ABS rules in the Protocol are not self-executing and that they would need to be implemented through national legislation or regulations. The main pillars of the Protocol are the fulfillment of prior informed consent (PIC), the existence mutually agreed terms (MATs) and the introduction of mechanisms needed to ensure monitoring, verification and compliance. The first two pillars were already part of Article 15 of the Convention on Biological Diversity and are further developed by the Protocol. The pillar on monitoring, verification and compliance was inspired by the Bonn guidelines on ABS related to genetic resources (2002)⁵ and completely changes the way in which ABS systems are perceived today. ABS systems now represent a binding regulatory

Estimates show that the markets for industrial sectors sourcing or directly using biodiversity inputs reached US\$ 84 billion in dietary supplements and botanicals¹, US\$ 64 billion in the case of organic agricultural products², US\$ 23 billion in the case of natural cosmetics³ and about US\$ 5.2 billion in BioTrade products⁴. These estimates show the significant value that genetic and biological resources still have for both providers and users.

¹ CBD (2013).

² FiBL and IFOAM (2014).

³ CBD (2013).

⁴ UNCTAD and UEBT (2013).

⁵ www.cbd.int/abs/bonn/



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framework that has to be fulfilled by businesses, in both provider and user countries, when seeking access and utilizing genetic resources, natural biochemicals and associated traditional knowledge. Companies desiring to access and utilize genetic resources and associated traditional knowledge will have to ensure that regulatory requirements of the country of origin are fulfilled in light of the intended use in order to show both legitimacy and legality.

When looking at the BioTrade⁶ sector, the Protocol will also have significant effects on those actors in the value chain intending to carry out research and development (R&D) on genetic resources and their natural biochemicals, as well as on the development of subsequent applications and their commercialization. It is very difficult nowadays to innovate, develop and market new products without undertaking a certain level of R&D. The probability of "utilizing" genetic resources, and potentially traditional knowledge, becomes higher as one moves upwards in the value chain.

CLARITY CRITICAL

Therefore, it is crucial for business to have a clear understanding on how the Protocol is currently being implemented in both

provider and user countries. Businesses will also require a system on the ground that is transparent and provides them with the legal certainty they need to ensure their economic sustainability and long-term commitment for their investments. In that sense, efficient administrative procedures for managing and evaluating requests, negotiating contracts, and ensuring a stable PIC and enforceable MATs on all Parties will be essential.

Additionally, the introduction of incentives for undertaking R&D and production activities locally may enhance interest of all parties to make the relationship work. In this regard, BioTrade will play an important role. Biotrade businesses are already working on the ground under sustainable principles and criteria in more than 21 countries and involving more than 30,000 producers, and have long standing relations with governments and indigenous and local community representatives (ILCs).

Principle n.3 of the United Nations Conference on Trade and Development (UNCTAD) BioTrade establishes that there will be an "equitable sharing of benefits derived from the use of biodiversity", principle n.5 requires that all actors comply "with national and international regulations" and principle n. 6 calls for the "respect for actors rights" when engaging in trade of biological resources⁷. In this regard, for instance, the BioTrade principles are already a guide for the implementation of the Protocol since they already incorporate benefit sharing schemes (e.g. fair price and exclusive sourcing agreements) and the direct involvement of ILCs in harvesting and processing of raw materials. For example, the Union of Ethical BioTrade has established a BioTrade standard for businesses to recognize this adherence to BioTrade principles and criteria, as originally designed by UNCTAD. Therefore, biotrade businesses are already applying to a large extent some of the core principles of the Nagoya Protocol.

This point of view was recently confirmed by the adoption of a decision (Decision XII/10) by the Conference of the Parties to the Convention when calling companies to participate and cooperate with UNCTAD's BioTrade Initiative and other organizations involved in BioTrade. Likewise, this decision recognizes the commitment of these organizations towards sustainable use of biodiversity, sustainable harvesting practices and equitable access and benefit sharing.

The challenge, therefore, is to make the process of adding value in the production, R&D and marketing stages of biodiversity-intensive value chains an effective vehicle to enable biodiversity conservation, sustainable use and to facilitate the legitimate flow of inputs, all while facilitating the involvement of all relevant actors, including the private sector. In addressing this challenge, the Convention on Biological Diversity and the United Nations Conference on Trade and Development can play a key role in facilitating the emergence of ABS-compliant value chains, creating new business opportunities and bridging interested governments, businesses and ILCs.❖

⁶ BioTrade refers to those activities of collection, production, transformation, and commercialization of goods and services derived from native biodiversity under the criteria of environmental, social and economic sustainability.

⁷ UNCTAD's BioTrade principles and criteria can be found at: http://unctad.org/en/docs/dicted20074_en.pdf



Putting ABS in practice: Approaches and experiences in the ethical sourcing of biodiversity

THE UNION FOR ETHICAL BIOTRADE PROVIDES A SNAPSHOT OF THEIR ACTIVITIES, INCLUDING SOME OF THE TOOLS THAT THEY HAVE PRODUCED TO HELP COMPANIES DEAL EFFECTIVELY AND EFFICIENTLY WITH ABS-RELATED ISSUES.

by **Maria Julia Oliva** ●

Senior Coordinator for Policy and Technical Support,
Union for Ethical BioTrade (UEBT)

supplying items ranging from bioactive compounds for functional foods and natural ingredients for cosmetics to novel enzymes for household cleaning products. All of this has been the trigger for the expanding number of legal requirements on access to genetic resources for their utilization and the fair and equitable sharing of resulting benefits (ABS).

In this context, business is becoming more and more engaged with the implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. This is evident among companies using natural ingredients for cosmetics, many of which – having participated in initiatives to raise awareness and understanding on ABS – are now seen as “ripe for setting in place best ABS practices.”² Countries with laws and regulations in place report a rising number of requests for ABS permits and agreements. There are also several examples of ABS principles reflected in biodiversity-based research, development and commercialization projects. Yet, as the majority of companies still struggle with understanding and applying ABS requirements, the necessity remains for tools,

The business case for fair and equitable benefit sharing is growing. Consumers show increasing awareness of biodiversity; they also expect that companies working with natural ingredients will adopt ethical sourcing practices.¹ Moreover, biodiversity remains a source of innovation for many economic sectors,

¹ Union for Ethical BioTrade (UEBT), UEBT Biodiversity Barometer 2015, available at <http://ethicalbiotrade.org/dl/UEBT%20-%20EN%20Barometer%202015.pdf>

² Sarah A. Laird and Rachel P. Wynberg, Bioscience at a Crossroads: Implementing the Nagoya Protocol in a Time of Scientific, Technological and Industry Change: The Cosmetics Sector, Convention on Biological Diversity, 2013.

training and technical support, as well as considerations of their perspectives and experiences in the ongoing evolution of laws and regulations in this area.

ABOUT UEBT

The Union for Ethical BioTrade (UEBT) is a member-based, non-profit association that promotes the ‘Sourcing with Respect’ of ingredients that come from biodiversity. Members, which include companies in the food, cosmetics and pharmaceutical sectors, adopt ethical sourcing practices for all operations and supply chains involving natural ingredients. These practices, established in the internationally-recognized Ethical BioTrade standard, reflect the principles of the Convention on Biological Diversity and advance sustainable business growth, local development and biodiversity conservation. Progress is independently verified through periodic audits. In addition, UEBT provides technical advice and support, including through training, consultancies and practical tools on ABS-related issues.

COLLABORATION ON ABS

Business engagement with ABS requirements could be described as a stepwise process. Companies must first be aware of ABS requirements, then understand the relevance to their activities, and finally identify when and how to undertake compliance

measures.³ Another significant aspect of business engagement involves the participation of industry associations or individual companies in discussions related to ABS-related laws, policies and permitting processes. Through various activities, UEBT supports its members and other companies as they navigate through the ABS process.

Since its creation, UEBT has played an important role in raising awareness on ABS issues among companies working with natural ingredients. For example, ABS has been a recurring topic in the annual ‘Beauty of Sourcing with Respect’ conference, now in its seventh edition, which brings together companies, policy makers, civil society representatives and other experts and stakeholders to share views and experiences on the ethical sourcing of biodiversity.⁴ In particular, companies have noted the usefulness of a non-technical, interactive approach to ABS issues, which teases out practical implications and provides insights into how these issues may be better addressed and understood.

UEBT also conducts training workshops that approach ABS issues in more depth. Training modules have been developed for

³ See, e.g., the stepwise approach in Principle 3 of the Ethical BioTrade Standard, available at <http://ethicalbiotrade.org/dl/verification/STDo1-Ethical-BioTrade-Standard-2012-04-11.pdf>.

⁴ For example, the report of the 2015 ‘Beauty of Sourcing with Respect’ conference is available at <http://ethicalbiotrade.org/dl/Conference%20report.pdf>.

“One point of consideration is how to extend ABS awareness beyond pioneering companies, moving it from being a niche issue to the basis of market transformation.”





a range of target audiences – from government representatives seeking to understand the context and implications of ABS laws and regulations to company representatives looking to define policies and practices required for ABS compliance. For example, UEBT has conducted training workshop for representatives of sourcing, purchasing, legal, innovation, sustainability and/or marketing departments in both member and non-member companies working in the cosmetics, flavor and fragrance and food sectors. Moreover, UEBT makes some of its training modules more widely available through an e-learning platform.

To support companies moving ahead with determining the relevance of ABS requirements to their activities, UEBT has developed a methodology called “ABS assessment.” Through this assessment, UEBT is able to identify whether there are any laws or regulations on ABS that apply to a specific product, project or supply chain. The assessment can also help in describing the implications of any such requirements for existing activities. In addition, the UEBT ABS assessment considers other factors that increase the relevance of ABS or ABS-related risks in relation of products, projects or supply chains. These factors include the nature of the biological or genetic resources, the role of traditional knowledge, the existence of intellectual property protection, and the type of research and development conducted. The UEBT ABS assessment process involves legal analysis, interviews with companies and other stakeholders, evaluation of the ingredient and/or supply chain and relevant policies and practices, and development of recommendations.

Once the relevance of ABS requirements has been established, UEBT also provides support for compliance both with legal and ethical requirements. Technical support is provided to assist companies in setting up relevant policies and procedures: for example, UEBT identifies critical control points and suggests procedures or tools that may be introduced to ensure compliance (for example, supplier questionnaires, patent and biodiversity policies and/or benefit sharing agreements). UEBT has also developed tools such as guidelines, templates and model clauses. For instance, the “UEBT Undertaking” allows suppliers of raw material to communicate to clients issues linked to ownership of material and information and ABS-related rights and obligations. Through local partners, UEBT also supports specific processes for access permits and the negotiation of benefit sharing agreements.

Finally, UEBT supports dialogue between business and policy-makers, thus helping to facilitate the contribution of company experiences towards more practical and effective rules on ABS. For example, in 2013-2014, UEBT conducted a joint project with the International Finance Corporation and the Brazilian Ministry of Environment towards strengthening Brazilian rules, policies and procedures on ABS. This project focused on gathering, assessing and building upon private sector perspectives on ABS, both in Brazil and around the world. UEBT then developed recommendations that it put forward for consideration with respect to enhancing existing ABS frameworks and approaches in Brazil, in a way that promotes innovation, improves local livelihoods and safeguards biodiversity.

CONCLUSIONS

The entry into force of the Nagoya Protocol, the progress made in various countries in its implementation, and the growing awareness of biodiversity are driving business interest and engagement with ABS requirements. Further work is needed, however, to ensure that this trend effectively leads to biodiversity-based innovation and the fair and equitable sharing of resulting benefits.

One point of consideration is how to extend ABS awareness beyond pioneering companies, moving it from being a niche issue to the basis of market transformation. Likewise, there are pending questions about the practical implications of ABS requirements, including the cost of compliance for companies and the sharing of responsibilities for ABS requirements along value chains. There is a role here for companies and industrial associations, which can contribute information and experiences to guide others in both the public and private sectors. Moreover, even as business engagement on ABS grows, compliance with laws and regulations will only be achieved if legal and regulatory requirements are functional and relevant to the companies and the activities involved. This implies, for example, clarity on what, how and who is actually engaged in the “utilization of genetic resources” that triggers ABS requirements – and the consequences of the different approaches.

ABS has been described as a missing pillar in the Convention on Biological Diversity. With the entry into force of the Nagoya Protocol comes a significant momentum for its implementation among all actors, from governments and indigenous peoples to companies and research institutions. Governments are moving towards a more practical, proactive approach to ABS rules and companies have grown to realize that compliance with ABS may be an opportunity, particularly for early adopters. Now is the opportunity to move beyond lingering questions and mistrust, in order to work together towards ABS rules that function and advance the conservation and sustainable use of biodiversity, as well as sustainable development. ♣

Using ABS in Africa to create positive opportunities for social, environmental and economic impacts

PHYTOTRADE AFRICA HAS LONG BEEN INVOLVED WITH THE ISSUE OF ACCESS AND BENEFIT-SHARING IN AFRICA. THIS ARTICLE EXPLAINS SOME OF THE WORK IT HAS DONE WITH BUSINESSES IN THE REGION AND CITES EXAMPLES OF THE MUTUAL BENEFITS THAT CAN ARISE WHEN PRODUCERS AND USERS ARE ABLE TO WORK TOGETHER CONSTRUCTIVELY.

by **PhytoTrade Africa** ● (www.phytotrade.com)

Southern Africa¹ is home to some of the most biodiverse countries in the world. South Africa contains approximately 10 per cent of all known plant species, and 70 per cent of the species that inhabit Madagascar are endemic. With this vast wealth of natural assets, a rich cultural diversity and history of traditional uses, Southern Africa is an important provider of genetic resources and associated traditional knowledge for commercialisation. The economic potential of its biodiversity has been recognised by governments as they increasingly build it into national development plans and strategies to preserve its existence and capture its value. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits (ABS) Arising from their Utilization, and industry's implementation of its provisions, has the potential to significantly increase benefits to the region where the sustainable use of biodiversity already contributes to the livelihoods and well-being of many people.

PhytoTrade Africa has been working with Small and Medium Scale Enterprises (SMEs) in Africa for 14 years, developing natural product value chains based on the sustainable management and valorisation of Southern African indigenous plant resources. PhytoTrade Africa's common goals remain centred on sustainable use, poverty alleviation and ecosystem conservation. But its approach also integrates the needs of various industrial sectors such as personal care, fragrance, food and beverage and herbal supplements, all

of which have distinct trading obligations (e.g. specific regulatory dossier requirements, or ABS approaches). Supporting Biotrade activities throughout their value chains enables pragmatic and workable cases to be duplicated in many other South/North "Bio-connections". The objectives of the Nagoya Protocol are thus at the heart of PhytoTrade's actions, even prior to the adoption of the Protocol in 2010. Companies and producer groups that are engaged with PhytoTrade are committed to grow their businesses in line with ABS principles.

ABS IN PRACTICE

In Namibia, the Marula oil value chain is one of the earliest examples of ABS in practice. The same women's cooperative has remained central to the development of Marula oil as a cosmetic ingredient and has fostered long-term commercial partnerships with international brands, namely The Body Shop. Throughout the development of this value chain, several benefits have accrued at the producer and community level. Both monetary and non-monetary, these benefits have included milestone payments, processing improvements, research funding, sharing in research results, participation in product development and various forms of training. While meeting increasing success at the consumer level, the demand was growing locally, impacting an increased number of communities involved in the supply of the raw material. Today, the focus of this Marula oil value chain is on strengthening its long-term viability, through value-addition, technology development and transfer, and setting in place innovative enterprise models that harness private sector business approaches to benefit primary producers.

Another key example from the Southern Africa region is the Baobab fruit powder value chain. Regulatory compliancy is one of the major bottlenecks faced by new resources to access international markets. To overcome and ease this process, PhytoTrade Africa obtained the European Union's Novel Foods and US Food and Drug Administration's Generally Recognized as Safe (GRAS) approvals for Baobab fruit powder in 2008. As a direct result, all producers of this ingredient could access both the European Union and USA markets. In parallel to opening international trade opportunities, SME's producing Baobab powder in Africa have received training, research results, technology transfer and capacity-building support to enable their businesses to grow. This extends to the community

¹ Southern Africa in this context includes South Africa, Swaziland, Namibia, Botswana, Malawi, Mozambique, Zimbabwe, Zambia and Madagascar (countries included in PhytoTrade's membership range).

level where the objective remains to move producing groups up the value chain to points of higher and more secure return.

Despite the presence of some key examples of ABS approaches in Southern Africa, it is important to note that many Southern African countries are only now developing their ABS regulatory frameworks. Demonstrating fully compliant value chains is challenging when legal certainty remains unclear. Stakeholders are calling on governments to provide the frameworks, guidelines and documentation required to enable implementation.

Aside from the presence of functioning regulatory frameworks other challenges exist. Many genetic resources of interest are transboundary and the corresponding value chains can span more than one country. Country-specific regulations also differ in terms of scope, i.e. different definitions, or paperwork requirements, which lead to country-specific obligations for providers or users. South Africa is further ahead than many countries around the world in the development of their regulations on ABS, with frameworks already in place by 2005. Considering the great economic potential of more workable ABS regulation, the Department of Environmental Affairs (DEA) published in May 2015 the proposed 'Amendments to the Regulation on Bio-prospecting, Access and Benefit-Sharing'. This document addresses issues raised by industry and other stakeholders implementing the regulation, such as timeframes, permits obligations and the point at which agreements of benefit sharing are set in place.

INCREASED INDUSTRY PARTICIPATION

With the markets' increasing interest in sustainable, ethical and traceable products from Africa, there is a wealth of opportunity to promote ABS-compliant ingredients while meeting the demands of consumers within the cosmetic, food and beverage or supplement sectors. In the past months, following the entry into force of the Nagoya Protocol, there has been a noticeable rise of industry participation in ABS discussions, particularly in the cosmetic and fragrance sectors. With the facilitation of legal frameworks and support mechanisms, the sustainable commercialisation of Southern Africa's genetic resources and associated traditional knowledge can generate significant business opportunities and related profits. SMEs, local industry, provider countries and their national development objectives are set to benefit, while industry will be presented unique and innovative products which meet consumer expectations for on-trend natural and environmentally friendly products.

Drawing on experiences to date, and through the development of regulatory frameworks which facilitate innovation and commercial relationships, ABS in Africa creates the opportunity to provide significant social, environmental and economic impacts which ultimately meet objectives of the Convention on Biological Diversity; the conservation of biodiversity and the sustainable use of its components. ♣

The fruits and seeds of Mafurra (Trichilia emetica), a species harvested by PhytoTrade members where the butter is used by the cosmetic sector, and where the provisions of the Nagoya Protocol may impact on any new research and/or uses.



Community protocols: Bridging the stakeholder divide

THE INTERACTION BETWEEN BUSINESSES AND INDIGENOUS PEOPLES AND LOCAL COMMUNITIES CAN OFTEN BE DIFFICULT, WITH ISSUES OF UNDERSTANDING AND POWER UNDERMINING TRUST. THIS ARTICLE DESCRIBES THE USE OF COMMUNITY PROTOCOLS WHICH CAN HELP TO BRIDGE THIS DIVIDE AND ALLOW FOR GENETIC RESOURCES AND ASSORTED TRADITIONAL KNOWLEDGE TO BE ACCESSED IN A FAIR AND EQUITABLE MANNER.

by **Barbara Lassen** ● Head, ABS Programme, Natural Justice; **Johanna von Braun** ● Head, US Office, Natural Justice

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity provides a framework for the interaction between the users of genetic resources and associated traditional knowledge, indigenous peoples and local communities (IPLCs) and national governments. While details for such interactions have to be further developed under the domestic law of the provider country, the Nagoya Protocol obliges state Parties to ensure that the prior informed consent (PIC) of indigenous peoples is obtained for:

- Access to traditional knowledge associated with genetic resources
- Access to genetic resources where communities have established rights over their resources.

BOX 1: POSSIBLE QUESTIONS CONFRONTING AN ABS USER WHEN APPROACHING A COMMUNITY

- Which local authority or institution is the entry point for dialogue and negotiations with the community?
- Which rights does the community have to the genetic resources and/or traditional knowledge according to national legislation?
- Who is entitled (legally and from the perspective of the community) to give prior informed consent concerning the genetic resources and/or traditional knowledge that I want to access?
- Who is entitled to negotiate and sign an ABS agreement?
- How does the community take decisions over access to their resources and knowledge? What processes are involved?
- Who constitutes “the community” for the purpose of this resource and/or knowledge?
- What expectations might the community have towards a commercial partner?
- Are there any cultural values concerning the genetic resources and/or traditional knowledge that I should be aware of as a future partner of the community?

The Nagoya Protocol also ensures fair and equitable sharing of the benefits arising from the utilization of these genetic resources and traditional knowledge. The Protocol further asks Parties to take into consideration IPLC's customary laws, community protocols and procedures when implementing these obligations.¹

APPROPRIATE MECHANISMS FOR PIC AND MAT

Processes for obtaining PIC and for negotiating Mutually Agreed Terms (MAT) should identify and respect the appropriate representatives and customary institutions of IPLCs, and should take into account IPLC's own decision-making processes. IPLCs should be able to decide which institutions are mandated to negotiate and receive benefits, and how these benefits will be distributed. Especially in the case of traditional knowledge, there may be customary norms about how this knowledge is kept, to whom it may be transferred, and under which conditions.

In spite of the fact that the above-mentioned elements of good process for PIC and sharing of benefits are widely recognized, including through the Nagoya Protocol, their operationalization remains a challenge. Government agencies, researchers and private companies are often unaware of the existing customary rules and norms of communities, and do not know who is entitled to give PIC, or who should negotiate and receive benefits. At the same time, many IPLCs are not aware of their rights to PIC and benefit sharing under international and national law, and/or lack the capacity to assert these rights. This lack of clarity can make it difficult for a user company to obtain the legal certainty that it seeks when accessing genetic resources and traditional knowledge, and, as a result, they may therefore shy away from engaging with communities. Similarly, for communities the fear of exploitation and misappropriation of their genetic resources or traditional knowledge may undermine the establishment of MAT.

More generally, ILCs and private companies (but also other users of biological resources such as research institutes) often start from very different perspectives when they enter into commercial negotiations. Companies need a better understanding of the cultural basis of the communities from which they source natural

¹ See Nagoya Protocol Articles 5, 6, 7, and 12.1

ingredients, but communities also have to understand the nature of supply chains, the role they possess within them as well as the realistic expectations they can have towards companies.

COMMUNITY PROTOCOLS AS TOOLS FOR PIC AND BENEFIT SHARING

Community protocols are instruments that facilitate culturally rooted, participatory decision-making processes within communities with the aim of asserting rights over their communally managed lands, resources and traditional knowledge. Community protocols are based on communities' customary norms, values and laws, and set out clear terms and conditions to governments and the private, research, and non-profit sectors for engaging with communities and accessing their local resources.

Every community protocol is distinct due to the unique ecological diversity in which they coexist as well as the unique cultural practices of the people that develop them. However, these protocols tend to contain a variety of common issues and themes, including details about:

- A definition of the group and its leadership and decision-making processes
- Community-based natural resource management systems, knowledge, innovations, and practices
- Ways of life, including the links between culture, customary laws and values
- Procedures relating to (free), prior and informed consent to any intended activities on their territories, e.g. the access to genetic resources and traditional knowledge
- Local challenges and aspirations
- Rights, responsibilities and duties according to customary, national and international law
- Calls to various stakeholders to engage in constructive dialogue.²

Community protocols gained their first formal recognition through Article 12 of the Nagoya Protocol. They can function as instruments of dialogue and of interface between customary systems of ILCs and "external" legal and policy frameworks, and thus help to facilitate a number of processes. In the case of access and benefit-sharing, they can clarify, for example, which local authority can give PIC for the access to genetic resources and traditional knowledge and under which conditions.

The potential of community protocols to improve certainty for external actors is a major benefit to the access and benefit-sharing (ABS) processes. A further advantage is the capacity-development of community members. In community protocols processes, community-level training on ABS and community rights are integrated with discussions of local values and practices. This increases awareness of communities, but also helps ground communities so as to allow them to participate as empowered and informed actors in ABS

BOX 2: EXAMPLE: CONDITIONS FOR ACCESS TO TRADITIONAL KNOWLEDGE IN THE COMMUNITY PROTOCOL OF THE KUKULA TRADITIONAL HEALTH PRACTITIONERS IN SOUTH AFRICA³

(...) We will base any consent to use our knowledge and access our indigenous biological resources on our customary laws and domestic regulations and the process of providing prior informed consent and deciding on the conditions for transfer will depend largely on the type of user. For example:

(...) *Academic researchers* must apply to the Executive Committee for any access to our traditional knowledge or indigenous biological resources. We will require, according to the BABS Regulations and the BABS Amendment Regulations, to see the letter from the Department of Water and Environmental Affairs (DWEA) stating that they can conduct the research. The Executive Committee will conduct an information gathering process to ascertain the exact parameters of the intended research. With that information the Committee will, based on our customary laws, conduct a process of community deliberation and ancestral consultation to decide whether the knowledge should be shared and on what basis. Where access is granted, it will be on condition that further consent is required if the intended use of the research is changed and for a range of non-monetary benefits including acknowledgement that we are the holders of the original knowledge. Any dealing with us must be conducted in total transparency.

Commercial bio-prospectors are welcome to engage us. They must first apply to the Executive Committee for any access to our traditional knowledge or indigenous biological resources. We will require, according to the Bio-prospecting, Access and Benefit Sharing Regulations, any commercial bio-prospecting company to provide us with all information relating to the intended use of the knowledge and/or indigenous biological resource. With that information the Committee will, according to our customary laws, conduct a process of community deliberation and ancestral consultation to decide whether the knowledge should be shared and on what basis. That will form the start of a process of negotiation with the company towards a Benefit Sharing agreement and material transfer agreement, if required. Benefits could include monetary and/or non-monetary benefits.

negotiations. It also helps to address the value-based aspects of the relationship between company and community within which any commercial exchange is embedded.

In the end, successful ABS agreements will largely depend on the capacity of users, providers and other stakeholders to build the necessary trust to engage in such contractual agreements. Such trust is not easily established when stakeholders come from different cultural backgrounds and value systems, often with very different concepts of property as well as rules of engagement. Community protocols, especially when coupled with a process for dialogue, can function as basis for building such trust and establishing the mutual understanding needed to engage with confidence in such agreements.⁴

² Natural Justice, 2010: Briefing Note on Biocultural Community Protocols http://naturaljustice.org/wp-content/uploads/pdf/briefing_note_on_BCPs.pdf

³ The community protocol is available at http://community-protocols.org/wp-content/uploads/documents/South_Africa-Bushbuckridge_Biocultural_Protocol.pdf

Biodiversity, business and the challenges for indigenous peoples

INDIGENOUS PEOPLES AND LOCAL COMMUNITIES HAVE OFTEN FOUND THEMSELVES AT A DISADVANTAGE IN DEALING WITH BUSINESSES LOOKING TO UTILIZE THEIR GENETIC RESOURCES AND/OR TRADITIONAL KNOWLEDGE ASSOCIATED WITH THEM. ALTHOUGH THE NAGOYA PROTOCOL MAY HELP ASSUAGE SOME OF THESE CHALLENGES, THIS PIECE FEATURES A NUMBER OF SUGGESTIONS THAT SHOULD HELP BUILD TRUST AND ENHANCE IMPLEMENTATION OF ABS RULES FOR ALL PARTIES.

by **Yolanda Terán Maigua** ●

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For indigenous peoples in Ecuador the term for biodiversity is *kawsay*, and includes the idea of nature, with all of her tangible and intangible beings, including humanity. Nature is considered a mother; alive and sacred, with diverse ecosystems in which everything is interconnected and interrelated. Since ancestral times, Mother Earth, or *Pachamama*, has been cared for, protected and preserved by indigenous peoples. She is fundamental for the development of life and cultural diversity. Traditional knowledge of genetic resources and their use as medicines and food has been orally transmitted from one generation to the next by elders and women. They taught indigenous children by doing practical activities and speaking indigenous languages. Since early childhood we learnt that our resources are our relations, essential for our life and

survival and for the benefit of human beings. Consequently, we share our resources without any cost following our customary law and the values of solidarity, reciprocity, support and compassion. We ignored the practice of bio-piracy of our plants and seeds that were taken abroad without our consent. We did not know about the access, use, products or the annual earnings that some companies obtained from these resources.

The issue of biodiversity and business was a painful and controversial one for indigenous peoples. We do not consider Mother Earth and her beings as merchandise. They need care and respect. Nevertheless, since 1996 the International Indigenous Forum on Biodiversity and the Indigenous Network on Biodiversity for Latin America and the Caribbean, as well as similar groups from other regions, began participating in international meetings of the Convention on Biological Diversity and in the negotiations of the International Regimen on Access and Benefit-Sharing (2004) in order to defend our resources, traditional knowledge and rights.

In 2010 this Regime, following six years of negotiations, was adopted in Nagoya, Japan, at the tenth meeting of the Conference of the Parties (COP 10) as the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS), and finally ratified at COP 12 in South Korea. During the negotiations, indigenous peoples and local communities obtained some good results, such as the inclusion of the United Nations Declaration on the Rights of Indigenous Peoples, the recognition of women's role in biodiversity, the importance of Article 8(j), and so forth. However, we need to be aware that the implementation of Nagoya Protocol carries several challenges for States Parties, indigenous peoples and local communities, industry, universities and other stakeholders due to the fact that every case of ABS has its own particularities and there are issues to be accomplished with care and transparency.

ABS FUTURE CHALLENGES

Therefore, from our perspective, the following represent some of the challenges that need to be addressed in the full implementation of the Nagoya Protocol to ensure that the rights and culture of indigenous peoples and local communities are respected, and



Carrying maize seeds, Kichwa indigenous students enter the Cotacachi Plaza in Ecuador. (Photo by J. Males, 1997)

that we can deal fairly with those users (including businesses) that wish to use the genetic gifts Mother nature has bestowed upon us:

- A clear ABS national framework based on national constitutions and customary law with defined roles and responsibilities
- Creation and maintenance of an ABS help desk to support indigenous peoples and other stakeholders
- Recognition of the intrinsic relationship between genetic resources, traditional knowledge and the importance of our traditionally occupied lands, territories and waters
- Obtaining prior and informed consent with culturally appropriate methods (i.e through the use of indigenous languages and respecting the ways indigenous peoples work)
- The right of veto if indigenous peoples conclude that a project is not beneficial
- In signing mutually agreed terms contracts must have clear terms and conditions. These contracts must be conducted in a spirit of goodwill by all actors involved and must take into consideration that indigenous peoples often come from an oral tradition
- Better decision-making on monetary and non-monetary benefits in order to satisfy the basic needs of indigenous peoples in areas such as education, health, housing, potable water and food security
- Creation of *sui generis* systems to protect traditional knowledge with the full and effective participation of indigenous peoples, women, youth and elderly following customary norms and the right of self-determination
- Elaboration of bio-cultural protocols and guidelines for businesses and researchers, with the participation of the full community, in order to safeguard resources and traditional knowledge for present and future generations
- Sustainable financial resources provided to promote the Nagoya Protocol and for capacity-building at different levels for all stakeholders, including indigenous peoples
- Creation of an ABS intercultural, multidisciplinary and intergenerational team to work in the implementation and monitoring of business projects at local, national and international levels
- Co-research and co-publication with information about the financial aspects of the research, the type of research (i.e. commercial or non-commercial), time, protocols, indigenous researchers, intercultural procedures with the findings in accordance with MAT, and with the collective intellectual property rights of indigenous peoples. Regarding commercial research, the type and timing of benefits should be specified, as should the guidelines for co-publishing
- Agreement on the number of scholarships at national and international settings, the types of technology (including laboratory equipment) to be transferred
- Considering the complexity of the Nagoya Protocol, indigenous peoples, including women and youth, would like to have full and effective participation in the circle of biodiversity business in order to identify a framework of partnership, mutual trust and respect and understanding that will allow all Parties to achieve harmonic growth and well-being, *Sumak Kawsay*, based in learning, sharing and caring, and avoiding unnecessary competition and the resultant destruction of Mother Earth. ♣





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