

# Role and Rights of Indigenous Peoples and Local Communities on Access and Benefit Sharing

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Legal Officer, Tebtebba Foundation Inc.

*“Regional Workshop on Access to Genetic Resources and the  
Fair and Equitable Sharing of Benefits Arising from their  
Utilization (ABS): Understanding the Nagoya Protocol”*

EDSA Shangri-la Hotel, 25-26 October 2011



## ... Involvement of Indigenous Peoples in the CBD & ABS Negotiations

### COP 5 (2000) – Nairobi

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- COP instructed ABSWG to complete work by 2010
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# ... CBD - Article 8(j)

## ARTICLE 8 In-situ Conservation

Each Contracting Party shall, as far as possible and as appropriate:

- Subject to its national legislation
- **respect, preserve and maintain** knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity
- and promote their wider application with the **approval and involvement** of the holders of such knowledge, innovations and practices
- and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;



## ... CBD Article 15: *Access to Genetic Resources*

- Recognizes state sovereignty over natural resources
- “Authority to determine access to genetic resources rests with the national government and **is subject to national legislation**” (Art. 15 (1))
- Each Party will “facilitate access to genetic resources for environmentally sound uses” and not impose restrictions which are counter to the objectives of the Convention (Art. 15 (2))
- Access to genetic resources should “be on mutually agreed terms”, and “shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party” (Art. 15 (4) and 15 (5))



## Highlights of the Nagoya Protocol on ABS – Preamble (1)

### PREAMBLE

*Recalling* the **relevance of Article 8(j)** of the Convention as it relates to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge,

*Noting* the interrelationship between genetic resources and traditional knowledge, their **inseparable nature** for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities,

*Recognizing* the diversity of circumstances in which traditional knowledge associated with genetic resources is held or owned by indigenous and local communities,



## Highlights of the Nagoya Protocol on ABS – Preamble (2)

### PREAMBLE

*Mindful* that it is the right of indigenous and local communities to **identify the rightful holders** of their traditional knowledge associated with genetic resources, within their communities,

*Further recognizing* the unique circumstances where traditional knowledge associated with genetic resources is held in countries, which may be **oral, documented or in other forms**, reflecting a rich cultural heritage relevant for conservation and sustainable use of biological diversity,

*Noting* the **United Nations Declaration on the Rights of Indigenous Peoples**, and

*Affirming* that **nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights** of indigenous and local communities,



## Highlights of the Nagoya Protocol on ABS – OBJECTIVE

The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, **taking into account all rights over those resources** and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

- **ALL RIGHTS** includes rights of indigenous peoples and local communities



## Highlights of the Nagoya Protocol on ABS – SCOPE

This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources. **This Protocol shall also apply to traditional knowledge** associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.





## Highlights of the Nagoya Protocol on ABS – Relationship Clause

The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments.

- Existing international agreements includes those that pertain to indigenous peoples (such as UNDRIP)



## Highlights of the Nagoya Protocol on ABS – Fair and Equitable Benefit Sharing

Each Party shall take legislative, administrative or policy measures, as appropriate, **with the aim of ensuring** that benefits arising from the **utilization of genetic resources that are held by indigenous and local communities**, **in accordance with domestic legislation** regarding the **established rights** of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.

Each Party shall take legislative, administrative or policy measures as appropriate, in order that the benefits arising from the **utilization of traditional knowledge associated with genetic resources** are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.



## Highlights of the Nagoya Protocol on ABS – ACCESS TO GENETIC RESOURCES

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

Pursuant to paragraph 1 above, each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:

(f) Where applicable, and subject to domestic legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources; and



## Highlights of the Nagoya Protocol on ABS – ACCESS TK ASSOCIATED WITH GR

In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.



## Highlights of the Nagoya Protocol on ABS – TRANSBOUNDARY COOPERATION

In instances where the same genetic resources are found in situ within the territory of more than one Party, those Parties shall endeavour to cooperate, as appropriate, with the involvement of indigenous and local communities concerned, where applicable, with a view to implementing this Protocol.

Where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties, those Parties shall endeavour to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objective of this Protocol.





## Highlights of the Nagoya Protocol on ABS – TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES (1)

1. In **implementing** their obligations under this Protocol, Parties shall in accordance with domestic law **take into consideration indigenous and local communities' customary laws, community protocols and procedures**, as applicable, with respect to traditional knowledge associated with genetic resources.
2. Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to **inform potential users** of traditional knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.



# Highlights of the Nagoya Protocol on ABS – TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES (2)

3. Parties shall **endeavour to support, as appropriate, the development** by indigenous and local communities, including women within these communities, of:

- (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;
- (b) Minimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources; and
- (c) Model contractual clauses for benefit-sharing arising from the utilization of traditional knowledge associated with genetic resources.

4. Parties, in their implementation of this Protocol, shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention.



## Highlights of the Nagoya Protocol on ABS – National Focal Point and Competent National Authority

Each Party shall designate a national focal point on access and benefit-sharing.  
The national focal point shall make information available as follows:

- (a) For applicants seeking access to genetic resources, information on procedures for obtaining prior informed consent and establishing mutually agreed terms, including benefit-sharing;
- (b) For applicants seeking access to traditional knowledge associated with genetic resources, where possible, **information on procedures for obtaining prior informed consent or approval and involvement, as appropriate, of indigenous and local communities** and establishing mutually agreed terms including benefit-sharing; and
- (c) Information on competent national authorities, **relevant indigenous and local communities** and relevant stakeholders.

The national focal point shall be responsible for liaison with the Secretariat.

2. Each Party shall designate one or more competent national authorities on access and benefit sharing. Competent national authorities shall, in accordance with applicable national legislative, administrative or policy measures, be responsible for granting access or, as applicable, issuing written evidence that access requirements have been met and be responsible for advising on applicable procedures and requirements for obtaining prior informed consent and entering into mutually agreed terms.





# Highlights of the Nagoya Protocol on ABS – Compliance with respect to TK

## COMPLIANCE WITH DOMESTIC LEGISLATION OR REGULATORY REQUIREMENTS ON ACCESS AND BENEFIT-SHARING FOR TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES

1. Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.
2. Each Party shall take appropriate, effective and proportionate measures to address situations of non-compliance with measures adopted in accordance with paragraph 1 above.
3. Parties shall, as far as possible and as appropriate, cooperate in cases of alleged violation of domestic access and benefit-sharing legislation or regulatory requirements referred to in paragraph 1 above.



## Highlights of the Nagoya Protocol on ABS – Awareness-Raising and Capacity

Each Party shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit sharing issues. Such measures may include, *inter alia*:

- (b) Organization of meetings of indigenous and local communities and relevant stakeholders;
- (c) Establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders;
- (g) Education and training of users and providers of genetic resources and traditional knowledge associated with genetic resources about their access and benefit-sharing obligations;
- (h) Involvement of indigenous and local communities and relevant stakeholders in the implementation of this Protocol; and
- (i) Awareness-raising of community protocols and procedures of indigenous and local communities.

As a basis for appropriate measures in relation to the implementation of this Protocol, developing country Parties, in particular the least developed countries and small island developing States among them, and Parties with economies in transition should identify their national capacity needs and priorities through national capacity self-assessments. In doing so, such Parties should support the capacity needs and priorities of indigenous and local communities and relevant stakeholders, as identified by them, emphasizing the capacity needs and priorities of women.





# Ambiguities

- “noting” the UNDRIP
- “subject to national legislation” vs “in accordance with domestic legislation”
- “approval and involvement” vs “prior informed consent” vs “free, prior, informed consent”
- ”established rights”
- “existing rights”



# ••• The UN Declaration on the Rights of Indigenous Peoples - UNDRIP



Adopted by the UN General Assembly on 13 September 2007 after more than 20 years of negotiations and lobbying.





- 144 YES
- 4 NO
  - Canada
  - New Zealand
  - US
  - Australia
- 11 ABSTAIN
- 30 ABSENT





## UNDRIP as interpretative tool

*The Declaration should be used by states to interpret their obligations under international agreements to which they are party.*



# ... UNDRIP – Art. 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the **right to own, use, develop and control** the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. **States shall give legal recognition and protection** to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

# UNDRIP – Article 31

1. Indigenous peoples have the **right to maintain, control, protect and develop** their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, **States shall take effective measures** to recognize and protect the exercise of these rights.





## ... UNDRIP – Article 32

1. Indigenous peoples have **the right to determine and develop priorities** and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior to the approval** of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

# • Rights of Indigenous Peoples' and Local Communities under the Nagoya Protocol

- To own, use, develop, and control their genetic resources and traditional knowledge
  - FPIC before access, right to identify holders, right to benefit from use of their TK and GR
- Use of Customary Law / Community Protocols as part of the compliance mechanism
- Participation in any activity that affect their rights
- Recognition and protection of their rights by the State



## ... Role of Indigenous Peoples and Local Communities

- Participation in Ratification Process
- Participation in Drafting of National ABS Law
- Participation in identification of Focal Point and National Competent Authority
- Identify Capacity Needs; Awareness Raising
- Strengthening and continued use of Indigenous Peoples' Customary Law on ABS, drafting of community protocols, providing information on Customary Law and Community Protocols



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*Noting* the **United Nations Declaration on the Rights of Indigenous Peoples**, and

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## Highlights of the Nagoya Protocol on ABS – OBJECTIVE

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Each Party shall take legislative, administrative or policy measures as appropriate, in order that the benefits arising from the **utilization of traditional knowledge associated with genetic resources** are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms.



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1. In **implementing** their obligations under this Protocol, Parties shall in accordance with domestic law **take into consideration indigenous and local communities' customary laws, community protocols and procedures**, as applicable, with respect to traditional knowledge associated with genetic resources.
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3. Parties shall **endeavour to support, as appropriate, the development** by indigenous and local communities, including women within these communities, of:

- (a) Community protocols in relation to access to traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising out of the utilization of such knowledge;
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