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# **The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization**

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**United Nations University-  
Institute for Advanced Studies**

# The Nagoya Protocol on Access and Benefit-sharing: Background

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**To further implement one of the CBD's three objectives:**

- Conservation of biological diversity
- Sustainable use of its components
- **Fair and equitable sharing of benefits arising from the use of genetic resources**

# The Nagoya Protocol on Access and Benefit-sharing: Background

## Mandate for negotiations:

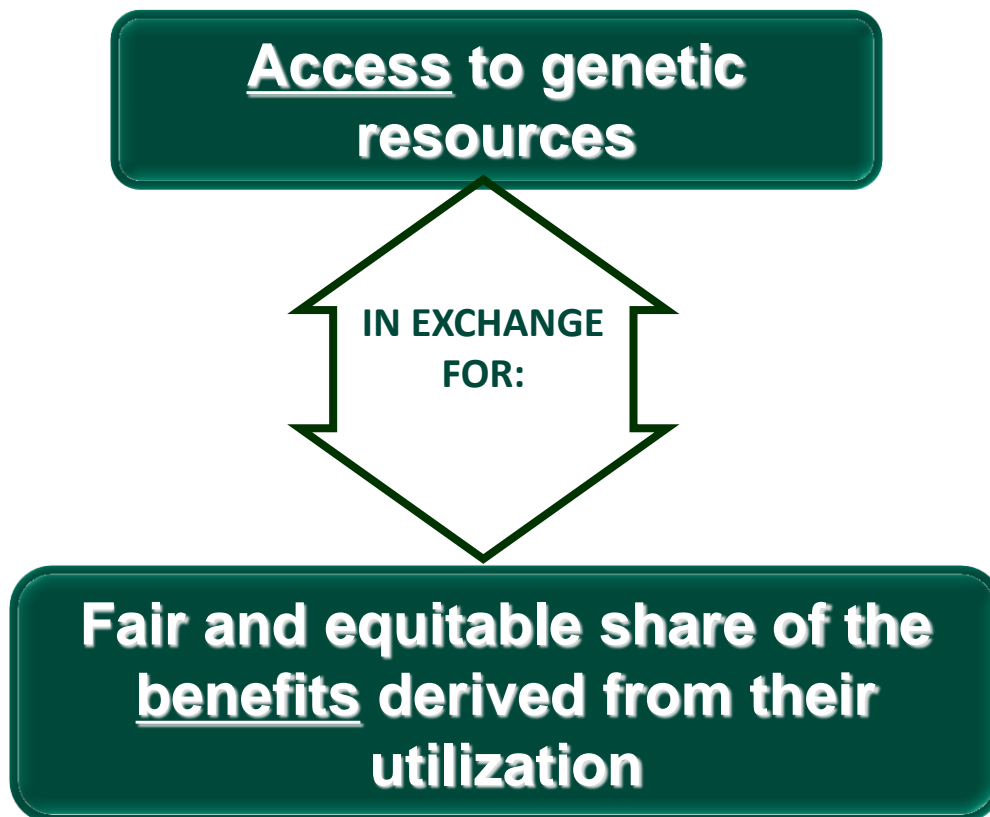
- **WSSD, 2002:** Political mandate for international regime on ABS
- **COP VII, 2004:** WG-ABS mandated to negotiate an international regime on ABS
- **COP X, 2010:** Finalization of the negotiations and adoption of the Nagoya Protocol on ABS



# The Nagoya Protocol on Access and Benefit-sharing

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The Nagoya Protocol aims at providing a legal framework to articulate the “**quid pro quo**” that underpins the CBD



# The Nagoya Protocol: Context

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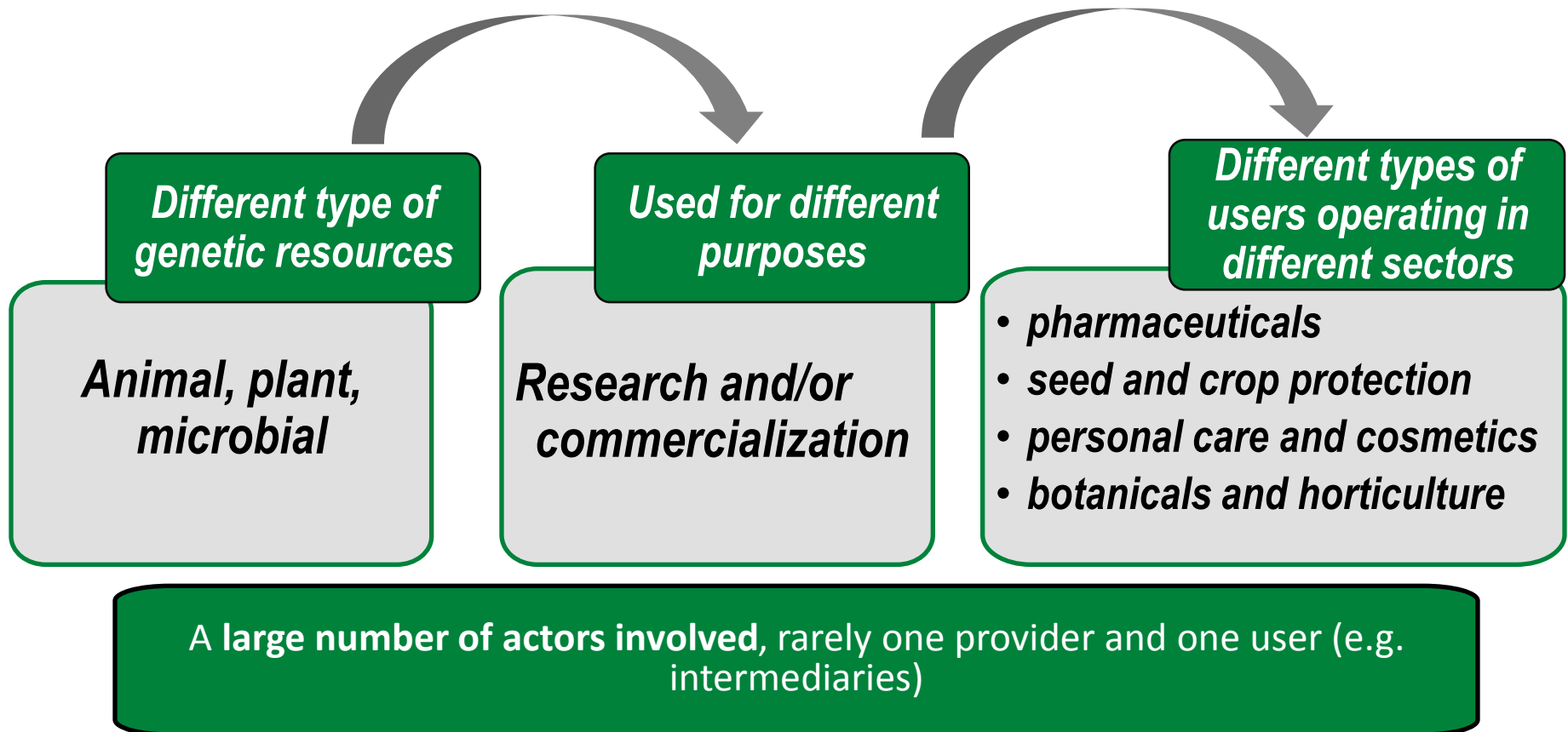
**Genetic resources** provide a **wide range of products and services** essential to human well-being, notably in the following sectors:

- Pharmaceuticals
- Personal care and cosmetics
- Seed and crop protection
- Botanicals and horticulture

Therefore, **countries have a shared interest** in the advancement of research on genetic resources as it leads to **new discoveries**.

# The Nagoya Protocol: Context

## Uses of genetic resources



# The Nagoya Protocol: Principles

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## Fundamental principles of ABS

- **Sovereign rights** of States over their natural resources
- **Access** to genetic resources is subject to the **prior informed consent** (PIC) of the provider country
- Users and providers must reach an **agreement** (mutually agreed terms) on the **sharing of benefits** that may result from their use

# Why a Protocol on Access and Benefit-sharing?

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## Legal certainty through a transparent framework on ABS:

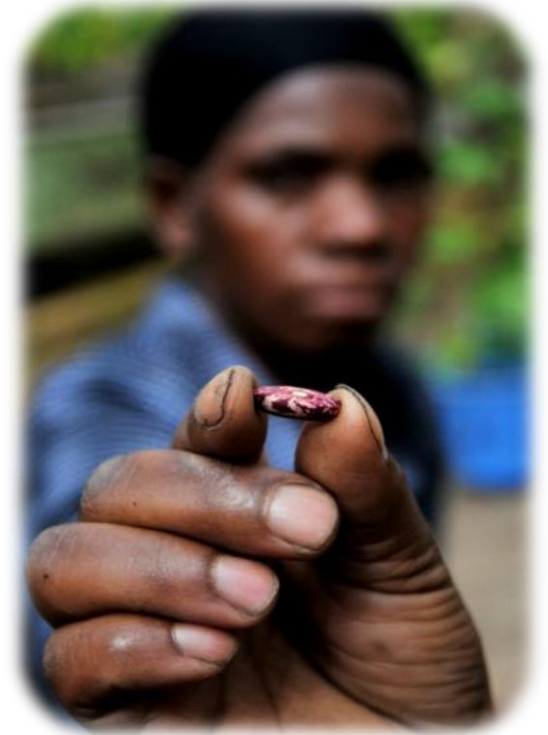
- **For providers:** to ensure benefit-sharing once genetic resources leave the provider country
  - To prevent misappropriation of genetic resources and associated traditional knowledge
- **For users:** to provide for clear procedures for access to genetic resources



# The Nagoya Protocol: Scope

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- Genetic resources **within the scope of Article 15 CBD** and the benefits arising from the utilization of such resources
- **Traditional knowledge associated with genetic resources within the scope of the CBD** and the benefits arising from the utilization of such knowledge



# Core elements: Access

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## Obligation to establish ABS measures at national level providing for:

- Legal certainty, clarity and transparency.
- Fair and non-arbitrary rules and procedures.
- Clear rules and procedures for prior informed consent and mutually agreed terms.
- Issuance of a permit or equivalent as evidence that PIC was obtained and MAT were established.

# Core elements: Access

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## Obligation to establish:

- A national focal point :
  - Make information on **procedures** for obtaining prior informed consent and mutually agreed terms available.
  - **Liaise** with the Secretariat
- One or more competent national authorities:
  - **Grant access** to genetic resources
  - **Advising** on applicable procedures.

# Core elements: Fair and equitable sharing

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## Obligation to take measures:

For benefits arising from the utilization of genetic resources, as well as subsequent applications and commercialization, to be shared with provider country. Benefits to be shared are subject to mutually agreed terms (MAT).

## Benefits may be monetary and non-monetary

- **benefits:** Access fees, milestone payments, licence fees, royalties, transfer of technology, sharing results of research, effective participation in research

# Core elements: compliance

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## Compliance obligations ensuring benefit-sharing

- Obligation to **comply** with **national ABS legislation** and with **mutually agreed terms (MAT)**
- **Obligation to monitor** the utilization of the genetic resources, including by:
  - Designation of effective **check points**
  - Establishment of an **internationally recognized certificate of compliance** as evidence that PIC was obtained and MAT established

# Core elements: traditional knowledge

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- Indigenous and local communities rely on genetic resources and have helped preserve and maintain biodiversity over centuries
- Traditional knowledge related to biological resources can be an important source of **information for identifying new uses of genetic resources**



# Core elements: traditional knowledge

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## The Protocol aims to ensure that:

- Indigenous and local communities obtain a **fair share of benefits** from the use of their:
  - **Traditional knowledge** associated to genetic resources
  - **Genetic resources**, in cases where they have established rights to grant access to them, in accordance with national legislation
- Access will be subject to their **prior informed consent**, taking into account their customary laws and procedures

# The Nagoya Protocol: Opportunities

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- **Enhance the contribution of biological diversity to sustainable development and human well-being**
  - Provides for **legal certainty** for users and providers of genetic resources
  - Provides incentives for the **promotion and protection of traditional knowledge**
  - Creates incentives to **conserve biological diversity** and the **sustainable use** of its components
  - By providing incentives and legal certainty it promotes the **advancement of research** on genetic resources leading to new discoveries for the benefit of all.



# The Nagoya Protocol: 3 Criteria for success of ABS policy models

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The monetary and non-monetary benefits arising from ABS must significantly exceed the costs of setting up and implementing an ABS regulatory framework;

High levels of innovation;

ABS must necessarily lead to conservation and sustainable use of biodiversity through an effective combination of rights and incentives.

# Monetary and non-monetary benefits of ABS must significantly outweigh costs

## Cost intensive ABS systems:

Protectionist ABS regulatory frameworks: a) High costs of setting up ABS regulatory frameworks; b) ABS laws are strongly protectionist in orientation; c) The aim of the law is to stop biopiracy at all costs through tight regulations designed to catch the minority of biopirates.

## Implications:

- High transaction and opportunity costs for potential research and commercial users of genetic resources and/or associated traditional knowledge leading to perverse incentives.
- Paradoxical counter-productivity, where the strict laws force users to figure out ways to beat the system or to disinvest from R&D on products that are based on genetic resources and associated traditional knowledge.
- Driving users to other jurisdictions where ABS laws are less restrictive and more facilitative.
- High profile cases of prosecuting biopiracy with a lot of media attention but very minimal revenues arising from ABS.

# Benefit intensive ABS systems

## **Facilitative ABS regulatory frameworks:**

- Low costs in setting up ABS regulatory frameworks;
- ABS laws are facilitative in nature- policies are designed to make it expensive for businesses to enter into brown economy and attractive to enter into green economy;
- The aim is to incentivise compliance by designing easy to comply ABS laws focusing on the law-abiding majority of users- for e.g. developing a two step process for ABS permits, where the first step involves a scoping permit and the second step involves an actualization permit. During the scoping phase, a quick approval is provided since the R&D is still at the stage of exploratory research. During the actualization phase, an ABS agreement is negotiated since there is greater clarity of the benefits likely to be incurred.

# Implications

- While there will be a minority of users of genetic resources and associated traditional knowledge who will flout the ABS law, the majority of users will comply with the law due to ease of compliance.
- Increased private investment in green economy (i.e. R&D in genetic resources and associated traditional knowledge) due to comparatively lower entry costs when compared with the brown economy.
- High revenue from ABS, which outstrips the revenues from other brown economy models.

# Innovation

## **Infrequent but potentially big pay offs v. Smaller but steady revenues**

Facilitative ABS systems are based on the principle of deposits, taxes and fees rather than mutually agreed terms (MATs). While ABS agreements will invariably be based on MATs, the aim of facilitative laws will not focus on securing all benefits through MATs but also by capturing benefits at various points in the value chain all the way to the end consumer through taxes and fees.

For example, fees are imposed at the point of application for bioprospecting permits and an ABS tax is imposed on companies, universities and research institutions engaged in R&D around genetic resources and associated traditional knowledge. Security deposits are into an ABS fund are required at the scoping phase.

# Innovation

## **Competing countries and communities v. common pools**

Genetic resources and associated traditional knowledge are common pool resources that are shared between countries and communities. ABS related competition between countries and communities sharing genetic resources and associated traditional knowledge could lead to cherry picking by users that is likely to end up in a race to the bottom forcing lower benefits and regulations.

A way to overcome this is for countries and communities to experiment with pooling shared resources and knowledge together and relying on a cost-efficient regional rather than a national regulating authority, clearing house and trust funds.

# Innovation

## Sticks v. carrots

While there has been a lot of discussion around sticks to ensure compliance with domestic ABS regulatory frameworks, there hasn't been much thought around incentives (carrots) to ensure that benefit sharing is actually taking place.

Carrots could include:

- i) ABS certification (like fair-trade certification);
- ii) Tax subsidies for users who comply with ABS and increased taxes for those who don't;
- iii) Government investment and low interest loans for research institutes and companies involved in R&D relating to genetic resources and associated traditional knowledge;
- iv) Risk sharing where publicly funded research and public sector companies engage in initial R&D on specific genetic resources and associated traditional knowledge after which they invite private companies to enter into ABS agreements to do further R&D based on useful leads (e.g. I-AIM).

# Conservation priorities

## **ABS and protected areas**

Can benefits resulting from bioprospecting in protected areas (including community conserved areas) be directed to defray the opportunity and operational costs of maintaining these protected areas? Interesting examples include community conservancies in Namibia.

## **ABS and biotrade**

Can using ABS augment existing biotrade value chains? For e.g. can a community engaged in sustainable harvesting as a part of a biotrade value chain sell their harvest at a premium price (rather than the market price) and require the buyer to buy the harvest only from them in exchange for the use of their traditional knowledge?

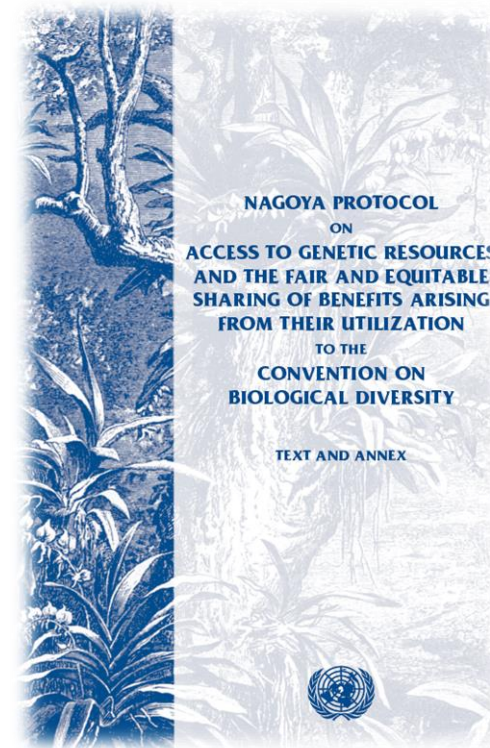
## **ABS and community enterprises**

Can a community enterprise relying upon the utilization of the community's genetic resources and/or associated traditional knowledge seek investment from a company or research institute as a part of an ABS agreement? For e.g. the community can offer the company or research institute 30% equity share in the community enterprise along with permission to do further R&D on the community resource and/or knowledge in exchange for the company or institute investing money in the community enterprise. This can be a different kind of an ABS agreement where communities are partners in the business rather than purely beneficiaries.



# Signature and ratification

- 26 Parties have ratified the Protocol and 92 Parties have signed it
- Entry into force 90 days after the date of deposit of the 50th instrument of ratification
- Info on how to ratify the Protocol can be found at:  
<http://www.cbd.int/abs/becoming-party/>



# Thank you

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