Article 12. Traditional Knowledge Associated with Genetic Resources

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.

3. Parties shall endeavor 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.
1 Overview

Although generally recognized as a cross-cutting issue during the negotiations, traditional knowledge associated with genetic resources has eventually been addressed in various, occasionally stand-alone, provisions in the Protocol. Article 12 serves as an overarching and wide-reaching provision enshrining: a general clause concerning indigenous and local communities’ customary laws, that is applicable in the implementation of all other obligations under the Protocol; two broadly framed obligations for Parties to support understanding and fairness in ABS transactions involving traditional knowledge; and a prohibition for Parties to restrict communities’ customary use and exchange of genetic resources and traditional knowledge that are in accordance with the CBD. The following sections will analyze these provisions in turn.

2 General Clause

Article 12(1) requires Parties to ‘take into consideration’ customary laws, community protocols and procedures of indigenous and local communities in their implementation of the Protocol with respect to traditional knowledge ‘as applicable’ and ‘in accordance with domestic law.’ The provision therefore leaves a considerable degree of discretion to Parties: it does not go as far as to require Parties to recognize or apply customary law, community protocols and procedures. However, it does oblige Parties at a minimum to factor in the development and application of domestic ABS measures the existence and relevance of indigenous and local communities’ customary laws, even if such consideration may not necessarily determine the content of the final legal act or administrative decision. This requires that national authorities identify and understand relevant communities’ customary laws, protocols and procedures, which would be practically impossible to achieve without the full and effective involvement of indigenous and local communities in the development

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2 See this commentary on Article 5, section 4, Article 7 and Article 16.
3 Nagoya Protocol Article 12(1).
4 Nagoya Protocol Article 12(2–3).
5 Nagoya Protocol Article 12(4).
6 For a commentary on the term, see this commentary on Article 7, section 3.
and implementation of these measures.\textsuperscript{7} In this context, national authorities will then have to determine whether legal recognition or other mechanisms to support the understanding and respect of customary laws, protocols and procedures are needed with a view to ensuring the implementation of the Protocol’s provisions on community PIC and benefit-sharing.\textsuperscript{8} That is, the consideration of customary laws, protocols and procedures needs to be \textit{functional to the actual realization} of PIC and benefit-sharing for indigenous and local communities. And, as previously argued,\textsuperscript{9} in applying Article 12(1), Parties will have to respect their relevant international human rights obligations.

The relevance of customary laws, protocols and procedures of indigenous and local communities in the implementation of the traditional knowledge-related provisions of the Protocol is an important development in international law. It has been considered an unprecedented recognition of legal pluralism in international treaty law.\textsuperscript{10} The study of the role of indigenous peoples’ and local communities’ customary laws in contributing to sustainability is still in its infancy, but there are indications that customary laws may inspire innovation in administering living resources and adapting to changing circumstances.\textsuperscript{11} The Protocol, therefore, opens the door for Parties individually and collectively (most likely in the course of the review of implementation by the Protocol’s governing body\textsuperscript{12} and possibly its compliance procedures and mechanisms)\textsuperscript{13} to explore the interactions of indigenous and local communities’ customary laws with international and national law on ABS, while ensuring a certain measure of inter-operability\textsuperscript{14} among Parties’ domestic ABS frameworks.\textsuperscript{15} That

\begin{itemize}
\item \textsuperscript{7} UNDRIP Article 19 and 32(2); ILO Convention No. 169, Article 6(2).
\item \textsuperscript{8} Nagoya Protocol Articles 5(2), 6(2) and 7.
\item \textsuperscript{9} See Introduction to this commentary, section 4 and this commentary on Article 5, sections 3–4, Article 6, section 4 and Article 7.
\item \textsuperscript{10} Bavikatte and Robinson, “Towards a People’s History of the Law,” op. cit., 45–46.
\item \textsuperscript{12} Nagoya Protocol Article 26(4)(a). See this commentary on Article 26, section 2.
\item \textsuperscript{13} See this commentary on Article 30; and Morgera, “Bilateralism at the Service,” op. cit., 760–763.
\item \textsuperscript{14} This concept is discussed in Young, “International Cooperation Perspective,” op. cit., 491–492.
\item \textsuperscript{15} The Nagoya Protocol may therefore provide a laboratory for the understanding of ‘global environmental law’ – a concept that is emerging from the promotion of environmental
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being said, principled and practical difficulties in understanding and providing due consideration for indigenous and local communities’ customary laws in a ‘transcultural context’ should not be underestimated.  

Article 12(1) is a general clause applying to the implementation of all Protocol provisions. It applies in particular to those provisions expressly related to traditional knowledge associated with genetic resources, namely on benefit-sharing, access, the multilateral benefit-sharing mechanism, transboundary cooperation, compliance with domestic ABS frameworks and MAT, awareness-raising and capacity, as well as the other provisions contained in Article 12 itself. It may also be argued, in light of the interrelationship between genetic resources and traditional knowledge, that Article 12(1) also applies to the Protocol provisions on genetic resources held by indigenous and local communities. It should be further noted that Article 12(1) does not exclude any provision of the Protocol from its applicability, so other Articles may be implemented in light of Article 12(1), when these turn out to be, on a case-by-case basis, relevant to traditional knowledge.

2.1 Community Protocols

The reference to ‘community protocols’ in Article 12(1) is also particularly noteworthy in facilitating the understanding and due consideration of the laws and procedures of indigenous and local communities. A community protocol is a written document developed by a community following a consultative process, to outline the core ecological, cultural and spiritual values and customary laws relating to the community’s traditional knowledge and resources, based on which the community provides clear terms and conditions to regulate access to and benefit-sharing from their knowledge and resources. It typically

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17 Nagoya Protocol Articles 5(5), 7, 10, 11(2), 16, 18, 21 and 22. See this commentary on Articles 10–11, 16, 18 and 21–22.
19 Nagoya Protocol Articles 5(2) and 6(2).
20 See, for example, this commentary on Article 18.
21 At the time of writing, existing literature is written by practitioners involved in the promotion of community protocols in the field and their recognition at the international level. See Kristina Swiderska et al., Biodiversity and Culture: Exploring Community
sets out the community’s customary rights and responsibilities for resource management and access, and the provisions in national and international law that recognize their rights and responsibilities to those resources.\textsuperscript{22} It may thus serve as a tool to promote recognition and application of customary laws and procedures concerning traditional knowledge and genetic resources through a bottom-up approach, by articulating them in a way that can be easily understood by national authorities and users. This may potentially make their recognition or integration in domestic law easier, as well as facilitate ABS transactions with potential users. At the same time, community protocols offer an articulation of the holistic approach of communities to the regulation and management of natural resources and the environment, which may challenge the sectoral approach to environmental regulation in statutory law.\textsuperscript{23}

The process of developing a community protocol is believed to have a value \textit{per se}: it may serve to bring the entire community together, as an opportunity to collectively map and evaluate customary laws, governance systems, traditional resource uses and community development plans.\textsuperscript{24} A holistic community

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\item From this perspective, community protocols can be considered an essential tool for the understanding and development of global environmental law (Morgera, “Bilateralism at the Service of Community Interests?,” op. cit., 762) and for facilitating the integrated implementation of different multilateral environmental agreements on the ground (Elisa Morgera, “No Need to Reinvent the Wheel for a Human Rights-Based Approach to Tackling Climate Change: The Contribution of International Biodiversity Law,” in \textit{Climate Change and the Law}, ed. Erkki Hollo, Kati Kulovesi and Michael Mehling (Springer, 2013), 350).
\item Jonas, Shrumm and Bavikatte, \textit{Biocultural Community Protocols and Conservation Pluralism}, op. cit., at 104, refer to ‘laws compartmentaliz[ing] the otherwise interdependent aspects of biocultural diversity by drawing legislative borders around them and addressing them as distinct segments.’
\item Bavikatte and Jonas, \textit{Bio-Cultural Community Protocols}, op. cit., 20.
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protocol usually involves a community’s reflection about the interconnectedness of the elements of their way of life, as well as an increased understanding within the community of the international and national legal ABS frameworks and of the extent to which they impact on their customary practices, values and norms.\textsuperscript{25} It can also lead to establishing internal community rules for the sustainable management of natural resources, equitable sharing of benefits and conflict resolution.\textsuperscript{26}

The inter-community agreement established among the six communities managing communally Peru’s Potato Park provides an illustration in that regard. The agreement aims to conserve the hundreds of potato varieties cultivated in the area and share equitably the financial benefits arising from a number of initiatives in the park. Following a three-year long participatory process, the agreement established new inter-community governance structures and a framework for equitably sharing the benefits from economic collectives in the park, including gastronomy and ecotourism initiatives, and the production and selling of medicinal plants, potatoes and crafts. The agreement is rooted in conservation and equity values enshrined in customary laws, and is regulated by community and inter-community authorities. It has minimized the risk of conflicts over resources and of elites unfairly benefiting from revenues. A percentage of the revenues is reinvested into a communal fund that is used to sustain and manage the park’s agro-ecosystem, and provide a safety net for the poorest people in the park communities. At the same time, the agreement has acted as a community protocol in the sense of the Nagoya Protocol, as it sets out the rules for access by outsiders to the park’s genetic resources and traditional knowledge and for equitable benefit-sharing by outsiders.\textsuperscript{27}

Overall, community protocols appear to have two advantages for indigenous and local communities.\textsuperscript{28} From an \textit{outward} perspective, they provide a specific framework for defining in a participatory manner the types of benefits indigenous and local communities may wish to secure, to support their culture and

\begin{itemize}
  \item \textsuperscript{25} Ibid.
  \item \textsuperscript{26} On questions related to intra-community equity and fairness in sharing benefits, see this commentary on Article 5, sections 3.1 and 4.
\end{itemize}
livelihoods, prior to being required for PIC and having to engage in the establishment of MAT. As such, the process leading to the development of a community protocol allows a community to prepare in advance for negotiations with outsiders of an ABS arrangement, rather than enter into such negotiations in an ad hoc manner, contributing thus to a more level-playing field among the parties. In addition, a community protocol can serve as a guide for outsiders (whether it is the State, a company or a research institution) to begin interacting with an indigenous or local community. From an inward perspective, the development of a community protocol may allow an indigenous or local community to identify any question related to the authority to provide PIC and the governance of future benefit-sharing, thus preventing internal conflicts. Where in-depth participatory processes are followed, such process can also strengthen communities’ organizational capacity, and collective identity and goals, and develop a sense of self-empowerment.

Compliance with the provisions of community protocols, however, remains voluntary, unless it is secured through national legislation or through contracts. In addition, development of community protocols would generally require capacity-building and legal assistance, so that community members can better understand the relevant international and national legal regimes, the interests involved and the consequences of their choices. The development of community protocols is in fact often supported by international and transnational networks of experts comprising State and non-State entities: community protocols have been developed before the conclusion of the negotiations of the Nagoya Protocol through the involvement of networks of NGOs, intergovernmental organizations, and bilateral donors, as well as the private sector.

In a broader perspective, community protocols attempt to bridge inter-State obligations established at the international level vis-à-vis traditional knowledge and genetic resources held by indigenous and local communities with specific communities’ needs, aspirations and livelihoods at the local level. Community protocols can therefore be seen as an instrument to link the local and the international legal levels, according to standards set out in customary, national and international law, with a view to mobilizing communities to

use international and national law to support the local manifestations of their right to self-determination.33

The importance of the development of community protocols for the implementation of traditional knowledge-related provisions of the Protocol is further highlighted elsewhere in the Protocol, which provides a best-effort obligation for Parties to ‘support, as appropriate,’ the development by indigenous and local communities of these protocols.34 Community protocols are also to be supported through capacity-building,35 awareness-raising measures,36 and international funding.37 It should be finally noted that further guidance for Parties’ consideration and support of community protocols may be developed in the context of other work carried out under CBD Article 8(j), such as the *sui generis* system of protection of traditional knowledge38 and customary sustainable use in protected areas.39

### 3 Obligation to Inform Potential Users

According to Article 12(2), Parties are under an unqualified obligation to establish mechanisms to inform potential users of traditional knowledge about their obligations towards indigenous and local communities, including through the ABS Clearinghouse.40 Basically, this provision implicitly recognizes that it is the responsibility of State Parties to inform potential users of the rights of indigenous and local communities under the Protocol and to create ways to support the respect of such rights by private operators. This is particularly relevant in light of the ‘right of indigenous and local communities to identify the rightful holders of their traditional knowledge associated with genetic resources..."
within their communities, and supports also the consideration of applicable customary laws, procedures and protocols. The rationale of Article 12(2) is to facilitate users’ compliance with domestic ABS requirements related to traditional knowledge. This provision is therefore complementary to Parties’ international responsibility vis-à-vis users’ violations of domestic ABS requirements related to traditional knowledge, which is spelt out elsewhere in the Protocol.

In implementing this obligation, Parties must proceed with the effective participation of the indigenous and local communities concerned. This language should be read in light of the principle of full and effective participation of indigenous peoples in decision making, which can be seen as an important aspect of indigenous peoples’ right to self-determination and is also considered a principle in the guidelines developed by CBD Parties by consensus, notably the Tkarihwaï:ri Code of Ethical Conduct. As for other provisions of the Protocol, relevant international human rights obligations and standards should guide the interpretation and implementation of this obligation.

4 Obligation to Support

Article 12(3) establishes a best-endavor obligation for Parties to support indigenous and local communities in the development of a series of tools.
aimed at ensuring fair and equitable ABS transactions concerning traditional knowledge. The tools include: community protocols,\(^{49}\) minimum requirements for MAT,\(^{50}\) and model contractual clauses.\(^{51}\) These are not only tools supporting transparent and equitable internal governance within communities in relation to ABS, but also their capacity to negotiate with outsiders/users.\(^{52}\) As to the latter, it has been observed that community protocols can be used as a basis for dialogue between communities and private companies.\(^{53}\) In that regard, support from national authorities to the development of community protocols may lead to ‘concrete tools [that] business needs to put ABS in practice.’\(^{54}\) On the other hand, it has been cautioned that minimum requirements for MAT and model contractual clauses are among the ‘most complex and controversial elements of ABS practice,’ therefore mutual learning should be encouraged and possibly international guidance should be developed on this matter by the Protocol’s governing body.\(^{55}\)

Implementation of Article 12(3) will be supported by indigenous and local communities’ own identification of their priority capacity-building needs.\(^{56}\) As a result, it remains the prerogative of indigenous and local communities to develop the tools required for their traditional knowledge-related ABS arrangements. Support to this end can be expected from the State, particularly in light of its own obligations vis-à-vis an indigenous or local community under the Protocol, on the basis of good-faith and reasonable efforts. The provision, however, also implicitly points – when read in light of relevant international human rights obligations and standards – to a certain responsibility of Parties in ensuring some guarantees for the substantive equity of MAT concerning traditional knowledge.\(^{57}\)

The best-endeavor obligation to support indigenous and local communities is qualified by the term ‘as appropriate.’ In this specific case, this qualifier may be understood as ‘upon request from the relevant communities’ or

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49 Nagoya Protocol Article 12(1) See section 2 above.
50 Nagoya Protocol Article 6(3)(g). See this commentary on Article 6, section 7.
51 See this commentary on Article 19.
52 We are grateful to Tomme Young for drawing our attention to this point. See also Munyi and Jonas, “Implementing the Nagoya Protocol,” op. cit., 222 and 234, who consider this provision as contributing to the legal empowerment of indigenous and local communities.
54 Ibid.
56 Nagoya Protocol Article 22(3) and (5)(j).
‘where these tools are not already in existence,’\textsuperscript{58} with a view to preventing States from exercising undue control over communities’ internal processes of governance in relation to \textsc{ABS}\textsuperscript{59} in exercising their discretion in selecting the means to implement this provision. Specific emphasis is placed, in the context of the obligation to support, on the participation of women in community procedures for the development of the tools listed in Article 12(3),\textsuperscript{60} while consideration should be given to communities’ customary laws and procedures, as well as human rights obligations.\textsuperscript{61}

Pragmatically, national authorities would be well advised to, first of all, determine whether community laws and protocols on traditional knowledge associated with genetic resources exist, and if so, support their respect. If these procedures do not exist, encourage and, where so required by these communities, support the development of community procedures in this regard. And only as a last resort and until such community procedures are in place, act on behalf of these communities in a facilitating role.\textsuperscript{62} It can be argued that development of tools provided for under Article 12(3) has the potential to relieve Parties (at least partially) from developing from scratch processes for obtaining community \textsc{PIC}, which would be a ‘formidable task.’\textsuperscript{63} This is particularly true when taking into account the diversity of circumstances in which traditional knowledge is held by indigenous and local communities, the right of these communities to identify their rightful holders of traditional knowledge

\begin{thebibliography}{9}
\bibitem{58} Singh Nijar “An Asian Developing Country’s View,” op. cit., 256.
\bibitem{59} Greiber et al., \textit{Explanatory Guide}, op. cit., 141, along similar lines, suggests that ‘as appropriate’ makes reference to the fact that ‘not all communities may need or desire such assistance.’
\bibitem{60} See also Nagoya Protocol 11th preambular recital and this commentary on Article 5, section 3, and Introduction to this commentary, section 4. See also Akwé: Kon Voluntary Guidelines, paragraph 54, which reads: ‘The vital role that women and youth play, in particular women and youth within indigenous and local communities, in the conservation and sustainable use of biological diversity and the need for the full and effective participation of women in policy-making and implementation for biological diversity conservation should be fully taken into consideration.’
\bibitem{61} Nagoya Protocol Article 12(1). On relevant international human rights law, see Introduction to this commentary, section 4.
\bibitem{62} These options have been identified and prioritized by Singh Nijar “An Asian Developing Country’s View,” op. cit., 257–8.
\bibitem{63} Ibíd., 257. This perception is confirmed by Cabrera Medaglia, “Implementation of the Nagoya Protocol,” op. cit., 360–361 and 364, where the author notes that even if certain Latin American countries have already legislated on \textsc{ABS} in relation to traditional knowledge, very few had developed detailed procedures for obtaining community \textsc{PIC} or model contractual clauses targeting traditional knowledge.
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and the unique circumstances in which traditional knowledge is held in different countries.64

5 Prohibition to Restrict Customary Use and Exchange

According to Article 12(4), Parties are subject to a qualified obligation (‘as far as possible’) not to 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. This provision therefore envisages that States avoid placing restrictions on traditional use and exchanges within communities within their territory and also located in other States, particularly as long as such traditional use and exchange contribute to the conservation and sustainable use of biodiversity. This provision confirms once again the holistic approach of the Protocol to the three objectives of the Convention, in light of the importance of traditional knowledge for biodiversity conservation and sustainable use, as well as for indigenous and local communities’ rich cultural heritage that is relevant for biodiversity conservation and sustainable use. The rationale is to recognize, due to the inseparable nature of genetic resources and traditional knowledge for indigenous and local communities, that traditional use and exchanges of genetic resources are essential for the preservation and continued evolution of traditional knowledge, and for its role in the preservation of communities’ cultural identity. Tensions however may arise between certain customary practices and conservation objectives, which Parties would need to resolve in the light of this holistic interpretation of the CBD objectives and international human rights norms.69

64 Nagoya Protocol 23rd–25th preambular recitals.
65 Nagoya Protocol Article 11(2). See this commentary on Article 11, section 4.
66 See this commentary on Articles 1, section 4; 8, section 2; 9, section 2, and 10, section 4.
68 Nagoya Protocol 22nd preambular recital.
69 Also from a human rights perspective, it can be argued that the right to own and use traditional resources implies an ‘obligation of stewardship toward the resource, for the benefit of future generations of the community and for the planet’: Wiessner, “The Cultural Rights of Indigenous Peoples,” op. cit., 240.
Article 12(4) thus represents an elaboration of the more general obligation under the CBD to ‘protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.’\(^{70}\) The provision can be compared with, and used to reinforce at the national level, farmers’ rights currently addressed under the International Treaty on Plant Genetic Resources for Food and Agriculture.\(^{71}\) When compared with the ITPGRFA provision, Article 12(4) of the Nagoya Protocol not only has a much wider scope (it applies to all genetic resources, encompassing – but not limited to – plant genetic resources for food and agriculture). It is also framed as a positive (albeit qualified) obligation for Parties, thereby providing an additional legal basis for national legislation on farmers’ rights.


\(^{71}\) ITPGRFA Article 9(3), whereby, using a formulation in the negative ‘Nothing in this Article [on farmers’ rights] shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.’ On the interactions between the Nagoya Protocol and the International Treaty provisions on farmers rights, see Chiarolla, Louafi and Schloen, “Analysis of the Relationship,” op. cit., 93–100 and 110. See also Munyi and Jonas, “Implementing the Nagoya Protocol,” op. cit., 222 and 234.