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.