



Summary Report of Nagoya Protocol Workshop Port Vila, Vanuatu Cultural Centre September 16-17 2015



Report compiled by the organizing committee

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Contents

Executive Summary.....	3
1. Discussion on Key Issues.....	4
2. Way Forward after this meeting.....	11
Appendix I: List of participants of ABS Nagoya Protocol National Workshop, September 16-17 2015	12
Appendix II: Workshop presentations included as separate PDF files	13

Executive Summary

This workshop was to discuss the current context for implementing the Nagoya Protocol in Vanuatu, and the obligations associated with it, following its signature and ratification by the Vanuatu government last year (2014). The workshop¹ was facilitated by Trinison Tari (Department of Environment) and Francis Hickey (Vanuatu Cultural Centre²), and two overseas specialists in access and benefit sharing (ABS), Daniel Robinson (UNSW) and Miranda Forsyth (ANU). The complete list of participants is given in Appendix I, and was a mixture of Department of Environment, VKS, and VIPO³ personnel and representatives from other relevant government departments involved in the sustainable use of Vanuatu's natural resources and associated traditional knowledge, including three USP law students and a USP lecturer in environmental law.

A key finding was that currently the procedures in place to monitor researchers and facilitate access and benefit sharing in Vanuatu is piecemeal and inadequate.

The meeting provided an opportunity for a general introduction and discussion of the issues raised by the Nagoya Protocol (NP), in particular access and benefit sharing (including Mutually Agreed Terms (MAT)), prior informed consent (PIC), research permit schemes, and how the NP encourages recognition of community/customary protocols. The USP students presented on the negotiation history of the NP, and the geopolitical dynamics that led to its adoption in its current form. There were also a number of presentations of case studies on access and benefit sharing agreements in operation in other countries around the world including one in PNG (between UPNG and University of Utah) that was highly relevant to Vanuatu.

It was also noted in the workshop that we must be mindful that "everything that belongs to the nakamal, belongs to the nakamal" and that in the minds of many ni-Vanuatu, you cannot separate biodiversity from traditional knowledge and culture. These statements speak to the inherent and holistic connections between land/sea, biodiversity and culture. It was also noted that over the past 100 plus years, there has been considerable migration of peoples and intermarriage, so defining membership of particular kinship groups is likely to be problematic. There was also a lot of discussion about the differences between 'ownership' and 'rights'.

Overall, it was clear that there are many critical ABS issues remaining to explore further and fine tune, and legislation to amend (particularly the Environmental Management and Conservation Act 2002 that deals directly with bioprospecting) and the workshop generated some useful tools, including key elements of PIC and MAT, to work with further.

¹ This workshop was kindly funded by UNSW, ANU and the ABS Initiative.

² Hereafter referred to as VKS (Vanuatu Kaljoral Senta), the Bislama translation.

³ VIPO is the Vanuatu Intellectual Property Office under the Department of Trade.

1. Discussion on Key Issues

A. Current legislative/ policy framework

There are numerous existing acts, draft acts and policies that impact upon ABS of genetic resources (GRs) and TK in Vanuatu. These include:

- The Environmental Management and Conservation Act (EMCA) 2002
- The MoU (currently with the State law Office) between Malvatumauri and VIPO to determine ownership of indigenous knowledge for the purposes of trademark and patent applications and copyright issues
- VKS national research and film policy/permits
- draft Oceans Policy, which covers some related issues regarding access and benefit sharing, especially for the deep sea mining permitting process
- draft National Scientific Research Council Bill
- Intellectual property legislation (including Copyright, Patent and Trademark laws and possible plant breeders rights legislation)
- Draft Traditional Knowledge Bill
- Draft MSG Treaty on the Protection of TK
- Bio-security legislation and procedures
- Laws relating to agriculture and their current revision
- Land legislation

There are also a number of relevant international treaties and other instruments, including the Convention on Biodiversity, the International Treaty on Plant Genetic Resources for Food and Agriculture, the United Nations Declaration on Indigenous People, and the United Nations Convention on the Law of the Sea, the Agreement on Trade Related Aspects of Intellectual Property.

It was agreed that although the EMCA currently contains provisions for bio-prospecting, these have not been fully implemented in practice and require some amendments to be consistent with the Nagoya Protocol, in particular with regard to including MAT and PIC elements.

B. Benefit sharing discussion

Some issues identified

The NP provides the legal framework that specifies any access to genetic resources and TK should be on the basis of benefit sharing that is agreed upon in the form of MAT and include PIC. There are a range of monetary and non-monetary benefits that can form part of the MAT. Overall best practice is to have a tiered process, whereby the MAT for the research is negotiated first, and then if there is a decision to file for a patent/develop a commercial product, a second series of MAT need to be negotiated (as agreed in the first 'research' MAT contract). It was thereby agreed by workshop participants that it is best to adopt a multi-tiered approach to MAT, having one set of MAT for 'basic' research, and another for development, and a separate set of MAT for when TK is involved (as opposed to when GRs are collected with no TK involved – e.g. soil or marine microbes collected during deep-sea mining (DSM)).

It was noted that a common problem in many ABS agreements around the world is unrealistic expectations of communities regarding the amount and timing of benefits (as development of a marketable product can sometimes take decades), and potential internal disputes amongst and between communities as a result of perceptions that some people benefit, whilst others are excluded. Considerable awareness to communities on these issues will need to be conducted to avoid these issues arising.

Some particular issues were identified as requiring further research:

- What happens when the biological resources are not found on TK holders land?
- What occurs when the resource (either genetic or TK) is found in many locations or islands? Or where it is found in many different countries?
- How does ABS work when accessing biological resources on leased land?
- How to avoid community disputes following contractual arrangements with outsiders?
- Should a dispute arise regarding the MAT, under which jurisdiction (Vanuatu or overseas) would it be adjudicated?
- Who should the various payments be made to, and how should they be distributed?

Some MATs for future consideration

- One-off payments for sampling; milestone payments; royalty payments
- Intellectual property provisions; joint ownership of patent/copyright; explicit recognition of TK contribution; possibility of co-inventor recognition
- Proponents to pay for translation of documents (e.g. PIC/MAT) to a language acceptable to the community members

- Duration of agreement and collection period clearly specified
- Amount of material collected specified
- Environmental protections specified during research/sampling period
- Social impact assessment (linked to environmental) and community consultations
- Duplication of research related field notes, reference collections and samples, digital data including photographs, videos and copies of publications and other research outputs to be deposited with appropriate body in-country; publications also deposited to Vanuatu National Library
- Build, or proponents provide funds toward building a facility to house reference collections
- Capacity building, scholarships and transfer of skills, editing support for co-publication
- Contribution to schools, community health clinics (depends on scale of project)
- Community to nominate a project, and then proponent funds it, rather than giving cash
- Trust fund managed by a committee with transparency and oversight; this can help to deal with issues where there is widely spread TK or GRs
- Restrictions about whether or not GRs or TK are allowed to be shared with third parties
- If TK is involved, then there will be another level of restrictions about what can be done with GRs, and who should share in benefits
- For both phases, timeline is important, so that MAT conditions remain in effect (e.g., receipt of publications; third party conditions, if R & D sold to a company but MATs are transferable, etc.)
- IP provisions, whether this can be licensed to other companies and if it is, then must comply with agreements of MAT
- Supply chain considerations so that communities receive longterm benefits
- Cannot license to a not-for-profit organization, without consent (again, for community benefits)
- Royalty payments, can be split to government, council of chiefs, community members, clans, family's, etc.; can specify the split in the MAT contract (consideration of trust fund to avoid problems of distribution when there are many stakeholders; parties may then apply to access funds)

The most applicable model to Vanuatu that was identified was the agreement between UPNG and University of Utah (ICBG agreement), more information about which is available here: <http://pharmacy.utah.edu/ICBG/resources.html> (last accessed Oct. 19 2015)

Prior informed consent discussion

Prior informed consent can mean a lot of different things, and may involve a number of different levels. Depending on the scope of the initiative, this may include not only the national or individual informant level in communities, but the provincial level, Malvatumauri, Island Council or Village Council of Chiefs as well.

It was also agreed that the person/group to give consent depends upon the nature of the resource involved (for example, whether it is common, or only held by a particular family, clan or 'tribe') and the type of research envisaged. The chiefs at a local level are largely responsible for guiding outside users to the correct people with rights to 'ownership'. Whatever strategy is utilized, at a community level it is important that there is transparency, and this may be facilitated by community discussions about the issue, at which time everyone can participate. The actual process could be developed in a community/customary protocol. One issue will be when the resources/knowledge is found in a number of different communities. Another is where the TK is held by a different person/group to the holders of customary tenure (as may occur for medicinal plants and associated TK).

At the state/national level there needs to be a more coherent/united system than the one that currently exists. One option is a multi-sectoral council like the one that exists in the Cook Islands that could serve as a focal point (see flow chart in Appendix II). This council should do an initial screening of requests to make sure that it is from a bona fide institution/individual with a good reputation. There is also scope for better integration with the provincial government and the Malvatumauri's chiefly council structures.

It is important to make sure that people at the community level have enough information to make a decision, and this may mean that the researcher needs to fund (but not necessarily conduct) further awareness of the various issues. It also needs to be a staged process, a researcher cannot come and get consent and then go to do the research straight away. MAT and PIC must be developed and agreed upon prior to research commencing. Given the importance of the ongoing relationship between the researcher and the community, the researcher should be involved in the PIC process in a meaningful way, but not in a way that creates a power imbalance.

A number of lessons can be learnt from the past and recent experiences with exploitation of customary land in Vanuatu. The new process of the Lands Department under the Customary Lands Act (2013 and amendments of 2014) requires PIC of every land rights holders groups prior to leasing land, and they agree to representatives to negotiate for them, which may be a model to be used for ABS. But as this could prove to be costly, it may not always be practical.

It has been suggested that in many cases, knowledge about land (and customary medicines) is often held more by women, and is therefore important that any process provides a mechanism for women to have a voice. And as youth will inherit the land, resources and TK, their voice is also important.

The VKS also expressed concerns that if intangible property (e.g. TK concerning biological resources) regulations follows the formerly used process of land registration, whereby only one individual may consent to lease land, this may result in a race by individuals to the VIPO office to register TK as exclusively theirs. This could thereby lead to disharmony amongst families, clans and communities if this is done without proper consultation, as has happened recently with land leases.

Community/Customary protocols discussion

Participants agreed that customary laws have historically been an important way of regulating access to biological resources and associated traditional knowledge. In fact, it was noted that custom is the original system in Vanuatu that has functioned to achieve equitable solutions to ABS within and amongst communities. These could be supported today by a process of mobilizing, strengthening and adapting them to ensure ABS follows traditional norms and an equitable distribution of benefits. It will be important to respect the oral traditions of Vanuatu's many different cultural-linguistic groups that have safeguarded TK for generations, and allow the community to internally debate and decide about any proposals for access to GR and/or TK, based on their own customary protocols. They could then specify which customary protocols apply to the MAT, and/or PIC, or alternatively reject the proposal if they are not in agreement. The customary protocols which apply may then be integrated into the PIC and MAT.

Research permit scheme discussion

This topic came up numerous times, and it was agreed that many attempts had been made in the past to develop a single national focal point comprised of the various stakeholders for overall scientific research screening and regulation, but that internal politics had undermined these initiatives. The participants discussed the development over many years of the current draft National Scientific Research Bill, but noted that as it had been politicized, it had never been properly enacted. It still seems to be the most sensible and equitable approach, as it will provide more comprehensive screening of applicants, will make regulation and monitoring much easier for government while also being easier for outsiders to deal with one body. It was noted that the Cook Islands has a similar process which works well, whereby numerous representatives from relevant departments receive permit applications and meet (or discuss via email) to approve or reject an application in a timely manner.

ABS and biodiversity conservation

The participants learned how the NP is meant to promote enhanced management of biodiversity as communities/clans have an additional incentive to manage well their biodiversity, especially endemic species (as they have unique, and potentially valuable genetic qualities). It was pointed out that communities that have registered Protected Areas under the EMCA already have some of the institutional arrangements in place enabling them to more easily deal with outside groups accessing their biological/genetic resources, as they have written management plans, and have sorted out land/marine tenure to a large extent.

It was also pointed out that many smaller and/or remote communities or those that have maintained social cohesion continue to practice their traditional taboos and other traditional resource management strategies to regulate access to resources, as they have done for centuries, and these too, are acknowledged by the CBD as effective ways to manage resources. It was noted that if traditional resource management by communities and their leaders is not supported, Vanuatu will lose this important part of its heritage and level of self-reliance. It will also shift the burden, and cost, from communities to government to centrally manage natural resources throughout the archipelago. The capacity of government to regulate village affairs, including access to natural resources under their tenure is extremely limited, so it makes little sense to shift this traditional right and responsibility to central government.

Overall amongst participants, there was also concern that there is too much ongoing focus on economic development based on resource extraction from the environment, but other longer term factors also need to be considered to ensure development is environmentally and socio-culturally sustainable. For example, it was cited that the trees and vines used for the nangol (Land Diving) are becoming problematic because of increased nangol events associated with tourism; for the bamboo band in TORBA, the bamboo is also under increased pressure. Exports of black palm carvings has also been recently commercialized, putting pressure on this resource already covered under CITES. Dark bush that supports our biodiversity is increasingly cleared for planting commercial crops, and potential impacts from climate change that may exacerbate increased environmental pressure need also be considered.

One participant noted that everything we depend on for our survival and well-being is connected to our environment; if we lose our environment, we also threaten our local livelihoods, as well as our self-reliance, cultural heritage and identity. It was also noted that most of our national policy makers reside in Vila, and therefore often fall out-of-touch with the realities of life in rural areas.

International compliance of ABS regulations by citizens of Vanuatu under NP

Vanuatu will also require international compliance measures, for example, amended in the bioprospecting regulations that specifies that citizens/residents of Vanuatu must comply with the ABS regulations of other countries when they go abroad, and that they can be punished in Vanuatu if they breach the laws of another NP Party country. This will require appropriate checkpoints for monitoring and is an obligation under the NP meant to ensure there are no 'safe havens' after committing biopiracy. The checkpoint is sometimes a patent office, or the research ethics/grants department of USP, or quarantine/customs. This includes checking GRs going out from Vanuatu, and the activities of researchers to ensure they are complying with the regulations, and if they are filing patents, and if so, it is in compliance with a MAT.

2. Way Forward after this meeting

- 1) Need to meet again and refine the draft MAT, PICs and draft structure of approval process to prepare for piloting these.
- 2) Identify all relevant ABS-NP related laws and policies. Miranda Forsyth (ANU) and Margaretha Wewerinke (USP) to prepare a draft on this.
- 3) Review and harmonization with the NP of our existing policies and legislation, especially the EMCA bioprospecting legislation. Should also include formal recognition of customary law in the EMCA, as customary laws are in effect, according to the Constitution, but this also needs to appear in legislation.
- 4) Formalize the Biodiversity Advisory Council (under the EMCA) to fulfill this commitment.
- 5) Create a Competent National Authority for ABS-NP along with a National Focal Point (which may but do not have to be the same entity) and continue to build capacity to implement NP so Vanuatu can comply with obligations associated with the NP.
- 6) Continue efforts to create the National Scientific Research Council as an inter-disciplinary body to regulate research in general for Vanuatu.
- 7) Website creation for Environment including ABS-NP info (this has recently been initiated).
- 8) SPREP Project (now being formulated) could be used to fund Provincial and Community consultations on ABS-NP so that people in rural areas have a clearer understanding of the issues.
- 9) Recognize the value of customary and community protocols to regulate ABS. Noted that we will need to further strengthen eroding customary protocols in areas where this is required, so that they will have the capacity to effectively deal with ABS at the customary/community level.
- 10) Explore various options of forms of benefit-sharing such as in-kind contributions, build schools or aid posts, promote scholarships, trust funds, training, etc.
- 11) Further National Consultations to build on preliminary steps at this workshop. The Malvatumauri need be engaged immediately after this meeting and seek their counsel on matters pertaining to ABS-NP.
- 12) Codes of ethical and procedural conduct and different categories for different types of research (commercial, academic, etc.) need to be developed. There is a question about whether research protocols should also cover ni-Vanuatu, or whether ni-Vanuatu should be exempt to research permit requirements (and from PIC and MAT requirements) in regard to their own cultural area?
- 13) Timing targets for next steps need to be established.

Appendix I: List of participants of ABS Nagoya Protocol National Workshop, September 16-17 2015

Name	Institution	Email
Rutha Timothy	VCCI	timothy.ruth5253@gmail.com
John Huri	Van IPO	jshuri@vanuatu.gov.vu
Merilyn temakon	Van IPO	mleona@vanuatu.gov.vu
Clarence Marae	Van IPO	cmarae@vanuatu.gov.vu
Christine Kapalu	Department of Industry	ckapalu@vanuatu.gov.vu
Sam Railau	Van IPO	srailau@vanuatu.gov.vu
Mark Kalotap	Dept of Environment	mkalotap@environment.gov.vu
Vatu Molisa	Dept of Environment	molisav@vanuatu.gov.vu
Joe Lomae	USP	valuit17@hotmail.com
Meuton Laiden	USP	meutonlaiden@gmail.com
George Toaki	USP	s11080860@student.usp.ac.fj
George Kalkot	VKS	gkalkot@vanuatu.gov.vu
Trinison Tari	Dept of Environment	ttari@vanuatu.gov.vu
Francois Kavierere	VCCI	fkavierere@gmail.com
Isso Nihmei	GIZ	Isso.nihmei@giz.de
Thomas Nagof	VKS	nagof.thomas@gmail.com
Daniel Robinson	UNSW	d.robinson@unsw.edu.au
Amiynio David	VKS	phosdaros@gmail.com
Russell Nari	Lands Department	rnari@vanuatu.gov.vu
Francis Hickey	VKS	francishi@vanuatu.com.vu
Miranda Forsyth	ANU	miranda.forsyth@anu.edu.au
Margarethe Wewerinke	USP	margaretha.wewerinke@vanuatu.usp.ac.fj

Appendix II: Workshop presentations included as separate PDF files

Introduction to the Nagoya protocol

Dr Miranda Forsyth

Nagoya Protocol and ABS Case Studies

Dr Daniel Robinson

Biocultural protocols, customary rights and codes of conduct

Dr Miranda Forsyth

MUTUALLY AGREED TERMS: CONTRACTS FROM THE REGION

Dr Daniel Robinson

ABS Flow Chart - COOK ISLANDS

Dr Daniel Robinson