

THE **ABS**
CAPACITY
DEVELOPMENT
INITIATIVE

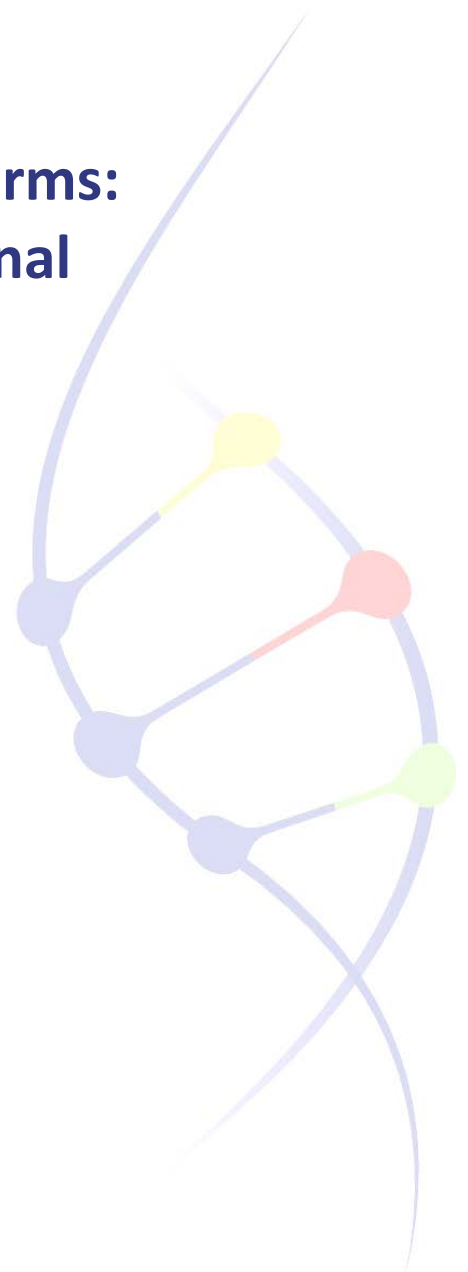


L'INITIATIVE DE
RENFORCEMENT
DES CAPACITES
POUR L'**APA**

Training on Mutually Agreed Terms: Contracts for Making ABS Functional

5-8 August 2014, Nadi, Fiji

REPORT



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Background

With the adoption of the Nagoya Protocol, many countries are in the process of developing new or are revising their existing ABS regulatory frameworks for its implementation.

In light of the central role of Mutually Agreed Terms (MAT) in any functioning ABS system, understanding key elements of ABS contracts and contract law is crucial for the conclusion of fair and equitable access and benefit-sharing arrangements and long-term trustful relationships between providers and users of genetic resources and associated traditional knowledge.

However, practice reveals that negotiating partners are often not equally empowered to negotiate at eye level. The development of an understanding of key elements for inclusion in ABS contracts, as well as negotiation skills has been mentioned at many occasions as one of the key capacity building needs in the context of ABS.

Against this background, the ABS Capacity Development Initiative developed a training model on how to elaborate contracts on ABS which was conducted for the first time in cooperation with the Secretariat of the Pacific Regional Environment Programme (SPREP) for participants from the Pacific region.

Objectives

This training aims at providing a more in-depth understanding of key elements of ABS contracts with respect to content, as well as negotiation process. In more detail, the objectives of the training are to:

- Gain an understanding of the overall role of mutually agreed terms in the context of ABS
- Identify and understand the various actors involved in ABS agreements and their differing interests and practices
- Learn how to find and understand the interest of your counterpart in ABS negotiations
- Comprehend the building blocks of ABS contracts, including object and purpose of the contract, third-party transfer and change of intent, benefit-sharing clauses, intellectual property rights (IPRs), compliance and enforcement
- Develop negotiation skills to conclude optimal and mutually beneficial ABS agreements
- To provide a platform for dialogue where national focal points and other representatives of relevant institutions potentially involved in ABS contracts negotiations can discuss and share concrete and practical experiences with ABS contracts and learn from each other

Participants

Representatives of the Cook Islands, Federated States of Micronesia (FSM), Fiji, Kiribati, Marshall Islands, Nauru, Papua-New Guinea (PNG), Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, Wallis and Futuna attended the training. Just two Pacific Island countries (PICs) were missing: Niue and Palau. Relevant stakeholders for the Pacific Region as SPC, USP, IUCN and UNDP also participated.

The training was held by two lawyers working on behalf of the ABS Initiative: Morten Walløe Tvedt, of the Fridtjof Nansen Institute, and Dr Kabir Sanjay Bavikatte from the United Nations University, Institute for Advanced Study of Sustainability.



Outcomes

After the workshop, participants came away with a sound understanding of:

- Key elements of ABS agreements
- Relevant aspects of contract law
- Negotiation skills required to conclude successful ABS agreements

Participants were actively involved in the discussions and group work. The workshop comprised presentations, films and group activities, including a wide variety of practical exercises based on real life and fictional cases.

Materials were circulated to the participants before the training as required reading.



Process

DAY I: TUESDAY, 5 AUGUST 2014

Session 1: Opening and welcome remarks by SPREP and introduction of trainers and participants

Outcome of the introduction:

ABS can work out differently depending on the situation. There is the need to apply the principles of ABS negotiations to the specific context of the Pacific region to suite the local situation. For this reason it is important to understand the governance structure in the Pacific Island Countries (PICs) as well as the basics of the regional contractual law and context where the ABS regime should apply. The specific financial and administrative situation of the countries has also to be considered while speaking of ABS: the ABS legislative system and the contractual process should be kept as simple as possible for countries with low financial and human resources.

The participants were asked to indicate their level of involvement in ABS, the grade of development of the ABS regime in their countries, the challenges for the region and their expectations from the training.

Major outcomes from this discussion:

- To date Fiji, Federated States of Micronesia, Samoa and Vanuatu are Parties to the Nagoya Protocol, with more PICs developing ABS legislation and policies in order to ratify the Protocol within the next year (e.g. draft legislation on the table in PNG and Cook Islands).
- Most of the countries do not have ABS legislation in force. In some cases, as Solomon Islands and Vanuatu, there are ABS provisions in place but these are included in other instruments (as Conservation Laws) and not operational.
- Most of the country representatives work in the National Ministries or Departments of Environment and Natural resources.
- In the PICs, ministries or departments are often very broad in their competencies and deal with different issues apart from the conservation of natural resources (e.g. economic development, commerce or climate change).
- Some of the country representatives have attended previous ABS trainings while other participants have no knowledge on ABS.
- In most of the countries there is no possibility to have an officer that deals uniquely with ABS. In many cases the focal point for all the other biodiversity MEAs (CBD, Cartagena Protocol, Ramsar, CMS, CITES) is also the focal point for ABS.
- In many countries, ABS work is shared among different ministries or departments. This implies that offices need to cooperate among each other as well as coordinate between departments that are providers of genetic resources.
- Traditional knowledge (TK) constitutes an important issue for the Pacific Islanders and has been also involved in a few ABS cases in the Pacific. Even though two different model laws for biological traditional knowledge and cultural traditional knowledge have been prepared for the region, the definition of traditional knowledge and its protection in practice represents still a challenge for PICs (e.g. define the owners of TK and the benefits arising from its utilization).
- The countries and stakeholders have expressed the need to learn more about ABS through interaction with other countries and by sharing experiences and good practices among the Pacific.



- Project documents are getting prepared for three GEF Projects on ABS, two national GEF projects in Fiji and Cook Islands and one regional GEF Project for Pacific Island countries.
- Regional institutions like the University of South Pacific are interested in the ABS field and encourage member countries to put in place a clear ABS mechanism that allows researchers and bio-prospectors to have access to genetic resources. Potential users would need to be made aware of steps that they should follow in order to get a prior informed consent (PIC).
- The Secretariat of the Pacific Community (SPC) through its Land and Resources division works on plant genetic resources for food and agriculture. Its objective is to facilitate the sharing of seeds throughout the Pacific region in the context of the Nagoya Protocol ABS regime and the Multilateral System under the International Treaty on Plant Genetic Resources for Food and Agriculture (IRPGRFA).

Session 2: Introduction to ABS in the Pacific

Major outcomes from this session:

- The ABS regime is still under development in the region. There are specific issues related to ABS that are particularly relevant for the Pacific. Among these are: marine bioprospecting, traditional knowledge and the legal regime for contracts.
- Two ABS contracts stipulated in the Pacific region were taken as case studies to showcase different issues that can arise from ABS and as an example of challenges for provider countries during the process to regulate access to genetic resources in their territories:
 - a) **ABS Agreement between the Samoan Government and the NTBG** (Hawaii based Breadfruit Institute of the National Tropical Botanical Gardens).
 - b) **Falealupo Covenant**, between the Falealupo Village of Savaii (Samoa) and Mr. Paul Alan Cox (1989).

The abovementioned examples raised important issues related to the elaboration of contracts in the Pacific region, among these: i) the definition of the parties that have capacity to contract (chiefs of the villages, the assembly of the villages etc...); ii) the definition of the subjects that have rights to benefit from the utilization of the concerned resources (the country, the village, the families, the single persons); iii) who are the subjects within a country with the right to allow the access to and the utilization of genetic resources.

Session 3: General context for ABS contracts: CBD, Nagoya Protocol and Beyond

Taking into account the ABS principles and obligations established by the CBD and further developed in the Nagoya Protocol, this session set the scene for the legal and political background against which agreements between users and providers (ABS contracts) are being negotiated. Besides providing a brief introduction to the basics of ABS the session also introduced the role and importance of contracts in the implementation of ABS.

Major outcomes from this session:

- Importance of genetic resource and the importance to manage them in a fair, equitable and sustainable way (example of the cases of Teff (Ethiopia), Hoodia Plant (South Africa), and Argan tree (Morocco)).
- Double benefit can arise from an ABS management regime: the access to genetic resources for the users and the benefits for the providers arising from providing the resource for utilization.
- The Convention on Biological Diversity (CBD) and the Nagoya Protocol (NP) are instruments to enhance legal certainty on the use of biological diversity and its associated traditional knowledge. Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT) procedures and



the check points are instruments under the NP to regulate the cross border movement of ABS genetic resources.

- Official check points are needed also in the countries where resource are utilized, as these have the role to ensure that MAT and PIC are done, and that the law of the provider country is respected (art. 15 NP).

Discussion among participants on “The point of ABS”:

- ABS creates a new form of property that needs to be recognized by the countries.
- ABS is strongly related to other objectives of the CBD. The CBD wants to ensure sustainable use and conservation of biological resources. In order to do this, fair and equitable sharing of benefits arising from the utilization of these resources is needed.
- ABS is an incentive for providers to conserve and use their natural resources in a sustainable manner. ABS is a way to generate an income from conservation (incentive to conservation), it constitutes an innovative financial mechanism for the conservation and the sustainable use of natural resources.
- However, in order to give an incentive to people to protect something (e.g. land) you have to create the right to own it. A new form of property has been created by ABS that has no precedent in history of humankind: genetic resources. The objective of the NP is to create the idea of “property” or “rights” on genetic resources as a base for the creation of a market of genetic resources.
- Under the NP, the user countries are to ensure that users who take genetic resources into their countries comply with the laws of the provider country.

Session 4: Types of users, types of uses and types of resources

This session began exploring the variety of actors involved in ABS agreements and their different approaches to ABS in practice. Issues that were examined included: the demand for genetic resources (GR), the market, the types of benefits shared, the use of traditional knowledge, the need for one-time access vs. repeated access to the resource, and how contracts can pave the way to increased valorisation of GR and TK.

The situation in GR Policy and Law.

- There are three levels of laws that regulate the movement of biological material from the provider country to the user country: a) international law (principle of sovereignty rights on genetic resources), b) domestic law (regulates access to the genetic resources); and c) indigenous/customary law systems.
- Normally, if the ABS contract is not respected by the user, the principle of sovereignty and sovereignty rights on natural resources would impede the cross-border enforcement of laws, policies, etc... In this context, the CBD/NP creates the regime to enforce the ABS national law of the provider country in the user country.
- The definition of sovereignty rights on genetic resources involves that the users have to respect the legislation of provider countries. The user countries should guarantee under their national law that all users that bring and utilize genetic resources respect the ABS national legislation of the provider country.
- To make the system work it is necessary that the countries adopt adequate national ABS provisions.



- Unfortunately, the NP has not the system in place to guarantee compliance at an international level. However, it is possible to use contracts in a way that allows the provider countries to bridge this gap.

Actors, approaches, characteristics of the demand for genetic resources

- Different types of actors can be involved in ABS agreements. Each of these actors may approach the provider country asking for genetic resources for many different purposes.
- It is important to identify with which actor the country is dealing before finalizing an ABS agreement. The reasons for the need to access a genetic resources can be really different from user to user.
- The intention is difficult to define.

Main outcomes from this session and some challenges for ABS contracts:

- Basic learning: know users and purpose of use, seek to get institutional structure, grasp the long term (building scenarios for what could happen best/worst case), look for alternative sources.
- The NP has no standardized contracts. At a national level it is possible to create multiple standardized contracts to apply to different situations. However, in every specific situation these models need to be adapted to the specific kind of user and purpose of use. It is important to be aware of and include in ABS policies all issues that can arise in the user-provider relationship and include them in the policies.

Session 5: Mutual Understanding of the parties to a contract – who are you negotiating with?

In this session, participants learned how to find and understand the interest of their counterpart in ABS negotiations – by better understanding the other’s perspective. What do you need to find out about the party you are negotiating with? Who is the company that is accessing? Who has discretion/authority to act on its behalf? Is this the company which will sell the products on the market? If so, which market? If not, which company will create the benefits that you target to get a share of?

Short practical exercise:

If you know of any company seeking access to GR and TK in your country, search the internet and research what you need to find out about the company. If there is no such company, identify a company you would want to enter into an ABS agreement with and undertake similar research. Prepare a short briefing on information about the company and present it to your colleagues.

Task: Search the internet and combine with your knowledge of the company (20min) and do a presentation (5 mins).

Main outcomes of the session:

- At the moment, cases of bio-piracy are raised to the public attention by NGOs. However, under the NP it is hoped that in the future, governments (committed under the NP) are handling these situations by denouncing cases of bio-piracy.
- Utilization of genetic resources is defined in art. 2(c) of the NP. This definition is general, thus the term “utilization” needs to be defined both in the national legislation of the provider country and the contract to capture the correct meaning in the specific situation.

Main challenges discussed during this session:

- In most cases it is difficult to define who are the users (e.g. Hoodia case: Afriflex, Nestlé or farmers) and who are the owners of the genetic resources. In most situations the resources are used at different levels and by different subjects, which makes it difficult to identify who is



the one that is guilty of misappropriation of the resource and who has to share the benefit arising from its utilization.

DAY II: WEDNESDAY, 6 AUGUST 2014

Session 6: Doubts, comments, views and questions related to the previous day session

This session had the objective to facilitate the discussion among participants about relevant aspects of ABS. Many elements that arose in the discussion were addressed during the following sessions.

Discussion among participants. Main questions, comments, doubts:

- 1) How can ABS fit into the Strategic Plan for Biodiversity?
- 2) Marine genetic resources: How much ABS covers these types of resources.
- 3) High seas genetic resources (not regulated in the NP): how to regulate this?
- 4) What is the traditional knowledge that is associated with genetic resources?
- 5) At what point does a resource become a genetic resource?
- 6) Retroactive aspect of the contract: how to deal with a resource that has already been taken?
- 7) Who has the right to claim the theft of genetic material? The government or the community?
- 8) What kind of activities is the provider country allowed to do with its material?
- 9) Legal personality of the parties of the agreement: who is counterpart? Could a single professor of a university bind all the university?
- 10) What happens if the company changes its name and transfer to another situation?
- 11) How can we take action as a region/ at a regional level?

Session 7: The object and purpose of the contract – subject matter of the contract

Main outcomes:

- Understand: what are you transferring, for what purpose, for what kind of utilization and what are the consequences of going beyond the legal transferred actions; links and gaps between the object of an ABS contract and Intellectual Property Rights (IPRs); the distant link between the GR accessed and the product sold in a market; issues of exclusivity; challenges and solutions.
1. **Legal personality of users:** are you negotiating with the right person? Is it the person that can bind the company to a contract?
 - It is important to know a little bit more of the company – for example its branches and if the contract binds all the corporate structure or just a branch. In the case of research institutions the main issues are: is the professor/person contracting allowed to represent the institution? What is the purpose of the institutions research? Cases have been presented by the participants from PNG, Fiji, USP and RMI on this issue.
 2. **Legal personality of providers:** who is the provider with the legal personality to enter into an ABS contract? Who gives consent? Who shares benefits?
 - This is a really important issue for the Pacific region, where villages and communities have an important role in society, and where ownership of resources and knowledge often belongs to the community (examples of organization among villages were presented by both Melanesian and Polynesian countries).
 - The participants were asked to consider this and to agree on national level how to regulate these issues with the communities.



3. **Object of the contract** (what is your contract about?):

Specificity: The contract should include, at a high level of specificity, the object of the contract (genetic resource), the action that the users are allowed to do (positively defined) and are not allowed to do (negatively defined), as well as the purpose of these activities.

Define the user: Considering the existence of a big variety of actors, it is important to define specifically the user on whom the obligations under the contract will arise.

Challenges for the countries that were identified:

- Creation of clauses to encourage the users to respect the contract and especially to share the benefits arising from the utilization of the resources.
- Reducing uncertainties related to the time between the access phase and sharing of benefits phase. The contract is a good instrument to minimize these uncertainties.
- Identifying which countries can claim the original ownership of the genetic resources.
- Redrafting objects of an agreement in such a way that all aspects that could arise are included and regulated.

Exercises:

- Redraft the object of an agreement and other relevant provisions. The contract of the Teff case was used.
- Falealupo Covenant: participants were asked to analyse positive and negative aspects of the contract.

Session 8: Third-party transfer and change of intent

This session dealt with the complexity of the user side (complex value chains and the role of middlemen/intermediaries); Commercial and academic users: challenges and opportunities; Prospects for following the GR onto becoming a product; A two step-model? Scoping phase and actualisation phase: Bhutanese prospects (potential) and Australian absence (obstacles).

Main outcomes:

- **Bio-prospecting:** this activity entails complexity from the user side (complex value chains and different roles (e.g. intermediaries).
- A third party could enter into relationship between provider and user, which could change the intent of accessing a resource. This element should be considered in the contract.
- While defining an agreement on bio-prospecting it is important to understand the whole process that is involved from the beginning (taking the genetic resource) until the end (sharing of benefits). A tool is required to track the genetic resource as it leaves the country (also in a long time framework) before it becomes a product and produces benefits.
- **Two step process:** Creation of different ABS agreements for different phases. It is possible to separate access (by creating a scoping agreement) and utilization of the genetic resources (by creating a commercialization phase agreement). E.g. Bhutan: scoping phase and actualization phase.
- In order to get protection from the risk of misappropriation, a trust bank deposit is a good instrument (guarantee).
- In order to avoid that the user goes to another country to collect genetic resources (because it has better ABS provisions), it could be useful to insert clauses that bind the user to collect from the country for a long term.



DAY III: THURSDAY, 7 AUGUST 2014

Session 9: Introduction to the day and review of progress of work

Discussion among participants - Questions, comments, doubts related to the previous day's sessions:

- 1) What is a genetic resource?
- 2) Doubts on third party transfer: How to guarantee enforcement?
- 3) Which are the benefits that can arise from the utilization? Monetary and non-monetary.
- 4) Prior informed consent – Relationship between the government and the communities.
- 5) Which are the country obligations arising by ratifying the Nagoya Protocol?
- 6) Which are the obligations of the non-parties on ABS?
- 7) What is Traditional Knowledge?
- 8) How useful would it be to create model or standardize agreements?
- 9) What kind of in-country coordination is needed?
- 10) How to manage traditional knowledge or genetic resources if these are owned by several countries?

Session 10: “Benefit sharing clauses”

Addressing possible benefit sharing clauses, this session dealt with the following issues: Non-monetary and monetary benefits; Example of Griffith University in terms of impacts of benefits on national development; How to make benefit-sharing clauses work? What types of benefits are most adapted to a particular situation? At what point in time should they be shared? The links to IPR: How can IPRs contribute to the sharing of benefits? How to bridge the gap between access to a GR and the development of a product based on this resource?

Main outcomes:

- Article 5 of the NP (Fair and equitable benefit-sharing) and its Annex (Monetary and non-monetary benefits) provide and explain a list of monetary and non-monetary benefits.
- NP emerges that the protocol language is not specific enough because it doesn't clearly specify the time frame when the sharing of benefits should start. It should be considered to include as many details as possible in the contract while defining a benefit sharing instrument. Clear and defined trigger points are needed.
- Benefits should be identified that have a big value for the provider country (and its communities) and not a big cost for the user.

Focus on Traditional Knowledge. Main outcomes:

- It is important to think about possible solutions for defining the property of TK and intellectual property rights, especially in the Pacific region where customary law and common property of goods is still common.
- The example of the breadfruit mentioned on the first day was used to identify the following issues for the Pacific region: Who are the owners? Who can get the benefit?
- It is important to take into consideration that a contract does not protect the provider when a product produced with the help of TK has been patented and the company declares bankruptcy. It is not possible to get a patent on traditional knowledge as TK is considered a common good.



Session 11: Confidentiality and exclusivity

This session addressed the following topics: The needs of businesses; Confidentiality and follow-up mechanisms; Building trust or substituting trust with money/ guarantees; Exclusivity on the use of GR and TK: Incentive to invest or invent around/ a race to the product.

Main outcomes:

- Confidentiality is an important part of the process of drafting a contract. Confidentiality can be related to several issues: existence of contract, terms of contract, the biological material, the research or the product.
- Confidentiality is part of the negotiation. It is not obligatory for the provider but can be an aspect to negotiate between provider and user.
- Exclusivity: time frame of exclusive right to species or accession should be discussed.

Session 12: Compliance and enforcement

In this session, participants looked at different solutions for compliance and challenges related to enforcement. The following instruments can support compliance: Reporting requirements; Choice of law; Dispute settlement provisions; Choice of courts or alternative dispute settlement mechanisms (mediation, arbitration). Furthermore, challenges related to the enforcement of foreign judgments or arbitral awards were addressed.

Main outcomes:

- One of the major problems is to enforce contracts negotiated under national law once the GR have been transferred to another country.
- Contracts should be written in a way that avoids conflicts between the parties.
- It is important for the countries to have a basic legislation on ABS in place. If not, the instrument to guarantee compliance under the NP cannot be effective.

Main issues discussed:

- **Obligations of non-parties to the CBD and NP:**
 - Non-parties to the CBD (e.g. USA) have obligations under the MAT but not under the CBD.
 - If a non-party to the NP is party to the CBD, it is bounded by the CBD provisions on ABS (3rd objective CBD). As a consequence it has to guarantee a fair and equitable sharing of the benefits arising out of the utilization of genetic resources.
- **Clearing house mechanism (CHM):** this instrument has the role to promote enforcement and compliance of ABS contracts by the user countries. The CHM is recording all the information on and constitutes an instrument to prevent non-compliance from user or provider.

DAY IV: FRIDAY, 8 AUGUST 2014

Session 13: Introduction to the day and review of progress of work

Questions and answers about the day 3. Main issues discussed were related to traditional knowledge.

One of the main challenges for the region results to be the definition of the concepts of TK and its consequences in practice. The major doubts of the participants were related to:



- How to protect TK, considered as part of the identity of a community and as an expression of culture?
- What needs to be protected in practice?
- Who are the owners of TK: who gives consent, who shares benefits and who is responsible to verify the respect of the ABS contract?
- How to deal with cases of misappropriation of TK?

Inclusion of indigenous peoples in the process: one of the major concerns of the countries related to the capacity of the CBD and NP is the inclusion of indigenous peoples in their regime.

The NP and CBD provide that TK and indigenous peoples need to be protected by the countries. However, there is no system in place to make sure that the provider countries respect these rights.

There is no dispute settlement mechanism between a private party and a country inside the CBD where indigenous peoples can raise concerns about their fair participation to the ABS process. In case a country does not respect its obligations to include the indigenous peoples in the ABS process, the Convention has no mechanism to solve the conflict between the state and local communities. The relationship between the state and its community on ABS should be properly regulated through the national ABS legislation.

Session 14: Introduction to negotiation dynamics

Screening the film “Getting to Yes”, this session explained the basic principles of good negotiation.

Main outcomes:

- ABS agreements are contracts where parties have the possibility to negotiate a variety of different terms and conditions.
- Main elements to consider: Interests, options and standards
 - Definition of interests and needs of the different parties of the negotiation process is important
 - Before the negotiation starts it is preferable to know the counterpart and to build a relationship as most times parties will work together for a long period.
 - Do researches about your counterpart as it will give you background information and you can learn more about their area of work.
 - Prepare a table with all the possible options integrating needs and interests of both parties. It is important to create a list of options (invent ideas) that could meet the interests of both parties, without having to make promises at the beginning.
 - Options need to be discussed: looking at the positive and negative aspects of the possible options in order to arrive at the best option/deal/result for both.
 - Criticisms or judgments on the options presented by the counterpart can be destructive.
 - There are often uncertainties (cultural differences) between the parties. It is important to formulate terms in a way that both parties know its meaning.
 - Do not make immediate commitments or promises. A higher level of trust makes the decision process easier and vice versa.

Working Groups focused on different scenarios in order put in practice the basic principles of negotiations illustrated by the film: “Getting to Yes”.

- Focus on interest and not positions.**
- Insist on using objective criteria.**
- Invent options for mutual gain.**



Main outputs from the discussion in the working groups:

Interests: Really important for the provider country to know its internal situation and needs (e.g. monetary but especially non-monetary). Being aware of needs allows for a more flexible approach to the user where benefits with high value for the provider with a low cost for the producer can be identified. Benefits do not need to be monetary. It can also be services and activities that have a high value for the countries and its communities (e.g. research that helps management of natural resources).

Separate people from the problem:

- It is important to have regular contact with the counterpart (interaction minimizes risk of misunderstanding).
- Find a way to avoid conflicts involving court. Guarantee mutual understanding and certainty between the parties.
- Since many ABS agreements involve different countries, parties cannot assume that the terms of agreement will be interpreted in the same way in these countries.
- Work on communication (listening) and deal with problems. Separate personal issues from the problem (cultural problems can be strong issues) and try to focus on goals/the interest. Come with a rationale for the requests made.

Summary of the main challenges for the parties:

- 1) Cultural differences
- 2) Consider difficulties of negotiation within a group.
- 3) Keeping calm makes the negotiation work.
- 4) Language barrier - in the long term, language limits can create many problems. Verbal and written communication language should be included in the terms of the contract. Translation is a cost but often useful.
- 5) Regular communication is important.
- 6) Internal decision making process
- 7) Writing down the contract of the negotiation is a good weapon: who writes can use the language as an instrument to give to the text the meaning they want to have. It is important to be included in the writing process of the contract – do not leave that to your counterpart.



Material

The full list of material provided during the workshop is listed here for download.

Presentations Day 1

- [Introduction to ABS in the Pacific – Clark Peteru, SPREP](#)
- [Types of users, types of uses and types of resources – Morten Tvedt, FNI](#)

Presentation Day 2

- [Markets for genetic resources: The object and purpose of the contract – the subject matter of the contract – Morten Tvedt, FNI](#)

Presentation Day 3

- [Benefit sharing, third party transfer and enforcement – Morten Tvedt, FNI](#)

Further Material

- [Heitmüller, S., Meyer, H., Bavikatte, K., Tvedt, M.W., Normand, V. & P. du Plessis \(2014\): The ABS Agreement: Key Elements and Commentary](#)
- [Access and Benefit Sharing Policy of Bhutan](#)
- [Bavikatte, K. \(2014\): How \(Not\) to Negotiate Access and Benefit Agreements](#)
- [Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity – Text and Annex](#)
- [Model Scoping Agreement](#)



Annotated Agenda

Tuesday, 5 August 2014

- 9:00** **Registration**
- 9:30** **Opening and welcome remarks by SPREP and introduction of trainers and participants**
- 10:00** **Introduction to ABS in the Pacific**
Clark Peteru
- 10:30 Coffee break and group photo
- 11:00** **General context for ABS contracts: CBD, Nagoya Protocol and Beyond**
Kabir Bavikatte
Screening of the film: *ABS Simply Explained*
- 12:15** **Types of users, types of uses and types of resources**
Morten Tvedt
- 13:00 Lunch
- 14:00** **Mutual understanding of the parties to a contract – who are you negotiating with?**
Kabir Bavikatte and Morten Tvedt
Screening of the film: *Rooibos Robbery*
- 15:00 Coffee break
- 15:30** **Practical exercise**
Screening of the film: *Rooibos Robbery*
- 16:30 Closing day 1



Wednesday, 6 August 2014

- 9:00** Introduction to second day
- 9:30** **The object and purpose of the contract**
Morten Tvedt
- 10:30 Coffee break
- 11:00** **Exercise: Redraft the object of an agreement**
- 12:30 Lunch
- 13:30** **Third-party transfer and change of intent**
Kabir Bavikatte
- 15:00 Coffee break
- 15:30** **Exercise: Drafting third-party mechanisms and obligation clauses for when a scoping agreement ends and a commercialisation phase starts (change of intent/utilization)**
- 16:30 Closing day 2

Thursday, 7 August 2014

- 9:00** Introduction to third day
- 9:15** **Benefit-sharing clauses**
Kabir Bavikatte and Morten Tvedt
- 10:30 Coffee break
- 11:00** **Exercise: Drafting benefit sharing clauses based on your national priorities and local context**
- 12:30 Lunch



13:30 **Confidentiality and exclusivity**

Kabir Bavikatte

15:00 Coffee break

15:30 **Compliance and enforcement**

Morten Tvedt and Kabir Bavikatte

16:30 Closing day 3

Friday, 8 August 2014

9:00 Introduction to fourth day

9:15 **Introduction to negotiation dynamics**

Kabir Bavikatte

Screening of the film: *Getting to Yes*

10:30 Coffee break

11:00 **Separate people from the problem**

Short presentation and exercise

11:45 **Focus on interests and not on positions**

Short presentation and exercise

12:30 Lunch

13:30 **Invent options for mutual gain**

Short presentation and exercise

15:00 Coffee break

15:30 **Insist on using objective criteria**

Short presentation and exercise

16:30 Closing day 4 and evaluation



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