**Access to Genetic Resources and Benefit Sharing in the Cook Islands**

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6. **INTRODUCTION**

Climate change and other natural influences on the environment, coupled by development within the Cook Islands in the continued interest of economic stability and sustainability that has impacted the environment and consequentially its biodiversity, has increased the urgency for the country to address the concerns of the Convention on Biological Diversity (CBD)[[1]](#footnote-1). The Cook Islands ratified and has subsequently been a party to the Convention since 29 December 1993, however it is still not party to either the Cartagena Protocol on Biosafety (ensuring the safe handling, transport and use of living modified organisms resulting from modern biotechnology that could have adverse effects on biological diversity and on human health) nor the Nagoya Protocol or the Nagoya-Kuala Lumpur Supplementary Protocol that addresses liability and redress associated with any damages resulting from an action relating to the Cartagena Protocol. The implications of the Nagoya Protocol and the agreements that arise from it, make the other protocols as important when viewing the issue of biosafety and any risks resulting from the use and transport of modified organisms and genetic resources. Permits to export biological resources will be required to support applications for genetic research.

During 2017, consultants were called in to develop an update of the National Biodiversity Strategy and Action Plan (NBSAP) in order to assist the Cook Islands to outline a strategy and a capacity building plan that would address how the government departments aim to meet their obligations to protect the biological resources of our small islands and to mitigate any potential consequences of natural and human impact on the biodiversity of the Cook Islands. This document has yet to be finalised by the Cook Islands National Environment Service and subsequently endorsed by Cabinet. These delays have the potential to hinder progress of policy development for the Access and Benefit-Sharing (ABS) component of the Convention.

While a National Focal Point for ABS has been identified under the Convention (Joseph Brider, Director NES) whose role will be the primary national source of information for a user wishing to access genetic resources and/or traditional knowledge associated with genetic resources. The Competent National Authority is still to be designated. This body will be the State institution that exercises the authority granted under Article 6(1) of the Nagoya Protocol to grant access to the resources and fulfilling the obligations under Article 6(3)(d) as well as issuing written evidence that access requirements have been met (especially in relation to Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT)) and to advise on applicable procedures and requirements for obtaining PIC and establishing MAT.[[2]](#footnote-2) Other requirements of the Cook Islands for compliance with the Nagoya Protocol will include: Legislative, administrative or policy measures on access and benefit sharing; national database and websites; checkpoints; internationally recognized certificates of compliance; checkpoint communiques; and an Interim National Report on the Implementation of the Nagoya Protocol. This is a monumental task as the Cook Islands and other island nations within the Pacific region are experiencing in their attempts to fulfil their obligations to the CBD, the Nagoya Protocol and other United Nations Conventions, with limited human and financial resources.

In the interim, within the Pacific, the Cook Islands ABS Project Coordinator is fortunate to be among a trial group of Pacific countries who are being offered support by the United Nations Environment Programme (UNEP) – to facilitate an enabling environment which will lead to the implementation of the basic provisions of the Nagoya Protocol, with specific support for developing a framework around which to protect traditional knowledge, innovations and practices, and customary uses of biological and genetic resources.[[3]](#footnote-3) With this support, the Cook Islands is being given access to experts and advisers to put checkpoints and mechanisms in place not only to ensure that other countries and companies who wish to use our genetic resources are complying with any legal requirements around any potential bio-prospecting, but also so that the Cook Islands can be in a position to take advantage of any benefits resulting from these biodiscovery and commercialisation prospects under the Protocol.[[4]](#footnote-4)

Of extreme importance to the development of our consultancy work on this project has been the access to ABS Clearinghouse[[5]](#footnote-5) information that has been shared among the wide range of stakeholders who are involved in similar developments both regionally and globally. This has helped to speed up our understanding of how we might best approach this undertaking and achieve the results expected of the Convention and by the government organisation which has requested support to implement the Nagoya Protocol.

In our consultancy team’s previous work to support the development of the NBSAP, we had recognised that among the objectives of the CBD were not only the conservation and sustainable use of biological resources, there was the potential for outsider interest in our resources and that the Convention was already taking this into consideration - the fair and equitable sharing of the benefits arising from their utilisation. Of particular note, and for the purpose of this consultancy, the Convention emphasises that the countries themselves have sovereignty rights over their biological resources and encourages governments to enact national legislation that will make provision not only for access to its genetic resources but also for the sharing of any benefits that may result from its utilisation. The current piecemeal coverage of local legislations to cater for the increased interest in bio-prospecting within the region hastens the need for Pacific nations to put specific ABS legislation in place. The United Nations Environment Project[[6]](#footnote-6) provides positive support for countries in the Pacific to at least make a start in this direction and to raise greater awareness of the importance of recognising the Convention.

The Convention aims to protect less developed countries like our own, from potential exploitation by industrialised nations without any adequate compensation for both the utilisation of the genetic resource but also of the intellectual knowledge based on the customs and traditions on which the value of the resources is based. The Convention recognises that there are industries that are active in “bio-prospecting” and collecting biological resources for commercial purposes, particularly in the field of botanical medicines, cosmetics and personal care, referred to as biotechnology. Recent interest in our own genetic resources for such purposes has heightened the need for the Cook Islands to develop protections from any potential exploitation of our resources and our traditional knowledge.

1. **METHODOLOGY**

The contract for this project was signed by my colleague, Mathilda Miria-Tairea on 9 November 2017. Although one contractual detail (the initial payment) remains outstanding, Mathilda and I are aware of the time constraints for this section of the project and have made an immediate start.

As we are both independent consultants working in a range of fields, our association with ABS was initially through our prior involvement in the development of the capacity building component of the Cook Islands National Biodiversity Strategy and Action Plan (NBSAP). Therefore, the concept of ABS was not new to us, but the details related to the development of a policy and its implementation processes were. Critical to gaining understanding of the requirements was the ABS Clearinghouse and the valuable resources within it. My introduction to the project therefore involved reading as much as I could on the topic and on how ABS policy was being introduced and implemented in other countries.

The first task with regards to making a start on the development of a policy document was to transfer the requirements of the Nagoya Protocol into a document using the Bonn Guidelines to provide the content of the requirements. Having looked at some other policy models they ranged from very simple statements which were backed up by comprehensive legislation to quite detailed documents outlining specific procedures within the policy itself as per the Bonn Guidelines. I have made an initial request to the ABS Samoa Office for some guidance in what would be a realistic expectation of a model policy especially with regards to our current situation where an ABS agreement still has not been formally signed concerning the research that is being undertaken by CIMTECH.

In the interim I have continued with my objective which is to provide the Cook Islands with a policy model that outlines the requirements of the Protocol but without being too prescriptive. The details will be in the delivery of the application forms, contracts and permits that will be appended to the policy statement itself.

Important components of this document will be some inclusion of the Biodiversity statement from the Cook Islands National Sustainable Development Plan as well as some formatting of the document according to the Cook Islands Policy Unit’s new Policy Toolkit.

An important document in the preparation of the Cook Islands National Policy, is the current arrangement that the Cook Islands government, via the Koutu Nui, has with CIMTECH, a Sydney based Australian university research team involving a Cook Islander who has used the genetic properties of a biological resource of the Cook Islands with associated traditional knowledge, to produce a unique range of skin care and cosmetic products (*Te Tika*) which are currently on sale in the Cook Islands, and overseas.

The current arrangement is an agreement achieved between the company and the Koutu Nui with a focus on how the university might leverage their association with traditional leaders to gain research funding. Although access appears to have been given though without the benefit of a PIC, MAT, Environmental Impact Report or, as I would like to include, a summary of the research proposal provided in the Maori language of the people of the Cook Islands This would enable all levels of those who would be associated with the biological resource to understand what is being undertaken and the implications of that undertaking in relation to the new policy on ABS relating to the use of our genetic resources. There has been no formal negotiation about benefit-sharing.

Since sending my first attempt at incorporating the Bonn Guidelines into a national policy, with the current arrangement between CIMTECH and the Koutu Nui in mind, I have been seeking other samples of policies and other supporting documents on which to base our Cook Islands model. The restrictions of time in which to carry out our task has constrained our own creativity, so that we are having to use what best practice models we can find in order to do our job.

My primary goal at this point in time, and with a proposed visit to talk to stakeholders in Aitutaki next week, is to start with a document that I can present to and discuss with stakeholders related to how we might manage a process for initial access to our biological resources and the traditional knowledge based around it. At this time, I have developed a model of a research permit and a simplified policy statement based loosely around an overseas model. Because ABS Samoa has intimated that they would like this part of the work to be completed by the beginning of February, it is important that I begin community consultations immediately.

1. **REGIONAL EXAMPLES OF HOW PACIFIC GENETIC RESOURCES ARE BEING PROTECTED**

**FIJI**

Fiji ratified the Protocol and has initiated a national process for the development of a regulatory ABS framework. However, there is currently no specific implementing legislation.[[7]](#footnote-7)

The current ad hoc agreement with the Fiji government is that any income from bioprospecting is shared between the prospector and the country in a 50:50 ratio and the 50% Fiji’s share is deposited into the Locally Managed Marine Area Network Trust Fund, where the bio-prospecting is done from marine areas. Government checks ensure that there is Prior Informed Consent from local communities before allowing any bio-prospecting and export of samples for study. A certificate of origin is also prepared to accompany the export permit.[[8]](#footnote-8)

**KIRIBATI**

While Kiribati does not have specific ABS legislation, there are provisions within other laws which can be used to give effect to some facets of ABS. Their NBSAP (2005) highlighted the need to review, develop and integrate appropriate legal backup on benefit sharing and bio-prospecting on biological diversity, in their existing ***Environment Act 1999***.[[9]](#footnote-9)

**NAURU, NIUE, TONGA, TUVALU**

Like Kiribati, they have not yet signed nor ratified the Protocol. While they do not have any specific ABS legislation, there are provisions in other laws which might be utilised to give effect to some facets of ABS. Limited human resources and infrastructure hinder the development and implementation of a domestic regulatory framework.

**FEDERATED STATES OF MICRONESIA, MARSHALL ISLANDS, PALAU**

Although they have signed and ratified the Protocol, they have no regulatory ABS framework, nor any specific ABS legislation. However, there are provisions in other laws which might be utilised to give effect to some facets of ABS. Limited human resources and infrastructure hinder the development and implementation of a domestic regulatory framework.

**PAPUA NEW GUINEA**

Like some other islands in the Pacific, Papua New Guinea (PNG) has not yet signed nor ratified the Protocol. While they do not have any specific ABS legislation, there are provisions in other laws which might be utilised to give effect to some facets of ABS. However, in 1998, PNG established the PNG BioNET which is an organisation of PNG scientists and government officials’ advisory to the PNG Department of Environment and Conservation, on the assessment, use and development of PNG biological resources. The ***Draft PINBio Act*** seeks to establish PNG BioNET as the national clearinghouse for all research permits and access to PNG’s genetic resources. Despite being only a draft law, there is a formal permit procedure in place through PNG BioNET and DEC. This permit system has been used, for example for a long-running biodiscovery research project funded by the International Cooperative Biodiversity Groups (ICBG) that supports collaboration between the University of Papua New Guinea, the University of Utah and University of Minnesota on biodiversity in PNG.[[10]](#footnote-10)

*It would be helpful to be able to know how the permit system works and how the universities collaborate together on their research projects. The UNEP project document does not mention any benefit-sharing between the partner organisations and the government (DEC)*

**SAMOA**

Samoa has ratified the Protocol and has initiated a national process for the development of a regulatory ABS framework. However, there is no specific implementing legislation. Bio-prospecting regulations were drafted in 2001, but the regulation has since been pursued through a more detailed CBD policy overseen by the Ministry of Natural Resources and Environment which is where the ABS NFP is located.[[11]](#footnote-11)

**SOLOMON ISLANDS**

The Solomons have neither signed nor ratified the Protocol. There is still a need for a domestic regulatory ABS framework, however, there is legislation relating to bio-prospecting in protected areas through the ***Protected Areas Act 2010***. The Act requires that holders of permits must provide reports on their biodiversity research and bio-prospecting. The Act prohibits biodiversity research and bio-prospecting without a permit[[12]](#footnote-12).

**VANUATU**

Vanuatu ratified the Nagoya Protocol in 2014 and has initiated a national process for the development of a regulatory ABS Framework. Under the ***Environmental Management and Conservation Act 2002***, a Biodiversity Advisory Council was established which is responsible for advising the relevant Minister about matters relating to bio-prospecting. Permits are distributed by the Advisory Council who must be satisfied that a legally binding and enforceable contract is concluded with customary landowners, or any owner of the traditional knowledge. The contract has to specify certain matters such as (a) rights of access (b) rights of acquisition of any biological resources or traditional knowledge (c) appropriate fees, and (d) concessions or royalties in relation to the activity undertaken.[[13]](#footnote-13)

Vanuatu’s ***Patent Act 2003*** explicitly rules out the patentability of living things, including non-living substances occurring in nature, plants and animals. The Patent Act has a separate provision on registration of patents involving indigenous knowledge. According to s47, if the Registrar considers that an application is for the grant of a patent for an invention that is based on, arose out of, or incorporates elements of, indigenous knowledge, he must refer the application to the National Council of Chiefs. Any patent application involving traditional knowledge must include an agreement between the applicant and the traditional/customary owners, setting out, inter alia, benefit sharing arrangements. If traditional knowledge in Vanuatu is being illegally exploited, the National Cultural Council and the National Council of Chiefs are authorised to institute civil proceedings on behalf of indigenous peoples in Vanuatu.[[14]](#footnote-14)

1. **PROPOSED MATRIX FOR A PERMIT CONSTITUTING AN INTERNATIONALLY RECOGNISED CERTIFICATE OF COMPLIANCE[[15]](#footnote-15)**

|  |
| --- |
| **GENERAL INFORMATION** |
| Country |  |
| ABSCH Unique Identifier |  |
| Issuing Authority | Competent National Authority | NameAddressPhone Email Website |  |
| **DETAILS OF THE PERMIT OR ITS EQUIVALENT** |
| Reference # of the permit or its equivalent |  |
| Additional national references or identifiers | Legislation |  |
| Other |  |
| Date of Issuance of the permit or its equivalent |  |
| Date of expiry of the permit or its equivalent |  |
| **PRIOR INFORMED CONSENT (PIC) INFORMATION** |
| Confirmation that prior informed consent was obtained or granted |  |
| The PROVIDER (person to entity that holds the right to grant access to the genetic resources in accordance with national legislation)  | NameAddressPhone Email Website |  |
| Endorsement of PIC by the Koutu Nui, Traditional Leaders, if there is any element of traditional knowledge referred to in the application.  |  |
| Person or entity to whom prior informed consent was granted | NameAddressPhone Email Website |  |
| Additional requirements (for the CNA):[[16]](#footnote-16)1. A Letter of Intent has been received by OPM Research Unit stating the intent and purpose of the proposed research in the Cook Islands.
2. A copy of the application form that has been sent to the National Research Committee (OPM) and the Ministry of Cultural Development.
3. An outline of the research proposal has been provided to the Koutu Nui in the Cook Islands Maori language for the benefit of community stakeholders
4. An Environmental Impact Report has been received and processed by the Cook Islands National Environment Service.
5. The Ministry of Agriculture’s Biosecurity Unit has authorised the transport of any biological product out of the country
 |  |
| **MUTUALLY AGREED TERMS (MAT) INFORMATION** |
| Confirmation that mutually agreed terms were established |  |
| Additional information about the mutually agreed terms |  |
| **SUBJECT MATTER OR GENETIC RESOURCES** |
| Details of subject-matter or genetic resources covered by the permit or its equivalent |  |
| **INFORMATION ON THE UTILISATION OF THE GENETIC RESOURCES** |
| Type of use allowed by this permit or its equivalent | CommercialNon-commercial |  |
| Additional information about the specified uses covered by the permit or its equivalent, or use restrictions |  |
| **AMENDMENT HISTORY** |
| Unique Identifiers of this and any subsequent amendments made to this permit or its equivalent |  |

**5. COOK ISLANDS NATIONAL FRAMEWORK FOR ACCESS AND BENEFIT SHARING V2**

1. **Vision**

To ensure the conservation and sustainable use of biological resources in the Cook Islands, and the fair and equitable sharing of any benefits arising from the use of these resources.

1. **Objectives**
2. To conserve and protect the biological resources of the Cook Islands for the wellbeing of present and future generations and any traditional knowledge associated with them.
3. To develop a mechanism that will ensure the sustainable use of the biological resources of the Cook Islands and fair and equitable sharing of any benefits arising from the direct and indirect use of these biological resources and their associated traditional knowledge.
4. To guide relevant authorities to establish and manage an efficient and effective system which will regulate access and benefit-sharing related to the use of the biological resources of the Cook Islands by interested stakeholders
5. **Principles**
6. The Cook Islands Government has national sovereignty over the biological resources of the Cook Islands and encourages the sustainability of its biological resources as a Sustainable Development Goal (SDG) in the Cook Islands National Sustainable Development Plan (NSDP) Goal 11: Promote sustainable land use, management of terrestrial ecosystems, and protect biodiversity
7. The conservation and sustainability of the biological resources and the environment of the Cook Islands will be paramount, so that bio-prospecting activities and their results must not, directly or indirectly, harm biodiversity, ecological balances or the inhabitants of the area where resources are being collected.
8. The following mechanisms must be in place to effectively implement the ABS policy
	1. An interim ABS National Focal Point (NFP) is located within the National Environment Service; the NFP is a key resource person for information about the Nagoya Protocol (NP or The Protocol) and associated sections of the Convention of Biological Diversity (CBD or The Convention) relating to access and benefit-sharing procedures
	2. A Competent National Authority (CNA) is established and registered with the CBD; specifically created to coordinate the processing of bioprospecting applications and ABS procedures, in particular, the implementation of PIC and MAT requirements and providing support for any institutional, political, technical or legal details
	3. Effective and efficient legislative mechanisms are in place to cover property rights and ownership interest issues, as well as to regulate access to biological resources in the Cook Islands[[17]](#footnote-17) and the fair and equitable sharing of benefits among all stakeholders
9. Current[[18]](#footnote-18) and future users of biological resources of the Cook Islands will be expected to provide:
	1. A Letter of Intent to the Office of the Prime Minister’s (OPM) Research Unit, stating the intent and purpose of the proposed research[[19]](#footnote-19)
	2. Applications for a permit to the National Research Committee (OPM) for either an academic research agreement (ARA) or a commercial research agreement (CRA) depending on the precise nature of the activities envisaged. ARAs deal with prospecting biological and genetic resources for academic purposes, and only apply to local universities and governmental or intergovernmental entities. CRAs deal with research and collection activities intended, directly or indirectly, for commercial purposes. Any changes to an ARA agreement where research may result in the commercial value of the resource being pursued, then this will require a new CRA.
	3. An outline or summary of the proposal must be provided in the language of the people of the Cook Islands, to the Koutu Nui, Traditional Leaders of our people, and to the Ministry of Cultural Development which holds the Traditional Knowledge database. This will ensure that all relevant stakeholders understand the full requirements and implications of the proposal. A process of reporting on the progress of the research and its developments will also be negotiated.
	4. An Environment Impact Report must be provided to the National Environment Service (NES) by potential researchers for processing and community consultation
	5. Authorisation by the Ministry of Agriculture’s Biosecurity Unit must be granted before any biological product can be transported out of the Cook Islands (Biosecurity Act 2008)
10. Recognition of the rights and interests of the people of the Cook Islands with respect to the proposal to use biological resources of the Cook Islands and any elements of traditional knowledge on which is it based, must be acknowledged by a copy of the research proposal to be written in Cook Islands Maori and presented to the Koutu Nui, the traditional leaders of the Cook Islands
11. Access to any biological resources from the Cook Islands must be preceded by Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT)
12. Any patents taken out on products resulting from the research of biological resources of the Cook Islands must not prevent the customary use of any biological resources and knowledge utilised in the development of a product or process for which a patent or any other intellectual property right has been obtained.
13. Regular assessment and monitoring of biological resources of the Cook Islands will ensure their sustainability and measures (raui) will be taken to conserve them if their sustainability is at risk.
14. Regular community education and awareness regarding Access and Benefit-Sharing will support the conservation of the biological resources of the Cook Islands and the value of any benefits shared among the partners of any Research and Development (R&D) projects involving biological resources of the Cook Islands
15. Following the introduction of this Policy, any bio-prospective activities without an agreement will be considered a criminal act.[[20]](#footnote-20)
16. Any behaviour that contradicts an agreement can result in:
	1. Cancellation or revocation of the agreement in favour of the government
	2. Confiscation of collected materials
	3. Forfeit of any bond payments
	4. A perpetual ban from the Cook Islands from any future prospecting activities in the Cook Islands

**Maureen Hilyard**

**04 December 2017**

1. A personal observation based on recent research activities for other clients [↑](#footnote-ref-1)
2. IUCN – National Focal Points and Competent National Authorities, Information Brief. <https://www.iucn.org/sites/dev/files/import/downloads/short_paper_on_art__13.pdf>. Accessed 2 December 2017 [↑](#footnote-ref-2)
3. Pacific ABS Project Document, Outcome 3.1, Annex 1, p67 [↑](#footnote-ref-3)
4. Pacific ABS Project Document, S162 p44 [↑](#footnote-ref-4)
5. The Access and Benefit-Sharing Clearinghouse, <https://absch.cbd.int/>. Accessed 1 December, 2017 [↑](#footnote-ref-5)
6. Ratification and Implementation of the Nagoya Protocol in the countries of the Pacific Region. GEF Project ID: 5634 [↑](#footnote-ref-6)
7. Pacific ABS Project Document, S71 p30 [↑](#footnote-ref-7)
8. Pacific ABS Project Document, S73 p31 [↑](#footnote-ref-8)
9. Pacific ABS Project Document, S76 p31 [↑](#footnote-ref-9)
10. Pacific ABS Project Document, S93 p33 [↑](#footnote-ref-10)
11. Pacific ABS Project Document, S96, S97 p34 [↑](#footnote-ref-11)
12. Pacific ABS Project Document, S101 p34 [↑](#footnote-ref-12)
13. Pacific ABS Project Document, S111 p35 [↑](#footnote-ref-13)
14. Pacific ABS Project Document, S112 p36 [↑](#footnote-ref-14)
15. From the ABSCH. From “The first cosmetic ingredients supplier to fulfil Nagoya Protocol on sustainability” (Mexico - October 2017) <https://absch.cbd.int/database/ABSCH-IRCC-MX-238488>. Accessed on 2 December 2017 [↑](#footnote-ref-15)
16. With reference to “*National Measures on Access to Genetic Resources and Benefit Sharing – the Case of the Philippines*” by Aphrodite Smagadi (2005) [↑](#footnote-ref-16)
17. The *Biological Research and Benefits Bill 2006* (draft) needs to be significantly re-designed to incorporate the Nagoya Protocol compliance elements, as well as to complement the *Traditional Knowledge Act (2013*). The Act requires traditional knowledge relating to biological resources to be registered, but the Register and the database have not been set up yet. Pacific ABS Project Document, S64, P29 [↑](#footnote-ref-17)
18. The Cook Islands urgently needs to support ratification of the Nagoya Protocol in order to implement its ABS framework in order to formalise current R&D on a bone healing product derived from Hibiscus tiliaceus. Ibid, S66, P30 [↑](#footnote-ref-18)
19. The Cook Islands *National Research Policy* outlines the research permit process required prior to conducting any R&D activities, including those on biological resources. But no mechanism has been created yet for the issuing of ABS licenses nor for the negotiating and enforcing agreements. Ibid, S65, P29 Provision for ABS licenses could be included into the National Research Policy additional to the current research permit process. [↑](#footnote-ref-19)
20. There is a Crimes Bill currently before the select committee but we will be too late to include any ABS provisions. [↑](#footnote-ref-20)