

## FATA 2016 – Lernwerkstatt:

### *ABS and BioTrade: How (not) to be a biopirate*

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The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization (Access and Benefit-sharing – ABS) establishes a framework for the utilisation of genetic resources for the purpose of research and development, which is translated into national regulatory systems by its member states. In the field of BioTrade (i.e. the access to and use of genetic resources for trade, consumption and processing), too, models for benefit-sharing are applied which are not under the scope of the Nagoya Protocol but also aim to contribute to the conservation and sustainable use of biodiversity. While the Nagoya Protocol clearly limits ABS to access for research and development, many national ABS laws also include their use for biotrade. It is therefore essential for GIZ projects working on natural resources and related value chains to be aware of the interface of ABS and BioTrade at a conceptual as well as at a practical level, including national regulatory frameworks under which the projects operate and need to adhere to.

This thematic workshop at the GIZ FATA aimed to raise awareness of the interface described above and provide an opportunity for experience exchange and discussion among GIZ projects working in ABS, BioTrade and related fields. Based on the results of this workshop, the ABS Initiative hopes to continue discussions within GIZ on how to address ABS and the interface to BioTrade in project planning and implementation.

#### 1. Introduction to the ABS principles of the Nagoya Protocol

*Lena Fey (ABS Initiative)*

- Short movie “ABS simply explained” ([http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Multimedia/videos/Animated%20Video%20ABS%20Simply%20Explained/ABS%20Simply%20Explained%20-%20English.mp4](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Multimedia/videos/Animated%20Video%20ABS%20Simply%20Explained/ABS%20Simply%20Explained%20-%20English.mp4))
- Presentation about the core principles, historical background of the Nagoya Protocol and its scope:
  - According to the Nagoya Protocol, ABS rules only apply for cases of **utilization**, which is defined as conducting research and development on genetic resources or their compounds, including biotechnology.
  - The guidance provided by the Nagoya Protocol remains very broad. It only sets minimal standards; Parties can thus define national measures for Access and Benefit-sharing relatively freely. This can lead to cases where the scope of national ABS measures covers more uses than the “utilization” scope defined in the Nagoya Protocol.
  - The Nagoya Protocol also covers **traditional knowledge** associated with genetic resources, acknowledging the rights of indigenous peoples and local communities (as holders of such knowledge) to participate in ABS. However, few countries have developed ABS systems for associated traditional knowledge so far.

## Discussion

*What could be Benefit-sharing? Is there a certain percentage of a profit share a company is obliged to pay?*

- Benefit-sharing can either be monetary or non-monetary (e.g. transfer of technology or know-how). The Nagoya Protocol gives examples of possible benefits, but it does not make recommendations regarding percentages of monetary benefit-sharing. The type of benefits to be shared will also depend on whether the utilization has a commercial or non-commercial purpose; the Protocol recommends that Parties provide for facilitated access for non-commercial research purposes.

## 2. BioTrade and ABS: Understanding the linkages

*María Julia Oliva (Union for Ethical BioTrade - UEBT)*

- The CBD is not an environmental but a sustainable development agreement: it combines conservation of biodiversity with its sustainable use and the fair and equitable sharing of resulting benefits. After its adoption, UNCTAD's BioTrade Initiative was launched to advance the CBD objectives by promoting a sustainable approach to the trade in biodiversity-based products. **BioTrade** was defined as the activities of collection/production, transformation and commercialization of goods and services **derived from native biodiversity** under criteria of environmental, social and economic sustainability.
- The **BioTrade principles** are
  - Conservation
  - Sustainable use
  - Fair & equitable benefit-sharing
  - Socio-economic sustainability
  - Legal compliance
  - Respect for actors' rights
  - Clear land tenure & resource access and use

Based on these principles, UEBT developed its Ethical BioTrade standard, an internationally recognized standard for natural ingredients that is the basis of its verification and certification systems.

- There are clear **overlaps** between ABS under the Nagoya Protocol and the BioTrade Principles:
  - **Principle 3** (fair and equitable benefit-sharing) relates directly to the third objective of the CBD and is required for all activities dealing with natural resources. Benefit-sharing is to be ensured for all actors along the value chain. In the Ethical BioTrade standard, Principle 3 contains specific references to compliance with ABS rules and principles.
  - **Principle 7** on clear land tenure & resource access and use reaffirms the right of resource and TK holders to prior informed consent, which is also echoed in the Nagoya Protocol.
- BioTrade supply chains may involve R&D on genetic resources and thus trigger ABS principles. For example, a company processing a plant powder for the food sector may also begin to explore the properties of an extract of the plant powder. Other companies may refer to traditional knowledge to find new and useful plants and ingredients.

- Depending on **national legislation**, more BioTrade activities can be covered by ABS rules. Under many ABS laws, the mere cultivation, production and commercialization of biodiversity-based products (without involving R&D) also requires ABS permits and agreements.
- ABS obligations can thus arise at every stage of a (BioTrade) **value chain**, which is often transboundary in nature and involves a multitude of actors. The challenge is to recognize ABS requirements and make sure that all relevant actors are involved.

### 3. BioTrade and ABS: Addressing the linkages

*María Julia Oliva (Union for Ethical BioTrade - UEBT)*

- **BioTrade and ABS can be mutually supportive:** ABS adds a rights-based approach to the voluntary BioTrade principles and can therefore help to make them legally binding. At the same time, BioTrade actors are often aware of ABS principles and can support its implementation as well as help to link it to conservation and sustainable use. The biggest challenge is to create legal certainty for all users and providers, as well as to ensure that fair and equitable benefit-sharing contributes to local development and biodiversity conservation.
- It is important to consult and consider BioTrade actors and activities when developing national regulatory systems for ABS; this allows awareness raising on both sides (BioTrade actors and ABS authorities) and the recognition of the elements of BioTrade that support ABS.
- ABS and BioTrade can be linked via agreements/contracts and through benefit-sharing arrangements. An example of integrating ABS in BioTrade contracts is the **UEBT undertaking** in which each buyer of a commodity along a value chain automatically agrees to adhering to ABS regulations in case of a later ABS-relevant use of the resource.

#### Discussion

*Is there a "BioTrade label" so that consumers know which products follow BioTrade standards?*

- *There is no existing label of BioTrade, because the costs to communicate to consumers are immensely high. The Ethical BioTrade standard offers a logo for business to business communication. Members of UEBT use the logo in their corporate communication. As some companies ask for the logo being shown on the actual product, UEBT has started a collaboration with UTZ, certified through their joint Herbal Tea Certification Programme, which allows the UTZ label to be used for products that include ingredients compliant with the Ethical BioTrade standard. This is a way to start communicating with consumers.*

### 4. Approaches by user countries: EU ABS Regulation

*Dr. Hartmut Meyer (ABS Initiative)*

- The scope of regulatory systems for ABS can differ immensely from country to country. Dr. Hartmut Meyer presented political statements made in the context of the development of the EU ABS Regulation and informed about the main provisions of the adopted compliance system.
- EU ABS compliance rules only apply when the following six conditions are met (important for companies and researchers operating in the EU to identify whether they need to adhere to the compliance rules):
  - Access to genetic resource or associated traditional knowledge
  - Genetic resources accessed is under sovereignty of a State
  - Acquisition occurs in a Party to the Nagoya Protocol

- ABS regulatory framework exists in this Party
- Access after 12 Oct. 2014 (entry into force of the Nagoya Protocol)
- Utilisation within the EU
- The EU Regulation is binding law, which the member states are forced to implement.
- Currently, the EU is developing guidance documents for the interpretation of still unclear issues of the scope and for assisting users in fulfilling their due diligence obligations. One guidance document on general scope issues will be accompanied by eight sector specific documents outlining which typical R&D activities fall under the definition of utilisation.

### Discussion

- ABS Checkpoints: The EU Regulation defines checkpoints as points in time along the research and commercialization process.
- Commercial users have to notify the checkpoints and provide evidence of PIC and MAT when they intend to put a product on the market.
- Users need to be aware that ABS legislation in provider countries usually has a broader scope than the EU ABS Regulation, e.g. covering typical biotrade activities without R&D. While users need to abide by these laws in the provider country, they do not fall under the EU ABS compliance system, which only covers activities that are defined as utilisation (R&D). In such cases, the user needs PIC and MAT in the provider country but does not need to notify the EU checkpoints about compliance with the provider regulation.

## **5. GIZ HQ experiences: How is ABS (not) addressed in GIZ projects?**

*Ellen Michel (develoPPP)*

- Ellen Michel presented a PPP project in the making: Local essential oil production as additional source of income for farmers in Eastern Uganda (10/2015 – 10/2018)
- Although the project design does not include research and development activities (i.e. utilization under the Nagoya Protocol), the Ugandan ABS law requires that ABS agreements are concluded also for biotrade cases. This has not been taken into account in the project planning phase.
- So far, there is little awareness and hardly any guidance for GIZ projects on how to deal with cases at the interface of BioTrade/biotrade and ABS. There is only one recent example of a BMZ reference framework for public-private partnerships in the agrifood sector which acknowledges the role of traditional knowledge and the importance of access to seeds for small-scale farmers.

## **6. Panel Discussion**

Panellists:

- Lena Katzmarski, ProAmbiente, Peru
- Paul Scholte, COMIFAC programme, Cameroon
- Berthold Seibert, ASEAN Centre for Biodiversity, Philippines
- Konrad Uebelhör, BMCC, Namibia
- Suhel Al-Janabi, GeoMedia/ABS Initiative (moderator)

**1. How do the different regions/countries define the scope of their ABS regulatory systems and the interface between BioTrade and ABS?**

**Lena Katzmarski - Peru**

- There has been a full-fledged ABS legislation since 2009 (Supreme Decree on the Regulation on Access to Genetic Resources).
- There is an existing law regulating the use of traditional knowledge (Collective Knowledge of Indigenous Peoples derived from Biological Resources (2001). There are no directives for the implementation of this law.
- The national patent institution (INDECOP) maintains registers on traditional knowledge, chairs the National Anti-Biopiracy Commission and serves as a checkpoint for ABS compliance.
- It is currently discussed about how to adapt national legislation/laws in order to implement every part of the Nagoya Protocol.
- Institutions dealing with ABS and being involved in the process of granting permits are the National Focal Point (Ministry of Environment), the forest service, the national institute for agricultural research and the vice ministry of fisheries.

*Problems occurring in Peru*

- The Environmental ministry is discussing about how to define ABS und BioTrade, but there is uncertainty about the definition of research & development, as well as the definition of derivatives.
- The permitting system is highly complex, which leads to long and unclear procedures until permits are issued, making it difficult to plan for users. There are more than 70 permits issued for investigation purposes, still 0 permits for commercial purposes.

*Positive Developments in Peru*

- The environment ministry is currently creating an online platform for all institutions involved in the permitting process, creating a one-stop shop solution for users. It will be presented with GIZ in September 2016.

**Paul Scholte –COMIFAC programme**

- Within COMIFAC, the state of dealing with ABS und BioTrade very much depends on the specific state - while the process in Chad, Burundi etc. is stagnating, some member states like Cameroon and Rwanda seem to be heading in a good direction, with Cameroon having two MATs signed with a French cosmetic company. These “champions” are generating first experiences in ABS that can be shared with the other member states.
- In general, the view on ABS is still relatively narrow in the COMIFAC countries, focusing on the scope defined in the Nagoya Protocol. The National ABS Focal Points have very little knowledge of and influence in industries related to BioTrade.

**Berthold Seibert - ACB**

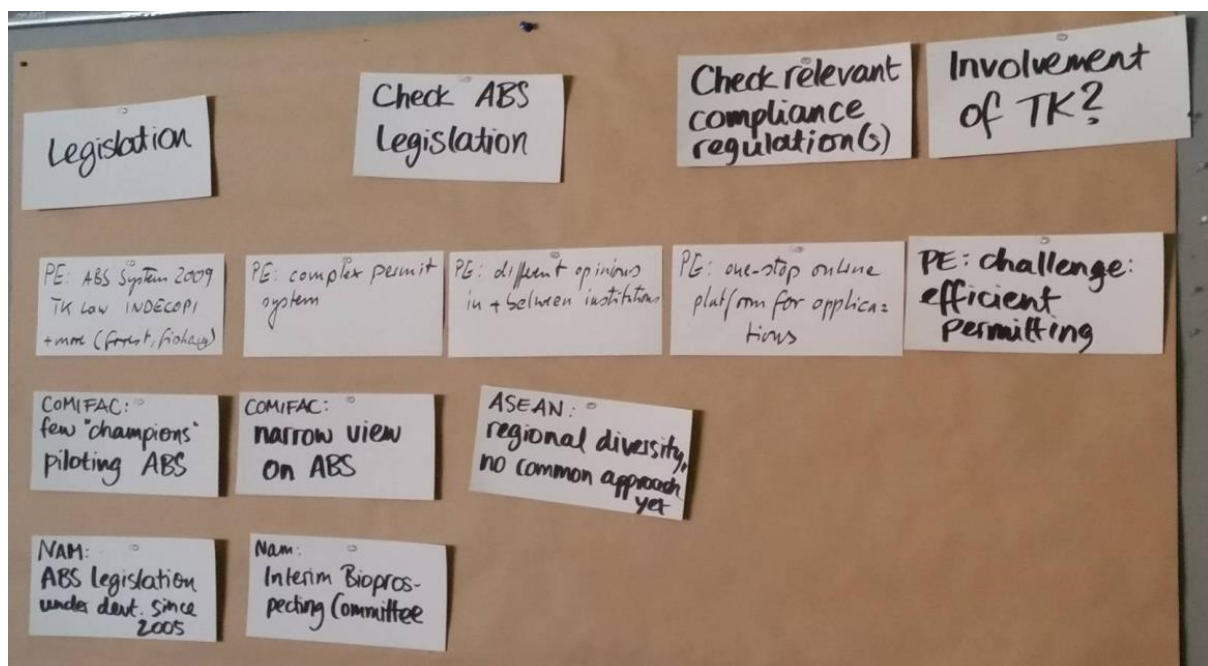
- In the ASEAN countries, there is no common approach to ABS yet. The ASEAN Centre for Biodiversity aims to promote a regional approach to ABS, which would also strengthen ASEAN as an institution.

## Konrad Uebelhör – Namibia

- Namibia planned to develop an ABS legislation already in 2005, but halted the process in 2006 when it became clear that an international framework (i.e. the Nagoya Protocol) would be negotiated. A multi-stakeholder committee (Interim Bioprospecting Committee, IBPC) was established and charged with permitting procedures for the interim period.
- After the Nagoya Protocol was adopted in 2010, campaigns were started to get Namibia to ratify. In parallel, a process was initiated to develop an ABS legislation based on the framework of Nagoya.
- 2 challenges: 1. To get the indigenous peoples and local communities involved in the development of the national ABS system; 2. Raising awareness among parliamentarians
- After the 2014 election, a new set of parliamentarians made the process start again.

### Current Situation:

- 2<sup>nd</sup> reading of draft of the bill was held, it is planned that this bill will be tabled for a 3<sup>rd</sup> obligatory reading.
- The interim ABS measures are using the AU Guidelines for a coordinated implementation of the Nagoya Protocol as a basis.
- Multi-stakeholder workshops including the private sector were organized and raised great interest especially among the private sector.
- A number of exporters are being asked from EU user countries to prove compliance with the ABS law.
- Under the new law, BioTrade will be treated as an ABS case - From the beginning, the owner of the permit needs to identify the purpose for the utilization to assure no other intention of using the product.



- 2. *What is happening at the project level? Is there any cross fertilization between BioTrade and the ABS Initiative in your project? How do you support the long-term vision of creating legal certainty through supporting national regulatory frameworks? How do you support the conclusion of ABS agreements in the shorter term (as “quick fixes”)?***

**Lena Katzmarski - Peru**

- The programme has three main activities
  - Capacity building for researchers, regional governments, public institutions & private sector actors on ABS;
  - Developing a checklist on ABS and BioTrade;
  - Developing guidelines on the relation between ABS and BioTrade in cooperation with the Environment Ministry.
- An incubation programme for small start-ups working with plants from the amazon region was organized with a Peruvian university. ABS & traditional knowledge topics are included in the capacity development programme.

**Paul Scholte – COMIFAC**

- The project, like the National Focal Points, has a narrow view on ABS (i.e. limited to the scope of the Nagoya Protocol).
- In June 2016, the project organized a workshop with 15-20 Cameroonian traditional leaders, which was an eye opener also for the project staff. The participants illustrated how people are confronted with ABS in daily life and discussed how to integrate ABS in their (business) activities.
- A lesson from several discussions also with the National Focal Point in Cameroon was not to focus solely on ABS under the Nagoya Protocol; the particular problem / situation should be the entry point for project activities, not the Protocol as an instrument.

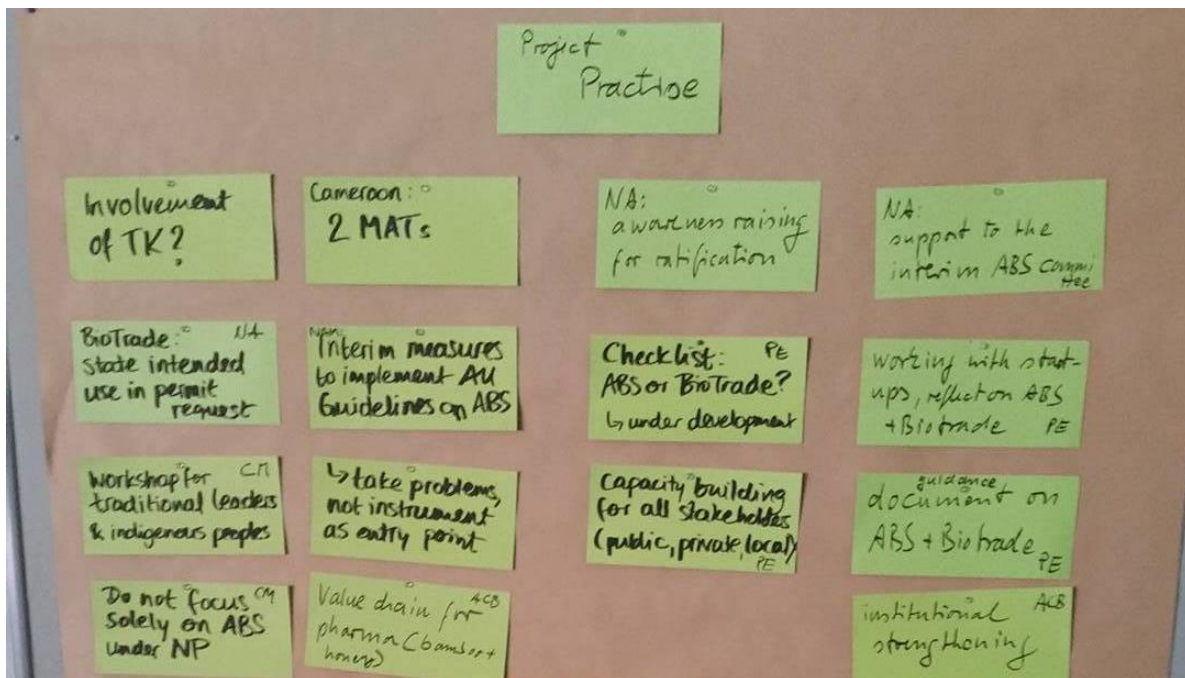
**Berthold Seibert – ACB**

- The ACB provides tools for the implementation and regulation of ABS.
- The aim of ASEAN and its member states is to sensitize national governments on the importance and relevance of the economic side of ABS & Nagoya Protocol.
- The current focus is on strengthening institutions in the member states to implement ABS.
- The project is also involved in value chain development for natural products, including in the pharmaceutical sector, the potential ABS aspects of which still need to be investigated.

**Konrad Uebelhör – Namibia**

- The project has supported the Interim Bioprospecting Committee and the further development of the ABS bill.
- Most of the value chains the project is currently supporting are either pre Nagoya Protocol, or associated to traditional knowledge – the pressure is mostly coming from indigenous peoples and local communities to make them ABS-compliant. ABS agreements, if at all, are concluded on a voluntary basis.

- For new developments of value chains, the project aims to establish a standard procedure for PIC and MAT, based on the AU guidelines for a coordinated implementation of the Nagoya Protocol.



### 3. Which challenges are you facing in your projects?

#### Lena Katzmarski - Peru

- Establishing a very clear guideline of how firms can enter the process defined by the environmental industry.
- Raise awareness on ABS and related obligations in the private sector.
- An inflexible legal framework makes it difficult to implement ABS in practice (especially when it comes to permits for commercial purposes); ABS and BioTrade has to be made feasible for the private sector.

#### Paul Scholte –COMIFAC

- Interacting with other GIZ projects and KFW to mainstream ABS via BioTrade
- There is a distinct lack of experts on ABS that countries need to develop their national regulatory and administrative systems and negotiate ABS agreements.

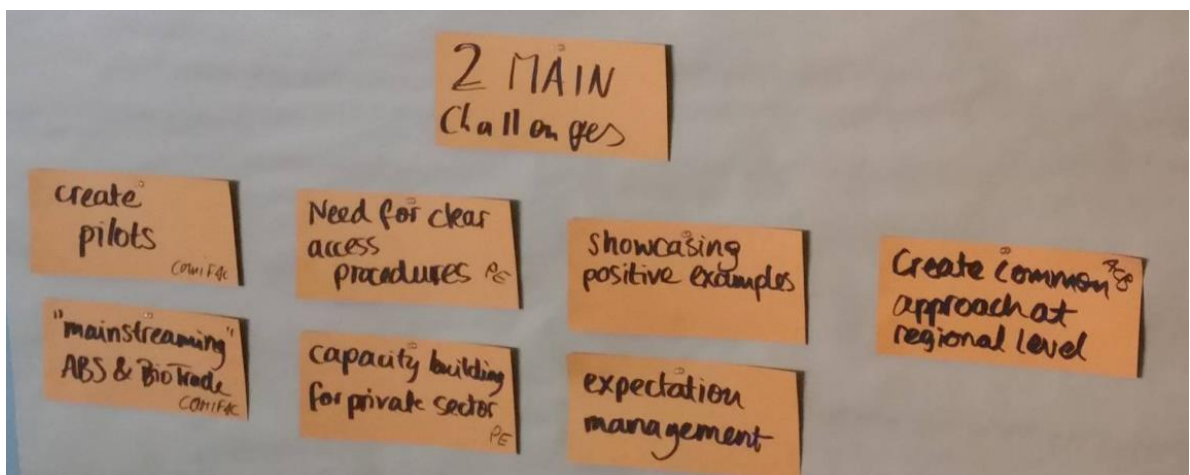
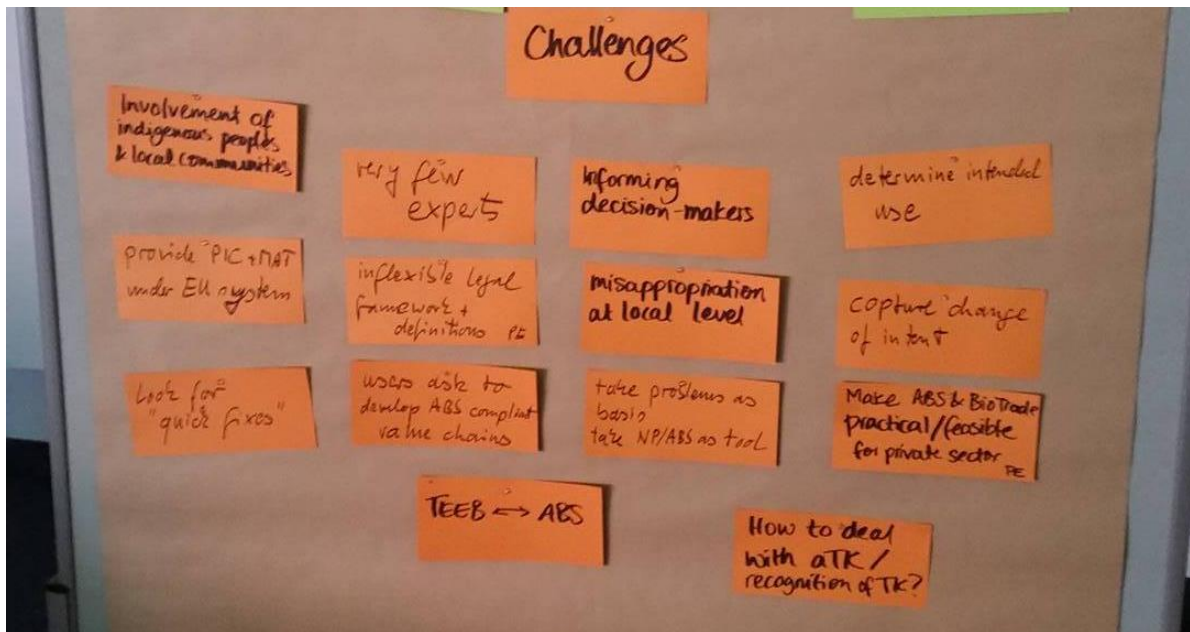
#### Berthold Seibert – ACB

- Working with regional organizations and thereby playing a crucial and active role in the implementation of the Protocol and legal frameworks
- Creating a common understanding in ASEAN countries to deal with the Nagoya Protocol



## Konrad Uebelhör – Namibia

- Proper involvement of indigenous peoples and local communities
- Providing and showcasing positive examples of the implementation of ABS and BioTrade – show some catchable benefits where ABS made a difference



### Final comments and proposals on how to raise awareness for ABS and BioTrade:

- Establish a useful, short guideline for countries on how to implement ABS / the Nagoya Protocol
- Publish more materials in Spanish
- Distribute recurrent, permanent information among GIZ projects
- Promote discussion and experience exchange within America

## List of Participants

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## Further Resources

- ABS Film “People, Plants and Profit”: [http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Multimedia/videos/ABS%20Film%20People%20Plants%20and%20Profit/People%20Plants%20Profit%20-%20English%20French%20subtitles.mp4](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Multimedia/videos/ABS%20Film%20People%20Plants%20and%20Profit/People%20Plants%20Profit%20-%20English%20French%20subtitles.mp4)
- ABS Initiative 2015: ABS Key Points for Policy Makers on Six Industrial Sectors: [Agriculture](#); [Industrial Biotechnology](#); [Botanicals Industry](#); [Cosmetics Industry](#); [Food & Beverages Industry](#); [Pharmaceutical Industry](#)
- African Union 2015: The African Union Guidelines for a Coordinated Implementation of the Nagoya Protocol: [African Union \(ABS\) Strategic Guidelines on ABS](#); [African Union \(ABS\) Practical Guidelines on ABS](#); [UA lignes directrices strategiques sur APA](#); [UA lignes directrices pratiques sur APA](#)
- UEBT 2016: Africa: Rules and practices on access and benefit sharing (ABS), <http://ethicalbiotrade.org/dl/Africa-ABS-2016-forWEB.pdf>
- UEBT 2016: Biodiversity-based innovation in the European Union. Key elements and practical implications of EU regulation 511/2014, <http://ethicalbiotrade.org/dl/EU%20ABS%202016%20r.pdf>
- UEBT 2013: Fair and Equitable Benefit Sharing: Manual for the Assessment of Policies and Practice Around Natural Ingredient Supply Chains, [http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Publications/UEBT/Fair\\_and\\_Equitable\\_Benefit\\_Sharing\\_Manual\\_-\\_UEBT\\_-\\_2013.pdf](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/UEBT/Fair_and_Equitable_Benefit_Sharing_Manual_-_UEBT_-_2013.pdf)
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- UNCTAD 2016: Facilitating BioTrade in a Challenging Access and Benefit Sharing Environment, [http://unctad.org/en/PublicationsLibrary/webditcted2016d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webditcted2016d4_en.pdf)
- UNCTAD 2016: Training Manual on Joint BioTrade and REDD+ Projects, [http://unctad.org/en/PublicationsLibrary/ditcted2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditcted2015d1_en.pdf)
- UNCTAD 2014: Biodiversity and Trade: Promoting Sustainable Use Through Business Engagement, [http://unctad.org/en/PublicationsLibrary/ditcted2015d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditcted2015d2_en.pdf)
- UNCTAD 2014: The Convention on Biological Diversity and the Nagoya Protocol: Intellectual Property Implications, [http://unctad.org/en/PublicationsLibrary/diaepcb2014d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2014d3_en.pdf)