

Streamlining ABS

A joint approach by industry, government & communities



ABioSA CASE STUDY

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**environment, forestry
& fisheries**

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THE ABS
CAPACITY
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Cover image: Rooibos Ltd

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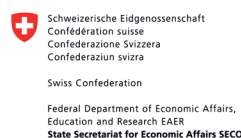
A glossary of biotrade terms can be found at www.abs-biotrade.info/resources

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Introduction

This is a case study about how the Rooibos industry in South Africa approached the implementation of Access and Benefit-Sharing and bioprospecting permits. It includes the challenges experienced and how they were overcome by a collective industry approach in collaboration with government, communities and holders of traditional knowledge. This is just one example of an approach to ABS.



Picture: Rooibos Ltd

Background

The National Environmental Management: Biodiversity Act (NEMBA) creates the legislative framework for the protection of species and ecosystems, and the sustainable use of indigenous biological resources. It provides for the fair and equitable sharing of benefits from these resources.

Chapter 6 of NEMBA covers bioprospecting and Access and Benefit-Sharing (ABS); and Chapter 7 includes legislative requirements of the bioprospecting permitting system. The Act says companies working with indigenous resources must enter into individual ABS agreements with local communities or holders of traditional knowledge (TK), and must apply individually for bioprospecting permits.

Administration of NEMBA is the responsibility of the Department of Forestry, Fisheries and the Environment (DFFE).

Understanding ABS obstacles

Industry stakeholders at times report difficulty with navigating the ABS and permitting processes, creating an administrative burden which can present significant barriers for smaller companies. Among obstacles are:

- Lack of clarity on the identity of the TK holders, creating challenges in contacting them to negotiate an ABS agreement
- Absence of guidelines and support around the best approach to ABS and sharing of financial and non-financial benefits
- Lack of guidance and clear communication on required content of permit applications, and processes and timelines for review and awarding of permits
- Industry and implementing authorities often don't dedicate time to sharing information about the structure of complex biotrade supply chains
- Industry members have reported delays between submission and review of the application by the Bioprospecting Advisory Committee (BAC)

These obstacles make it difficult for businesses to comply with NEMBA, and impact on their ability to trade. As a result, the benefit-sharing intended by NEMBA is not being delivered, and the potential of the biodiversity economy is not realised.

A complex industry found a novel approach to ABS

The Rooibos industry has a complex value chain, with distinct groups fulfilling particular roles. This needed to be accounted for in the sector's approach to ABS.



Farms & wild harvesting

- ± 300 commercial farmers
- ± 150 small-scale farmers in Wupperthal
- ± 60 small-scale farmers in Moedverloor & Heiveld
- ± 80 tea drying facilities (on farms and in villages)



Processing

- Tea & extracts
- SARC members
 - Rooibos Limited
 - Cape Natural Tea Products
 - The Red T Company
 - Cape Rooibos
 - Skimmelberg
- Non-SARC members
 - Elandsberg
 - Carmien
 - Khoisan Gourmet
 - Kings Products
 - Redbush Teehandel



Trade

- Bulk & packed tea
- Local market
- Export market (60 countries)
- Packer/branders
 - National Brands Limited
 - Unilever
 - Joekels Tea Packers
 - Annique
 - BOS
 - African Extracts

A collective solution

In August 2016 DFFE hosted a meeting between the South African Rooibos Council (SARC), the Department of Science and Innovation, and legal representatives of the South African San Council (SASC) and the National Khoi & San Council (NKC), to discuss NEMBA and the Indigenous Knowledge Systems (IKS) Bill.

SARC argued that individual ABS agreements, as required by NEMBA, were a risk to the industry. If only some businesses undertook ABS it could lead to competitive disadvantages, and an unstructured approach would not see communities benefit from the full volume of Rooibos production.

SARC suggested that the whole industry needed to be compliant, and a process was proposed for a sector-wide ABS agreement. It made the case for a collective ABS approach, and this was supported by industry members at a January 2017 workshop.

It was agreed that SARC should negotiate on behalf of the Rooibos industry and regularly update the sector. The collective approach pioneered by the Rooibos sector extended over time to supporting permit applications.

How it happened

After industry support was secured for a collective approach, three SARC directors were mandated to negotiate with SASC and NKC, in a process facilitated by DFFE.

Negotiations started in 2017 and concluded with the signature of the industry-wide ABS agreement in December 2019. In a triumph for

consultative and collaborative approaches, the process involved 16 negotiation meetings with community representatives, four discussions between SARC and DFFE to develop standard operating procedures (SOP), and four feedback and consultation workshops with industry.

It was a long and successful process that produced a model for collective industry ABS agreements across the biotrade sector, the first of their kind in the world.

Since NEMBA does not specifically allow for collective industry agreements, it was vital to develop the SOP to support implementation and compliance.

The final ABS agreement between SARC and DFFE includes:

- Nature of the agreement
- Description of parties to the agreement
- How benefits will be shared
- Establishment of trusts and associated roles and responsibilities for TK holders
- Undertakings by TK holders
- Undertakings by SARC on behalf of the Rooibos industry
- How TK is defined and engaged with
- Intellectual property rights
- Confidentiality of industry information
- Disputes and termination of the agreement

Interested parties can apply to DFFE for access to the full ABS agreement.

4 

discussions between SARC and DFFE

4 

feedback and consultation workshops with industry

16 

negotiation meetings with community representatives

Considerations

The Rooibos ABS agreement is specific to that sector, but includes many measures which may be of value to other biotrade sectors.

Relationships

It is important for DFFE and industry to develop strong, open and supportive relationships based on a common commitment to efficient ABS processes, community benefits and development of the sector.

When are benefits shared?

NEMBA does not specifically detail measures for the movement of a resource across the value chain, from harvest to product, so there is a risk it may be subject to benefit-sharing more than once.

Analysis of the Rooibos value chain identified processing as the point through which all of the resource would move on its way to market. It was agreed that processors would be responsible for benefit-sharing on behalf of the whole industry. Under the terms of the Rooibos ABS agreement, benefit-sharing thus happens only once. Downstream organisations are still required to apply for permits, but not to benefit-share.

The industry negotiated for primary producers and wild harvesters to be exempt from applying for permits, but to be included on a suppliers list submitted by the processor with their ABS permit application.

This was because there are many primary producers and wild harvesters, and they are often

small businesses with limited administrative capacity. Excluding them from the need to apply for permits significantly reduced the administrative burden on industry and DFFE.

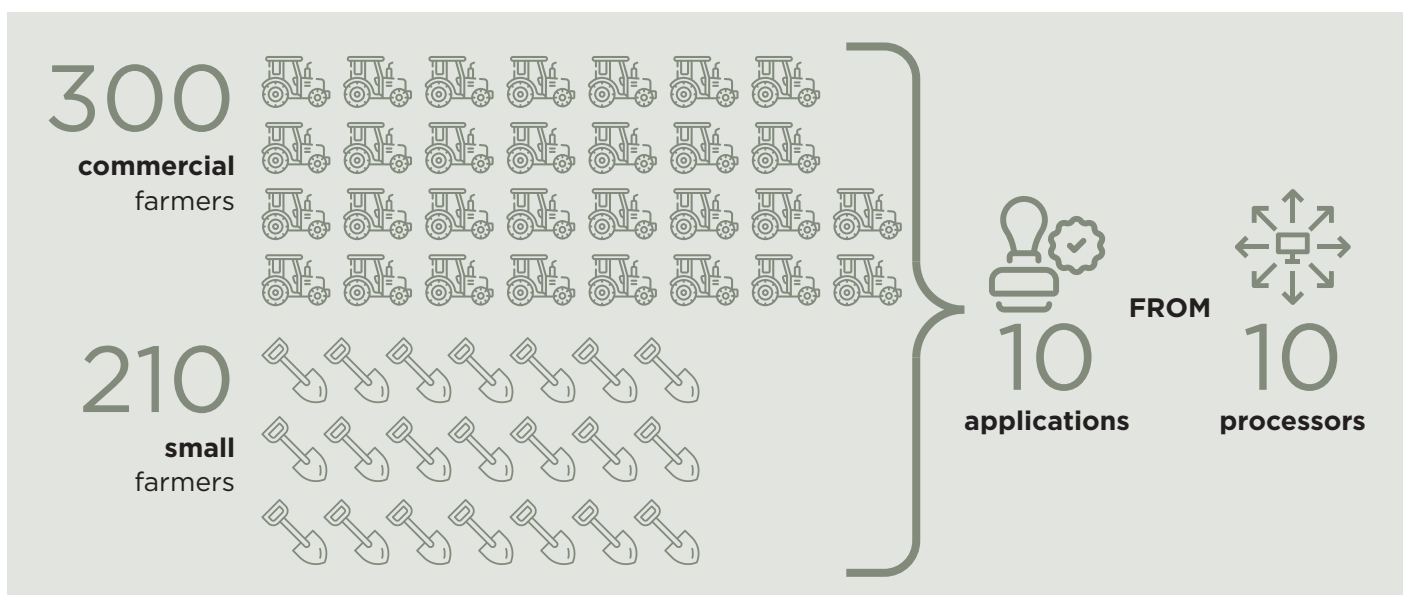
Instead of 510 permit applications from 300 commercial farmers and 210 small-scale farmers, the Rooibos industry and DFFE now handle just ten applications from ten processors. Levies are charged on the same volumes, producing the same benefits to TK holders, but through a streamlined process.

Calculating levies

The landmark Rooibos agreement considered how levies would be calculated. The options included a fixed value per kilogram bought from primary producers and wild harvesters, or an agreed percentage of the purchase price.

Because there is fluctuation annually in the cost of raw material and downstream market prices for Rooibos, a fixed value per kilogram would disadvantage communities when prices rose, and leave businesses with the same levy when prices dropped.

It was agreed the fairest model for both industry and TK holders would be a calculation based on a percentage of the price for every kilogram bought from producers and harvesters. This means that all stakeholders experience equal gains and losses when the Rooibos market fluctuates. The percentage was set at 1.5% of the farm gate price of Rooibos.



Lessons learned from the Rooibos industry ABS model

- Mandate a representative group to negotiate on behalf of the industry
- The process should be facilitated by DFFE, which can provide guidance on the intention of ABS legislation
- Consider the structure of the industry when negotiating an ABS agreement, and ensure community and TK holders' understanding of the value chain
- Develop industry-specific operating procedures to ensure all parties are clear on implementation
- Reduce administrative burdens of ABS for communities, industry and DFFE
- Ensure the agreement is fair to all parties by linking levies to price not volume



Picture: Rooibos Ltd

Administration of the TK levy

The process below was designed for the Rooibos industry, but could be a template for other sectors, with adaptations to specific industry characteristics.

The Rooibos industry decided on collective payment of the TK levy for several reasons:

- To ensure responsibility for the levy is spread across all industry stakeholders
- To ensure processes for benefit-sharing on **all volumes**
- To protect confidentiality of company information by presenting volumes and levies in aggregate, with individual details only available to the administrator of the process



Picture: Rooibos Ltd

The process

DFFE and SARC worked together to develop a SOP for the collection and administration of the levy. The cost of administration needs to be considered and agreement on who will be responsible for this cost needs to be part of negotiations. This could include taking administrative costs from the TK levy, or from a special levy on industry.

Step 1	Appoint parties for the implementation of the standard operating procedure (SOP)
Parties involved	DFFE and industry
Rationale	To ensure the implementation of a robust process, a legally responsible administrator needs to be appointed. An auditor is appointed to verify the work of the administrator and provide assurance.
Actions <ul style="list-style-type: none"> • Appoint administrator responsible for collection, verification and administration of TK levies • Appoint auditors responsible for verification of calculations and transactions by the administrator • Appoint administrator responsible for issuing TK levy invoices, setting up an account, receiving the levies and paying them to the Bioprospecting Trust Fund of the DFFE 	
Step 2	Develop and maintain a register of processors
Parties involved	Administrator
Rationale	An up-to-date register ensures industry, DFFE and TK holders can monitor compliance and payment of the levy
Actions <ul style="list-style-type: none"> • Develop a register of processors including all parties responsible for paying the levy • Inform all parties of the process for levy collection and administration • Keep the register updated and share with DFFE annually 	

Step 3	Submission of processors' reports on volumes traded
Parties involved	Administrator and processors
Rationale	To ensure all volumes are declared, industry members with knowledge of the supply chain should identify data categories that need to be captured. As a further safeguard, processors' accountants should report on these categories.
Actions <ul style="list-style-type: none"> Data categories necessary for the calculation of the TK Levy are identified by the administrator, in collaboration with the industry, and communicated to processors Categories could include: <ul style="list-style-type: none"> Total purchase value Total purchase mass Total sales volume Total volume for contract processing (if applicable) In collaboration with a registered accountant, processors compile a report inclusive of all data categories identified by the administrator The report is submitted to the administrator for data aggregation and levy calculation 	
Step 4	Data aggregation and levy calculation
Parties involved	Administrator
Rationale	To protect confidentiality of industry data, only the administrator and auditor see individual company data. The administrator aggregates the data and calculates the levy for verification by the auditor.
Actions <p>Administrator uses data from the processors' reports to calculate the average price paid by processors (R/kg) throughout the industry</p> <ul style="list-style-type: none"> The levy for each processor will be 1.5% of the average price per kg multiplied by the volume of Rooibos purchased by each processor 	

Step 5	Verification
Parties involved	Auditor
Rationale	To provide confidence in the process through a neutral professional evaluation of the process
Actions <ul style="list-style-type: none"> The administrator submits the reports and the calculation of processor prices and levies to the auditor for review and verification The auditor confirms the accuracy of the calculation 	
Step 6	Levy invoicing and payment
Parties involved	Party appointed for invoicing and collection of levies. This could be the industry body, a law firm or the auditors.
Rationale	To build in another set of checks and balances, an independent party needs to be responsible for issuing the levy invoices, receiving the funds, and paying them to the Bioprospecting Trust Fund.
Actions <ul style="list-style-type: none"> Administrator instructs the party appointed to invoice processors per the calculated amount approved by the auditor Invoices are issued, and processors pay the levy into the designated account and submit proof of payment to the auditor Once all levy payments are verified as correct and received into the designated account, the party responsible informs the administrator of the total to be paid to the Bioprospecting Trust Fund The administrator verifies the payment is correct and gives written approval to proceed with the payment of the levy The levies received from processors are paid into the Bioprospecting Trust Fund The Administrator sends proof of payment to DFFE, NKC and SASC 	



Picture: Rooibos Ltd

Step 7	Development of report
Parties involved	Auditor
Rationale	In order for DFFE to verify the correct amount has been received, it needs a report from the auditor to confirm the data has been verified, the calculation of the levy was correct, and the levy has been invoiced and paid
Actions <ul style="list-style-type: none"> The auditor prepares a report for submission to DFFE, including: <ul style="list-style-type: none"> Aggregate annual levy paid Total volumes bought Average purchase price Updated register of processors who paid the levy according to the operating procedure, and those who didn't 	

Step 8	Management of non-compliance
Parties involved	DFFE and administrator
Rationale	SARC wants the whole Rooibos industry to be ABS compliant, and supplies DFFE with information to support its processes
Actions <ul style="list-style-type: none"> Compliance management is a function of DFFE, but the Rooibos industry provides information If the Administrator becomes aware of any processor not paying levies in accordance with agreed procedures, the processor and DFFE are informed as soon as possible The processor has two weeks to submit proof of corrective action to the administrator, with DFFE included in the communication If the processor fails to submit proof of corrective action within two weeks, the administrator informs DFFE and its compliance monitoring and law enforcement processes take effect. The processor's permit is suspended during this process. 	

Centralised administration to support permitting

The collective ABS and TK levy collection process is applicable to just ten processors, but all Rooibos industry stakeholders are required to apply for a bioprospecting permit, except primary producers and wild harvesters.

Different levels of permit application

In order to streamline the process, different levels of permit application were negotiated and agreed by SARC and DFFE, with the SOP detailing what is required from applicants at different parts of the value chain.

Exempt Farms and wild harvesting	<ul style="list-style-type: none"> Exempt from bioprospecting permits due to low administrative capacity and the burden it would place on the regulatory system to process and issue permits for all 510 parties at this level It was agreed that processors buying from these parties would submit a list of raw material suppliers with their applications, giving DFFE a full record for its permitting process
Category A Processors	<ul style="list-style-type: none"> Comprehensive permit application because this is the part of the value chain where volumes are calculated and benefits shared Category A applicants need to submit the following: <ul style="list-style-type: none"> Prescribed DFFE permit application form Annex 5 A list of all suppliers of Rooibos in the year An example of a purchase agreement between the processor (as the permit applicant) and the farmers or wild harvesters as the access providers (this and the supplier list replaced Annex 11: Material Transfer Agreement) A verified list from the applicant's auditors detailing countries Rooibos is exported to Copy of the Rooibos industry Benefit-Sharing Agreement (BSA) Copy of signed deed of adherence to the BSA (this replaces Annex 12: Benefit-Sharing Agreement)
Category B Packer branders	<ul style="list-style-type: none"> This category covers processors' direct trading partners They are subject to a streamlined permit application because they don't directly share benefits Category B applicants need to submit the following: <ul style="list-style-type: none"> DFFE permit application form Annexures 5 DFFE permit application form Annexures 11 & 12 for every supplier (processor) Recommendation letter from the compliant processor stating that the volumes procured have been benefit shared. This should indicate the permit number of the processor.
Category C Other companies	<ul style="list-style-type: none"> There are many companies working with Rooibos in the cosmetics and the food and beverage industry. They buy Rooibos from Category B permit applicants. These companies must submit a minimum of: <ul style="list-style-type: none"> DFFE permit application form Annex 5 DFFE permit application form Annexures 11 & 12 for every supplier (i.e. Category B applicant) The invoice for the volume of Rooibos tea procured, including the permit number of the processor

Permit application support

The permit application process can be challenging. SARC supports the process across the industry, for members and non-members.

Step 1 <i>Document templates</i>	SARC has worked with DFFE and created guidance for the completion of the required DFFE application forms. Guidance was tailored for different levels of permit applicants.
Step 2 <i>Review of permit applications</i>	The SARC secretariat checks applicants' completed forms and suggests changes before submission to DFFE
Step 3 <i>Support with application amendments</i>	The SARC secretariat is copied on the submission of the form to DFFE, so can provide support if clarification or changes are required

Streamlined application process

The SARC secretariat and DFFE structured the permit submission and review process to ensure efficiency. Category A permit applicants were encouraged and helped to submit their applications first, enabling DFFE to arrange sittings of the Bioprospecting Advisory Committee (BAC) to deal to deal with these applications. Once Category A permits were awarded, the process was repeated for Category B applicants.

The basic permit application process is illustrated here.

