Expert Meeting on ABS and Intellectual Property Rights
5th to 9th September 2011
Addis Ababa, Ethiopia

Details of the Workshop

Day One, 5th September 2011

1. Summary

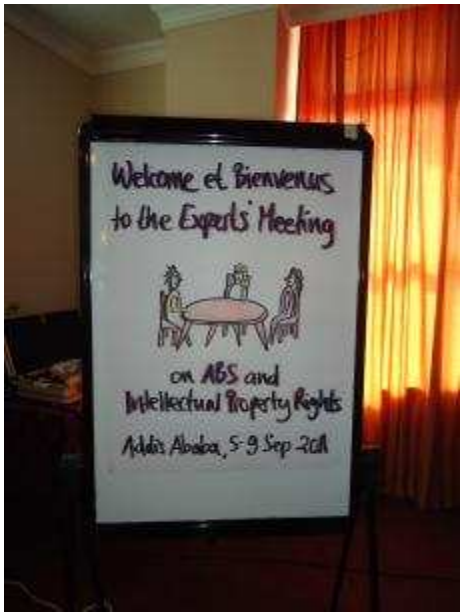
During the first day of the meeting, participants were:

- Familiarised with the core elements of the Nagoya Protocol, and more particularly with the interlinkages between Access and Benefit Sharing (ABS) and Intellectual property Rights (IPRs) and their significance in the implementation of the Nagoya Protocol in domestic and sub-regional policies and regulations;

- Informed on the process and status of negotiations under the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO) regarding relevant IPRs aspects related to ABS; and

- Introduced to the classical IPRs instruments such as patents, geographical indications (GIs) or trademarks relevant to ABS as well as to *'sui generis'* systems relevant to ABS and the protection of Traditional Knowledge (TK).

2. Welcome and Opening Statements



Kathrin Heidbrink opened the meeting and welcomed the participants to the first African workshop dedicated to ABS and IPRs. She then introduced the representatives of the facilitating and supporting institutions of the meeting and wished the attendees a successful and productive meeting.

2.1. The Ethiopian Institute of Biodiversity Conservation

Dr Gemedo Dalle Tussie from the Ethiopian Institute of Biodiversity Conservation (IBC) addressed a warm welcome to the participants, highlighting the successful and longstanding relationships between the IBC and the ABS Capacity Development Initiative (ABS Initiative). He then wished the participants a very successful workshop.

2.2. The Access and Benefit Sharing Capacity Development Initiative for Africa

Suhel al-Janabi from the ABS Initiative also welcomed the participants and thanked the IBC for co-hosting this event. He first gave a brief overview of the ABS Initiative and informed the participants that the ABS Initiative was entering a new phase. Mr al-Janabi explained that, following the adoption of the Nagoya Protocol the ABS Initiative is a direct response to the new requests for support in developing and implementing national ABS systems. He went on to say that the focus will now be placed on the implementation of activities at national and local levels in conjunction with regional and sub-regional organisations. From the end of 2011 until 2014, the ABS Initiative will then put considerable attention and support on the ratification process of the Nagoya Protocol and its national implementation as well as on facilitating the establishment of value chains. In this regard, Mr al-Janabi pointed out the importance for the ABS Initiative to collaborate further with and provide support to the African Union (AU) and other regional African organisations. He then indicated that the aim of the meeting was to shed some light between ABS and IPRs and more particularly, to look at the points of interface between the two. He concluded by highlighting that this was the first African expert meeting dedicated to ABS and IPRs issues and that the outcomes could greatly contribute to provide useful inputs and guidelines to countries, partners and other fora.

2.3. German Federal Ministry for Economic Cooperation and Development

Dr Christian Glass from the German Federal Ministry for Economic Cooperation and Development (BMZ) greeted the participants and gave a general overview of the German Development Cooperation, its partner approach and areas of work in partner countries. He explained the role of the Ministry in setting political guidelines and the role of implementing organisations Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)[1] and KfW Entwicklungsbank, in executing projects.

Dr Glass highlighted the importance of biodiversity and ABS in German Development Cooperation. Key development policy objectives were both poverty reduction and the conservation and sustainable use of biodiversity and ecosystems services. He stressed that ABS had a great potential to protect biodiversity, alleviate poverty and foster sustainable development. He also underlined the significance of implementing the Nagoya Protocol properly to ensure legal clarity with regard to access to Genetic Resources (GRs) and the fair sharing of benefits arising from their utilisation, to foster entrepreneurship and innovation in countries where GRs are found. He went on to say that it was

[1] GIZ is the result of successful merger in 2010 of three agencies responsible for Technical Cooperation: the Deutscher Entwicklungsdienst (DED) GmbH (German Development Service), the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (German technical cooperation) and InWEnt – Capacity Building International, Germany.

essential to understand these issues from the perspective of different fora such as on IPRs and to be aware of the negotiations under the WIPO and the WTO – Trade-Related Aspects of Intellectual Property Rights (TRIPs) Council. Similarly, he stressed that a good understanding of the specific principles and challenges of ABS was essential and that these principles should be explained to colleagues implementing IPRs related regulations. Dr Glass concluded by wishing the participants a very productive workshop and fruitful discussions.

3. Objectives of the Workshop and Getting to Know Each Other

Dr Susanne Reyes-Knoche from the ABS Initiative extended a warm welcome to the participants and introduced the objectives of the meeting. These were as follows:

- Examine the Nagoya Protocol, placing a particular attention on the interlinkages between ABS and IPRs;
- Explore the process and status of the negotiations under the WIPO and WTO regarding the relevant IPRs aspects related to ABS;
- Explore the interface between ABS and IPRs through different national case studies and discuss lessons learnt from them;
- Reflect on IPRs issues relevant to the ABS implementation process in domestic and sub-regional policies and regulations;
- Discuss the development of effective institutional coordination mechanisms between the relevant competent national and international authorities;
- Introduce and discuss the practicality of different Intellectual Property (IP) instruments used along the value chain, research and/or product development process of GRs and associated TK, such as Prior Informed Consent (PIC), Mutually Agreed Terms (MAT) and the granting of access permits; and
- Discuss ways and means to put the two negotiations together in order to foster and encourage investment in countries where GRs are found.

In relation to the above objectives, the five day programme of the workshop was presented as follows:

- Day One: Setting the scene – Where are we? What are the critical issues to understand from both perspectives?
- Day Two: Presentation of ABS national cases related to IPRs
- Day Three: Core part of the problem – What does IPRs mean in practice and in ABS regulations?
- Day Four: Other core issues – What is really needed in MAT, PIC and access permits and international certificates?
- Day Five: What could be generally done around ABS/IPRs issues and what can the ABS Initiative do in this regard?

After identifying the different types of expertise present in the room, Ms Heidbrink invited the participants to introduce themselves to their neighbours and take few minutes to provide a brief

overview of the work that each of them are involved in, and expand on their interest in participating in the meeting.

4. ABS Erklaerix – ABS Simply Explained presented by Dr Christian Glass from BMZ, Germany

The ABS Erklaerix or "ABS Simply Explained" was presented to the participants. The short animated video clip captures the basic principles of ABS and related issues in five minutes. It explains what ABS should be in a very simple way and therefore can be used to explain ABS to people who are not familiar with ABS and the Nagoya Protocol.

4.1. Comments from the Audience

Following the projection, participants were invited to share their thoughts and comments. These were as follows:

- This short animated movie is a valuable and useful tool to present ABS principles to different parties. However, it does not emphasise the various processes and the roles of the different stakeholders.
- Reference to the International Treaty on Plant Genetic Resources for Food and Agriculture and to Article 10 of the Nagoya Protocol would have been relevant.
- The interface between ABS and IPRs is important but it would have been valuable to also consider traditional systems such as community ownership of seeds based on which various communities exchange seeds.
- It is an interesting movie that should be disseminated extensively, especially in the academic world and at local authority level.
- It is important to bring this message down to national level.
- The message is through graphics. Was it intended to be just graphics? Could we not add real case study pictures?

4.2. Addressing the Comments

It was further explained that the idea was that the movie should be as short as possible, as comprehensive as possible and as simple as possible. It would be too long and difficult to add these suggestions into the five minutes. The focus of the film is meant to be on ABS and the Convention on Biological Diversity (CBD). Article 10 of the Nagoya Protocol and other crucial issues were excluded to avoid overloading the contents of the movie. However, add-ons on different issues such as IPRs could be done separately. French and German versions will soon be available along with the English one to download from the ABS Initiative's website.

5. Introduction to ABS and the World Intellectual Property Organisation: Where Are We?

This session aimed to provide an initial overview on the links between global and national ABS and IP regimes, both from the perspective of ABS regimes as well as from the perspective of IP regimes.

5.1. The Nagoya Protocol on ABS and its Links to Intellectual Property Rights by Dr Susanne Reyes-Knoche from the ABS Initiative, Germany

Dr Susanne Reyes-Knoche pointed out that her presentation aimed to open the box and highlight the explicit and non-explicit links to IPRs in the Nagoya Protocol. To do so, she first provided a brief background of the Protocol stressing that it is rooted in the CBD and particularly in its third objective: the fair and equitable sharing of the benefits arising from the utilisation of GRs. She then explained that the logic of the CBD lied in access regulations. 'Resource-rich' countries shall facilitate the access to GRs and 'technology-rich' countries shall share benefits arising from the use of GRs while facilitating the access to technologies and means necessary for the conservation and use of these GRs. She stressed that instruments such as PIC, MAT as well as benefit sharing provisions are central to such a process.

Dr Reyes-Knoche highlighted that the Nagoya Protocol was a tool that addresses the need for legal certainty and transparency for both user and provider countries. For the latter, it will ensure benefit-sharing once GRs leave the provider country and prevent misappropriation of GRs and associated TK. For the former, it will provide clear and transparent procedures to access GRs.

While giving a concise overview of the Nagoya Protocol, its objective, scope, tools and mechanisms to assist implementation and institutional provisions, she underlined its core elements as follows:

- Access – the Nagoya Protocol leaves it up to member states to define how to implement it at national level.
- Fair & Equitable Sharing – benefits shall be shared on mutually agreed terms by user and provider countries. Benefits may be monetary and/or non-monetary.
- Compliance – (i) discussed in particular Articles 15 – 18. Compliance with national ABS legislation is obligatory (but "as appropriate"), but again the protocol fails to provide much detail regarding this issue, (ii) compliance with MAT and (iii) monitoring of GRs. The last two points being both very important aspects with regard to IPRs.
- Indigenous Peoples and local communities (ILCs) – TK being acknowledged as central for conservation and sustainable use of biodiversity and research based on GRs. Access subject ("in accordance with domestic law") to PIC or approval and involvement of ILCs; community protocols mentioned in Article 12.1.
- Global Multilateral Benefit Sharing Mechanisms, Article 10.

The second part of the presentation focussed on highlighting the explicit or non-explicit links to IPRs in the Nagoya Protocol. Dr Reyes-Knoche indicated that only in Article 6. 3 lit (g) (ii) and in 1 (j) and 2 (q) of the Annex "Monetary and Non-Monetary Benefits" IPRs were explicitly mentioned in the Nagoya Protocol. She then drew attention to the non-explicit links to IPRs such as:

- Obligation ("as appropriate") to establish ABS measures that provides for legal certainty, clarity and transparency, fair and non-arbitrary rules and procedures, clear rules and procedures for PIC and MAT and the issuance of a permit or equivalent: Article 6.
- Compliance with MAT: in particular in Article 6. 3 lit (g) Article 15 and Article 18.

- Regulations in the context of the protection of TK associated with GRs: Article 12.3 lit (b) & (c).
- The ABS Clearing House and information sharing: Article 14 (Permits or equivalents, certificate of compliance, model and tool developed to monitor GRs and code of conduct and best practices).
- Monitoring the utilisation of GRs: Article 17 (Checkpoints, internationally recognised certificates of compliance, access permits or their equivalent).

5.2. The World Intellectual Property Organisation and the World Trade Organisation Negotiation Process and its Links to ABS by Christoph Spennemann, from the United Nations Conference on Trade and Development (UNCTAD), Switzerland

Christoph Spennemann introduced his presentation by providing a general overview of the ABS related negotiations at WIPO. He informed the participants that the Intergovernmental Committee (IGC) on IP and GRs, TK and Folklore was a body established by WIPO General Assembly in 2000. Since 2009, its mandate is to undertake text-based negotiations with the objective of reaching agreement on a text of one or several international legal instrument(s) which will ensure the effective protection of TK, Traditional Cultural Expressions (TCEs) and Folklore as well as of GRs and associated TK. To do so, the IGC examines how IP principles and systems can protect TK and TCEs from misappropriation, and equitably share benefits from their commercialisation. The IGC also focuses on the role of IP in access to and benefit-sharing related to GRs.

He noted that the negotiations on TK and TCEs have resulted in the form of one single draft text for each including a common operational language (subject matter of protection, beneficiaries, scope of protection, limitations and exceptions). The negotiations on GRs and associated TK, on the other hand, are less advanced and many core issues remain unsettled. He pointed out that, although mandatory disclosure mechanisms could be regarded as very efficient instruments to ensure compliance with CBD principles, a big controversy remained on the disclosure of the source of GRs and TK (PIC, MAT and ABS) in IP application. Other core issues, such as the definition of TK, enforcement of ABS, scope of rights, scope of limitations and exceptions and the nature of beneficiaries are still being discussed.

Mr Spennenman also reported on the WTO negotiations and on the two main positions on ABS within WTO (i) supporting ABS outside patent systems (contracts) or (ii) supporting ABS through patent system (disclosure requirement to enforce CBD objectives). He also informed the participants that in April 2011, a group of WTO Members tabled a proposal for text-based negotiations for a TRIPS amendment recommending the insertion of a requirement to disclose the origin/source of GRs in patent applications. This proposal was, however, objected to by a number of other delegations.

Mr Spennemann concluded by listing the main activities undertaken by UNCTAD in relation to IP & ABS:

- 2006: Study on options for disclosure requirements upon request of the 7th Conference of the Parties (COP) to the CBD;
- 2011: Launch of capacity building programme with BMZ/GIZ on the role of domestic IP laws to implement CBD/Nagoya Protocol including:
  - The development of a training manual on interface IP, trade and biodiversity;
  - Joint regional courses with BMZ/GIZ (face to face and e-learning) throughout 2012/2013 for government officials (e.g. IP offices, Nagoya Protocol checkpoints), domestic small and medium enterprises, indigenous communities, Non-Governmental Organisations (NGOs) and academia; and
  - Upon request, advisory services on integrating CBD/Nagoya Protocol objectives within national patent laws

6. Intellectual Property Right Instruments and *Sui Generis* Systems for Protection

The following session discussed key IPR instruments (e.g. Patents, GIs, Trademarks and Designs).

6.1. Intellectual Property Relevant to ABS and Traditional Knowledge by Manuel Ruiz Muller from the Peruvian Society for Environmental Law

Mr Ruiz Muller gave a basic overview of tools that can be used by ILCs to address the issue of IP relevant to ABS and TK. The question of who has the control and can exercise rights over biological resources, GRs and TK is therefore central. He pointed out that this presentation also aimed at providing some connecting lines between the various international instruments such as the Nagoya Protocol, WIPO, TRIPS, the Convention of the International Union for the Protection of New varieties (UPOV), the CBD, the Food and Agriculture organisation (FAO) IP and Free Trade Agreements with IP content (TRIPS plus). He went on to say that it was important to look at the potential advantages and disadvantages when considering TK. He added that there were various classic and/or well-known tools to cover certain aspects of communities' knowledge and creativity. Each tool has a certain type of administrative procedures depending on each country's national regulations. He also pointed out that twenty years ago, when IP was first discussed, there was a very strong opposition from the indigenous peoples, especially, regarding patent issues. Since, their position has changed opening the door for further discussions.

Mr Ruiz Muller indicated that IP tools can be used as incentives to stimulate creation and innovation in the arts, technology and all sectors of human activities. They also can be used in relation to the complex international regime on IP and national systems. IP operates mostly through national legislation and administrative procedures with some variations among countries (scope, period of protection, etc…).

The different IP tools, their advantages and disadvantages are presented in the table below:

IP Tools	Advantages	Disadvantages
Patents (as they related to ABS and TK) – To consider isolated communities that may have difficulties to address the requirements and administrative procedures for filling patent application (need for legal advice, etc…)	▪ Strong rights ▪ Universal recognition of IP principles ▪ Limited monopoly	▪ Complex administrative procedures ▪ Expensive ▪ Do not respond to collective innovation
Trade Secrets (as they related to ABS and TK) – very complex procedures	▪ Maintain control of innovation ▪ No registration procedure-contract ▪ Defensive action if trade secret is revealed illegally	▪ Weak tool ▪ Complex to up hold rights in court ▪ Complex to invoke unfair competition ▪ Need of unfair competition rules.
Plant Breeder Rights (related to ABS and TK)	▪ Strong monopoly right ▪ Universal system ▪ Targeted to modern, high yielding varieties	▪ Farmers exceptions limited ▪ Research exceptions can be limited ▪ Complex procedures
Trademarks – Communities are not usually tied to markets and such process is very complex for them.	▪ Distinguish products in markets ▪ Registration in IP office	▪ Strong commercial objectives and linkages to market ▪ Need for a legal person to own the trademark (formal organisation of communities)
Collective Marks	▪ Protect collective interests ▪ Relate to geographical, site specific features of a product ▪ Market oriented	▪ Need to organise communities in associations, cooperatives, etc… ▪ Need for legislation recognising collective marks ▪ Internal regulation for use of each mark
Geographical indications (GI) – A classic IP tool.	▪ Protect collective interests, through State representation ▪ Relate to geographical, site specific features of a product ▪ Market oriented ▪ Formal registration procedure	▪ Need to organise communities in associations, cooperatives, etc… ▪ Need for legislation recognising GIs ▪ Not recognised worldwide
Copyright – It has not been fully explored in the sense of protection communities.	▪ No registration ▪ Moral and economic rights ▪ Broad dissemination of creativity ▪ Can protect writings, songs, images	▪ Piracy ▪ Often related to individuals (but not necessarily)

6.2. Intellectual Property Right Instruments: Patents and Geographical Indications by Christoph Spennemann, from the United Nations Conference on Trade and Development (UNCTAD), Switzerland

Mr Spennemann provided a brief but comprehensive overview of all categories of IPRs with a special focus on patents and GIs:

1) Patents : technical solutions/interventions
2) Copyright: expression of ideas
3) Industrial designs: new or creative shapes and designs
4) Trademarks: distinction of producer and reputation
5) GIs: distinction of geographical area by linking origin with quality, reputation, production process etc.
6) Trade Secrets: secret information of commercial value

Mr Spennemann stressed that the main objective of patents was to protect inventions. He informed the delegates that the term 'invention' referred to a technical intervention to solve a particular problem. He specified that according to some national laws extraction and purification as well as biotech products incorporating GRs and associated TK could be patented. He then stated that the use of TK database could help to determine whether a patent application passes or fails the novelty criterion. In this regard, disclosing the origin or source of materials may also be helpful. He pointed out that, whatever the case may be, a patent application must be new, inventive and applicable by industry. He stressed that it was important to understand that a patent does not give the rights to market a product and therefore any product will also need the approval of relevant competent national authorities. He then notified that discoveries (natural substance), medical treatments, plants and animals, biological processes, plant varieties, with the exclusion of microorganisms such as pathogens for vaccines, may be excluded from patentability.

Mr Spennemann stated that GIs are defined by indications of origin that link product characteristics or reputation to a geographical origin (e.g. Darjeeling, Basmati or Tequila). He went on to say that unlike patents, GIs could potentially be a more promising tool for the protection of GRs and TK as GIs are based on quality and/or reputation, natural factors such as soil and climate as part of the quality. GIs confer communal rights – for instance to any producer in an indicated region. As opposed to patents, GIs do not require novelty of a technical intervention, but often rely on traditional production methods, which correspond more to the nature of TK and related GRs. As to the scope of GI protection under the TRIPS Agreement, all products enjoy protection to prevent acts of unfair competition and/or the use of misleading indications that create public confusion as to the origin of products, while GIs for wines and spirits enjoy a higher level of protection.

Mr Spennemann closed his presentation by saying that classical IP instruments had limited potential for the *Sui Generis* protection of TK and GRs. This is because patents require technical intervention and novelty. While GIs are built on tradition, natural factors and communal rights, successful GIs management necessitates the experience and long-term commitment of producers. Defensive

protection from misappropriation will involve TK databases and disclosure of origin requirements in patent law. Trademarks could be relied on as additional means to ensure benefits.

7. Discussion of Sui Generis Systems (UPOV/IT; *Sui Generis* Systems; Traditional Knowledge)

7.1. *Sui Generis* Systems in the Context of ABS and Traditional Knowledge by Manuel Ruiz Muller

Mr Ruiz Muller reported that the intent of *Sui Generis* Systems is the protection of innovations regarding GRs and the protection of knowledge, innovations and practices of ILCs that are mostly related to biodiversity. There is actually no universal legal definition about what *sui generis* means. Therefore, rather than a single *sui generis* regime, it might be more relevant to develop different *sui generis* systems or other forms and/or approaches of protection for GRs and TK and adapt them to national, regional and international circumstance and needs.

Mr Ruiz Muller highlighted that the term 'protection' is often use loosely. Depending on the objectives one may have by using the term protection, one may identify the right ways, tools, instruments to protect TK and GRs. He then provided examples of *sui generis* regimes and ways with which TK could be protected. These were as follows (this is a non-exhaustive list):

- The UPOV – early 1960's.
- The FAO International Treaty on Plant Genetic resources (2001) – In this instance, elements to consider are, for example, farmer's rights at national and international level which at the same time may involve other rights and other measures such as rights to land, biodiversity registers, seed laws and/or bio-cultural community protocols (BCPs).
- The Nagoya Protocol on ABS (2010) and national/regional ABS regimes (Andean Community Decision 391, Philippines EO 247, Organisation of African Unity (OAU) Model Law, etc.).
- National legislation/laws such as the Peruvian Law 27811 for the Protection of Collective knowledge of Indigenous Peoples related to Biodiversity (2001) – An interesting piece of legislation which specifically refers to TK and includes/provides for contracts, recognition of customary law for decision making by representative organisations, registers, trade secrets and unfair competition principles and an indigenous People Compensation Fund; ; these interact to provide with a form of protection which includes: granting levels of control over TK, ensuring compensation for us of TK and maintaining TK over time.

- Law 20 for the Protection of TK, in Panama (2000) which also specifically protects TK, but has been applied mostly to cultural expressions in the context of crafts and embroidery techniques used by Kuna peoples.
- Defensive protection such as "user measures" strategies recognised by the CBD Bonn Guidelines and Nagoya Protocol, using the IP to protect countries and communities interests over their GRs and TK and granting rights conditioned to complying with national ABS and TK legislation and frameworks.

7.2. Protecting Traditional Knowledge – Considerations and Options by Dr Johanna von Braun, Natural Justice

Dr von Braun started her presentation by highlighting the importance of remembering where the protection of TK comes from. First, with events and treaties such as the 1980s/90s Indigenous People Rights movement surrounding resources, land and participation rights, the International Labour Organisation (ILO) Convention n°169 (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)(2007) among others. Second, with the growing awareness on misappropriation of 'intangible resources rights' leading to calls for TK protection. Last, with the initial focus on IPRs as means of protection, thought soon deemed inappropriate as stand-alone mechanism. As these debates were becoming more prominent, it was time to look at IP from another light.

Dr von Braun summarised the limitations of IPRs for protecting TK as follows:

IP	TK
▪ **Clarity regarding owners**	▪ Collective nature of TK -> difficult to identity exclusive 'owners'
▪ **'New' from 'old' knowledge easy to distinguish**	▪ TK perpetual -> no distinction between 'new' and 'old'
▪ **Inventors motivated primarily by future rewards**	▪ TK is connected to a way of life developed in response to the needs of the community
▪ **IPRs reward inventors by guaranteeing them exclusive and time-bound use of such knowledge in exchange for sharing the knowledge with society**	▪ The sharing and exchange is not based on 'ownership rights' but on 'stewardship duties'

Such limitations incited the search for additional or alternative models such as *sui generis* systems.

Dr von Braun then explained that the motives behind TK Protection were either defensive or aspirational in nature. Defensive motives are reflected in (i) the creation of databases or registries for Prior Art such as the Indian Traditional Knowledge Library or the South African Database, (ii) the disclosure requirements in patent files and (iii) the regulation of access and/or use of TK in accordance with customary norms and thereby acknowledging the cultural and geographical aspects of TK. Aspirational motives are expressed in the UNDRIP, Article 8j of the CBD, the Nagoya Protocol and national ABS regimes with the aim to ensure the fair and equitable sharing of benefits and incentivise conservation, affirmation and protection for traditional lifestyles that conserve and generate TK.

Dr von Braun then described two approaches of policy models for TK Protection. First, the state-centric based approach where the State records all TK in a database to establish Prior Art to prevent biopiracy. However, this approach dissociates TK from community and customary use as the State assumes power to its use, community involvement being at the State's discretion. Second, the community rights-based model approach where communities have clear rights to control their TK and also sometimes their lands. TK remains linked to indigenous communities and to some extent give strong incentives to protect these communities and their traditional life style. However, such an approach also raises a number of issues when being implemented such as which community? Who owns what? What are the customary laws and so forth?

Dr von Braun concluded by highlighting that BCPs, mentioned in Article 12.1 of the Nagoya Protocol, are one way to provide support to the communities and address the various challenges they are encountering to protect their TK, GRs and traditional lifestyles.

8. Question and Answer Session with the Three Presenters

8.1. Questions and Answers

Q1*: About the Ayahuasca plant for which an American organisation got a patent: Did they get a patent on the plant or the use of the plant itself?*

A1: The patent was on the plant itself. In the US, you can have a patent on the plant itself. Whether plants are patentable depends on the different countries' legislation.

Q2: *Could you clarify territorial protection, collective trademarks and GIs?*

A2: (i) Territorial protection: An IPR is only valid in the jurisdiction (normally a national territory) for which is has been granted. Communities have to register their rights (in a number of countries) if they want any protection but this is a very complex and expensive process for them. GIs are a right that belongs to the area (e.g. Champagne). (ii) Collective Trademarks distinguish goods/services according to their geographical origin or other common characteristics, benefiting to all producers in that region that use the indication or share the common characteristic. By contrast, ordinary trademarks distinguish goods/services according to the company that makes/provides them.

Q3: *Do we have strong instruments? For example, if we look at the Argan case in Morocco, can these instruments be used in parallel? What about GIs protection?*

A3: You need to make sure that GIs are registered at national level. The trademark comes first so if it has been first registered in France, it will be difficult for Morocco to get the GIs protection in France. Moroccan producers could seek to have the French trademark invalidated before a French court, based on the concept that descriptive terms such as "Argan" (which indicates a region in Morocco) usually do not qualify for trademark protection. In the final analysis this will, however, depend on the

particularities of French trademark law and its eligibility criteria for trademark protection in the case of descriptive terms.

Q4: *Getting a GI is very complex with respect to demonstrating certain production/quality standards. Is this feasible in the context of TK protection?*

A4: Indeed, to receive a GI means that the product has a stable quality. Producers get together to define criteria and common production standards before they apply for a GI – which in itself is a very long process. The production according to certified standards is not usually practised among traditional communities. Thus, this issue is probably the biggest challenge for using GIs as a mechanism to protect TK.

Q5: *Regarding patents on TK, do the benefits go to the communities?*

A5: Patenting of innovation comes first. TK is involved at an early stage of the research & development process, hence the importance of national laws for protecting TK. No patent will be granted on TK alone. Whether benefits will go back to communities will depend on national and international ABS and IP policies.

Q6*: Can you trademark a noun?*

A6: You cannot trademark proper nouns – or use a trademark as a noun.

Q7*: When we have a GI, there is no limitation in time - duration of protection – does this mean that there are already some systems currently in place to protect TK?*

A7: Yes, GIs do offer some advantages in terms of protecting TK – above all because they allow for collective ownership and, the protection does not end after 20 years, as for example patent protection does. Furthermore, GIs are linked to natural products. This is also more suitable for GRs and related TK than other forms of IP. However, there are a number of challenges of using GIs for protecting TK, mostly related to the need to ensure stable quality of the products, and to satisfy the very strict production process harmonisation requirements. Another challenge is that GIs really only make sense in a context where the subject matter of protection actually has a market. For a protection against biopiracy in a bioprospecting context of a little known species, it would not be appropriate. In addition, GIs or trademarks (collective marks) only protect the used geographical name, but not the substance as such from misappropriation.

Q8: *Could you clarify TK and communities rights and check points?*

A8: It is essential to establish check points where the use of TK can be verified but this is closely related to disclosure. Disclosure in patent files is one of the check points that has been suggested and is mostly cited as appropriate – though there are some countries (i.e. Japan, US, Australia, Canada, etc. who have expressed their concerns to the use of the patent system

to ensure providing countries' interests are safeguarded).

Q9: *If GIs are not recognised at national level, how can you deal with that issue at the international level?*

A9: There are some requirements that some countries can implement but, apart from wines and spirits, GIs are not compulsory. However, there is a minimum standard of protection that countries will have to address. GIs are a legal tool which is receiving considerable attention and is being discussed in bilateral trade agreements too.

Q10*: Can you share more practical experiences of implementing these laws in Peru especially from an investment point of view?*

A10: In Peru and probably other countries where laws/frameworks have been passed, progress regarding these issues can be seen. In practice, however, from a community perspective, the benefits are not yet very clear or successful. Researchers have difficulties in following the rules of national ABS frameworks. There is a great opportunity in Africa to learn from experiences in Latin America and revise how to implement these frameworks more appropriately. Progress in terms of awareness and policy processes is considerable, but implementation is proving a complex matter.

Q11: *BCPs, is there any place for the State to ensure that BCPs are in line with national legislation?*

A11: The state could use BCPs in the context of PIC or MAT. BCPs are useful in ensuring that these requirements have taken place in an appropriate and satisfactory manner.

Q12: *Are communities benefiting from TK Databases?*

A12: No real success has been reported with the use of the Chinese database but quite interesting outcomes with the Indian database. However in the Indian system the information in the database belongs to the state. This will not work in Latin America where communities have a very strong position on the ownership of their TK and the use of GRs and associate TK. One needs to look at the different examples of current/existing database and their short comings.

8.2. Comments from the Audience

- Clarification regarding terminology:
  - Prior Art is a term used in patent law to broadly describe the entire body of knowledge from the beginning of time to the present. Prior Art is everything publicly known before the

invention, as shown in earlier patents and other published material. It is a barrier to obtaining a patent.

- 'IPRs' is an expression that includes all types of intellectual property, whereas industrial property usually refers mainly to patents. It is one part/aspect of IPRs.

- About the matter relating to TK and its capacity to qualify as prior art - it is important to note that there is a big difference between Europe and United States (US) in terms of what can qualify as prior art. In Europe, inventions have to be, among other, novel and innovative to be considered patentable, which is measured against anything made available to the public, both written or verbally. In the US, undocumented (verbally transmitted) use only qualifies as prior art if this use takes place within the US. If the same use or verbally transmitted information is shared with the public outside the US, it fails to qualify as prior art – and subsequently can be claimed as 'new' again by other parties.

- The first challenge is that there are complications when it comes to the definition of TK and when considering the trust of ILCs in their government. These had led them to very extreme positions such as working out of the negotiations sometimes.

- The way communities can benefit from databases will be dependent on how the rights issues are solved. While in some cases, such as the Indian one, the government assumes ownership over its content, this is not necessarily the case in others. For example, in the current draft IP Amendment Bill of South Africa, the emerging database is used to register information but the knowledge remains the ownership of the communities. In this case the state takes the role of a guardian but the community rights remain intact. Naturally, the implementation of such a system is challenging, but in order for communities to benefit from the system, it is crucial that they are not deprived of their rights to TK.

- The Pacific Region (Pacific Island Forum has adopted two *sui generis* model laws for the protection TK. This might be a very useful input to this programme so we can see how governments and parliaments are dealing with implementing TK laws. The first addresses expressions of culture and was endorsed by Pacific Ministers of Culture in 2002. The second, developed by the Pacific Regional Environment Programme, focuses on traditional biological knowledge, innovations and practices.

- It is advised to look at current implementation systems used by other countries in order to better focus on where to start on policy implementation.

End of Day One