

**Expert Meeting on ABS and Intellectual Property Rights**  
**5<sup>th</sup> to 9<sup>th</sup> September 2011**  
**Addis Ababa, Ethiopia**

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## Details of the Workshop

### Day Three, 7<sup>th</sup> September 2011

#### 1. Summary

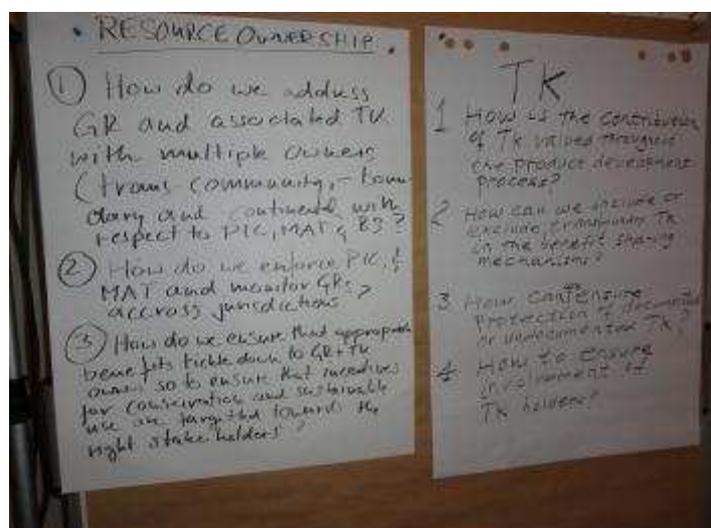
After presentation and discussion of the results of the group work on day two, day three aimed to reflect on IPRs issues relevant to the ABS implementation process in domestic and sub-regional policies and regulations by providing:

- A comprehensive overview and analysis of patent cases relevant to ABS in Africa;
- Practical business reflections on IPRs in national ABS regulations and MAT negotiations; and
- An overview on the ABS related activities of relevant regional African institutions such as the AU Commission, the AU Scientific, Technical and Research Commission, and the African Regional Intellectual Property Organisation (ARIPO).

A group work served to examine the different approaches and activities to dealing with IPRs in ABS regulations and MAT negotiations at local, national and international levels (on the basis of the eight identified clusters on day two now merged into the four following clusters:

- 1) TK and Resource Ownership
- 2) Capacity Building and Technology Transfer
- 3) Valuation and Benefit Sharing
- 4) Monitoring and IP Management

#### 2. Reporting Back from Group Work on Day Two



Each group designated a spokesperson to present the outcomes of their reflection work. Participants were invited to comment or ask for some clarification on the key questions elaborated by each group for their allocated cluster.

## 2.1. Results of the Group Reflection Work on "Traditional Knowledge"

- 1) How is the contribution of TK valued throughout the product development process?
- 2) How can we include or exclude transboundary TK in the BS mechanisms?
- 3) How can we ensure Protection of documented or undocumented TK?
- 4) How to ensure involvement of TK holders?

### Comment from the Audience:

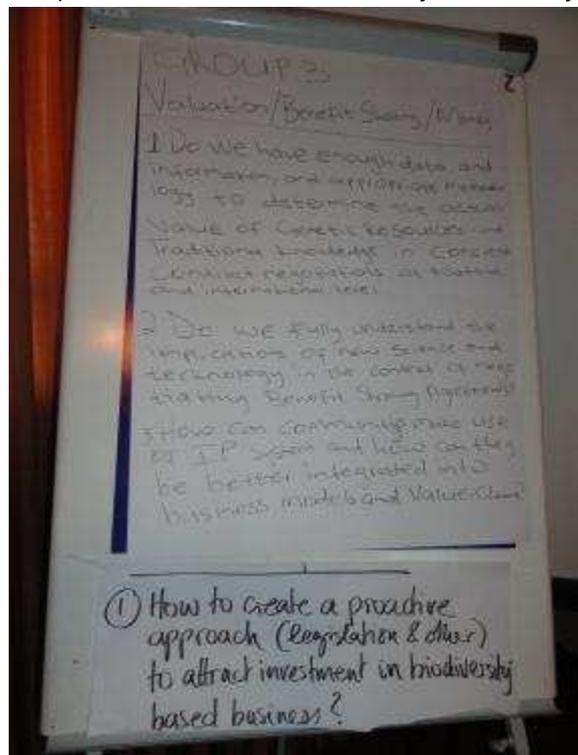
- To look at how the TK users themselves can use the TK and/or the resources.

## 2.2. Results of the Group Reflection Work on "Resource Ownership"

- 1) How do we address GRs and associated TK with multiple owners (Trans – community – boundary and continental with respect to PIC, MAT & Benefit Sharing)?
- 2) How do we enforce PIC & MAT and monitor GRs across jurisdictions?
- 3) How do we ensure that appropriate benefits trickle down to GRs + TK owners so to ensure that incentives for conservation and sustainable use are targeted towards the right shareholders?

## 2.3. Results of the Group Reflection Work on "Valuation, Benefit Sharing and Money"

- 1) Do we have enough data and information, and appropriate methodology to determine the actual value of GRs and TK in concrete contract negotiations at national and international level?
- 2) Do we fully understand the implications of new science and technology in the context of negotiating Benefit Sharing agreements?
- 3) How can communities make use of IP system and how can they be better integrated into business models and value chains?



### Comments from the Audience

- 'We' – refers to both communities and governments.
- Countries need to develop strong national capacities to become strong partners in research, bioprospecting and biotrade projects. It is necessary to ensure that national frameworks create appropriate incentives and are not control based only. It is then that partnerships can thrive and

positive interaction be developed. Not investing public funds in research will make possibilities of negotiating agreements and participating in benefit sharing very complicated and difficult to achieve.

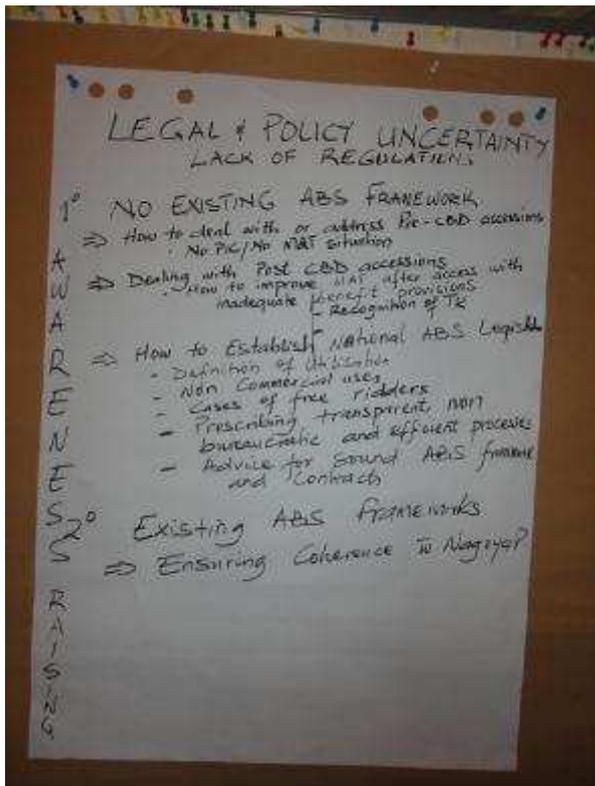
#### 2.4. Results of the Group Reflection Work on “ABS /Intellectual Property Interface”

How to coordinate the implementation of ABS and IP Laws /regulations in the following areas:

- 1) Access regulations (e.g. permits/certificates)
- 2) Disclosure requirements
- 3) Check points
- 4) MAT (e.g. IP Clause)
- 5) Sui Generis Systems for protection of TK associated with GRs

#### 2.5. Results of the Group Reflection Work on “Legal and Policy Uncertainty and Lack of Regulations”

To take into account that awareness raising is essential with regard to all the points listed below:



Nagoya?

- 1) No existing ABS framework
  - How to deal with or address pre-CBD accessions?
    - No PIC/no MAT situation
  - Dealing with post CBD accessions
    - How to improve MAT after access with inadequate?
      - Benefit provisions
      - Recognition of TK
  - How to establish national ABS legislations?
    - Definition of utilisation
    - Non-commercial users
    - Cases of free riders
    - Prescribing transparent, non-bureaucratic and efficient processes
    - Advice for sound ABS framework and contract
- 2) Existing ABS Frameworks
  - How to ensure coherence with the

## Comment from the Audience

Issues for further discussion:

- The need for Africa to develop a regional/an African ABS framework.
- The need to develop comprehensive awareness raising campaign to promote the implementation of the Nagoya Protocol.

### 2.6. Results of the Group Reflection Work on “Intellectual Property/Intellectual Property Management” and “Capacity Building and Transfer of Technology”

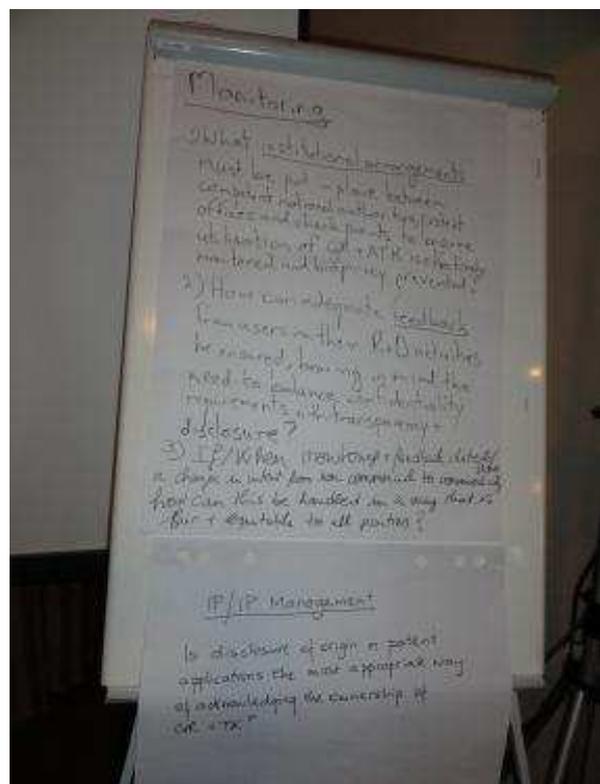
- 1) Disclosure of origin in patent applications is crucial for acknowledging the ownership of GRs & TK.
- 2) Are guidelines and capacity in place which provide simple access to PIC and MAT and enable national authorities to monitor?
- 3) Are there effective mechanisms in place to evaluate the value of TK and GRs?

## Comment from the Audience

- Transfer of patented technology from user to provider and capacity building are necessary.
- It is not only about obtaining a PIC and MAT – how do you manage the transfer of technology and what capacity do you need in the receiving country to make this technology transfer successful. This is a key issue because it has an interface especially with IP and parties agreeing how this transfer shall be done. This matter needs to be added to or be reflected in the questions.
- Importance to develop a research and development platform at national level, including public and private sector.
- Which role would IP play in such a proactive approach?

### 2.7. Results from the Group Reflection Work on “Monitoring”

- 1) What institutional arrangements must be put in place between competent national authorities, patent offices and check points to ensure utilisation of GRs and associated TK is effectively monitored and biopiracy prevented?
- 2) How can adequate feedback from users on their research & development activities be ensured, bearing in mind the need to balance confidentiality requirements with transparency and disclosure?



- 3) If/when monitoring and feedback detect/show a change in intent from non-commercial to commercial, how can this be handled in a way that is fair and equitable to all parties?

### Comments from the Audience

- The group worked on this issue from an international perspective i.e. based on the assumption that monitoring will be done at international level.
- Monitoring is one of the most important/ critical issues especially when dealing with the monitoring of cross-boundary materials.
- Institutional arrangements in both user and provider countries are necessary. It is also essential to establish a fair level of trust otherwise it may become a very costly process.



### 2.8. Plenary Discussion

Dr Reyes-Knoche congratulated the participants on their impressive work while summarising the suggestions resulting from the group discussions. She pointed out that many of the issues identified were very specific questions across the various areas reflected upon. She went on to say that the previous exercises enabled participants to identify where the interface points between ABS and IPRs were and where relevant questions should be addressed.

She then suggested reducing the number of areas for the next group work by merging areas with synergies. She indicated that the idea behind such a suggestion was to provide more time for deeper, detailed and more focused discussions.

The proposition was well received, however, some participants pointed out that there was a need for clarification in the integration of some of the issues. They explained that each cluster was an important issue on its own, and that keeping in mind the general idea of the workshop, i.e. the interface between ABS and IPRs, such a merger could be quite a challenging task. To address this issue, it was suggested that a designated group of experts (Manuel Ruiz Muller, Pierre du Plessis, Emmanuel Sackey, Suhel al-Janabi and Dr Susanne Reyes-Knoche) would facilitate the merger of clusters. The outcomes of the merging were as follows:

- Two overarching issues, setting the framework:
  - 1) ABS and IP Interface
  - 2) Legal and Policy Uncertainty and Lack of Regulations
- Four areas of work, corresponding to four working groups:

- 1) Capacity Building and Technology Transfer – with the following amendments
- 2) Valuation, Benefit Sharing and Money - with the following additional question
- 3) Monitoring and IP/IP Management
- 4) TK and Resource Ownership

### **3. Intellectual Property Rights in National ABS Regulations and Mutually Agreed Terms Negotiations**

#### **3.1. Analysis of Patent Cases Relevant to ABS in Africa by Judith Silveston, Intellectual Property Consultant, Phyto Trade Africa, United Kingdom**

Mrs Judith Silveston provided a perspective of the effect of ABS and related work on client ability to get a patent and presented three cases to illustrate various aspects of the interface of patents and ABS:

- Hoodia to illustrate issues relating to TK in patents and how a strong patent could facilitate ABS, assist in sustainable development and result in inward technology transfer and other investment. The accepted story was that the Council for Scientific and Industrial research (CSIR) in South Africa took the TK of San People that eating Hoodia suppresses appetite and obtained worldwide patents to the use of Hoodia to suppress appetite and treat and prevent obesity. The European Patent Office (EPO) file told a different story. In a successful appeal after the refusal of the patent application because of prior use by the San People, CSIR provided evidence to support their contention that the San People sometimes ate Hoodia, because they were hungry, not to suppress appetite. They also produced evidence of their independent scientific discovery of a new chemical compound with appetite suppressant activity. In this case there was use of a GR without TK. Hoodia was used as an example of how a strong patent can bring advantages over non-patent use: CSIR negotiated an ABS agreement with the San People, their licensees brought inward investment and set up controlled cultivation. Non-patented use resulted in illegal harvesting, no benefit to the San, and no investment. The strong Hoodia patent opened up a completely new field of research activity.
- Pelargonium to illustrate the successful use of TK in a patent challenge. A claim to the use of pelargonium root extracts for treating AIDS was invalidated at the EPO by the prior use of the same extracts for treating AIDS by traditional healers. Even though there was only one instance of such use, that it sufficient under EPO law.
- Kenya microorganisms and enzymes, microorganisms obtained from Rift Valley lakes were patented in the US and commercialised. Even though a Kenyan student was a key member of the collection team she was not acknowledged as an inventor. Under US law inventors have ownership rights. The patent has expired,



so no action can now be taken by Kenya.

Mrs Silveston then provided a brief overview of the patenting process. She introduced this topic by stating that the "Myth of the International Patent" was wrong. There is no such thing as an International Patent. She mentioned that the publication that was often believed to be such a patent was, in fact, an International Patent Application. It gave a holding position for 18 months for subsequent filing of applications in chosen countries. She highlighted that a patent application was what was filed at a Patent Office. It is not what the applicant would like to get. A patent is what is granted. She went on to say that many applications were refused or dropped, and many were amended (narrowed). In the International Phase a Patent Office Examiner would carry out a search of patent and literature databases. Documented TK should be found but, of course, undocumented TK cannot be found. In the subsequent "national/regional phase" the application must be refilled separately in every country or region where a patent is desired. She informed that many applications were dropped at this stage. She specified that even when there was a filing programme it was rarely for more than 10 countries/regions, more usually for about three to six. She pointed out that getting an application to grant was not a trivial undertaking. It is expensive, time-consuming and generally takes a long time. Not all granted patents were equal. Some Patent Offices e.g. EPO, US, Japan have rigorous examination as to the merits. Others, for example, South Africa, merely have a registration system, which can result in the granting of patents that are invalid, which is very bad for third parties.

Mrs Silveston then used Scelletium as an example of the patenting process. The first international application, to an oral supplement containing Scelletium, kava and another defined component was dropped at the International stage. The second concerned mesembrine, the active ingredient in Scelletium. It entered the national phase and was granted in several countries. She indicated that there were two further applications, but still pending in the international phase.



Mrs Silveston stated that patents were territorial. Therefore, she said, they had force in the country where they were granted. A patented product could be used or sold in any country where there was no patent, and could be exported to any country where there was no patent. Relatively few patents in the ABS field were filed in Africa, in which case the inventions could be used there. She stressed that this could open opportunities for GRs, with associated benefits to the owners of the GRs. She took as example the Devil's Claw. A

patent to a good extraction process was filed in Germany only. This process could be used in Africa and the product exported anywhere except Germany. This could be regarded as free technology transfer. She informed the participants that any patent or application that had been refused or dropped was in the public domain and could be used. Accordingly, the status of any patent of interest should be checked. Thus, it might be possible to use the invention.

Mrs Silveston concluded by highlighting that patents did not necessarily result in products. With the cases presented above, there were plenty of patents and applications, but other than the Kenya microorganisms there were no products on the market. She noted that in her professional life of more than 35 years (mainly in pharmaceuticals, biotech, with some natural products), she could not think of more than about five products on the market. She recommended the participants not to think that every patent would result in ABS benefits even if disclosure of origin and all ABS agreements were in place.

### 3.2. Question and Answer Session

**Q1):** *There is a lack of products on the markets despite the number of the patents – what is the reason for this? Is it because people want to collect royalties as opposed to exploiting their patent into a product?*

**A1:** In this field, especially pharmaceuticals, patents have to be filled at an early stage. There is a big rush to file an application to earn some time but it is often found that after research done, the research does not lead anywhere. So in terms of end products, it is a very small number or sometimes, if there is a final product, the market does not exist anymore. Protection for trademarks and designs are usually obtained more quickly.

**Q2:** *Clarifications – what is the appropriate legal structure which we can use to protect TK and products based on TK?*

**A2:** If you want to protect TK, you may need to look other ways than patents e.g. as discussed by Manuel Ruiz. TK as knowledge would generally be considered as not patentable. TK is only patentable when associated with something physical e.g. a product, a process or a use.

**Q3:** *Shed a bit of light on the international patent application system – where can these applications be filled? Does it relate to all countries for GRs for example? Is it the same process for all countries?*

**A3:** Most countries in the world belong to the system. For filing an international application every country has a designated patent office or can file at the regional office. The international application gives the applicants some time to decide where (which countries)



to file their patent application (this refiling of the international application in individual countries is expensive). The US legal system and patent filling system is very different from the one in European countries. But there are discussions about aligning all systems and this is starting to happen.

**Q4:** *I am lost – if we consider the presentation made by our friend from Benin – could the solution used for malaria treatment be patented as in this case, TK is relevant to cure the disease?*

**A4:** What could be patentable is the active compound/molecule.

**Q5:** *For Hoodia you said that the patent is not related to TK, what I don't understand is that from my understanding of the case TK was used?*

**A5:** CSIR filed an affidavit from an expert who had worked with the San for over forty years. He said that the San sometimes ate Hoodia, but as a bush food because they were hungry, not to suppress their appetite. CSIR found the appetite suppressant activity independently by scientific research, which also showed that there is not enough of the appetite suppressant chemical in the amount of Hoodia that the San would eat to actually suppress the appetite.

**Q6:** *Would you feel that disclosure requirements will facilitate the protection of TK or the use of TK to challenge a patent?*

**A6:** Yes, it would.

### **3.3. Additional Comments from the Audience and Points for Further Discussion**

- Importance of understanding IP management – understanding where patents actually applied and how this system works and relates to product development, technology transfer, capacity development, etc. It highlights the significance of the interface between IPRs and ABS.
- To what extent can the IP regime(s) be applied to the protection of TK.? This discussion is linked to the disclosure issue discussed above.
- The need for Africa to develop an African ABS framework.

## **4. Reflections from the Perspective of Business**

### **4.1. A Business Perspective on Intellectual Property Rights in National ABS Regulations and Mutually Agreed Terms Negotiations by Norbert Weitkemper, Vital Solutions, Germany**



Mr Norbert Weitkemper provided an overview of the industry experience with regard to the Hoodia patents and highlighted the importance of active ingredients in such a context. He went on to say that the main lesson learnt from these cases was that strong patent position in relevant international markets could really lead to heavy

investments of the industry and to establish value chains in the provider country.

Mr Weitkemper explained that from an industry point of view, IP protection is necessary because:

- Only strong IP patents filed in the relevant markets generates interest from the industry.
- Strong patents increase the negotiation power of the patent owners.
- Strong patents prevent competitions and other to copy business concepts.
- Strong patents can result in inward technology transfer and investments into local industry.

Mr Weitkemper stated that one cannot expect the industry to ever become an expert on ABS as it was in bringing products to markets. It is therefore essential to refer to experts to make sure that the industry complies with the ABS regulations. He then emphasised the importance to create value systems in countries where knowledge and/or ideas could be transformed in a good business plan/case. In fact, if countries, individuals or communities were able to combine the knowledge and propose good business plans to the industry, there would be more opportunities where businesses will invest in these cases. He was adamant that legal certainty, as encouraged by the Nagoya Protocol, would also be an advantage to attract private sector. However, and though the industry is looking for innovations, it will not invest in a product development that will last more than 5 to 10 years.



ABS regulations will be ineffective without any basic research on GRs/BRs in the provider countries. To this effect, Mr Weitkemper suggested the creation of a research and development platform that will enable assessing the value of GRs and ensure that ABS is implemented in a proper way through appropriate check points while also ensuring the monitoring of the different parts of IP related processes.

Mr Weitkemper ended his presentation by highlighting that the establishment of a comprehensive research and development platform in countries or on a local or regional level as centre of excellence would:

- Ensure that communities benefit from the commercialisation of products;
- Enable communities to benefit from IP license fees;
- Attract national or international inward investments;
- Impact positively on the Gross National Product;
- Increase export opportunities for producing countries; and
- Ensure the sustainable commercialisation of strategic natural resources can support carbon capture and mitigation of desertification.

## 4.2. Question and Answer Session

**Q1** *From your experience in the industry; is industry ethical or is industry only interested in making money? Or do they look into sustainability?*

**A1:** The industry has social responsibility programmes, therefore decisions are not just driven by making money, sustainability is also important. However, when investing in countries from Africa, it means more investments in technology, frameworks and so forth. As a result, only good business plans/cases will be considered. It has to be cost effective with a good turn over projection.

**Q2:** *Your wish list makes a lot of sense providing that the countries have the capacity to do so. All parties get what they want. However the ABS regulations are in their infancy, do we wait until they are operational? How do we go about it as ABS regulations are not operational as yet?*

**A2:** Having appropriate regulations in place would be ideal but you can also start with a good business case. Don't let the industry deals with local issues. Keep it simple for license approvals to be obtainable in a short time frame.

**Q3:** *How can communities derive benefits from IP?*

**A3:** There are many models on how you can ensure this, but, you basically need a good business model and to follow appropriate national legislations. For example, the Hoodia case and related processes put in place to have benefits back to the communities. Such processes need to be implemented in individual countries.

**Q4:** *Have you experienced countries where your wish list is already in place and more particularly the suggested platform that would make it easy to move forward these processes?*

**A4:** (i) Brazil, where we had good relations until the ABS was implemented. In this case, the situation was reversed; (ii) Namibia is also a good example as it is already at the level where industry can step in; (iii) South Africa is another example; however the framework is not very flexible.



## 4.3. Comments from the Audience:

- Putting in place functional ABS systems is much more than just putting regulations in place. It is much more than being political processes or choices. It has a lot to do with what kind of ABS strategy countries want to develop. Are provider countries ready to invest in research and development? All these

aspects have to be taken into account when developing strategies.

- Existing ABS frameworks are a disincentive for the development of any relationship with business and research. Such systems need to be reviewed and amended appropriately to attract them. Countries should think about creating national research capacity when developing such policies/policy frameworks so they are creating a good space where they can enter in a dialogue with other parties.
- Looking at a country like Israel; they work with local communities and allow them to access the IP(s) that they have developed. They invest in capacity building, research, etc. and in developing policies with relation to very little resources. One can certainly draw very practical lessons from their experience. It is essential that countries adopt a more proactive approach to creating value about their biodiversity. In doing so, countries would have a stronger hand to select their partners.
- It is striking that ABS framework is not necessary a very good incentive to attract investments from the industry and develop sustainable relationships/partnerships.
- From a business perspective, having a research development platform is essential. The question is how do we encourage public and private sectors to invest in it?

#### **4.4. New Issues Identified by the Participants for Group Work**

- 1) How to create a proactive approach (legislation or other) to give value to GRs and attract investments in biodiversity based business?
- 2) Which role does/should IP play in such a proactive approach (Capacity, Benefit Sharing and Money)?
- 3) How do we put in place ABS framework without disturbing the business process?
- 4) Importance to develop a research and development platform at national level, which includes public and private sector. How to? Role of legislation?
  - To provide examples of countries where legislation is encouraging such a development.



## **5. Regional Approaches and International Coordination – Overview of Relevant Regional Institutions and ABS/Intellectual Property Related Activities**

### **5.1. The African Union**

#### **5.1.1. The African Union Commission, Life and Earth Sciences Unit by Mahlet Teshome, from the Secretariat of the African Union Commission, Ethiopia**

Ms Mahlet Teshome gave a brief overview of the AU. She expanded further on the AU's engagement on biosafety related issues and the different initiatives undertaken to provide support to Member States with regard to strategy development and biosafety related matters.

Ms Teshome informed the participants that earlier this year, the AU took its first steps in the ABS field and decided to broaden the work of the Life and Earth Sciences Unit to include ABS related issues with the aim to:

- Build a regional coordination mechanism on continental and international issues on biosafety, biotechnology, biodiversity and related issues;
- Complete the revision of the African Model Law on Biosafety;
- Engage and provide further substantive support on issues of biodiversity (bridge on-going initiatives on the FAO treaty, Nagoya Protocol on ABS, Article 8(j) of CBD with African regional initiatives);
- Mobilise partners and funds to support the Unit in the course of its broader mandate.
- Create a sustainable regional information system on biosafety (regular updates of web page, online discussion forums etc.); and
- Use interactive processes.

#### **5.1.2. The African Union Scientific, Technical and Research Commission by Barr A. E. Igbokwe, Nigeria**

Mr Barr A. E. Igbokwe presented on the African Union Scientific, Technical and Research Commission. He highlighted that Commission's priority areas were:

- Medical research including utilisation of African medicinal plants and herbal medicines;
- Industrial and technological development;
- New and renewable energies, natural resources, environmental sciences, technology planning, technology transfer, management and innovation; and
- IPRs, Indigenous TK and Community Rights as well as Plant Breeders' Rights.

Mr Igbokwe then introduced the Pan African Intellectual Property Organisation (PAIPO) which aims to serve as a cost-effective entity to streamline IP management in Africa. He concluded by informing the participants that PAIPO's constitution and structure were currently being revised in a workshop in Dakar.

### 5.1.3. Question and Answer Session for both Presentations



**Q1:** *Very interesting programmes but the challenges are to diffuse these good programmes on the ground. To what extent are you making use of the AU structures such as the Pan African Parliament?*

**A1:** Various challenges with the implementation of biosafety projects. We are trying to engage different structures and organisations in workshops such as this one in order to gain their inputs. We also have inter-

departmental committees to deal with the environmental related issues while using the human resource capacity from within the commission.

**Q2:** *Will PAIPO replace the African Regional Intellectual Property Organization ARIPO & Organisation Africaine sur la Propriété Intellectuelle (OAPI)? How much time for this?*

**A2:** PAIPO does not seek to replace or arbitrate ARIPO and OAPI but aims to work in harmony with them. PAIPO will address the needs that ARIPO and OAPI do not address for some African countries such as South Africa, Namibia and/or other regions.

**Q4:** *The African countries as a region do not look at priorities such as biopiracy. The AU has a role to play so that these countries come with strong national ABS frameworks. Regarding challenges of ABS and IP: What are the real strategy and concrete proposal to cover the ABS and IPRs issues? What is the AU doing as far as ABS is concerned?*

**A4:** The intent and will to address ABS are there. The AU is budgeting for our further activities while carrying on supporting work currently done. The budget for ABS will be unfolded in 2012. The assembly of Heads of States and Governments of the AU decided to prioritise biodiversity in this year of work. The mandate of the existing unit on biosafety is therefore being broadened. The staff working in this field will also be engaged in biodiversity ABS related issues by collaborating with existing initiatives in the African region, coordinating these initiatives at a central level, supporting member states in international negotiations and so forth. Further concrete programmes will be developed after 2012.

## 5.2. African Regional Intellectual Property Organisation

### 5.2.1. Regional approach on the Protection of Traditional Knowledge, Expressions of Folklore and Genetic Resources by Emmanuel Sackey, Chief Examiner of the African Regional Intellectual Property Organisation (ARIPO), Zimbabwe

Mr Emmanuel Sackey, delivered a presentation on regional approach on the protection of GRs and TK. He highlighted the importance of African Countries to establish enabling legislations and put in place institutional structures for the implementation of the Nagoya Protocol and the ARIPO Swakopmund Protocol on the protection of TK and expressions of folklore.

The presentation focused on the functions of ARIPO, the relationship between GRs and TK, particularly those aspects of GRs associated with TK, the CBD and WIPO processes, initiatives by ARIPO on the preparation of regional policy framework on ABS, capacity building activities on TK/GRs and the provisions of the Swakopmund Protocol adopted by the 18 Member States of ARIPO on 9<sup>th</sup> August 2010.

### **5.2.2. Question and Answer Session**

**Q1:** *Since the Swakopmund Protocol has been adopted by ARIPO Member States and the WIPO Process is still on-going, will ARIPO amend its Protocol when the WIPO process is finalised?*

**A1:** The ARIPO Swakopmund Protocol has been used by the African Group at WIPO as a negotiating document so that the current draft of the IGC texts on traditional knowledge and expressions of folklore are not significantly different. It added that, should the WIPO outcome show a significant departure from the Swakopmund Protocol, the Member States will be called upon to review the Protocol to be consistent with the international instruments.

**Q2:** *What is the relationship between the Swakopmund Protocol and the patent system given that under the Swakopmund Protocol, TK is protected in perpetuity while patents are protected for 20 years?*

**A2:** The Swakopmund Protocol is a *sui generis* system which will be implemented as an alternative mechanism for the protection of TK that is holistic (bio-cultural) and by virtue of its characteristics cannot be protected under the conventional IP regimes.

**Q3:** *What is the focus of the development of ARIPO's regional policy framework on ABS since ARIPO has no capacity on ABS and what is the timeframe?*

**A3:** The focus of the policy framework will be on the IP interface with ABS and a draft regional policy framework will be submitted to the forthcoming ARIPO Council of Ministers, at its 13<sup>th</sup> Session which will be held concurrently with the 35<sup>th</sup> Session of the Administrative Council of ARIPO in Accra, Ghana from November 28 to December 2, 2011.

**Q4:** *Could we talk about an on-going harmonisation of ARIPO and OAPI? This did not come very clearly in your presentation.*

**A4:** The two organisations are harmonising processes with the view of one continental organisation. WIPO cannot proceed without the collaboration of ARIPO and OAPI. However, there are 43 Member States and all political issues need to be addressed first in ARIPO and OAPI.

**6. Approaches to Dealing with Intellectual Property Rights in National ABS Regulations and Mutually Agreed Terms Negotiations**

Ms Heidbrink introduced the afternoon group work which aim was to reflect on the questions developed so far. She specified that this group work was devoted to processes while the next group work will be dedicated to contents. Participants were divided into four groups (i) TK & Resource Ownership, (ii) Capacity Building & Technology Transfer, (iii) Valuation & Benefit Sharing (iii) Monitoring and IP Management and asked to discuss for each question:

- At what level it happens (national, international, regional, bilateral, etc...)?
- Where does it belong and who or which organisations, actors should deal with the issue raised?
- What should they do to resolve this question (set up guidelines, set up a platform, negotiations, etc...)?

**6.1. Reporting Back**

**6.1.1. Group Work on “Traditional Knowledge & Resource Ownership”**

Question	Level	Who	What
<b>TK &amp; Resource Ownership</b>			
<b>1) How is the contribution of TK valued throughout the product development process?</b>	Local	Local Authorities Government IGOs NGOs CBOs	Community involvement, empowerment and capacitation
<b>How do you ensure involvement of TK holders?</b>	National	Government bodies responsible for legislation NGOs Relevant stakeholders	Ensuring recognition of rights of ILCs to GR and associated TK in national law
<b>How do you ensure that appropriate benefits tickle down to GR + TK owners so to ensure that incentives for conservation and sustainable use are targeted towards the right stakeholders?</b>	International	National governments Regional organisations International organisations	Ensuring recognition of rights if ILCs to TK and associated GRs in relevant international treaties
<b>2) How can we include or exclude transboundary TK in the benefit sharing mechanisms?</b>	National	National governments	Establish at national level mechanisms for community cooperation
<b>How do we address GR and associated TK with multiple owners (trans – community – boundary and continental with respect to PIC, MAT &amp; Benefit Sharing)?</b>	Regional	Regional organisations	Establish mechanisms for inter-state cooperation
	International	International organisation	

<b>3) How can we ensure protection of documented or undocumented TK?</b>	Local	Local authorities Governments IBOs NGOs CBOs	Establishment of sui generis systems for TK protection Documentation e.g. through databases ILCs sensitisation and capacity building Disclosure requirements in IPR applications Customary laws practices & protocols
	National	Governmental bodies responsible for legislation Relevant stakeholders NGOs	
	International		
<b>4) How do we enforce PIC and MAT and monitor of GRs across jurisdictions?</b>	National	National government Regional IGOs	Establishment of regional and international cooperation arrangements (treaties, protocols) Establishment of effective national enforcement and compliance mechanisms.
	Regional		
	International		



- Question 1: These issues can be addressed at a local, national or international level. At local level, this can be done by community involvement, empowerment and sensitisation carried out by local authorities, NGOs, International Governmental Organisations (IGOs) and Community-based Organisations (CBOs). At national level, governmental bodies responsible for legislation can address the issue in collaboration with NGOs and other relevant stakeholders by ensuring recognition of rights of ILCs to GRs and associated TK in national laws. At international level, it can be addressed by national governments, as well as regional and international organisations by ensuring that rights of ILCs to GRs and associated TK are recognised in relevant international treaties.

- Question 2: The issue can be handled at national, regional and international levels through the establishment of mechanisms at national level for inter-community cooperation while at regional and international levels; governments would put in place mechanisms for inter-state cooperation.

- Question 3: The issue can be addressed at local, national, regional and international levels. At local level, by local authorities, IGOs, NGOs and CBOs starting with community sensitisation, building of trust between TK owners and their governments, documentation and database establishment and through encouraging and supporting use of customary

laws and practices. At national, regional and international levels, it can be done through ensuring disclosure requirements in relevant national, regional and international legal instruments, establishment of 'Sui Generis' systems for protection of TK at the various levels.

- Question 4: This can be done at the national, regional and international levels by national governments, regional organisations and IGOs; through establishment of regional and international cooperation arrangements (treaties, protocols) and at national level by the establishment of effective national enforcement and compliance mechanisms.

### 6.1.2. Group Work on “Monitoring and Intellectual Property Management”

Question	Level	Who	What
<b>Monitoring &amp; IP Management</b>			
<b>1) What institutional arrangements must be put in place between competent national authorities, patent offices and check points to ensure utilisation of GR + ATK is effectively monitored and biopiracy prevented?</b>  <b>Is disclosure of origin in patent applications the most appropriate way of acknowledging the ownership of GRs &amp; TK? (IP/IP Management)</b>	National (IP – ABS)	IP Office ABS Competent National Authority	IP Disclosure requirement and access certificate (from ABS Office or Competent National Authorities)
	Regional (IP-ABS)	IP Office ABS Competent National Authority?	
	Internal (IP-ABS)	IP WIPO ABS Clearing House Mechanisms	
	Non IP: National Regional? International	Regulatory/ Registration Authorities	Access certificate
<b>2) How can adequate feedback from users on their R&amp;D activities be ensured, bearing in the need to balance confidentiality requirements with transparency + disclosure?</b>  <b>If/when monitoring + feedback detects/shows a change in intent from non-commercial to commercial, how can this be handles in a way that is fair + equitable to all parties?</b>	National	Courts Tribunals	Sanctions in: MAT National legislation International cooperation

- The activities at various levels are as follows:
  - (i) At local level, local providers have to negotiate and insert specific monitoring clauses in PIC, MAT, MTA, etc.

(ii) At national level:

- IP Offices should require disclosure of origin in patent applications and a copy of the access permit, notify that ABS Focal Points and revoke patents if disclosure requirement is not submitted.
- ABS Focal Points should include specific sections in the ABS legislations, requirements for reporting back on annual basis, minimal information on the access permit as per Article 17.4; notify the providers on the progress including IP and handle disputes under a tribunal etc.
- Non-IP National Regulatory Agencies should require access permits and revoke certificate (where appropriate).
- National border points should verify access permits and confiscate GRs where relevant.

(iii) At regional level:

- Disclosure of origin of GRs should be required in regional patent application as well as a copy of the access permit/certificates.
- Intent to file a patent should be notified to the National ABS Focal Points.
- National IP Offices should revoke patents if MAT is not honoured. and
- Regional border points should verify access permits and confiscated GRs when relevant.

(iv) At international level:



➤ In patent applications under PCT, the WIPO should require disclosure requirement, a copy of the access permit. Failure to do so should result in the rejection of patent applications.

➤ FAO and World Health Organisation CODEX should require a copy of the access permit. Failure to do so should result in the application for market approval to be refused.

➤ The WTO Secretariat should ask Member states to require disclosure of origin in patent applications, copy of the access permit. Failure to do so should

result in patent applications to be rejected.

- CBD-CHM should require a copy of the international certificate of compliance.

▪ Action to be taken if feedback fails:

(i) At national level:

- Special IP/ABS courts should institute hearing /proceeding.
- National Competent Authority – ABS Tribunals should institute hearing and proceedings, resource owners should have the possibility to sue.
- The police should assist in civil proceedings.
- IP Offices should assist in the search for the relevant patent on GRs and report on biopiracy.

(ii) At regional level, Trade & Economic Blocks could serve as arbitration while ARIPO/ OAPI search and report on any biopiracy.

(iii) At international level, the WTO-Dispute Resolution Body should institute dispute resolution mechanisms and arbitration.

- Monitoring on switch from non-commercial to commercial research

At national level:

- Resource providers should keep vigilant on the research progress according to MAT.
- ABS Focal Point should require annual reports of research.
- IP Offices should require disclosure requirement in patent applications and access permit/certificate copy, notify ABS Focal Point and revoke patents if disclosure requirement is not submitted.
- Non-IP regulatory Agencies should require access permits and revoke certificates where appropriate.
- National Border should verify access permits and confiscated GRs where relevant.

### 6.1.3. Group Work on “Capacity Building & Technology Transfer”

Question	Level	Who	What
<b>Capacity Building &amp; Technology Transfer</b>			
<b>1) Importance of helping people understand how patent etc. work and how they relate to product development, technology transfer etc. (- &gt; Capacity Development &amp; Technology Transfer)</b>	Local (1)	NGOs (1,2)	Capacity Building
	National (2) Sub regional (3)	Private Sector (1,2,3) University (2) National research Institutions (1,2) Professional Associations (TBA, AFSTA, ...) (2,3) Sub-regional organisation (Southern African Development Community,...) (3,2) IARCs + other international research institutions (1,2,3)	- Institutional (1, 2, 3) - Human resources training (1,2,3) - Technical Infrastructures (2,3) Awareness raising and PR activities (1,2,3) Technology Transfer (1,2,3) Strengthening partnerships & Linkages (1, 2,3)
<b>2) To what extent can the IP regimes be applied to the protection of TK?</b>	Local National Sub-regional International (4)	WIPO (4) WTO/TRIPs (4) CBD (4)	Reach clarity and harmonisation of IP- ABS Study options and consequences of the IP Regimes Raise awareness and take decisions at communities level Capacity Building Technology transfer and training

**3) Importance to develop an R&D platform at national Level, which includes public and private sector?**  
**→ How to? Role of Legislation?**  
**→ Are there effective mechanisms in place to evaluate the value of TK and GRs?**

**Are there effective mechanisms in place to evaluate the value of TK and GR**

**4) Which role should IP have in developing a proactive approach to attract investment in biodiversity based business?**

National	Professional Associations NGOs Sub-regional Organisations Private Sector	
Local National	Local Community Group (resource owners) Individual farmers or pastoralists Private sector	Product assessment Market assessment Develop a business case Build capacity to construct a business plan with IP assessment

- The question addresses the process of helping people and understanding the implication of implementing ABS and IP regimes, and how to attract investment in biodiversity based business. To make a better use of ABS, IP and research and development opportunities at local, national, sub-regional, international levels, it is essential to (i) build capacity (institutional, human resources, technical infrastructure), (ii) raise awareness of the importance of ABS and IP, (iii) strengthen partnerships and linkages, and (iv) transfer technology.



- There is a need within WIPO, WTO/TRIPS and CDB for a better harmonisation of IP/ABS systems. This will allow GRs and TK providers to understand the various options and take informed decisions. A proactive approach combined with a value chain, product and market assessment, business case studies and sound business plans will attract business.
- Partners, at local, national, sub-regional and international levels have to be involved: governments, universities/national research institutions, professional associations, private sector, ILCs, individual resource holders, sub-regional organisations, and international research institutions.

### 6.1.4. Group work on “Valuation, Benefit Sharing and Money”

Question	Level	Who	What
<b>Valuation &amp; Benefit Sharing</b>			
<b>1) Do we have enough data and information, and appropriate methodology to determine the actual value of GRs and TK in concrete contract negotiations at national and international level?</b>	Bi-lateral	User /Provider	Transparency on the business model
	National		Market intelligence (Cap B)
	International		
<b>2) Do we fully understand the implications of new science and technology in the context of negotiating Benefit Sharing agreements?</b>	National	Provider	Encourage R&D (Cap B)
	International		
	National	Providers	Treat GR as information (Cap B)
	Regional UN CBD	Negotiators Regulators	
<b>3) How can communities make use of IP system and how can they be better integrated into business models and value chains?</b>	National	IPBES <sup>1</sup>	Review policy against scientific development
	International	Competent National Authorities	
	Enterprise level	ILCs with support	Use GR & ATK as Equity
<b>4) How to create a proactive approach (legislation &amp; other) to attract investment in biodiversity based business?</b>	Bi-lateral	ILCs Business	Revolving GR Supply (Biotrade Model)
	Domestic with donor support	Government led multi-stakeholder private sector	National development strategy (CEPA)

- Question 1: Transparency in the business model is essential so is the understanding of the business model. It is as equally important that the provider has a good market intelligence.
- Question 2: If it is new science and technology, then very little people will know about it but the providers. The best route is to encourage research and development. The provider should therefore incite research and development



<sup>1</sup> Intergovernmental Platform on Biodiversity and Ecosystem Services

to avoid the research to be made in another country. GRs in essence create information so it is important to start treating GRs as information (providers, regulators, negotiators) when dealing with ABS and IP. It is important to constantly reveal your policy and your scientific development.

- Question 3: GRs and associated TK is 'capital' to negotiate with businesses. It will happen at enterprise level. In this instance, it is advised to develop business models where GRs are considered as information such as biotrade models.
- Question 4: Make a commitment to be proactive and develop a domestic strategy which needs to be as broad as possible (in terms of biodiversity) because it deals with IPs but in a realistic way. Government led efforts and multi stakeholders' process especially involve the private sector.

### **End of Day Three**