

THE ABS  
CAPACITY  
DEVELOPMENT  
INITIATIVE



L'INITIATIVE DE  
RENFORCEMENT  
DES CAPACITES  
POUR L'APA

# 12<sup>th</sup> Pan African Workshop on Access and Benefit-Sharing

9 – 14 September 2019, Cape Town, South Africa

Hosted by the National Department of Environment, Forestry and Fisheries (DEFF) in South Africa

Organised by the ABS Capacity Development Initiative

## REPORT

funded by



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Swiss Confederation

Federal Department of Economic Affairs,  
Education and Research EARS  
State Secretariat for Economic Affairs SECO

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Deutsche Gesellschaft  
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## Acronyms and Abbreviations

ABS	Access and Benefit-Sharing
ABioSA	ABS Compliant BioTrade in South(ern) Africa
BCP	Biocultural Community Protocol
BioPANZA	Bio Products Advancement Network South Africa
CBD	Convention on Biological Diversity
CNA	Competent National Authority
COP	Conference of the Parties (to the Convention on Biological Diversity)
CPC	Checkpoint Communiqué
DEFF	Department of Environment, Forestry and Fisheries (South Africa)
DSI	Digital Sequence Information
FAO	Food and Agriculture Organisation
F&F	Fragrance and Flavour (industry)
GMBSM	Global Multilateral Benefit-Sharing Mechanism
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP	Intellectual Property
IPLCs	Indigenous Peoples and Local Communities
IRCC	Internationally Recognised Certificate of Compliance
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
MAT	Mutually Agreed Terms
MOP	Meeting of the Parties (to the Nagoya Protocol)
NBES	National Biodiversity Economy Strategy
PIC	Prior Informed Consent
PGI	Protected Geographic Indication
SANBI	South African National Biodiversity Institute
SCBD	Secretariat of the Convention on Biological Diversity
SDGs	Sustainable Development Goals
SMEs	Small and Medium Enterprises
SMMEs	Small, Medium and Micro Enterprises
SMTA	Standard Material Transfer Agreement
UEBT	Union for Ethical BioTrade
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UID	Unique Identifier
WIPO	World Intellectual Property Organisation



## Background

The GIZ-implemented Access and Benefit-Sharing Capacity Development Initiative (ABS Initiative) supports African partner countries in elaborating legislative and regulatory frameworks, developing access and benefit-sharing (ABS) compliant value chains and involving indigenous peoples and local communities (IPLCs) in ABS processes. In support of the *Strategic Framework for Capacity-Building and Development to Support the Effective Implementation of the Nagoya Protocol on Access and Benefit-Sharing* as well as the *Short-Term Action Plan to Enhance and Support Capacity-Building for the Implementation of the Convention and its Protocols*, the ABS Initiative provides advice, expertise and trainings on ABS-related issues to stakeholders from all African countries as well as from the Caribbean and Pacific regions, and facilitates their involvement in ABS-related international processes.

Since 2006, the ABS Initiative has convened eleven Pan-African workshops on ABS and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of benefits arising from their Utilisation to the Convention on Biological Diversity (Nagoya Protocol) with a view to updating participants on international, national and regional ABS-related processes.

While the last Pan-African ABS Workshop, held in Addis Ababa, Ethiopia in October 2018, was specifically designed to support African delegates in coordinating and developing common positions for the third meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD) serving as the Meeting of the Parties to the Nagoya Protocol (COP MOP 3), this new edition of the Pan African ABS Workshop which took place in Cape Town, South Africa focussed on fostering the national implementation of ABS systems in Africa. Participants elaborated on key aspects relevant to the implementation of effective and efficient national legislative and regulatory ABS frameworks as well as to the development and support of ABS-compliant value chains based on genetic and/or biological resources, including their contribution to rural economic development and biodiversity conservation in Africa.

The event was hosted by the South African Department of Environment, Forestry and Fisheries (DEFF). South Africa is the country with the longest standing national ABS regulatory framework in the region and has recently developed a bioeconomy strategy to harness the potential of its unique biodiversity and generate sustainable economic growth. With several examples of ABS agreements as well as numerous initiatives promoting the valorisation of genetic and/or biological resources and associated traditional knowledge, South Africa's experience provided an excellent opportunity to share lessons learnt in implementing the Nagoya Protocol and developing ABS compliant value chains supporting rural economic development and biodiversity conservation.

### Participants

The workshop hosted 117 participants from over 40 countries, including representatives of national ABS focal points, competent national authorities (CNA), relevant regional and international organisations, IPLCs, and stakeholders from research, civil society and the private sector.

Resource persons from the ABS Initiative and partner organisations were available throughout the week to provide, as needed, targeted technical advice on specific issues. Simultaneous interpretation (English/French) was provided throughout the workshop.

## Approach and Objectives

The 12<sup>th</sup> Pan-African ABS Workshop was aimed at providing a forum where national ABS focal points, CNA and representatives of all relevant stakeholder groups could obtain information, exchange on national experiences and discuss ABS national implementation strategies from an African perspective. Where appropriate, linkages were made with relevant (emerging) topics and processes such as permitting and regulatory compliance issues, the role of Digital Sequence Information (DSI), or embedding ABS in the Post-2020 Global Biodiversity Framework. Specific sessions were dedicated to the elaboration of models and approaches that facilitate national ABS implementation processes. Working sessions were based on the strategic and practical guidance contained in the African Union Strategic and Practical Guidelines for the Coordinated Implementation of the Nagoya Protocol in Africa (AU Guidelines).

A one-day field trip in the Western Cape province was part of the workshop programme and allowed participants to engage first-hand with different ABS actors (IPLCs, small and medium enterprises (SMEs), industry and research representatives) involved in emerging or existing ABS cases and valorisation processes.

The main objectives of the workshop were for participants to:

- Be updated on international and regional processes relevant to ABS, in particular of key outcomes of COP 14 / COP MOP 3 for Africa;
- Understand the different options possible for national ABS implementation (laws, implementing regulations, institutional setups, permitting procedures, etc.) based on examples from the African region and other regions;
- Share experiences and lessons learnt regarding the operationalisation of national ABS frameworks and strategies, e.g. with respect to prior informed consent (PIC) and mutually agreed terms (MAT) procedures, CNA establishment, permitting landscapes, development of commercial or non-commercial ABS partnerships, sectoral considerations, etc.
- Identify ABS implementation challenges and possible solutions for specific groups, such as regulators, IPLCs/providers, SMEs/industry;
- Gain a better understanding of different approaches and instruments to facilitate ABS agreements;
- Become familiar with the ABS online coordination tool of the African Union Commission and discuss options for its improvement and further application/use;
- Agree on key topics for consideration and a way forward towards common African positions on the Nagoya Protocol / ABS and the Post-2020 Global Biodiversity Framework for COP 15 / COP MOP 4.

## Key Outcomes

### Monday, 9<sup>th</sup> September 2019: International Processes and Activities

- Interlinkages between international ABS-related processes, in particular the CBD, the Food and Agriculture Organisation (FAO)/International Treaty on Genetic Resources for Food and Agriculture (ITPGRFA) and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at the World Intellectual Property Organisation (WIPO): On-going communication and substantial exchanges between the respective government institutions in charge of these processes at the national level are essential to ensure consistent African ABS positions internationally.
- The African Group is therefore encouraged to make use of the Online Coordination System for African Negotiators, available at [www.coordination.africa](http://www.coordination.africa), to coordinate biodiversity negotiations, especially during intersessional periods, and support the coordination and the development of African common positions on key issues for Africa such as, among others, DSI; the role of benefit-sharing in the Post-2020 Global Biodiversity Framework and the Global Multilateral Benefit-Sharing Mechanism (GMBSM) under the CBD/Nagoya Protocol.
- For more information on DSI, see the primer compiled by the Initiative (follow the link below).
- The Secretariat of the CBD highlighted that there will be an opportunity for the African Group to comment on future peer reviewed studies on DSI. Any opportunities for engagement and for providing comments will be shared through the normal channel of notifications.
- The role of the ABS Clearing-House is to facilitate interactions between users and providers of genetic resources and associated traditional knowledge and to therefore promote opportunities to develop fair and equitable ABS agreements;
- Lessons learnt from the ABS monitoring simulation example presented:
  - 1) Uploading all information on ABS national systems (legal and administrative measures, permit information, designation of publishing authorities, etc.) on to the ABS Clearing House is key to the functioning of the overall compliance system;
  - 2) A national database storing permits, PICs and MATs, and most importantly linking these documents to the Unique Identifier (UID) of an internationally recognised certificate of compliance (IRCC) generated by the ABS Clearing House and which corresponds to these respective documents, is essential for an effective monitoring system. With this information, the CNA in provider country will be able to verify whether the information provided in the checkpoint communiqué with the same UID, which might be submitted years later to the ABS Clearing-House, is correct and that the contractual obligations set forth in the MAT have been fulfilled by all the users;
  - 3) The CNA in user countries does not play a role in MAT enforcement; however, a good communication between users and the CNA in provider countries is important;
  - 4) ABS agreements must be legally binding contracts to be enforceable in both provider and user countries;
  - 5) Compliance measures are to be established by all Parties to the Nagoya Protocol.



## Tuesday, 10<sup>th</sup> September 2019: National ABS Frameworks and Strategies

Main lessons arising from presentations of African and South African regulatory and institutional frameworks:

- There is no one-size-fits-all option for the national implementation of the Nagoya Protocol. Countries need to develop ABS systems according to their national circumstances and priorities and can opt for different policy options and approaches in relation to key issues, such as, among others, the functional scope of ABS regulation (follow or adapt the scope of the Nagoya Protocol), entity negotiating MAT or granting PIC, and the form of benefit-sharing. However, African countries should consider the AU Guidelines. For further details, see the discussion paper on ABS Implementation Options (follow the link provided below);
- Elements for an effective ABS regulatory framework comprise, among others: an enabling legal and policy environment, an effective coordination and communication between all the actors involved, financial and technical support mechanism for national actors (SMEs, research, IPLCs) and a strategy linked to the national development strategy and/or the Sustainable Development Goals (SDGs);
- Clear guidance on national procedures to apply for permits, obtain PIC and establish MAT for users (academia, research organisations and industries) is essential;
- In the context of utilisation of biological and genetic resources, intellectual property (IP) pervades the whole ABS value chain. With respect to traditional knowledge, IP tools could, for example, be used as a 'shield' to protect traditional knowledge from misuse and misappropriation or as 'sword' to economically valorise traditional knowledge;
- Understanding the different steps of the valorisation process and the reality of research and development is essential;
- Constellations of actors and their functions in research and development/the valorisation of genetic resources can vary to a large extent depending on their respective business models which often entail a collaboration between universities and the private sector. Consequently, utilisation rights and IP may be held by individual actors, shared, licenced out, etc.;
- Understanding the linkages between IP, ABS and the protection of traditional knowledge associated with genetic resources is essential;
- A contract is a key tool to fill the gaps in international law on ABS – appropriately worded clauses in ABS contracts are essential to, for example, prevent erroneous patents and secure the rights of providers of genetic resources.

### Wednesday, 11<sup>th</sup> September 2019: Field Trip to ABS Actors Along the Value Chain

The field visit provided an opportunity to explore the different stages of operational value chains, from the permit process and research phase to the commercial phase, illustrating some examples of business concepts or academic research projects on which the South African bioeconomy is based:

- The area of expertise of Parceval (Pty) Ltd includes cultivation and sourcing of botanical raw materials, establishing supply chains, and product formulation and manufacturing of intermediary and finished products predominantly in the pharmaceutical sector. Parceval complies with South African ABS legislation and regulations. It has been granted several bioprospecting permits and established ABS agreements accordingly. Key challenges encountered are, among others, the identification of traditional knowledge holders; a low level of understanding of communities on bioprospecting, the establishment of ABS contracts and legal agreements and the high transaction costs of compliance.
- Afriplex is a South African company focusing on the development and manufacturing of botanical extracts, complementary medicines and food & beverage product solutions. Combining state-of-the-art facilities and processes with a source to shelf approach, Afriplex aims at unlocking the potential of traditionally used African medicines and botanicals while adding value to all the components of the supply chain. Working closely with multiple educational institutions and research organisations, Afriplex has established a productive ABS compliant bioprospecting pipeline from the permit application process and the biodiscovery phase to the commercial phase, including, where relevant, benefit-sharing agreements with traditional knowledge holders. It is thus a good example of collaboration where research is undertaken by universities while product development and manufacturing are carried out by the company. Different constellations of IP ownership are being applied.
- The case of the Honey Flower (*Melianthus major*) provided an example of an international research partnership between University of Dortmund in Germany and Parceval (Pty) Ltd, raising various issues related to PIC, MAT, benefit-sharing and the involvement of IPLCs in such commercially-oriented research collaboration projects. The research is still in the biodiscovery phase. Even if new bioactive compounds found in the plant prove to be potentially applicable for anti-inflammatory applications, commercial success is not yet in the cards as further regulatory requirements and consumer safety schemes need to be met.
- The case of Kraalbos (*Galenia africana*), a herbal shrub used for various traditional medicinal remedies, provided a useful example on how a successful national academic research has turned into a promising ABS case. Kraalbos has been traditionally used to treat skin diseases, wounds and coughs and is currently used in cosmetic formulations such as soaps, lotions, and shampoos. Further biochemical investigations revealed the potential of this shrub to be used as a natural pesticide and fertiliser and led to a patent. The product developed is now ready for commercialisation. This example also illustrated the case where although traditional holders on the plant have not been involved at the initial stage of the research and development process due to a lack of legislation at the start of the research process, they have later been approached by the researcher to establish an ABS agreement in relation to the future commercialisation of the products developed from his research on Kraalbos. The business model aims at integrating IPLCs as shareholders (exposure to all potential benefits and risks).

#### **Thursday, 12<sup>th</sup> September 2019: Approaches and Instruments to Facilitate ABS Partnerships and Agreements**

- Establishing fair and equitable ABS systems is a long process of learning by doing.
- Raising awareness on ABS and building the capacity of all stakeholders involved, IPLCs, academia, the research industry and the private sector in particular, is key to the development of national ABS systems.
- National budgets should plan for capacity building activities to enable the full participation of IPLCs in ABS processes and the development of sustainable ABS value chains from the onset.
- Organising and networking across communities is also key. Experienced IPLCs should share lessons learnt and knowledge gained on ABS with other IPLCs.
- Complex supply chains in some sectors where a final product is based on multiple ingredients sourced in very small quantities in different countries implies significant difficulties not only in ensuring compliance with multiple national laws but also in the distribution of fair benefit-sharing along the value chain.
- Despite their divergences, different perspectives and system of values, it is critical that all actors involved in the value chain understand the difficulties and impediments the others encounter.
- ABS issues cannot be dealt with in isolation – all actors must work together towards the common goal of creating a fair and equitable balance of benefits between providers and users of genetic resources by establishing better ABS regulatory frameworks and better ABS contracts.
- Non-commercial research has specific features which need to be addressed in national ABS frameworks: short research project cycles (of 2-3 years) that require ABS permits as prerequisite for funding (in the European Union), subject of research sometimes not clear from outset, pathogens require fast track access (Article 8 of the Nagoya Protocol).

#### **Friday 13<sup>th</sup> September 2019: Framing the Use of Genetic Resources / ABS**

- Sectors using genetic resources vary considerably with regard to research and development entities, research periods, budgets, IP instruments, access quantities, business models (business to business or business to clients), the relevance of specific genetic resources in final products, etc. Such issues have to be carefully considered and taken into account when establishing MAT. Companies users of natural ingredients are leading the number of applications to access genetic resources.
- Access permits like national laws are not enforceable in another country. If you want to make an obligation on the user, it must take the format of a binding contract which adheres to contract law and makes the obligation legally binding and enforceable. The two golden rules of contract drafting are: (1) avoid ambiguity and (2) be clear, specific and dynamic, but not narrow.

- Avoiding the use of terms impossible to define such as the terms ‘genetic resources’ or ‘non-commercial’ in a contract is critical.
- Trust is an important issue to build any partnerships and/or relationships with the communities. Regulators have a key role to play in bringing communities and the private sector together.
- Share thoughts on possible options to support a coherent approach for the national implementation of the Nagoya Protocol and the development of effective ABS systems that will foster innovation and contribute to economic development and biodiversity conservation in Africa is essential.
- Benefit-sharing has a crucial role to play in the Post-2020 Global Biodiversity Framework, with benefit-sharing as an incentive for sustainable use and conservation. IP rights and ABS are important tools to link up the three objectives of the CBD and manage expectations in terms of benefit-sharing.
- More coordination among different sectors at the international level is required in order for ABS to play a key role in contributing to the Agenda 2030 on Sustainable Development and achieving the SDGs.

#### **Links to guides:**

*ABS Implementation Options - Policy and Administrative Options for Implementing the Nagoya Protocol on Access and Benefit Sharing (ABS)*, available at: [http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Publications/Implementation\\_Options/Collection\\_-\\_Implementation\\_Options\\_-\\_ABS-I\\_-\\_201909.pdf](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/Implementation_Options/Collection_-_Implementation_Options_-_ABS-I_-_201909.pdf)

*Digital Sequence Information on Genetic Resources (DSI) - An Introductory Guide for African Policymakers and Stakeholders*, available in English and French at:

[http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Publications/DSI/Introductory\\_Guide\\_-\\_DSI\\_-\\_ABS\\_Initiative\\_-\\_201908.pdf](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/DSI/Introductory_Guide_-_DSI_-_ABS_Initiative_-_201908.pdf)

[http://www.absinitiative.info/fileadmin/media/Knowledge\\_Center/Publications/DSI/Introductory\\_Guide\\_-\\_DSI\\_-\\_ABS\\_Initiative\\_-\\_FR\\_-\\_201908.pdf](http://www.absinitiative.info/fileadmin/media/Knowledge_Center/Publications/DSI/Introductory_Guide_-_DSI_-_ABS_Initiative_-_FR_-_201908.pdf)

## Contact

**For questions and comments on the workshop please contact:**

**Dr Andreas Drews**

ABS Capacity Development Initiative  
Deutsche Gesellschaft für Internationale  
Zusammenarbeit (GIZ) GmbH  
Postfach 5180

65726 Eschborn

Germany

E [andreas.drews@giz.de](mailto:andreas.drews@giz.de)

I [www.abs-initiative.info](http://www.abs-initiative.info)

**Dr Hartmut Meyer**

ABS Capacity Development Initiative  
Deutsche Gesellschaft für Internationale  
Zusammenarbeit (GIZ) GmbH  
Postfach 5180

65726 Eschborn

Germany

E [hartmut.meyer@giz.de](mailto:hartmut.meyer@giz.de)

I [www.abs-initiative.info](http://www.abs-initiative.info)

**For questions and comments on the ABS Capacity Development Initiative or the topic of Access and Benefit-Sharing, please contact:**

ABS Capacity Development Initiative

Email: [abs-initiative@giz.de](mailto:abs-initiative@giz.de)



## Annex 1: Process

### Opening

The 12<sup>th</sup> Pan African ABS Workshop was opened by *Matibe Khorommbi, Chief Director of Biodiversity and Sustainable Use at Department of DEFF*. Mr Khorommbi warmly welcomed all the participants to the workshop, highlighting that DEFF was very proud to host the Pan African ABS Workshop for the third time. He thanked the ABS Initiative and its donors, as well as representatives from the Secretariat of the CBD, the WIPO, United Nations Development Programme (UNDP) in South Africa, ITPGRFA, the South African National Biodiversity Institute (SANBI), and the Department of Science and Technology. Mr Khorommbi then focused on the implementation of ABS and its importance for the development of sustainable economies in Africa, securing jobs and growth from the utilisation of natural resources. He called attention to the fact that biotrade is also a high-growth sector with great economic potential, creating skilled and unskilled jobs through the value chains and stimulating technology development while promoting the conservation and sustainable use of biodiversity and generating valuable foreign exchange from exports. Wishing fruitful debates to all the participants, Mr Khorommbi concluded by stressing that one of the main challenges was to ensure that the utilisation of African plants produces fair and equitable benefits for IPLCs who have lived for generations on the land where these plants are found and hold traditional knowledge.

*Andreas Drews, Manager of the ABS Capacity Development Initiative*, also welcomed the participants to the 12<sup>th</sup> Pan African ABS Workshop and thanked DEFF for hosting this event. He highlighted that South Africa has played a leading role regarding ABS implementation regionally and internationally, enshrining the concept of ABS in its national legislative and regulatory framework long before the adoption of Nagoya Protocol. Mr Drews informed the participants that the main focus of the workshop was to share experiences and lessons learnt from the operationalisation of national ABS frameworks and strategies and on the development of ABS value chains based on both biological and genetic resources, supporting rural economic development and conservation. He went on to say that the workshop was also the opportunity to introduce the newly launched 'BioInnovation Africa' project which aim is to facilitate the development of partnerships between user and provider countries and also made reference to the "ABS Compliant BioTrade in South(ern) Africa" (ABioSA) project which aims to create a high-growth, jobs-rich and innovative biotrade sector in South(ern) Africa that complies with international and domestic ABS regulations. In concluding, Mr. Drews briefly introduced the new ABS contract tool<sup>1</sup> and its accompanying book on '[d]rafting successful access and benefit-sharing contracts',<sup>2</sup> which was developed by the ABS Initiative and provide practical support for the establishment of ABS contracts. Mr Drews concluded by wishing all participants fruitful discussions and a productive workshop.

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<sup>1</sup> The new ABS contract tool can be downloaded here: [http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Publications/Contract\\_Tool/Contract\\_Tool\\_-\\_ABS-I\\_-\\_201909.pdf](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/Contract_Tool/Contract_Tool_-_ABS-I_-_201909.pdf).

<sup>2</sup> Tomme Rosanne Young and Morten Walløe Tvedt *Drafting Successful Access and Benefit Sharing Contracts* (2017) Brill Nijhoff, Leiden, Boston.

The workshop facilitators *Kathrin Heidbrink* and *Hugues Quenum* gave participants a brief overview of the programme and facilitated an interactive exercise to introduce the participants to one another.

## International Processes and Activities

### Linkages Between ABS-Relevant United Nations Processes

#### The Convention on Biological Diversity

*Kristina Taboulchanas from the SCBD* provided participants with an overview of key issues currently being addressed by the Secretariat since COP-MOP 3 (COP 14) focussing on decisions related to the GMBSM (Decision NP-3/13); specialised international ABS instruments in the context of Article 4(4) of the Nagoya Protocol (NP-3/14) and DSI on genetic resources (decision 14/20 and NP-3/12). Mrs Taboulchanas highlighted that various views had been collected to further policy developments on these three important topics. To further this work:

- 1) A peer-reviewed study to identify specific cases of genetic resources and traditional knowledge occurring in transboundary situations or for which it is not possible to grant or obtain PIC (Article 10 on the GMBSM) with opportunity for inputs during the peer review process will be commissioned;
- 2) A report synthesising submissions and views received on information on how specialised international ABS instruments are addressed in domestic measures and on the potential criteria of what constitutes such an instrument identified in a previous study will be compiled;
- 3) Views on four commissioned studies on DSI have been collected and synthesised. These studies looked at the concept and scope of DSI on genetic resources; ongoing developments in the field of traceability; public and private databases, including terms and conditions on which access is granted; and, how domestic measures address benefit-sharing arising from commercial and non-commercial use of DSI. Results of all these studies will be presented in March 2020 to formulate recommendations for COP 15. The African Group will have an opportunity to comment on any future peer reviewed studies on DSI commissioned by the SCBD.

Ms Taboulchanas indicated that additionally to the one-day consultation scheduled in China on 1st March 2020, an online consultation may be planned in January to comment on the long-term strategic framework for capacity building. She concluded by highlighting that all opportunities for engagement and for providing comments will be shared through the normal channel of notifications.

#### The World Intellectual Property Organisation

*Wend Wendland from the Traditional Knowledge Division at WIPO*, gave a brief update of the current state of the negotiations at the WIPO's IGC. He explained that the focus of the negotiation was currently on two very sensitive issues: (i) a proposed mandatory disclosure requirement in patent law related to genetic resources and associated traditional knowledge<sup>3</sup> and (ii) the IP-similar protection of traditional knowledge. He further explained that the mission of the IGC was to reach an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to IP which

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<sup>3</sup> For more on the disclosure of the source of genetic resources and/or associated traditional knowledge, see 'Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge' available at <https://www.wipo.int/publications/en/details.jsp?id=4194>.

will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions.<sup>4</sup> Mr Wendland also informed the participants that a new text was now for review and indicated that although DSI was not addressed in this new draft, it would be in the near future. Commending the African Group for playing a leading role in the IGC process, he then highlighted that the significance and complexity of these negotiations lay in the creation of new collective rights that never existed before. It is therefore a profound re-imagining of the IP system. In conclusion, Mr Wendland informed the participants on the possibility for them to be selected to participate in the 'Advanced International Training Programme on Intellectual Property and Genetic Resources: In Support of Innovation' offered by the Swedish Patent and Registration Office and WIPO, with funding from the Swedish International Development Cooperation Agency.

### The International Treaty on Plant Genetic Resources for Food and Agriculture

*Olivier Rukundo from the Secretariat of ITPGRFA* focussed on the status of discussions related to the enhancement of the Multilateral System under the Treaty. He highlighted that the Governing Body of the ITPGRFA<sup>5</sup> extended the mandate of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System and requested it, among others, to develop a proposal for a Growth Plan to attain the enhanced Multilateral System; revise the Standard Material Transfer Agreement (SMTA) based on its report to the Seventh Session of the Governing Body; elaborate criteria and options for the possible adaptation of the coverage of the Multilateral System; and, make recommendations on any other relevant issues. The results of these different studies will be discussed at the next session of the Governing Body. Mr Rukundo also notified that the Draft Revised SMTA proposed by the Working Group had not yet been fully agreed upon. He then mentioned that outstanding issues such as DSI, articulation of subscription/single window access, and benefit-sharing provisions were still under consideration and that views also diverged regarding the adaptation of the coverage of the Multilateral System. While some Members expressed that an expansion of the current list of crops in Annex I of the ITPGRFA was a *sine qua non* condition for achieving the enhancement of the Multilateral System, others have reservations about such an expansion until proof of principle that benefits will be generated and shared. All the above will be submitted for adoption as a package deal. The amendment of the text of the ITPGRFA will enter into force after two-thirds of the contracting Parties have ratified, accepted and approved it.

### Plenary Discussion

The highlights of the plenary discussion were as follows:

- On-going communication and substantial exchange between the respective government institutions in charge of processes at the national level are essential to ensure consistent African ABS positions internationally.

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<sup>4</sup> Extract from current WIPO IGC mandate for 2018-2019.

<sup>5</sup> The Governing Body is the highest organ of the Treaty as established in Article 19. Composed of representatives of all Contracting Parties, its basic function is to promote the full implementation of the Treaty, including the provision of policy guidance on the implementation of the Treaty. Decisions are taken by consensus unless it is decided (by consensus) to employ another method to arrive at decisions on certain measures. However, consensus is always required for amendments of the Treaty and its annexes.

- Developing synergies between the CBD, ITPGRFA and WIPO is essential to prevent any further fragmentation of these international processes and in turn, facilitate the mutual supportive implementation of the Nagoya Protocol and the ITPGRFA.
- Any discussion on the extension of the list of crops in Annex 1 of the ITPGRFA must take into account the Nagoya Protocol and its scope as provided in Article 3 of the Protocol.
- The mandatory disclosure of the source in patent is essential to ensure the acknowledgment of the origin of the genetic resources and/or associated traditional knowledge used and fair and equitable benefit-sharing.
- The involvement of IPLCs is supported in all three international processes: A voluntary funding mechanism has been established to facilitate the participation of IPLCs in meetings related to the CBD.<sup>6</sup> Efforts are also being made to include IPLCs in relevant meetings of the ITPGRFA. WIPO facilitates the organisation of meetings of the Indigenous Caucus and has established a voluntary fund to facilitate the participation of IPLCs in the IGC's negotiation.<sup>7</sup> WIPO also runs an Indigenous Fellowship Programme.<sup>8</sup>

## African Union Update & Regional Coordination

### Updates on Regional Coordination

*Mahlet Kebede from the Department of Human Resources, Science and Technology at the African Union Commission* provided a short overview of the latest developments at the AUC since COP 14 in Sharm El-Sheikh and activities planned in preparation of COP 15 (Kunming, China, 2020). Briefly informing the participants on the launch of the Online Coordination System for African Negotiators at the ABS Pan African Workshop in Addis Ababa the previous year, Mrs Kebede focussed her presentation on the role of the Continental Coordination Committee. She explained that the Committee was established in response to the critical issues dealt with under the CBD and its protocols. She went on to say that the objective of the Committee was to update countries on ongoing progress on biodiversity-related topics, consult with and advise the African Union Commission in its mandate to coordinate implementation of African Union decisions and ensure that their support services to Member States were synergised. She concluded by highlighting that the Committee, with the support of the online system, will coordinate countries through a medium- and long-term agenda and strategies aiming at prioritising biodiversity in all relevant sectors.

### The Online Coordination System for African Negotiators and Key Issues at Stake

*Pierre du Plessis from the ABS Initiative* provided participants with a brief overview of the Online Coordination System for African Biodiversity Negotiations. Mr du Plessis explained that the primary purpose of this online system was to support the AUC through its relevant departments, to better utilise freely available online tools to increase stakeholder participation, coordination and collaboration. This online communication system is also aimed to be used to prepare common African positions before and during biodiversity-related negotiations or any international environmental negotiations, thereby enhancing the impact of African negotiators while making efficient use of time

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<sup>6</sup> More information is available at <https://www.cbd.int/traditional/fund.shtml>.

<sup>7</sup> More information of the Voluntary Fund is available at <https://www.wipo.int/tk/en/igc/participation.html#fund>.

<sup>8</sup> More information of the Indigenous Fellowship Programme is available at: <https://www.wipo.int/tk/en/indigeno us/ fellowship/>.

and resources. Mr du Plessis highlighted that the Online Coordination System will therefore support the coordination of activities that impact the implementation of the CBD and its protocols. He then strongly encouraged all the participants, the African Group in particular, to make use of this system, especially during intersessional periods, to support the coordination and development of African common positions on key issues for Africa such as, among others: DSI; the role of benefit-sharing in the Post-2020 Global Biodiversity Framework; ABS obligations for CBD Parties who are not Nagoya Parties ; and, action on Article 10 of the Nagoya Protocol providing for a GMBSM. Mr du Plessis highlighted the importance and complexity of DSI-related issues for African countries in ensuring fair and equitable benefit-sharing, particularly regarding the commercial use of DSI, and addressing the technical challenges of controlling access to sequenced information. Finally, Mr du Plessis referred participants to the primer on DSI recently compiled by the ABS Initiative.<sup>9</sup> To conclude this session, participants were provided with a technical introduction to and tutorial on the African Online Coordination System.<sup>10</sup>

### Plenary Discussion

- The Online Coordination System uses freely available online tools (google doc). They are simple to use, cost effective and time saving.
- It is composed of five main components: email, document management, online meetings, discussions groups and support.
- The Online Coordination System is also designed to enable online collaboration so that all users can see the same version of the document online at the same time with all changes neatly recorded.
- It is free and can be used by any authorised individual. However, for any matters related to the African Group, only members of the African Group will be allowed access to the related emails, documents, online meetings and discussion groups. In other words, this system will allow members of the African Group to be able to exchange, especially when it is impossible for them to meet physically.
- The online platform is not aimed at documenting African traditional knowledge but at ensuring that the African Group is well-coordinated not only during international processes but also during intersessional periods to prepare, gather ideas and submit proposals, following the calendar of the CBD. It applies strict control to avoid making documents that are sensitive public during negotiations.

## Monitoring the Utilisation of Genetic Resources

### The ABS Clearing-House

*Kristina Taboulchanas from the SCBD* gave a brief overview of the ABS Clearing House established under Article 14 of the Nagoya Protocol. Enhancing legal certainty, transparency and clarity by sharing information on ABS procedures between user and provider countries, the ABS Clearing House is a fundamental tool for facilitating the implementation of the Nagoya Protocol. However, the majority of

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<sup>9</sup>Digital Sequence Information on Genetic Resources: An Introductory Guide for African Policymakers and Stakeholders, available in English and French at: [http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Pulications/DSI/Introductory\\_Guide\\_-\\_DSI\\_-\\_ABS\\_Initiative\\_-\\_201908.pdf](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Pulications/DSI/Introductory_Guide_-_DSI_-_ABS_Initiative_-_201908.pdf).

<sup>10</sup> The Online Coordination System for African Negotiators is available at [www.coordination.africa](http://www.coordination.africa).



countries, still in the process of establishing their institutional arrangements and national measures, have not uploaded any information on to the ABS Clearing House as yet. To encourage countries to do so, the SCBD has simplified the process of submitting information. It is hoped that this will enhance information-sharing between users and providers of genetic resources and increase opportunities for benefit-sharing from the use of genetic resources and associated traditional knowledge. The ABS Clearing House ensures compliance with ABS measures and transparency in monitoring the utilisation of genetic resources along the value chain (research, development, innovation; commercialisation) through the IRCC, checkpoints, and checkpoint communiqué (CPC), allowing provider countries to access the information related to the utilisation of genetic resource. Ms Taboulchanas concluded that the ABS Clearing House was particularly central in the monitoring of genetic resources that leave the provider country's jurisdiction by providing the information related to the utilisation back to the provider.<sup>11</sup>

### **ABS Monitoring and Compliance Process Simulation**

*Peter Schauerte from the ABS Initiative* presented a fictional ABS case, taking participants through the entire process of using the ABS Clearing House from the issuance of the access permit in the provider country to the publication of the CPC and the respective follow-up actions. Mr Schauerte highlighted that there was currently no real practical example of how national ABS systems share information through the ABS Clearing House. While there is an increasing number of IRCC, very few CPC have been published on the ABS Clearing House. Because it is still challenging to understand how each stage of this entire process works together to enable countries to monitor utilisation of genetic resources, the ABS Initiative developed a hypothetic ABS case along the process logic of the AU Guidelines on ABS. Since national processes vary, the case begins after PIC has been obtained and MAT have been negotiated. While concluding the simulation, Mr. Schauerte shared the following lessons learnt:

- Uploading all information on ABS national systems (legal and administrative measures, permit information, designation of publishing authorities, etc.) on to the ABS Clearing House is key to the functioning of the overall compliance system;
- A national database storing permits, PIC and MAT and most importantly linking these documents to the UID of the IRCC which corresponds to the respective documents is essential for an effective monitoring system. A CPC containing the UID of the IRCC might only be submitted to the ABS Clearing House several years after issuance of the permit. Institutional memory of the associated ABS case might have gone by that time. The CNA of the provider country will then be able to identify the corresponding permit, PIC and MAT based on the UID of the IRCC. With the appropriate documents at hand, the CNA of the provider country will be in the position to verify whether the contractual obligations set forth in the MAT have been fulfilled by the user that has passed through the checkpoint in the user country. Based on this, the provider of the genetic resource can decide whether or not to take legal action against the user.
- The CNA in user countries does not play a role in MAT enforcement; however, a good communication between users and the CNA in provider countries is important;

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<sup>11</sup> More information on functioning of the ABS-CH is available at: <https://absch.cbd.int/about/>.

- ABS agreements must be legally binding contracts to be enforceable in both provider and user countries
- Compliance measures are to be established by all parties to the Nagoya Protocol.

## Plenary Discussion

- An IRCC can only be published on the ABS Clearing House if an access permit has been issued by the provider country.
- An IRCC does not imply nor ensure that the contract clauses in MAT have been complied with. In other words, clauses included in MAT must be enforceable.
- All Parties to the Nagoya Protocol are required to designate effective checkpoints.<sup>12</sup> Effective checkpoints can be located at key places along the value chain (from the research stage to the commercialisation phase) where information on the utilisation of genetic resources can be collected or received from users.
- Possible checkpoints can be patent offices, funding institutions, publishers, market authorisation authorities, etc.
- The information collected or received by checkpoints is meant to inform or alert relevant authorities in the provider country as to how their genetic resources are being used and is made available as a record on the ABS Clearing House. This record is called a CPC.
- The ABS Clearing House is neither concerned with the monitoring of the utilisation of traditional knowledge associated with genetic resources nor is it designed for tracking biopiracy. However, it does act as a strong disincentive. It is therefore essential that more countries publish relevant information on the ABS Clearing House.
- Establishing a national ABS website or clearing-house is not an obligation of the Nagoya Protocol. However, Parties are required to share information with the ABS Clearing House. The ABS Clearing House is designed to be interoperable with other databases, particularly with Parties' databases if any is operational.
- The ABS Clearing House can neither assist in identifying traditional knowledge holders nor assist in establishing ABS contracts. Such assistance is provided by national institutional arrangements i.e. ABS Focal Points and CNA.
- For the Nagoya Protocol's system of monitoring the utilisation of genetic resources to be operational, all Parties must effectively put CNA, information on access permits (or IRCC) and CPC in place.

## National ABS Frameworks and Strategies

### ABS Implementation Options

#### Introduction and Overview

In this presentation, *Hartmut Meyer from the ABS Initiative* highlighted that there was no-one-size-fits-all option to implement the Nagoya Protocol. Countries need to develop ABS systems according to their national circumstances and priorities and can opt for different policy options and approaches in relation to key issues, such as, among others, the functional scope of ABS regulations (follow or

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<sup>12</sup> Article 17 of the Nagoya Protocol.

broaden the scope of the Nagoya Protocol), entity negotiating MAT (one central or multiple entities or a combination of both negotiating MAT) or granting PIC (one central or multiple entities granting PIC) and the form of benefit-sharing (bilateral benefit-sharing, benefit-sharing through a national or provincial fund or a combination of both). These options are not exhaustive. Others may also be put forward. Adopting a mixed approach is also possible. However, all options need to be assessed before countries can take informed decisions on the way forward. There is indeed no bad or wrong option. It is about what fits the country. Options selected can be reviewed when national ABS legislation is being reviewed. Circumstances may have changed and so the legislation may be amended accordingly. For further details, see the ABS Initiative's discussion paper titled 'ABS implementation Options: Policy and Administrative Options for Implementing the Nagoya Protocol on Access and Benefit-Sharing' (2019).<sup>13</sup>

## Examples from Selected African Countries

### Scope

- *Madagascar*: The scope of the legislation covers all genetic resources, endemic or introduced, insects, microorganisms, animals and derivatives. It also covers any traditional knowledge associated with those resources used to valorise them for the benefit of local communities. These are considered as national assets and must be protected, conserved, and valorised.
- *Namibia*: The scope of application of the Namibian ABS legislation is broader than the scope of the Nagoya Protocol but focusses on the utilisation of genetic resources as opposed to biological resources (biotrade).
- *Cameroon*: The legislation has been amended to include genetic information or what is now known as DSI on genetic resources.

### Entity Negotiating MAT and Granting PIC

- *Cameroon*: Requests for access are centralised and discussed by a competent committee composed of the actors involved. The request is then redirected to the IPLCs concerned under State supervision. If the IPLCs give their consent, PIC and MAT are negotiated in this order by the State because all the resources belong to the State. A permit is issued only if PIC has been granted and MAT established.
- *Zimbabwe*: There are three different types of custodians of genetic resources in Zimbabwe: national parks authority, forestry commission and local authorities. Users are granted PIC by local authorities and they also negotiate MAT with the respective local authorities.

### Form of Benefit-Sharing

- *Ethiopia*: The ministry is receiving the benefits on the behalf of the people of Ethiopia. Then 50% will go to the local communities and the other 50% to a special fund for biodiversity conservation. If traditional knowledge associated with the genetic resources was used, 100% goes to traditional knowledge holders.
- *Kenya*: Benefit-sharing is enshrined in the Constitution and is shared equitably with the citizens. A benefit-sharing formula is used to determine the share of the benefits redistributed/allocated to the providers of the genetic resources.

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<sup>13</sup> This discussion paper is available at: [http://www.abs-initiative.info/fileadmin/media/Knowledge\\_Center/Publications/Implementation\\_Options/Collection\\_-\\_Implementation\\_Options\\_-\\_ABS-I\\_-\\_201909.pdf](http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Publications/Implementation_Options/Collection_-_Implementation_Options_-_ABS-I_-_201909.pdf).

## Plenary discussion

The following is a summary of the main issues discussed:

- Developing a national ABS system that does not address the specific circumstances of a country would be incongruous and inefficient.
- Any manipulation of genetic resources gives genetic information. Genetic information should therefore fall under the scope of the application of the Nagoya Protocol.
- The Nagoya Protocol anticipates that benefit-sharing will support the conservation and sustainable use of biodiversity. National laws must provide for the setting up of an entity which will ensure that benefit-sharing serves this purpose. If benefit-sharing goes directly to the providers of genetic resources, it might not necessarily be used for conservation and sustainable use. There is therefore a need for a requirement in national legislation that will ensure that beneficiaries plan actions related to the conservation and sustainable use of biodiversity. A special fund should also be required to do so.
- AU Guidelines, although not prescriptive, have been developed to encourage the harmonisation of national ABS systems in Africa. National ABS laws may vary from one African country to another but it is important that countries develop their legislation in line with the AU Guidelines and the African thinking.
- Elements for an effective ABS regulatory framework comprise, among others: an enabling legal and policy environment, an effective coordination and communication between all the actors involved, financial and technical support mechanism for national actors (SMEs, research, IPLCs, etc.) and a strategy linked to the national development strategy and/or the SDGs.

## ABS Implementation Approach of South Africa

### South African ABS Framework

*Lactitia Tshitwamulomoni from the DEFF* provided a comprehensive overview of the current South African ABS legal framework, including a detailed description of the requirements to be fulfilled to access and use genetic resources and traditional knowledge for non-commercial and commercial research.<sup>14</sup> She informed the participants that this framework, in place since 2008, was the result of a long learning-by-doing process. The legislation regulates ABS and biotrade of indigenous and biological resources, including associated traditional knowledge with the aim to ensure the sustainable use and conservation of those resources as well as the social and economic development of the South African people, IPLCs in particular. *Ms Tshitwamulomoni* indicated that South Africa has established an ABS Focal Point, a CNA, a publishing authority (in charge of providing information to the ABS Clearing House) and designated several checkpoints (the patent office, ports of entry and exit, the provincial permit issuing authorities and the DEFF itself). She then gave a detailed description of the permit application process highlighting that the law aimed to protect the rights of IPLCs. Resources are not only found in communal lands but also on private lands. To access them, a PIC has to be obtained from the providers of the resources and, where relevant, from IPLCs providing any traditional knowledge associated with them. Then, researchers have to go back to DEFF to establish MAT and start the actual

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<sup>14</sup> Chapter 6 of the National Environment Management Biodiversity Act (or NEMBA) of 2004 and the Bioprospecting, Access and Benefit-sharing (BABS) regulations adopted in 2008 are the main legislative tools constituting the South African regulatory framework that gives effect to the ABS concept introduced by the CBD.

permit process. This process ensures that applicants engage with providers. They must submit their application with all the required documents, including a material transfer agreement. DEFF will then process the application and submit it to the Bioprospecting Advisory Committee for recommendations. The decision of granting permits lies with the Minister. Any benefits will be directed to the providers. To date, 95 permits have been issued for various sectors (pharmaceuticals, cosmetics, nutraceuticals, natural ingredients and agriculture), with the cosmetic sector being the biggest user. Benefit-sharing arrangements cover a variety of options or a combination of them ranging from short, medium and long-term monetary and non-monetary benefits and include, among others, payment of royalties, joint ventures, upfront or milestone payments, training and research collaboration, co-authorship of publications, conservation, enhancement of the livelihoods of communities, etc. The bulk of permitted entities use a combination of monetary and non-monetary benefits. Specific kinds of benefits are decided on a case by case basis by Parties to ABS agreements. To date, there is a sort of balance between the monetary and non-monetary benefits received. *Ms Tshitwamulomoni* ended her presentation by highlighting the practicality of tools such as biocultural community protocols (BCP) and the important role DEFF plays in the facilitation of negotiations for establishing ABS agreements. To improve the existing ABS system further, the legislation is being revised to meet the new obligations set out under the Nagoya Protocol and the existing permitting process upgraded to an electronic permitting system for more efficiency.

### South African Bioeconomy Strategy

*Preshantie Naicker from the DEFF* introduced the South African National Biodiversity Economy Strategy (NBES) focussing on bioprospecting and biotrade, two sectors that have demonstrated remarkable growth as well as development and economic transformation potential for South Africa. *Ms Naicker* explained that the bioeconomy of South Africa encompasses business and economic activities that either directly depend on biodiversity for their core business or contribute to conservation of biodiversity through their activities. NBES provides an implementation framework to achieve optimum economic benefits from the commercialisation of South African biodiversity while ensuring sustainable utilisation of biodiversity and its conservation. It aims at unlocking and optimising the bioprospecting and biotrade sectors by increasing supply of high-value indigenous plant species through mass cultivation and sustainable harvesting. NEBS also aims at increasing demand and local value-addition of South African indigenous biological resources through better coordination of stakeholders by harnessing existing biodiversity-based initiatives and accelerating innovation in both the bioprospecting and biotrade sectors through a new Bio Products Advancement Network South Africa (BioPANZA). To operationalise the BioPANZA model, DEFF is providing support through different clusters such as finance, access to markets, innovation, policy and sustainable supply. Overall, the aim is to facilitate the sharing and dissemination of information across all levels to ensure balanced representation of communities, traditional knowledge holders, all spheres of government and industry role players and stimulate the creation of sustainable, inclusive, commercially viable and ABS compliant value chains.

### Plenary Discussion

Participants raised the following issues:

- How to regulate the discovery phase when it is happening outside the country?
- The need for more experiences in dealing with transboundary issues.



- Identifying a community project to be implemented for the benefit of the IPLCs providing the resources and associated traditional knowledge in a similar fashion as in Fairtrade can constitute a non-monetary benefit.
- Small-medium- and micro-enterprises (SMMEs) in the bioprospecting and biotrade industries are a growing segment of the South African economy. A range of support and activities are available to make their projects or concepts into commercially viable products and capacitate them to develop a business plan. SMMEs are also often too fragile to afford a normal bank loan. A special fund has been set up to assist them to access low interest rate loans following the blended finance principles.
- Successful examples of commercialised products based on indigenous knowledge (herbal products, cosmeceuticals, nutraceuticals, etc.) illustrates the value of bringing together biodiversity, communities, the private sector and scientific innovation. These examples illustrate how business and economic opportunities. These examples also show how employment in rural communities can be created and thereby contribute to poverty alleviation and the transformation of the South African economy, demonstrating how the biodiversity economy is an ideal development and transformation sector in the South African context (marginalised communities).
- Wherever possible, the value created through each step of the value chain to the commercialisation of a finished product should be captured in ABS contracts.

## Preparation of the Field Trip

### Selected ABS Cases in South Africa

In this short presentation, *Lactitia Tshitwamulomoni* provides four examples of bioprospecting/biotrade business models as follows:

- 1) A research and development entity that manages IP rights but with one third party in the same country;
- 2) A research and development entity that manages IP rights but with multiples third parties from various countries;
- 3) A manufacturer entity licenced IP rights by the research and development entity; and
- 4) A trading entity of raw materials or natural ingredients.

### A Benefit-Sharing Agreement for the Clanwilliam Cedar in South Africa

Following the projection of a short movie, *Maria Julia Oliva from Union for Ethical BioTrade (UEBT)* and *Heather Ducharme from the Body Shop International* presented on the main lessons learnt from the negotiation process and circumstances which led to a successful ABS agreement for the Clanwilliam Cedar (*Widdringtonia cedarbergensis*). The agreement was established between The Body Shop and Givaudan South Africa designated as the users and CapeNature, provider of the biological resources and the Heuningvlei community, recognised as steward of the Clanwilliam Cedar. Benefit-sharing includes, among others, support for local biodiversity and development initiatives with the Heuningvlei (a community nursery to carry on conservation efforts of the Clanwilliam Cedars and other indigenous plant species), improvements of communal lodges for eco-tourism, recognition of geographical origin and cultural heritage of the Clanwilliam Cedar, and payments defined in relation to the turnover of the final product to be transferred to the South African bioprospecting trust fund and then to providers.

This case demonstrates the importance of the support provided by DEFF to identify providers and to navigate the conundrum of national legislation procedures, especially in circumstances involving new technologies raising specific ABS-related issues and different actors along the value chain. The close collaboration and partnership between companies and providers were key success factors. Both Givaudan and The Body Shop were committed to address all ABS requirements and learn by doing throughout this long and complex negotiation process. Finally, this case particularly emphasised how third-party facilitators and advisors such as UEBT and the ABS Initiative can contribute to bringing different actors together and reaching positive outcomes.<sup>15</sup>

### Plenary discussion

- Clear guidance on national procedures to apply for permits, obtain PIC and establish MAT for users (academia, research organisations and industries) is essential.
- Strategic partnerships with third party facilitators and collaboration between all the actors involved are key factors to reach positive outcomes.
- To make the entire permit application process more practical and less lengthy, the decision to grant a permit or not should not rest with the minister alone.
- Constellations of actors and their functions in research and development/the valorisation of genetic resources and associated traditional knowledge can vary to a large extent depending on their respective business models which often entail a collaboration between universities and the private sector. Consequently, utilisation rights and IP may be held by individual actors, shared, licenced out, etc.

## Parallel Sessions

### The World Intellectual Property Organisation and the ABS Initiative

This session was aimed to follow-up on various demands to carry on the discussion on the linkages between ABS and IP rights started in two previous regional workshops which took place in Windhoek and Marrakesh in 2015 and 2016 respectively.

#### Intellectual Property Rights Relevant to Genetic Resources and Associated Traditional Knowledge

*Wend Wendland from the Traditional Knowledge Division at WIPO* provided some clarifications on the nature of the linkages between IP and ABS. Mr Wendland explained that the term ‘intellectual property’ referred to the creations of the human mind and that the protection of IP is done through the application of different IP tools. However, despite WIPO’s efforts to promote innovation and creativity through a balanced and effective evolution of the international IP system, gaps still remain to protect all aspects of traditional knowledge adequately. Nevertheless, different protection options are under consideration. The first option is the use of existing IP tools (copyright, trademarks, patents and geographical indications are particularly relevant). The second option is the adaptation of existing IP tools to better reflect the interests of traditional knowledge holders. The third and final option is to

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<sup>15</sup> More detailed information on Clanwilliam Cedar Case are available at <https://static1.squarespace.com/static/58bfcaf22994ca36885f063e/t/5cebc1b1ec212dc60a51d6f9/1558954418957/UEBT-Clanwilliam-ABSCaseStudy-final.web.pdf>.

develop a *sui generis* system of protection that addresses all aspects of traditional knowledge and is recognised as a form of IP. Their protection would then be provided by a special system or mechanism based on the types of measures, principles and values that underlie the traditional IP system. Mr Wendland indicated that protection of traditional knowledge could also be done outside the IP system. For example, more and more countries are considering documenting traditional knowledge to prevent misuse and misappropriation. However, from an IP law perspective, documenting traditional knowledge may be, in some cases, a risky undertaking as it may result in the loss of secrecy or confidentiality and thus be detrimental to the interests of traditional knowledge holders. Understanding the different options and approaches available – defensive, positive or a combination of both – and developing a country-specific strategy is therefore essential before embarking on such a process. Finally, Mr Wendland informed the participants that WIPO had been particularly engaged in activities related to the protection of genetic resources and traditional knowledge, including by facilitating negotiations aimed at reaching an agreement on one or more legal instruments concerning their protection (as discussed earlier) and ensuring that IPLCs actively and effectively participate in this process.

#### African Case Study: Argan Tree and Morocco

Following the projection of a short movie on the Argan Tree (*Argania spinosa*) in Morocco, *Suhel al-Janabi from the ABS Initiative* explained that the Argan Tree, endemic to Morocco, provided a good example to critically examine the different applications of IP rights and underline the importance of taking IP related issues into careful consideration when drafting ABS contract clauses. Long valued for its nutritive, cosmetic and medicinal properties, Argan oil, produced from the kernels of the fruits of the Argan Tree, was registered as a protected geographic indication (PGI) under Moroccan law since January 2009. In 2011, Argan oil became the first product in Africa to receive a PGI in the European Union (this was made possible after the cancellation of trademark 'Argane' owned by Pierre Fabre by the Tribunal de Grande Instance de Paris in 2010 due to lack of a distinctive sign). Both recognitions led to protection rights nationally and internationally, increasing the market value of the product. However, in the absence of a national ABS legislation, the granting of patents, mostly foreign owned (e.g. Pierre Fabre, Cognis & L'Oréal, etc.) raised numerous questions around the issue of benefit-sharing with the Moroccan women holders of the traditional knowledge. Despite different challenges, combining modern technology and traditional knowledge has had very positive social, economic and environmental outcomes. Argan oil cooperatives have significantly increased their production and in so doing, improved economic situation of women and their families. Against all odds, new methods of extraction have made the process more efficient, using less fruits as before to produce more oil, thus protecting the vital ecological and socio-economic resource that the Argan Tree is.

#### ABS Contract Template Clauses

*Morten Walløe Tvedt from the Fridtjof Nansen Institute (FNI)* provided a brief presentation on how to draft effective ABS contract clauses. He called attention to the fact that, in most cases, users would not patent the genetic material and the associated traditional knowledge but something more specific like a process. Prohibitive clauses which do not allow the patenting of genetic resources and associated knowledge are therefore useless. Instead, contracts should establish clear rights for providers to share the benefits of patents. Mr Tvedt ended his short presentation by informing the participants that more information would be provided at a later stage in the programme of the workshop in a session entirely dedicated on how to draft successful ABS contracts.

## Plenary Discussion

Issues discussed were as follows:

- In the context of utilisation of biological and genetic resources, IP pervades the whole ABS value chain. IP tools could be used as a ‘shield’ to protect traditional knowledge from misuse and misappropriation or as a ‘sword’ to exploit traditional knowledge, if IPLCs so decide, as cultural assets for economic development.
- The importance to continue to be vigilant in the context of trademarks applications conflicting with geographic indications.
- Experience shows that value chains based on products protected by geographic indications can have a positive impact on the economy, the environment, employment and the preservation of traditions and traditional knowledge.
- The documentation of traditional knowledge can prevent anybody, including the inventors or traditional knowledge holders, to have rights over an innovation/knowledge.
- The Indian Traditional Knowledge Digital Library is the best example of a defensive protection.
- A contract is a key tool to fill the gaps in international law on ABS – appropriately worded clauses in ABS contracts are essential to, for example, prevent erroneous patents and secure the rights of providers of genetic resources.

## African Group Coordination Session on Emerging Issues

This session was a closed session for African government officials only.

## Field Trip – ABS Actors Along the Value Chain

### Introduction

The field trip consisted of three consecutive site visits and was concluded by a plenary discussion. South Africa is one of the most biodiverse countries in the world, with parts of the Cape Floral Kingdom hosting the most outstanding diversity, density and endemism of the flora of the world. With this in mind, the field visit provided participants with an opportunity to explore the different stages of operational value chains, from the permit process and research phase to the commercial phase, illustrating some examples of business concepts or academic research projects on which the South African bioeconomy is based. Participants were divided into three groups and invited to inquire on any relevant issues such as, among others, business concepts, commercial pathways and employment creation, the permit application process, ABS agreements, the use of traditional knowledge and the involvement of local communities and traditional knowledge holders, etc.

### Afriplex

Afriplex is a South African company focusing on the development and manufacturing of botanical extracts, complementary medicines and food & beverage product solutions. Combining state-of-the-art facilities and processes with a source to shelf approach, Afriplex aims at unlocking the potential of traditionally used African medicines and botanicals while adding value to all the components of the supply chain. Working closely with multiple educational institutions and research organisations, Afriplex has established a productive ABS compliant bioprospecting pipeline from the permit application process and the biodiscovery phase to the commercial phase, including, where relevant, benefit-sharing agreements with traditional knowledge holders. It is thus a good example of

collaboration where research is undertaken by universities while product development and manufacturing are carried out by the company. Different constellations of IP ownership are being applied.

### **Parceval (Pty) Ltd**

The area of expertise of Parceval (Pty) Ltd includes cultivation and sourcing of botanical raw materials, establishing supply chains, and product formulation and manufacturing of intermediary and finished products predominantly in the pharmaceutical sector. Parceval complies with South African ABS legislation and regulations. It has been granted several bioprospecting permits and established ABS agreements accordingly. Key challenges encountered are, among others, the identification of traditional knowledge holders; a low level of understanding of communities on bioprospecting, the establishment of ABS contracts and legal agreements and the high transaction costs of compliance.

### **The Case of the Honey Flower**

The case of the Honey Flower (*Melianthus major*) provided an example of an international research partnership between University of Dortmund in Germany and Parceval (Pty) Ltd, raising various issues related to PIC, MAT, benefit-sharing and the involvement of IPLCs in such commercially-oriented research collaboration projects. The research is still in the biodiscovery phase. Even if new bioactive compounds found in the plant prove to be potentially applicable for anti-inflammatory applications, commercial success is not yet in the cards as further regulatory requirements and consumer safety schemes need to be met.

### **The Case of Kraalbos**

The case of Kraalbos (*Galenia Africana*), a herbal shrub used for various traditional medicinal remedies, provided a useful example on how a successful national academic research has turned into a promising ABS case. Kraalbos has been traditionally used to treat skin diseases, wounds and coughs and is currently used in cosmetic formulations such as soaps, lotions, and shampoos. Further biochemical investigations revealed the potential of this shrub to be used as a natural pesticide and fertiliser and led to a patent. The product developed is now ready for commercialisation. This example also illustrated the case where although traditional holders on the plant have not been involved at the initial stage of the research and development process due to a lack of legislation at the start of the research process, they have later been approached by the researcher to establish an ABS agreement in relation to the future commercialisation of the products developed from his research on Kraalbos. The business model aims at integrating IPLCs as shareholders (exposure to all potential benefits and risks).

### **Plenary Discussion**

Exchanging with providers, traditional knowledge holders, SMEs and industry representatives involved in ABS value chains and ABS agreements, the following issues were discussed/highlighted:

- The length and cost of the research and development process.
- The fact that it may occur that the finished product has nothing to do with any traditional knowledge associated with the indigenous or medicinal plants used.
- The continuous support and assistance provided by South African government, DEFF in particular, to all the stakeholders involved on any ABS related matter and the development of



ABS compliant value chains and the particular attention given to IPLCs (awareness raising and training).

- Awareness raising and capacity building on ABS of the researchers, the various industry sectors and the IPLCs are still critical.
- Involving IPLCs as providers of genetic resources and / or associated traditional knowledge in the research and development process from the start is critical.
- ABS legislation and regulations should be the least cumbersome possible. Inputs and suggestions could be provided by all the actors of the value chain.
- How far along the value chain/value creation should benefit-sharing occur?

## Approaches and Instruments to Facilitate ABS Partnerships and Agreements

### Key Implementation Challenges and Proposals for Solutions

#### IPLC Perspective

*Lucy Mulenkei from Indigenous Information Network and Stanley Petersen, representative of the Khoisan people, leading this first panel discussion, highlighted that engaging with IPLCs in ABS negotiations was key. They discussed some of the main challenges faced, among others, the lack of access to their lands, the lack of knowledge on ABS-related issues and the industry, the misappropriation of traditional knowledge, the little or no benefits from the use of genetic resources and associated knowledge flowing back to the communities and the lack of an appropriate organisational structure to enable them to better interact with third parties regarding the access to their resources and associated traditional knowledge. They concluded by questioning whether the use of biocultural community protocols could assist in securing their rights and help address those challenges.*

In this first round of table discussions, participants were asked to reflect on the different challenges faced by the IPLCs and focused on the following questions:

1. How to deal with knowledge and means imbalance between IPLCs and industry when negotiating MAT?
2. How to strengthen the role of IPLCs providers of genetic resources and associated traditional knowledge as actual shareholders in the value chain?
3. Unclear attribution /legal status of associated traditional knowledge: How can IPLCs still make the use of traditional knowledge an asset for local development?

The following is a summary of the main thoughts arising from the table discussions:

- National budgets should plan for capacity building activities to enable the full participation of IPLCs in ABS processes and the development of sustainable ABS value chains from the onset.
- IPLCs who have acquired skills and experience should to share information and lessons learnt with other communities. Community to community exchanges and capacity development workshops for traditional knowledge holders have proven very helpful for sharing experiences and lessons learnt.
- Despite their divergences, different perspectives and system of values, it is critical that IPLCs, the private sectors and all the other actors involved in the value chain understand the

difficulties and impediments the others encounter (e.g. understanding the financial investments and risks taken by the private sector to commercialise a product).

- BCPs, customary laws, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), etc. provide the legal basis for knowledge, benefit-sharing and understanding the rights of IPLCs.
- IPLCs should reflect on how to use their knowledge, explore to take the risk and invest in a company.
- In the case of SMEs or SMMEs, not only benefits but also risks could be shared equally between all parties (users and providers).

#### Industry & Small and Medium Enterprises Perspective

*Cécile Gonzalez from the International Fragrance Association and Cyril Lombard, Independent Consultant*, discussed some of the challenges faced by the industry and SMEs engaged in biotrade or bioprospecting activities. Addressing those challenges from the perspective of the fragrance and flavour (F&F) industry, Ms Gonzalez first highlighted that biodiversity was the foundation of the F&F industry in terms of ingredient sourcing, inspiration and innovation driver. She also informed the participants that the SDGs stood high on corporate agendas and that most companies, understanding that ABS was an opportunity to move towards sustainable value chains, had integrated ABS as part of their strategy on sustainability. Ms Gonzalez then provided an overview of some the main challenges specific to the F&F industry, some of which potentially applicable to other businesses based on biodiversity. She first shed light on the complex supply chain which characterises the F&F industry, explaining that it was composed of a myriad of actors, with each step of the value chain facing different challenges (availability of raw materials, legislation, access, safety, financial costs, etc.). Another specificity of the industry is that, housing simultaneously suppliers, manufacturers and sellers, the F&F industry is a business to business industry. One fragrance or one flavour could therefore be connected to multiple national ABS laws, implying not only significant workloads to ensure compliance for one product, but also many stakeholders that desire a fair share. Such non-linear supply chain combined with the complex composition of one fragrance or flavour mixture can lead to a loss-loss situation in terms of ABS. Finally, Ms Gonzalez indicated that industry was looking for a workable and advantageous solution on benefit-sharing for all parties. Following-up on this presentation, Mr Lombard underlined the importance to find solutions on such issues and bring them to the fore for governments and other relevant stakeholders to be aware of them and contribute to advancing the discussion. Highlighting the importance to stay abreast of rules in other fora that could affect the implementation of the Nagoya Protocol, Mr Lombard concluded this perspective by inviting participants to reflect on what type(s) of measures could be taken to address the above challenges.

In this second round of table discussions, participants were asked to reflect on the different challenges faced by the industry and SMEs, focusing on four guiding questions. The following is a summary of the main issues raised:

- 1) How to limit transaction costs for sectors using a wide range of biological/genetic resources?
  - Much of industry is willing to share benefits to support local livelihoods, but is unable to negotiate bilaterally for the range of resources they are using. A multilateral system would solve these problems. Industry could focus on its activities and pay a percentage of its

profits into a fund, which would then be charged with benefit sharing. Why is industry not discussing this solution?

- Another view is that a sectoral approach, rather than a multilateral, may be more manageable for industry. Sector-level agreements and, when relevant, regional-level agreements for a specific set of resources could be useful.
- At sector level, tools must be found to facilitate traceability. It is also key to deal with sharing of multiple benefits that may arise over the use of a single product. Harmonisation may be a useful approach (e.g. exhaustion of rights under IP protection systems).
- To reduce time and costs, business needs to accommodate. For example, hiring people to provide them support. These costs should be incorporated into business plans. In some cases, delays come from business resistance to ABS.
- It is the SMEs on the ground, the ones buying from communities, that shoulder the costs – not the larger companies buying ingredients and inputs from abroad. So difficult rules are a problem for national companies! Regulators need to remember this.

2) How to regularise the use of resources that currently (still) being used without ABS permit?

- High amount of research cannot be used for lack of ABS compliance. A window of opportunity to regularise would be useful to “unlock” this valuable information.
- There are examples, such as India. It was a success: companies in India and abroad rushed to ensure compliance.
- PIC and MAT may be based on broader environmental laws, if there are no ABS laws in place.
- Importance/need of joint approach in Africa, perhaps with support of African Union.

3) How can negotiations with associated traditional knowledge holders be facilitated?

- These negotiations should be seen as part of the investment and costs of product development. Such costs are accepted for complying with other laws and market standards. It should be the same for ABS!
- Many genetic resources have associated traditional knowledge. Community involvement is therefore critical. Compliance measures should be monitoring these cases – otherwise they are not serving their purpose. It should make sure communities receive fair and equitable benefit-sharing.
- Third party facilitation – a marriage counsellor! – is key to negotiations. Otherwise, it is hard to understand each other and build a relationship. Parties need to trust each other!
- Importance of working together towards common goal. If there is no use of genetic resources and traditional knowledge, there are no benefits! ABS questions cannot be isolated from broader policies and issues, including IP.

#### Research Perspective

*China Williams, ABS Focal Point at the Kew Royal Botanic Gardens (Kew Gardens) in UK, provided a non-commercial research perspective on the key challenges encountered by the academic and*

research sector and what could help facilitate ABS partnerships and agreements. Ms Williams informed the participants that researchers at Kew Gardens were undertaking important non-commercial research on biodiversity and conservation in partnership with various institutions in different countries worldwide, much of which being publicly funded. Ms Williams pinpointed a number of issues making it cumbersome and confusing for scientists to address all ABS requirements while at the same time proposing, where possible, some solutions to remedy to the situation. These were among others:

- Domestic compliance procedures (in Kew Garden case, these are the European Union Regulations on ABS and the UK Statutory Instrument): Besides the difficulties to address two different legislations, it is generally a complex, costly and time-consuming process.
- Definitions and scope of the Nagoya Protocol and domestic access legislation i.e. issues with PIC and MAT: The variety of definitions used in different access legislation also means that there are challenges for researchers in ensuring legal access of material, as well as the curation of collections to ensure material is used on terms of access, including future use. It would be useful to have increased clarity of terms and move towards more standardisation of terms used in national legislation as well as standardisation of clauses in PIC and permits.
- How to implement Article 8 of the Nagoya Protocol in practice, e.g. access to pathogens in case of pandemic outbreaks: There are no standard conditions agreed at the global level for the exchange of pathogens implicated in global public health. A possible solution could be: (1) the creation of special international regulations for the management of pathogens related to public health problems; (2) the creation of a legal framework at the country level that is in line with the Nagoya Protocol and the interest of global public health, and (3) to encourage dialogue within the pathogen exchange networks and sensitise them to the Protocol.

After the presentation, a third table round took place focussing on the following guiding questions:

- 1) How to better match time for issuing permits with research project funding periods?
- 2) How to deal with PIC and MAT when the actual biological/genetic resource is not yet defined at the start of the research project?
- 3) Pandemic outbreaks require rapid access to pathogens. How can it be provided?

Below is a summary of the key points discussed:

- The idea of forcing foreign companies to work with national institutions is not necessarily the solution. Many African biopiracy cases involve local institutions. It is important to make a contract dealing with all eventualities. It is also key to keep the process short for non-commercial researchers and more complex for commercial research.
- Standardised MAT are important, but they will also need to be context specific.
- The false dichotomy between commercial and non-commercial contracts should be reduced, as often one leads to the other. A contract should cover the situation when academic research becomes commercial, as researchers seldom return to a country when the intention changes.
- With regard to pathogens, there is a need for better cooperation. Different ministries are involved and must understand transfer approaches and material used.
- In public health situations one needs to act rapidly and many African countries might not have the capacity to find solutions. Other countries could support this process. Benefit-sharing is not only an economic issue – e.g. in the Ebola epidemic, samples and vaccines were available

but people from the same country could not get access to these vaccines developed from their own material.

### **Panel Discussion with Selected African ABS Focal Points / CNA Representatives**

Reflecting on the many issues discussed during the session, Panel member highlighted a few messages to take home. These were among others as follows:

- Building trust and enhancing communication between IPLCs, governments and users is critical.
- BCPs have to provide clearer guidance on how to access traditional knowledge and what can contribute to economic development in communities.
- Additional focus should be placed on the risks involved in giving access to traditional knowledge.
- Promoting local scientific development is essential to increase local benefits.
- Knowing better the different sectors for better ABS agreements, particularly regarding access to pathogens.
- Interim measures before any national ABS legislation is in place are advisable to facilitate negotiations between IPLCs and users.
- The relationships and partnerships between universities and the private sector/industry players should not be ignored.
- Should businesses which keep infringing the rights of IPLCs be restricted from access?
- ABS agreements must therefore address/cover any possible uses and any other issue that partnerships between universities and the private sector/industry players can raise.

In the plenary, participants raised additional issues such as:

- The role of the African Union in coordinating activities and providing some political support to countries to address the many challenges raised by the different actors;
- The importance of involving all the actors along the value chain in the negotiation process;
- Exchanging and learning from other countries' experiences is essential;
- As the industry uses biological/genetic resources intensively, the link between ABS and biodiversity must be strengthened and benefits channelled to projects and activities promoting the conservation and the sustainable use of those resources.

## **Framing the Utilisation of Genetic Resources / ABS**

### **Understanding Applicants, Users and Sectors**

Maria Julia Oliva and Suhel al-Janabi conducted an interactive quiz session using an online educative tool called the 'Mentimeter' with the view to provide participants with a better understanding of the different sectors using biodiversity for innovation. Overall, the aim of this exercise was to demonstrate how a better knowledge of the different actors, types of resources, kinds of utilisation in each industrial sector and market trends was key to develop practical and effective approaches to PIC, MAT and benefit-sharing. Participants learnt, for example, that companies using natural ingredients were leading the number of applications to access genetic resources or that the uses of rules in key markets was an important disincentive for new plant-based ingredients and that most biotech products take two to five years to reach the market whereas pharmaceutical products take ten to fifteen years on average. Hence, sectors using genetic resources vary considerably with regard to research and

development entities, research periods, budgets, IP instruments, access quantities, business models (business to business or business to clients), the relevance of specific genetic resources in final products, etc. Such issues have to be carefully considered and taken into account when establishing MAT.

## Plenary Discussion

Participants discussed the following trends and issues/ the highlights of discussion were as follows:

### Natural Ingredients

- Sustainability is central to sectors, cosmetics and botanicals in particular.
- The demand for naturally sourced flavours and fragrances is increasing, driven by the rising demand for cosmetics and personal care products with natural ingredients.
- Consumers are increasingly demanding that natural ingredients are sourced with respect for people and biodiversity. Transparency on the origins of ingredients is a growing concern.
- ABS and ethical sourcing are gradually integrated into practices (internal policies and procedures).

### Pharmaceuticals

- Programmes for natural products<sup>16</sup> research in large companies have declined. However, the majority of drugs on the market have been synthesised from natural products. Natural products, therefore, have still an important role to play in drug discovery.
- Traditional knowledge, once a primary lead, is no longer a significant part of R&D.
- Reliance on smaller, specialised companies for new technologies and materials linked to biodiversity.

### Cosmetics

- Growing markets other than Europe are increasingly being targeted.
- The Inventory of Existing Cosmetic Ingredients in China (or China List) is highly regarded in the industry, particularly regarding the composition of high-priced products and cosmetics brands.
- The procedure for the approval for registering a new ingredient on the China List is cumbersome – safety and risk substances assessment in particular. During the last ten years, only ten new plant-based cosmetic ingredients were approved. The last approval took place in 2014.
- The China List is very important for natural ingredients development in Africa.

### Intellectual Property

- Patents are important tools for ABS but they are sector-specific. In the pharmaceutical sector, for example, patents are the most appropriate form of protection for break-through innovations.

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<sup>16</sup> Natural product is a chemical compound or substance produced by a living organism found in nature that usually has a bioactivity used in research and development of drugs and other products.



- In sectors with only incremental innovation, there will be a lower rate of patent applications. In the cosmetic sector, for example, trademark and trade secret have traditionally been the main IP tools to protect innovation.
- The pharmaceutical sector has secured the most patents from species coming from African countries.

### Industry Perspective

- Regulatory processes to put a product on the market can be very lengthy and costly, often placing a big financial burden on SMEs (major industry players).
- Costs of compliance for safety and efficacy trials, for drugs in particular, are very high.
- Biotech products generate smaller revenues than pharmaceutical products, but they cost less to develop and require less testing.

### Establishing ABS Contracts

#### The ABS Contract Tool Version 2.0

*Morten Walløe Tvedt from the Fridtjof Nansen Institute* provided a brief introduction to the ABS Contract

Tool Version 2.0, a hands-on and practical tool for drafting of ABS contracts in situations where the user states that his/her objective is to conduct research without immediate commercial application. The tool provides a collection of sample clauses that can be used to help providers of genetic resources draft appropriate clauses in ABS contracts. Mr. Tvedt informed participants that an ABS contract is not a conventional type of contract. There are two golden rules of contract drafting, namely (1) to avoid ambiguity, and (2) to be clear, specific and dynamic, but not narrow. He highlighted that terms such as 'genetic resources' or 'non-commercial' shall not be used in a contract because they are ambiguous and impossible to define. Contract law is built on specificity and concreteness, and cannot function without it. Mr. Tvedt further pointed out that access permits like national laws are not enforceable in another country. If you want to make an obligation on the user, it must take the format of a binding contract which adheres to contract law and makes the obligation binding. Mr. Tvedt also advised participants to move away from the false dichotomy of commercial versus non-commercial contracts.

#### WIPO Intellectual Property Clauses

*Shakeel T. Bhatti from the Traditional Knowledge Division at WIPO* focussed on IP clauses in ABS contracts. He informed participants that the IP system was evolving rapidly due to new uses and emerging technologies. As the Nagoya Protocol is being implemented, IP clauses in contractual agreements are more and more important. IP has come to play a more significant role at different stages of the value chain. Mr Bhatti also referred to WIPO's capacity building resources, namely the WIPO Guide on IP Issues in ABS Agreements<sup>17</sup> and the WIPO online collection of biodiversity-related ABS agreements<sup>18</sup>, with particular emphasis on the intellectual property aspects of such agreements. The collection can be found on the WIPO website. Some of the model contracts go back to 1997 and clearly show the evolution of contractual practices in ABS. It also provides examples of IP clauses in ABS contracts for DSI as well as experiences of contracts from other regions than Africa. Concluding

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<sup>17</sup> The guide can be downloaded here: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1052.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1052.pdf).

<sup>18</sup> The online collection can be downloaded here: <https://www.wipo.int/tk/en/databases/contracts/list.html>.

his presentation, Mr. Bhatti pointed to a shift towards standardising contractual practices, including IP, in sectorial ABS communities of practice.

### Plenary Discussion

Participants discussed the following issues:

- Provider countries can retain exclusive property rights on the material accessed.
- If users do not have any commercial intent, there is no reason why they should not agree that all the property rights rest with providers of genetic resources and associated traditional knowledge.
- ABS contracts with national users must follow the exact same drafting process and rules as they might partner with international users (universities, research institutes and private sector).
- Clearly identifying parties on both the provider and user sides who have legal authority to sign the agreement is critical to ensure that the agreement holds the desired degree of accountability. Individuals should not sign any ABS agreement.
- Unconditional use-rights is the most obvious non-monetary benefit-sharing and a very important clause to include in a contract, so as to secure rights to invention leading to a patent and prevent the transfer of any potential patent to third party.

## Overall Links to COP and Post-2020

### ABS as a Building Block for the Global Biodiversity Framework Post-2020 and the 2030 Sustainable Development Goals

*Pierre du Plessis from the ABS Initiative* introduced this last session by highlighting that ABS had a crucial role to play in the Post-2020 Global Biodiversity Framework, with benefit-sharing as an incentive for sustainable use and conservation. He informed the participants that there was a general understanding that the new biodiversity framework should be consistent and coherent with the 2030 Agenda for Sustainable Development. Mr du Plessis further explained that biodiversity was essential for sustainable development and features prominently across many of the SDGs and associated targets. Fostering national and international partnerships and encompassing ecological, social and economic aspects, ABS is highly relevant to achieving the SDGs. In fact, ABS is directly referred to in SDG 2.5 (Zero hunger) and SDG 15.6 (Life on land) and indirectly in many other SDGs<sup>19</sup>. Particularly relevant for the discussion at hand, Mr du Plessis highlighted the various links between ABS and all targets of SDG 17 (Strengthening the Global partnership for sustainable development and mobilising additional financial resources). Concluding his presentation, Mr du Plessis invited panellists (representatives of academia, the private sector, regulators and IPLCs) and the plenary to reflect and discuss on how could ABS contribute more strategically and more efficiently to linking biodiversity conservation and sustainable use and the SDGs.

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<sup>19</sup> SDG 1 (poverty alleviation); SDG 3 (health and well-being); SDG 8 (sustainable economic growth and employment); SDG 9 (research and innovation); SDG 14 (sustainable use of marine resources); SDG 16 (good governance and justice for all); and, SDG 17 (strengthening the global partnership for sustainable development and mobilising additional financial resources).

The following is a summary of the different thoughts and suggestions made:

- More coordination among relevant international processes is required in order for ABS to play a key role in contributing to the Agenda 2030 on Sustainable Development and achieving the SDGs.
- More coordination is needed at the AU level. The AUC acknowledges that ABS is one of the drivers of biodiversity conservation and sustainable use. Agenda 2063, a transformation plan for the African continent, is linked to the SDGs through its priority intervention areas.
- Raise awareness of the potential and opportunities ABS provides in terms of employment, innovation, etc. and demonstrate that there is a clear link between biodiversity use and economic growth.
- Strengthening national ABS systems is essential. This can be done by, among others:
  - 1) Creating an enabling environment in which regulators play an active role in bringing all relevant actors together, establishing clear national bioeconomy strategies and regulatory frameworks addressing the reality on the ground, developing tools, programmes and projects to support local SMMEs and IPLCs;
  - 2) Raising awareness and building the capacity of the different industry sectors/actors, IPLCs in particular, on ABS;
  - 3) Involving IPLCs in international, national and local processes that concern them;
  - 4) Strengthening communication and relationships between government, industry, research and IPLCs and establishing trust to build stronger links and partnerships between users and providers of genetic resources and associated traditional knowledge;
  - 5) Developing a better understanding of the different sectors using genetic resources and a better understanding on how to interact with IPLCs;
  - 6) Promoting business models that are ABS compliant.
- Research in the context of ABS is extremely relevant to achieving SDGs on important topics such as poverty alleviation, food security, health, economic growth, managing and restoring ecosystems, etc. The numerous links between research and the SDGs are reflected particularly in SDG 2.5, SDG 3.3.b and SDG 14.a to name a few. To realise tangible and sustainable results to contribute to achieve SDGs, it is therefore essential to:
  - 1) promote research and development as national activities bringing wealth and move from the status of a country supplying genetic resources to the status of a country that develops its own endogenous research capacity, protects innovations, and exports products based on the valorisation of genetic resources;
  - 2) Focus on four strategic areas: capitalising on existing knowledge, developing appropriate governance mechanisms, building capacity (in all areas including law), encouraging public-private partnerships;
  - 3) Strengthen regional synergies, North-South, South-South and triangular cooperation.
- With the potential of securing substantial benefits (monetary and non-monetary) and commitments to sustainable use of biodiversity, ABS contracts are key tools to link conservation and the SDGs.

- The use of appropriate IP tools can assist in managing expectations while ensuring that economic benefits flow back to the provider country or providers of genetic resources and associated traditional knowledge.

## Closure of the 12th Pan-African ABS Workshop

In his closing remarks, *Suhel al-Janabi from the ABS Initiative* highlighted the longstanding relationship between the ABS Initiative and South Africa. He stated that while the previous Pan African ABS Workshop which took place in Addis Ababa, Ethiopia focussed on preparing for the 14<sup>th</sup> meeting of the Conference of the Parties (COP) to CBD in Sharm El Sheikh, Egypt, this year's workshop concentrated on discussing relevant options and approaches for the national implementation of well-designed ABS regulatory frameworks and strengthening the coordination between all the actors of the ABS value chain. Mr al-Janabi thanked all the participants for their active engagement and their openness throughout the workshop. He also thanked the donors of the Initiative, the ABS Team and the DEFF for hosting this 12<sup>th</sup> Pan African ABS Workshop.

*Natalie Feltman from DEFF* thanked the German Government, through GIZ and the ABS Capacity Development Initiative and the entire team from DEFF for their support in organising this latest edition of the Pan African ABS Workshop. She highlighted that this had been an excellent opportunity for participants to look at various ABS cases, share experiences, lessons learnt and best practices from different countries and discussed those through different perspectives. She hoped such exchanges would ensure a successful implementation of the Nagoya Protocol further. Ms Feltman also emphasised the importance of ensuring that IPLCs are involved from the onset of the research process and developing effective benefit-sharing models for better return in the communities. She then thanked all the participants and the ABS Initiative on the behalf of DEFF for a very productive workshop. Ms Feltman also thanked WIPO for providing extremely useful inputs on IP, genetic resources, traditional knowledge and traditional cultural expressions, underlining the need for more training on such issues in South Africa and the region. Ms Feltman further emphasised that DEFF wished to continue this type of collaboration with WIPO and organise further workshops on IP and ABS in Africa. Officially closing the workshop, Ms Feltman indicated that she looked forward to hearing more success stories on ABS implementation in the future and wished all participants a safe journey home.

## African Group Coordination

A closed coordination meeting of the African Group took place providing an opportunity for African Negotiators to discuss further issues at stake.

## Annex 2: Presentations

The full list of presentations made during the workshop is available [here](#) to download.

### Day One

**Linkages between ABS-Relevant UN Processes** – Hartmut Meyer, ABS Capacity Development Initiative; Kristina Taboulchanas, Secretariat of the Convention on Biological Diversity, Canada; Wend Wendland, World Intellectual Property Organisation; Olivier Rukundo, International Treaty on Plant Genetic Resources for Food and Agriculture (joint presentation).

**ABS Clearing-House: Your Tool to Facilitate the Implementation of the Nagoya Protocol** – Kristina Taboulchanas, Secretariat of the Convention on Biological Diversity.

**ABS Monitoring and Compliance Process Simulation** – Peter Schauerte, ABS Capacity Development Initiative.

### Day Two

**ABS Implementation Options** – Hartmut Meyer, ABS Capacity Development Initiative.

**Implementation Approach of ABS Framework in South Africa** – Lactitia Tshitwamulomoni, South African Department of Environment, Forestry and Fisheries.

**Bioprospecting/Biotrade Economy of South Africa** – Preshantie Naicker-Manick, Department of Environment, Forestry and Fisheries.

**ABS Case Studies South Africa** – Lactitia Tshitwamulomoni, South African Department of Environment, Forestry and Fisheries.

**A Benefit-Sharing Agreement for the Clanwilliam Cedar in South Africa** – Maria Julia Oliva, Union for Ethical BioTrade and Heather Ducharme, The Body Shop International.

**Introducing Parceval: Unlocking Essential Africa** – Avril Harvey, Parceval.

**Research Projects** – Suhel al-Janabi, ABS Capacity Development Initiative.

**Afriplex, From Source to Shelf** – Short movie presentation.

### Day Three

**Afriplex, Source to Shelf** – Varvara Nikolayenko, Afriplex.

## Day Four

**Access and Benefit-Sharing Regulation: Challenges & Opportunities for the Fragrance and Flavour Industry** – Cécile Gonzalez, The International Fragrance Association.

**Approaches and Instruments to Facilitate ABS Partnerships and Agreements: A Non-Commercial Research/Botanic Garden Perspective** – China Williams, Kew Royal Botanic Gardens.

## Day Five

**Understanding Applicants, Sectors and Users** – Maria Julia Oliva, Union for Ethical BioTrade and Suhel al-Janabi, ABS Capacity Development Initiative.

**The ABS Contract Tool Version 2.0: A Hands-on and Practical Tool for Drafting Contracts Governing (Access and Benefit-Sharing) in the Context of Use of Biological Samples without Declared Immediate Commercial Application** – Morten Walløe Tvedt, Fridtjof Nansen Institute.

**Intellectual Property Clauses in ABS Contracts** – Shakeel T. Bhatti, World Intellectual Property Organisation.

**ABS as Building Block for the Post-2020 Biodiversity Framework and the 2030 Sustainable Development Goals** – Pierre du Plessis, ABS Capacity Development Initiative.



## Annex 3: Agenda

Monday 9 <sup>th</sup> September 2019: International Processes and Activities	
Time	Topic / Content
8:00 – 9:00	Registration
9:00 – 10:30	<b>Technical Opening</b> ( <i>Matibe Khorommbi, Andreas Drews</i> ) <b>Programme overview &amp; Getting to know each other</b>
10:30 – 11:00	Coffee / tea
11:00 – 12:30	<b>Linkages between ABS-relevant UN processes</b> <ul style="list-style-type: none"> <li>• SCBD (Kristina Taboulchanas)</li> <li>• WIPO (Wend Wendland)</li> <li>• The Treaty on PGRFA (<i>Olivier Rukundo</i>)</li> </ul>
12:30 – 14:00	Lunch
14:00 – 15:30	<b>African Union update &amp; regional coordination</b> ( <i>Pierre du Plessis, Mahlet Kebede</i> ) <ul style="list-style-type: none"> <li>• Process overview COP 14 to COP 15</li> <li>• Key issues at stake (DSI, post-2020 framework, etc.)</li> <li>• African online coordination system</li> </ul>
15:30 – 16:00	Coffee / tea
16:00 – 17:30	<b>Monitoring GR utilization</b> <ul style="list-style-type: none"> <li>• ABS Clearing-House (Kristina Taboulchanas)</li> <li>• ABS monitoring simulation (Peter Schauerte)</li> </ul>
18:00	<b>Reception</b> ( <i>ABS Initiative, Secretariat of the Convention on Biological Diversity (SCBD), Ministry of Climate and Environment of Norway, European Union Delegation to South Africa, Embassy of Switzerland in South Africa, German Embassy to South Africa, Department of Environment, Fisheries and Forestry, South Africa</i> )

Tuesday 10 <sup>th</sup> September 2019: National ABS Frameworks and Strategies		
Time	Topic / Content	
8:45 – 9:00	Introduction to the day	
9:00 – 10:30	<b>ABS Implementation Options</b> <ul style="list-style-type: none"> <li>• Introduction and overview (Hartmut Meyer)</li> <li>• Examples from selected African countries</li> </ul>	
10:30 – 11:00	Coffee / tea	
11:00 – 12:30	<b>ABS implementation approach of South Africa</b> <i>(Preshantie Naicker, Lactitia Tshitwamulomoni)</i> <ul style="list-style-type: none"> <li>• Biodiversity Economy Strategy</li> <li>• South African ABS framework</li> </ul>	
12:30 – 14:00	Lunch	
14:00 – 15:30	<b>Preparation of field trip (Paarl / Wellington)</b> <ul style="list-style-type: none"> <li>• Selected ABS cases in South Africa (Preshantie Naicker, Lactitia Tshitwamulomoni)</li> <li>• ABS cases and actors at field trip (Suhel al-Janabi)</li> <li>• Logistical information</li> </ul>	
15:30 – 16:00	Coffee / tea	
16:00 – 17:30 <i>(in parallel)</i>	<b>African-Group Coordination</b> <i>(for African government officials only)</i>	<b>WIPO and ABS Initiative</b> <i>(Wend Wendland, Olivier Rukundo, Suhel al-Janabi)</i> <ul style="list-style-type: none"> <li>• Intellectual Property Rights relevant to genetic resources / associated traditional knowledge</li> <li>• African examples</li> </ul>

Wednesday 11 <sup>th</sup> September 2019: Field Trip to ABS Actors – Along the Value Chain	
Time	Topic / Content
7:30	Departure from hotel
08:00 – 16:30	<b>Visits to</b> <ul style="list-style-type: none"> <li>a) Parceval Pharmaceuticals (Pty) Ltd (Waterkloof farm, Wellington)</li> <li>b) Afriplex (production facility, Paarl)</li> <li>c) Research projects (University of Western Cape / University of Dortmund, Germany)</li> </ul> <i>Participants will visit all three venues (rotation)</i>
16:30 – 18:00	Panel discussion with actors
18:00 – 20:00	Dinner at field trip location
20:00 – 21:00	Return to Hotel

Thursday 12 <sup>th</sup> September 2019: Approaches and Instruments to Facilitate ABS Partnerships and Agreements	
Time	Topic / Content
8:45 – 9:00	Introduction to the day
9:00 – 10:30	<b>Key implementation challenges and proposals for solutions (IPLC perspective)</b> <ul style="list-style-type: none"> <li>• Input by Lucy Mulenkei and South African IPLC representative</li> <li>• Discussions and exchange</li> </ul>
10:30 – 11:00	Coffee / tea
11:00 – 12:30	<b>Key implementation challenges and proposals for solutions (industry /SME perspective)</b> <ul style="list-style-type: none"> <li>• Input by Cécile González / Cyril Lombard</li> <li>• Discussions and exchange</li> </ul>
12:30 – 14:00	Lunch
14:00 – 15:30	<b>Key implementation challenges and proposals for solutions (research perspective)</b> <ul style="list-style-type: none"> <li>• Input by China Williams and representative of African research institution</li> </ul>

	<ul style="list-style-type: none"> <li>• Discussions and exchange</li> </ul>
<b>15:30 – 16:00</b>	<b>Coffee / tea</b>
<b>16:00 – 17:30</b>	<b>Implications for regulators</b> <ul style="list-style-type: none"> <li>• Panel discussion with selected African ABS focal points / CNA representatives</li> </ul>

## Annex 4: List of Participants

Name	First Name	Country	Institution	Email
Abdurahman	Shehaam	South Africa	Stellenbosch University	shehaam@sun.ac.za
Ackhurst	Albert	South Africa	Department of Environmental Affairs & Development Planning	albert.ackhurst@westerncape.gov.za
Akampurira	Innocent	Uganda	Uganda National Council for Science and Technology	iakampurira@gmail.com
Alwan	Mohamed Ali	Djibouti	Ministère de l'Urbanisme, de l'Environnement et du Tourisme	rahaytobara@gmail.com
Amari Koffi	Alaki Véronique	Côte d'Ivoire	Ministère de la Salubrité, de l'Environnement et du Développement Durable	koffialaki@yahoo.fr
Ardila-Chauvet	Stéphanie	France	Institut de Recherche pour le Développement	stephanie.chauvet@ird.fr
Benryane	Ali	Maroc	UNDP	a.benryane@gmail.com
Beukes	Winston	South Africa	Stellenbosch University	W0abeukes@sun.ac.za
Bhatti	Shakeel	Switzerland	WIPO	shakeel.bhatti@wipo.int
Birouk	Ahmed	Maroc	Institut Agronomique et Vétérinaire Hassan II	ahmed.birouk@gmail.com
Bossou	Bienvenu	Bénin	ONG CESAREN	cesarenongbis@yahoo.com
Boukar	Attari	Niger	Conseil National de l'Environnement pour un Développement Durable (CNEDD)	biocnedd@intnet.ne attariboukar@yahoo.fr
Capela	Aline	Sao Tome & Principe	Ministère des Travaux Publiques et Ressources Naturelles	alinecastro527@hotmail.com
Chiarolla	Claudio		UNDP	claudio.chiarolla@undp.org

	Mery	Belgium	European Commission Directorate General for Environment	Mery.CIACCI@ec.europa.eu
Cissé	Souleymane	Côte d'Ivoire	Institut Pasteur	souleymanecisse@pasteur.ci
Condé	Laye	Guinée	Ministère de l'Environnement, des Eaux et Forêts	layeconde.500@gmail.com layeconde2016@yahoo.com
Crouch	Neil	South Africa	South African National Biodiversity Institute	n.crouch@sanbi.org.za
da Costa	Guilherme	Guinée-Bissau	Secretaria de Estado do Ambiente	dacostaguilherme020@gmail.com gcosta69@hotmail.com
Dao Sanon	Solange	Cameroun	Organisation Africaine de la Propriété Intellectuelle (OAPI)	solange.dao@oapi.int
Dauchi	Allan	Zambia	Ministry of Lands and Natural Resources	duchi45@yahoo.com emobcbgique@gmail.com
Dingom	Aurélien Taylor Patience	Cameroon	Ministry of Environment, Protection of Nature and Sustainable Development	adingom@yahoo.com dingom25@gmail.com
Dossou-Yovo	Pierre	Bénin	Agence Béninoise de Valorisation des Résultats de la Recherche et de l'Innovation Technologique (ABeVRIT)	pierre.dossouyovo@uac.bj pidam57@yahoo.fr
Dridi	Mohamed Ali	Tunisie	Ministère des Affaires Locales et de l'Environnement	dridi_alitn@yahoo.fr
Ducharme	Heather	United Kingdom	The Body Shop International	heather.ducharme@thebodyshop.com
El Mohamadi	Adrie	South Africa	GIZ ABioSA	adrie.elmohamadi@giz.de
Feiter	Ulrich	South Africa	Parceval	ulrich.feiter@parceval.co.za
Feltman	Natalie	South Africa	Department of Environment, Forestry and Fisheries	Nfeltman@environment.gov.za
Fonkou	Prof. Théophile	Cameroun	University of Dschang, Faculty of Science, Department of Plant Biology	tfonkou@yahoo.fr theophile.fonkou@univ-dschang.org



Frederichs	Ellen	Germany	Federal Agency for Nature Conservation	Ellen.Frederichs@BfN.de
Gnagne	Arthur Stéphane	Côte d'Ivoire	Djeka Pharmaco	artgnagne@yahoo.fr
Gnénao	Sah Michel	Côte d'Ivoire	Association Villageoise Conservation et Développement de Djouroutou	koffialaki@yahoo.fr
Golding	Janice	South Africa	United Nations Development Programme	janice.golding@undp.org
González	Cécile	Belgium	IFRA	cgonzalez@ifraorg.org
Gristwood	Michael Anthony	South Africa	SQQFFI	info@saaffi.co.za
Hailu	Ashenafi	Ethiopia	Ethiopian Biodiversity Institute	ayenewashenafi2007@gmail.com
Halimana	Nonhlanhla	Switzerland	Swiss State Secretariat for Economic Affairs	nonhlanhla.halimana@eda.admin.ch
Harvey	Avril	South Africa	Parceval	ulrich.feiter@parceval.co.za
Heita	Natalia	Namibia	Office of the Attorney General	natalieheita@gmail.com natalia.heita@ag.gov.na
Honsbein	Dagmar	Namibia	NANCI	dagmar@ideal-x.com.na
Idriss	Dapsia	Chad	Ministère de l'Environnement, de l'Eau et de la Pêche	idrissdapsia77@gmail.com
Imende	Joyce	Kenya	NEMA	jimende@yahoo.co.uk
Jubek	Paul L.	South Sudan	Ministry of Environment and Forestry	ladolodemen@yahoo.com
Kablan	Landry	Côte d'Ivoire	Université Peleforo Gon Coulibaly,	kablanahmont@yahoo.fr
Kalemba	Martha Mphatso	Malawi	Environmental Affairs Department	mphakalemba@gmail.com
Kandiado	Peter	Malawi	Zankhalango association	peterkandiado@yahoo.com
Kebede	Mahlet	Ethiopia	AUC	MahletK@africa-union.org
Keoagile	Kebaabetswe	Botswana	Ministry of Environment, Natural Resources Conservation and Tourism	kebkeoagile@gov.bw kebkeoagile@gmail.com
Kerapetse	Matshwenyego Josephine	Botswana	Botswana Khwedon Council	kerapetsejosephine@yahoo.com

Kingunia Ineet	Nicky	République Démocratique du Congo	Ministère de l'Environnement et Développement Durable	ineetnick@gmail.com
Klaasen	Jeremy	South Africa	University of the Western Cape	jklaasen@uwc.ac.za
Kpidiba	Kounkatonébéha	Togo	Ministère de l'environnement et des ressources forestières	kpidibaados@yahoo.fr
Kromberg	Steven	South Africa	Social Weaver	steve@socialweaver.co.za
Kurebgaseka	Nyarai Violet	Zimbabwe	Kaza Natural Oils	nyarai@kazanaturaloils.com
Langazane	Phindile	South Africa	Department of Environment, Forestry and Fisheries	plangazane@environment.gov.za
Le Breton	Gus	Zimbabwe	B'Ayoba (Pvt) Ltd	gus.lebreton@gmail.com
Lentunyo	Joseph	Kenya	Laikipia Permaculture Trust	ntunyo@gmail.com
Lombard	Cyril	South Africa	Consultant	newbotanical@hotmail.com
Madzou	Moukili	Congo	Ministère du Tourisme et de l'Environnement	madzou14@gmail.com
Makkink	Elize	South Africa	Department of Environment, Forestry and Fisheries	emakkink@environment.gov.za
Mane	Michel	USA	Mane USA	michel.mane@mane.com
Masabo	Onesphore	Burundi	Office Burundais pour la Protection de l'Environnement	mas_ones@yahoo.fr
Maseko	Phephsile	South Africa	Traditional Healers Organisation (THO)	phepmas@yahoo.co.uk
Matatiken	Denis	Seychelles	Ministry of Environment, Energy and Climate Change	boga@seychelles.net dmatatiken@env.gov.sc denis_matatiken@hotmail.com
Matibe	Khorommbi	South Africa	Department of Environment, Forestry and Fisheries	kmatibe@environment.gov.za
Mbuyazi	Nomusa	South Africa	Department of Environment, Forestry and Fisheries	nmbuyazi@environment.gov.za

Mehdi	Mohammed	Maroc	Direction du Changement Climatique, de la Diversité Biologique et de l'Économie Verte Secrétariat d'Etat Chargé du Développement Durable	mehdi@environnement.gov.ma mehdi.s3e@gmail.com
Menga Mengue	Saturnino	Equatorial Guinea	Dirección General de Medio Ambiente Ministerio de Agricultura, Ganadería, Bosques y Medio Ambiente	mengamengues@yahoo.es
Modiba	Bridgette	South Africa	Department of Environment, Forestry and Fisheries	bmodiba@environment.gov.za
Mokhehle	Lebakeng	Lesotho	Ministry of Tourism, Environment and Culture	lmokhe@yahoo.co.uk
Monjane	Isaias	Mozambique	Ministry of Land, Environment and Rural Development	isaiasdzovo@yahoo.com.br
Moodley	Pooven	South Africa	Natural Justice	pooven@naturaljustice.org.za
Mukonyi	Kavaka Watai	Kenya	Kenya Wildlife Service	mwatai@kws.go.ke mukonyi2000@yahoo.com
Mulenkei	Lucy	Kenya	Indigenous Information Network	mulenkei@gmail.com
Mutisya	Priscillar	Kenya	Kenya Wildlife Service	mumopm@gmail.com
Mvondo	Bruno	Cameroun	RECTRAD / CNCTC	smbmvondo@yahoo.fr
Naicker	Preshanthie	South Africa	Department of Environment, Forestry and Fisheries	pnaicker@environment.gov.za
Nemudzivhadi	Zwavhavhili Farelela	South Africa	Department of Environment, Forestry and Fisheries	fnemudzivhadi@environment.gov.za
Nepfumembe	Ntambudzeni Ephraim	South Africa	Department of Environment, Forestry and Fisheries	nnepfumembe@environment.gov.za
Netshitohole	Tshilidzi Edward	South Africa	Department of Environment, Forestry and Fisheries	enetshithothole@environment.gov.za

Ngoshi	Beavan	Zimbabwe	Ministry of Environment, Tourism and Hospitality Industry	ngoshibeavan@gmail.com
Nott	Michelle	South Africa	Botanica Natural Products	m.nott@botanica.africa
Oliva	Julia	Netherlands	UEBT	julia@ethicalbiotrade.org
Ouoba	Daogo Léon	Burkina Faso	Ministère de l'environnement de l'économie verte et du changement climatique	daogoleon@yahoo.fr
Peterson	Stanley	South Africa		royalchiefgriekwa@yahoo.com
Radaniela	Adana	Madagascar	Aroma Forest	direction@aromaforest.mg
Ramafalo	Prince	South Africa	Department of Environment, Forestry and Fisheries	pramafalo@environment.gov.za
Ramiarison	Claudine	Madagascar	Ministère de l'Enseignement Supérieur et de la Recherche Scientifique	ramiaris@moov.mg mc.ramiarison@gmail.com
Ranaivoson Ramamonjisoa	Lolona	Madagascar	Ministère de l'Environnement, de l'Ecologie et des Forêts	lolona.ramamonjisoa@gmail.com
Randrianavosoa	Njato	Madagascar	Homeopharma	njato.agronome@homeopharma.mg
Rasolojaona	Jazzy	Madagascar	Natural Justice	jazzy@naturaljustice.org.za
Rees	Jonathon	South Africa	Proof Africa	jonathon@proofafrica.co.za
Riha	Klemens	Namibia	GIZ Namibia	klemens.riha@giz.de
Rukundo	Olivier	France	ITPGRFA	olivier.rukundo@gmail.com
Sall	Ndiaga	Sénégal	Enda Tiers Monde	ndiagasall@endatiersmonde.org
Salzwedel	Michael	South Africa	Social Weaver	michael@socialweaver.co.za
Seema	Lerato	South Africa	Natural Justice	lerato@naturaljustice.org
Sehona	Serole	South Africa	GIZ ABioSA	serole.sehona@giz.de
Seydou	Frances B.	Liberia	Environmental Protection Agency	brownefrance@yahoo.com
Singh Rana	Anshuman	France	Institut de Recherche pour le Développement	anshuman.rana@ird.fr
Snyders	Leana	South Africa	San Council of South Africa	leanacloete@ymail.com

Spiteller	Michael	Germany	TU Dortmund Department of Chemistry and Chemical Biology	michael.spiteller@tu-dortmund.de
Spörri	Franziska	Switzerland	Swiss State Secretariat for Economic Affairs	
Swanepoel	Karen Magdalena	South Africa	Southern African Essential Oil Producers Association (SAEOPA)	saeopa@gmail.com
Taboulchanas	Kristina	Canada	Secretariat of the Convention on Biological Diversity (CBD)	kristina.taboulchanas@cbd.int
Teschner	Anja	Germany	BiInnovation	anja.teschner@giz.de
Tshitwamulomoni	Lactitia	South Africa	Department of Environment, Forestry and Fisheries	lmabadahane@environment.gov.za
Turay	Joseph Sapunka	Sierra Leone	Environmental Protection Agency	sapunka71@yahoo.com
Tvedt	Morten Walloe	Norway	FNI	Morten.W.Tvedt@himolde.no
Valentine	Ebua	Cameroon	GIZ ProPFE	ebua.valentine@giz.de
Voigt-Hanssen	Gaute	Norway	Ministry of Climate and Environment	gh@kld.dep.no
Watson	Gavin	South Africa	GIZ South Africa	gavin.watson@giz.de
Wendland	Wend	Switzerland	WIPO	wend.wendland@wipo.int
Williams	China	United Kingdom	Royal Botanical Gardens, Kew	c.williams@kew.org
Wynberg	Rachel	South Africa	University of Cape Town	rachel@iafrica.com
Youm	Babacar Ngor	Sénégal	Ministère de l'environnement et du développement durable	bacaryoum@yahoo.fr youbaba@yahoo.fr
Zonkle	Luay	Egypt	Ministry of Environment	luay09@yahoo.com

## ABS Team & Interpreters

Name	First Name	Country	Organisation	Email
al-Janabi	Suhel	Germany	ABS Capacity Development Initiative	s.aljanabi@geo-media.de
Dierks	Tobias	Germany	ABS Capacity Development Initiative	tobias.dierks@giz.de
Drews	Andreas	Germany	ABS Capacity Development Initiative	andreas.drews@giz.de
du Plessis	Pierre		ABS Capacity Development Initiative	pierre.sadc@gmail.com
Fenster	Eva	Germany	ABS Capacity Development Initiative	e.fenster@geo-media.de
Girard	Nadine	Germany	ABS Capacity Development Initiative	nadine.girard@giz.de
Heidbrink	Kathrin	Germany	Facilitator	kathrin.heidbrink@web.de
Karger	Elizabeth	Germany	ABS Capacity Development Initiative	elizabeth.karger@giz.de
Mcladi	Norman	Namibia	ABS Capacity Development Initiative	norman.mcladi@giz.de
Meyer	Hartmut	Germany	ABS Capacity Development Initiative	hartmut.meyer@giz.de
Quenum	Hugues	Bénin	Co-Facilitator	comdou@yahoo.fr
Ronoh	Christine	Kenya	ABS Capacity Development Initiative	christine.ronoh@giz.de
Schauerte	Peter	Germany	ABS Capacity Development Initiative	p.schauerte@geo-media.de
Zajderman	Sabine	France	ABS Capacity Development Initiative	sabinezajderman@gmail.com

Kasanga	Kas	Ethiopia	Interpreter	kasangam@gmail.com
Mariotte	Chantal	Kenya	Interpreter	chantal.mariotte@gmail.com
Petros	Emmanuel	Ethiopia	Interpreter	emmanuelpetros@gmail.com
Woldegiorgis	Mesfin	Ethiopia	Interpreter	meswolde@gmail.com

