



Practical Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/Folklore

17th – 20th August 2015, Windhoek, Namibia

Organised by the World Intellectual Property Organisation and the ABS Capacity Development Initiative in cooperation with the Ministry of Environment and Tourism of Namibia

REPORT



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Acronyms and Abbreviations

ABS	Access and Benefit-Sharing
ACP	African, Caribbean and Pacific (Group of States)
ARIPO	African Regional Intellectual Property Organisation
CBD	Convention on Biological Diversity
CBNRM	Community-Based Natural Resources Management
CGRFA	Commission on Genetic Resources for Food and Agriculture
CNA	Competent National Authority
CSIR	Council for Scientific and Industrial Research (South Africa)
EU	European Union
IIFB	International Indigenous Forum on Biodiversity
IIN	Indigenous Information Network
IRCC	International Recognised Certificate of Compliance
IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IKS	Indigenous Knowledge Systems
IPLCs	Indigenous Peoples and Local Communities
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
MAT	Mutually Agreed Terms
NRS	National Recordal System (South Africa)
OAPI	Organisation Africaine de la Propriété Intellectuelle
PIC	Prior Informed Consent
SMMEs	Small, Medium and Micro-Sized Enterprises
TCEs	Traditional Cultural Expressions/Expressions of Folklore
TKDL	Traditional Knowledge Digital Library
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
WIPO	World Intellectual Property Organization



Outline

Background

This workshop on intellectual property, genetic resources, traditional knowledge and traditional cultural expressions (TCEs) (or, “expressions of folklore”) held in Windhoek, Namibia from 17th to 20th August 2015 was the first workshop of its kind organised by the World Intellectual Property Organization (WIPO) and the Access and Benefit-Sharing Capacity Development Initiative (ABS Initiative or the Initiative) in cooperation with the Ministry of Environment and Tourism of Namibia.

The overall objective of the workshop was to build capacity and raise awareness amongst representatives of Indigenous Peoples and Local Communities (IPLCs) from six African countries and key government agencies from those countries. The workshop also aimed at reinforcing national policy dialogues and processes around the interface between intellectual property and the utilisation of genetic resources, traditional knowledge and TCEs. This event therefore provided participants with an opportunity to meet in national groups to reflect on, conceptualise or improve future work in their respective countries. However, discussions were informal and were not intended to result in any formal outcome.

The workshop also addressed the interface between intellectual property and access and benefit-sharing (ABS), particularly in relation to the intellectual property considerations that may arise in the utilisation of genetic resources and traditional knowledge associated with genetic resources, and subsequent benefit-sharing arrangements. The emphasis was put on how, in practice, intellectual property principles, systems and tools are or can be relevant to the developmental interests of IPLCs and governments. Practical examples from Africa were used to illustrate the different issues at stake.

Objectives

With this context in mind, the main objectives of the workshop were to:

- Impart basic knowledge of the main principles of the international intellectual property system and how they relate to the issue of ABS (i.e. the potential value and role of IP in relation to the use of genetic resources and in the protection of traditional knowledge and TCEs). In this regard, the following issues were examined:
 - (i) Intellectual property aspects/considerations in the development of legislative, administrative and policy measures to protect traditional knowledge and TCEs, and to address the interface between intellectual property and genetic resources at national level;
 - (ii) Intellectual property aspects/considerations in mutually agreed terms (MAT) for the fair and equitable sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge.
- Provide an overall overview of relevant regional and international processes by:
 - (iii) Explaining the rationale and objectives of the negotiations that are taking place in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC);



- (iv) Providing an overview of relevant processes under the Convention on Biological Diversity (CBD) (i.e. under the Working Group on Article 8 (j) and the Nagoya Protocol) on ABS and the relevance of intellectual property to these processes, as well as of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore adopted by the Diplomatic Conference of the African Regional Intellectual Property Organisation (ARIPO) in 2010;
- (v) Contributing to building cooperation and collaboration between and among IPLCs and government agencies.

Participants

The workshop welcomed 29 participants from the six African countries: Cameroon, Ethiopia, Kenya, Namibia, South Africa and Uganda. Five participants were selected per country as follows: two IPLCs representatives (selected following an open application process), one officer from the Intellectual Property Office, one officer from the Ministry of Environment (ABS Focal Point) and one officer from the government body in charge of development planning or science and technology.



Outcomes

The active involvement of the participants contributed to the success of this first practical workshop on the interface between intellectual property and genetic resources, traditional knowledge and TCEs and provided a good basis for fruitful discussions and exchanging valuable experiences. Over the course of four days, participants were familiarised with intellectual property principles, systems and tools; discussed the various options available for the protection of traditional knowledge and TCEs; and, addressed the crucial interface between intellectual property and ABS, particularly the considerations that may arise in ABS agreements. Furthermore, discussions in the country groups focused on how an intellectual property approach to the national implementation of the Nagoya Protocol could maximise the economic potential of genetic resources, traditional knowledge and TCEs for the developmental interests of IPLCs, governments and countries at large. The first day of the workshop, entirely dedicated to IPLCs, was specifically designed to prepare and equip IPLC representatives with the necessary resources to allow them to participate more effectively in the programme of work of the rest of the workshop. During this preparatory day, IPLC representatives also discussed the challenges encountered and identified the major issues at stake in relation to the protection of traditional knowledge and TCEs.

Workshop proceedings, constructive exchanges, group exercises and activities contributed to:

- An increased knowledge of the basic principles of ABS in the context of the Nagoya Protocol;
- An increased understanding of intellectual property principles, systems and tools;
- A better understanding of the specific intellectual property tools of particular relevance to ABS such as patents, copyright, trademarks and geographical indications and the kind of rights they provide;
- An increased understanding of the multifaceted challenges and opportunities of using intellectual property tools to protect the creations of the mind and in particular, the creations of the mind based or linked to traditional knowledge or TCEs;
- A better understanding of the relationship between TCEs, traditional knowledge and ABS;
- A better understanding of the linkages between intellectual property and ABS;
- A better understanding of the intellectual property instruments predominantly used by the different sectors using genetic resources;
- An increased knowledge of the various intellectual property related issues to take into consideration in ABS agreements;
- A better understanding of the IGC negotiation process and its work on the protection of genetic resources, traditional knowledge and TCEs as well as the role played by IPLCs in this process;
- A better understanding of the synergies between the different regional and international processes and their linkages to intellectual property and ABS;
- A better understanding on how an intellectual property approach to ABS national implementation is a concrete means to valorise and unlock the potential of biodiversity, particularly genetic resources associated with traditional knowledge;



- Create a space where IPLCs could engage with government officials, including patent office officials, to discuss their concerns;
- The exchange of concrete and practical experiences on the interface between intellectual property and genetic resources, traditional knowledge and TCEs on a national and regional level with the aim to identify and develop solutions to common challenges; and
- The development of roadmaps on how to advance the development of comprehensive ABS systems at national level using intellectual property tools to unleash the economic potential of genetic resources and traditional knowledge associated with genetic resources.

In light of the above, key lessons learnt can be summarised as follows:

- Traditional knowledge and TCEs are economic and cultural assets of IPLCs. Their protection, exploitation and valorisation could contribute significantly to the generation of new intellectual property in Africa and the development of sustainable value chains that will both benefit IPLCs and economic development across Africa.
- The outcomes of “utilisation” of genetic resources as defined in Article 2 of the CBD and the Nagoya Protocol are inextricably linked to intellectual property. Integrating relevant and effective intellectual property clauses in ABS agreements is therefore essential because ABS agreements are the main legal tools to create obligations for benefit-sharing between users and providers of genetic resources and associated traditional knowledge. Good ABS contracts i.e. appropriate prior informed consent (PIC) requirements and carefully drafted MAT, will, in turn, increase the value of African genetic resources, traditional knowledge and TCEs and the African heritage as a whole.
- In light of the previous lesson learnt, it is essential that IPLCs and governments in Africa understand the different issues related to the interface between intellectual property and ABS and the different options or combination of options available to addressing and filling the gaps in intellectual property law in order to adequately protect traditional knowledge associated with genetic resources and TCEs.
- Intellectual property principles, systems and tools can play a key role in protecting traditional knowledge and TCEs from misappropriation and misuse and in the equitable sharing of the benefits from their utilisation.
- From an intellectual property law perspective, documenting traditional knowledge could, in some instances, be a risky undertaking because it may destroy the “novelty” of the knowledge (as understood in patent law) and thus undermine the IP interests and rights of the traditional knowledge holders. Documenting TCEs carries its own intellectual property risks and opportunities under copyright and related rights. Understanding the different available options and approaches – defensive or positive or a combination of both – prior to embarking on a process of documenting traditional knowledge is critical. Documentation of traditional knowledge and TCEs, while helpful for safeguarding and conservation, must therefore be done with the right intellectual property strategy in mind and considerations must be given to the holders of these resources and to the specific circumstances of a country.
- Building sustainable relationships with users of genetic resources and associated traditional knowledge is essential to increase economic development based on African genetic resources.



- While sometimes seen as a tool of misappropriation, intellectual property can also be used as a tool to encourage and protect innovation for socio-economic development, technology transfer and empowerment. Applying an intellectual property approach to the national implementation of the Nagoya Protocol should therefore be seen as an opportunity to unlock and harness the potential of genetic resources and associated traditional knowledge. The key is to use intellectual property in a strategic manner, whether defensively and/or positively. To do so, one has to know more about how the intellectual property system functions and how and when it can be used to further one's own interests.
- It is essential that governments and IPLCs engage with each other on matters related to the utilisation and valorisation of genetic resources and the protection of traditional knowledge and TCEs held by IPLCs, so that the interests of IPLCs will be reflected in relevant national policies and legislation and in future international negotiations.
- The coordination of relevant regional and international processes is necessary for a more effective implementation of international treaties, in general, and the Nagoya Protocol, in particular, and for a better understanding of their linkages with ABS and intellectual property.



Process

Part One: Indigenous Peoples and Local Communities Day

Indigenous Opening

Lazarus Kairabeb, Secretary General at the Nama Traditional Leaders Association was very pleased to welcome the participating IPLCs in Namibia to the first practical workshop dedicated to raising awareness and building capacity on the interface between IP and the use of genetic resources, traditional knowledge and TCEs. He then highlighted that traditional knowledge associated with genetic resources offered great opportunities to improve the livelihoods of IPLCs. He went on to say that a better understanding of the linkages between IP, traditional knowledge and ABS was therefore essential for the formulation of effective national ABS legislation that will ensure that the consent of IPLCs had been provided for the use of their genetic resources, traditional knowledge and TCEs and that benefits arising from their utilisation had been fairly and equitably shared. Mr Kairabeb concluded by wishing all the participating IPLC representatives fruitful discussions.

Hai-Yuean Tualima, Indigenous Fellow at the Traditional Knowledge Division at WIPO, expressed a warm welcome to all the participants and thanked the Namibian Ministry of Environment and Tourism for hosting this first workshop on the interface of intellectual property and genetic resources, traditional knowledge and TCEs co-organised by the ABS Initiative and WIPO. She then briefly introduced the work of WIPO around the issues of protection of traditional knowledge and TCEs. She invited the participants to take this opportunity to interact with all the stakeholders taking part in the workshop, especially government officials and patent officers. Ms Tualima also emphasised that today's workshop was focussed on identifying issues and best practices as well as looking at the value of traditional knowledge and TCEs and the solutions intellectual property could provide for their protection. Ms Tualima concluded by wishing participants a fruitful practical workshop.

Lena Fey, Programme Manager IPLCs at the ABS Initiative, warmly welcomed the participating IPLC representatives and briefly introduced the work of the ABS Initiative and its involvement in training IPLCs on ABS & intellectual property rights (Intellectual property rights). She drew attention to the fact that although Intellectual property rights were often seen as a threat, they could also be seen as an opportunity to protect traditional knowledge associated with genetic resources. However, in order to make use of these opportunities and deal with potential threats, it is important to first understand the different forms of Intellectual property rights and how they relate to the protection of tradition knowledge and ABS. Second, it is crucial to find partners to approach the issue in a strategic manner. Ms Fey pointed out that therefore this workshop was designed to gather traditional knowledge holders as well as government officials in charge of ABS, Intellectual property rights and development planning in order to give them the opportunity to jointly strategise and discuss potential ways forward. She emphasised that the ABS Initiative and the WIPO hoped that this new workshop format will be successful and stimulate fruitful discussions. She concluded by highlighting that this day was dedicated to IPLCs to give them the opportunity to discuss and exchange experiences amongst themselves and to get prepared for the programme of work of the next few days. She then wished all the participants well in their deliberations.



Lucy Mulenkei, Executive Director of the Indigenous Information Network (IIN) and facilitator for this first day of the workshop welcomed the participants and thanked WIPO and the ABS Initiative for the opportunity to gather the IPLCs participating to the workshop to discuss issues related to intellectual property and the protection of traditional knowledge and TCEs. She then provided an overview of the agenda and objectives of this preparatory day and wished participating IPLC representatives every success in their deliberations.

Paving the Way

Introduction

The purpose of this first day was to familiarise the participating IPLC representatives with the concepts of intellectual property, the linkages between intellectual property and the utilisation of genetic resources, traditional knowledge and TCEs, particularly the utilisation of genetic resources and associated traditional knowledge in the context of ABS, so as to equip them with the necessary resources to effectively participate in the programme of work planned for the next days of the workshop. This preparatory day was designed to facilitate discussions on the challenges encountered and to identify the major issues at stake in relation to the protection of traditional knowledge and TCEs. Finally, the programme of this first day aimed at highlighting the importance of ensuring that IPLCs work with governments and at encouraging participants to seize this opportunity to engage with government officials taking part in the workshop.

Getting to Know Each Other

A short introductory exercise was undertaken to take stock of the current level of interaction between IPLC representatives and government officials in their respective countries regarding biodiversity issues, ABS, intellectual property, traditional knowledge and TCEs. The results showed that in the majority of countries, IPLCs were involved, to a certain extent and at different levels, in discussions with various government departments such as, for example, National ABS Focal Points, the Ministry of Environment or other relevant government departments dealing with ABS related issues. The exercise also allowed participants to express and formulate their expectations of the workshop while indicating the various environmental concerns they were facing in their respective communities. These are summarised in the table below.

Expectations	Environmental Concerns
<ul style="list-style-type: none"> ▪ Learn more on intellectual property/Intellectual property rights, on how to secure intellectual property of traditional knowledge, on intellectual property defence mechanisms to protect traditional knowledge and on whether to and, if so, how to establish databases of traditional knowledge. ▪ Learn more from other participants' experiences and share our knowledge on how to benefit from ABS. ▪ Learn more from other African countries on legal matters and policy, about their challenges and 	<ul style="list-style-type: none"> ▪ Drought ▪ Climate change ▪ Illegal settlements ▪ Bush encroachment and land degradation ▪ Destruction of trees by chemicals which also affects wildlife. ▪ Removing of stones and minerals as well as land grabbing. ▪ Logging and deforestation and the nationalisation of that industry. Hence communities do not benefit from any benefits that arise from this



<p>share experiences.</p> <ul style="list-style-type: none">▪ Learn how governments in Africa work towards the protection of traditional knowledge and TCEs and address IP related issues in relation to the use of traditional knowledge associated with the utilisation of genetic resources.▪ Learn more about Indigenous Peoples of Africa and how to create awareness about them.▪ Acquire new knowledge about the protection of TCEs.▪ Acquire knowledge and share experience on how to protect traditional knowledge and TCEs.▪ Learn more about WIPO as an international organisation.▪ WIPO and the ABS Initiative to organise such workshops in the communities.	<p>industry which at the same time impact on the conservation and use of biodiversity, particularly indigenous plants.</p> <ul style="list-style-type: none">▪ Lack of documentation of traditional knowledge and on climate change affecting as a result biodiversity.▪ Access to genetic resources is not regulated properly which causes biodiversity loss and no benefit is channelled down to IPLCs - how can they benefit more when sharing some information about traditional knowledge.▪ Displacement of IPLCs to areas where they have no history with the surrounding biodiversity which in turn is affecting the existence and survival of traditional knowledge. How to benefit now from the traditional knowledge these communities have left behind in the forests or their previous natural environment.▪ Encourage the rehabilitation of areas of the environment as much as possible.▪ Sensitise more the communities about the value of biodiversity, the sustainable use of natural resources and the equitable sharing of benefits arising from the use of natural resources.
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Introducing World Intellectual Property Organization and the Access and Benefit-Sharing Capacity Development Initiative

What is WIPO and What does it do?

Wend Wendland, Director of the Traditional Knowledge Division at WIPO gave a brief overview of the work of WIPO and provided some clarifications on the nature of the linkages between intellectual property and ABS. Mr Wendland told the participants that WIPO was an international organisation dedicated to the protection of “intellectual property” worldwide. He then explained that the term “intellectual property” refers to the creations of the human mind and that the protection of intellectual property is done through the application of different intellectual property tools. Common forms of intellectual property tools particularly relevant for the theme of this workshop include copyright, trademarks, patents and geographical indications. Mr Wendland indicated that each country has its own national intellectual property protection systems and that WIPO was helping governments, only at their request, to establish and harmonise rules and practices of intellectual property, to agree on new intellectual property treaties and on how to implement them by providing legal and technical assistance and various forms of training. Despite all these efforts, gaps in this system remain,



especially in relation to the protection of traditional knowledge and TCEs. Participants were then introduced to the work of the IGC, established in 2000 within WIPO, to discuss the protection of traditional knowledge and TCEs and the intellectual property issues that arise in the context of ABS. In 2009, the IGC began formal negotiations with the objective to come to an agreement on one or more international legal instruments that would ensure the effective protection of genetic resources, traditional knowledge and TCEs. To support the work of the IGC, WIPO provides training to both governments and IPLCs in order to facilitate a greater understanding of what the issues and the options are. The work of the IGC also takes note of the interface with other international treaties or instruments such as, for example, the CBD and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) which touch on similar issues so that the work of the IGC is complementary and not duplicative. Mr Wendland pointed out that the participation of IPLCs in this negotiation process was key. WIPO has therefore introduced a series of initiatives to ensure that IPLCs are actively and effectively involved. These are, for example: (i) practical training and workshops for IPLCs and other relevant stakeholders in order to bring them together and encourage governments to cooperate with and support IPLCs (such as the present workshop); (ii) the Indigenous Fellowship Programme at the Secretariat in Geneva since 2009 and (iii) the establishment in 2005 of the WIPO Voluntary Fund for Accredited Indigenous and Local Communities (several entities have contributed to this fund, such as the Swedish International Biodiversity Programme, the Christensen Fund, and several countries: South Africa, Norway, Switzerland, France, Australia and New Zealand) to facilitate the participation of IPLCs in the work of the IGC. Some proposals have been recently suggested to find alternative funding to the Voluntary Fund but no decision has been made as yet.

The ABS Initiative in a Nutshell

Suhel al-Janabi, Co-Manager of the ABS Initiative provided a brief overview of the work of the ABS Initiative which, since 2006, builds the legal and technical capacity of relevant stakeholders, especially IPLCs, on ABS related issues. First starting by providing support to African countries during the negotiations that led to the adoption of the Nagoya Protocol in 2010, the Initiative has also convened numerous training courses and multi-stakeholder workshops with a regional or issue-based focus in Africa and in the African, Caribbean and Pacific (ACP) Group of States. Over the years, the ABS Initiative has developed different strategies and programmes of work which ultimately aim at developing ABS agreements that are fair and equitable for providers and users of genetic resources and associated traditional knowledge. This involves building capacity in implementing ABS national policies and legislation as set out in the Nagoya Protocol. Mr al-Janabi then drew attention to the fact that 'utilisation' meant 'to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of both the CBD and the Nagoya Protocol. He pointed out that, more often than not, research results that are based on traditional knowledge are patentable innovations. Still, there is little awareness and understanding of the various intellectual property instruments that exist to protect traditional knowledge associated with genetic resources. There is therefore a real need for capacity building on the interface between intellectual property and ABS, especially for building the legal capacity of IPLCs in this area.

Lucy Mulenkei from the Indigenous Information Network provided some valuable insights on the negotiations leading to the adoption of the Nagoya Protocol and the role the ABS Initiative played in supporting African countries and the participation of IPLCs in this process. She pointed out that having more IPLCs to take part in the negotiations had been a real challenge. By working with governments, the ABS Initiative helped IPLCs to have a voice and contribute to advancing the work of the negotiations. Ms Mulenkei concluded by highlighting



the importance of working with governments to make things happen with regard to ABS and the protection of traditional knowledge associated with genetic resources.

Lazarus Kairabeb from the Nama Traditional Leaders Association added that in order to reinforce the voice of provider countries, the ABS Initiative also established a South-South dialogue process between India, Brazil and South Africa. He reported that these dialogues provided a unique platform for the exchange of experiences and innovative approaches in implementing ABS national legislation and regulatory frameworks. Mr Kairabeb also agreed that dialogues among all the stakeholders concerned, particularly between governments, businesses and IPLCs were critical. He highlighted that the information generated in the two first dialogues was invaluable to share best practices among provider and user countries and to make the implementation process work. He went on to say that these kinds of dialogues also help to educate researchers on how to approach provider countries and more particularly on how to approach IPLCs. They also help to discuss the various options selected and strategies developed, positive or defensive or a combination of both, by the different countries to protect traditional knowledge.

Bruno Mvondo from the National Council of Traditional Rulers of Cameroon highlighted the importance of involving IPLCs in the development of national ABS legislation. Sharing the example of Cameroon, Mr Mvondo, informed his peers on the support provided by the ABS Initiative to develop and implement Cameroon's national ABS policy and legislation and set up ABS Networks/Committees. He explained that the establishment of ABS Networks/Committees help IPLCs to be informed on ABS related issues, attend capacity building events and participate in the country's national ABS process. Mr Mvondo further explained that the ABS Networks/Committees then meet with the relevant government departments and assist in the implementation of the national ABS policy and legislation for the development of effective ABS agreements. They also assist in the negotiation of ABS or biodiversity related issues in international processes. He concluded that, thanks to this participative approach, IPLCs have their voice heard through their involvement in ABS Networks/committees.

Plenary Discussion

In the plenary discussion that followed these opening presentations, most participating IPLC representatives were of the opinion that dealing with the interface between intellectual property and ABS in a more formal way was essential to promoting the effective implementation of the Nagoya Protocol. They agreed that issues related to intellectual property needed to be included in the discussions currently taking place among themselves and that expertise should be shared as much as possible among all IPLCs. They then noted that participating in international negotiations was a substantial undertaking and thanked the ABS Initiative for its invaluable support so far. Participants also all agreed on the crucial role governments could play to advance international negotiations and on the importance to learn to work with or lobby government officials so that the various issues of concern for IPLCs will be included in future negotiations. Some participants highlighted that the participation of IPLCs in the negotiations currently taking place within the IGC at WIPO was also critical. Finally, participants discussed the meaning of the term 'utilisation' and the adequacy of the definition provided in both the CBD and the Nagoya Protocol. They were told that the issue of what triggers ABS was one of the most discussed topics during the negotiation process leading to the adoption of the Nagoya Protocol. The rapid advancement of science and technology also had to be addressed in the text of the Protocol. The question of which resources would fall under the scope of the Nagoya Protocol was finally resolved by deciding that ABS would be triggered by 'utilisation', i.e. conducting research and development on the active



compounds of an organism as well as their derivatives. Hence, for example, biotrade¹ does not fall under the scope of the Nagoya Protocol. However, countries may go beyond or below this definition in the formulation of their national ABS measures.

Identifying Critical Issues

Group Exercise

The objective of this group exercise was to help participants to identify the various issues encountered in their respective communities regarding the protection of traditional knowledge and TCEs. To do so, participants were divided into three groups and asked to reflect on the following questions:

1. What challenges is your community currently facing regarding traditional knowledge and TCEs?
2. Which steps could be taken by IPLCs at community level to promote the protection, add value and maximise the economic opportunities associated with traditional knowledge and TCEs?

The results of the deliberations of the three groups were then aggregated into one document and distributed to participating IPLC representatives for them to use as guidance in their discussions with government officials and patent officers during the next days of the workshop. The aggregated results are reported in the boxes below.

Challenges

- ❖ The disappearance of traditional knowledge due to the erosion of the ecosystem that keeps traditional knowledge alive as a result of:
 - The undermining of communal land tenure systems (across Africa);
 - The over regulation and limited access to plants associated with traditional knowledge held by IPLCs in protected areas and private lands;
 - Loss of transmission of traditional knowledge associated with genetic resources and oral cultural heritage or TCEs;
 - Lack of recognition of and lack of respect for traditional knowledge holders and traditional way of life/lifestyles;
 - Lack of interest of youth in traditional knowledge and TCEs;
 - Lack of record or documentation of traditional knowledge and TCEs by IPLCs; and
 - Death or disappearance of communities before their knowledge has been transmitted resulting in the death of traditional knowledge.
- ❖ Lack of a recognised legal framework for the protection of traditional knowledge associated with genetic resources and TCEs.
- ❖ Lack of recognition of customary laws and systems in national laws. When they are, they are not incorporated effectively enough in national legislation development. As a result, there is no clear policy system put in place by governments to protect traditional knowledge and TCEs.
- ❖ Misappropriation and misuse of traditional knowledge associated with genetic resources and TCEs:

¹ According to the BioTrade Initiative launched by the United Nations Conference on Trade and Development (UNCTAD) in 1996, the term biotrade refers to those activities of collection/production, transformation, and commercialisation of goods and services derived from native biodiversity (species and ecosystems), under criteria of environmental, social and economic sustainability.



- Illegal use and/or exploitation of traditional knowledge associated with genetic resources by others. For example, researchers come as tourists and use information on traditional knowledge obtained from individuals without their consent or without consulting any community structure; and
- Illegal use and/or exploitation of TCEs through music and other arts. For example, the Maasai's rights to their name. There is no IP instrument which specifically protects the cultural identity of an ethnic or national group.
- ❖ Little or no benefits arising from the use of traditional knowledge associated with genetic resources or TCEs are going back to the IPLCs holders of such knowledge.
- ❖ Transboundary issues such as inter-cultural knowledge-sharing systems are not harmonised between the different IPLCs.
- ❖ Lack of capacity building and awareness at grassroots level on issues related to the use or protection of traditional knowledge and TCEs. IPLCs have limited knowledge and a poor level of information on their rights in relation to use of their traditional knowledge and TCEs and on how to negotiate their use or commercial exploitation.
- ❖ Land grabbing by investors (national or foreign) resulting in the loss of large tracts of ancestral and indigenous/traditional lands leading to the collapse of traditional forms of land tenure and consequently to the loss of traditional knowledge systems and TCEs. This also leads to the impoverishment of IPLCs due to loss of access to their lands and resources – the loss of ancestral lands and associated natural resources are closely linked to the degradation and loss of traditional knowledge systems of indigenous peoples.
- ❖ Climate change and poverty.

Steps to Take

To address the above challenges, the IPLCs proposed to:

- ❖ Build the legal capacity of IPLCs by:
 - Urging IPLCs to become proactive and document their internal laws by for example developing a Bio-Cultural Community Protocol;
 - Encouraging the development of strategies to harmonise ABS procedures;
 - Raising awareness and learning more about IP options and systems;
 - Establishing IPLCs watchdog committees to protect and scrutinise researcher motives.
- ❖ Promote traditional knowledge and TCEs by:
 - Building capacity and training IPLCs on how to market community's intellectual property;
 - Educating IPLCs on the value and economic benefits associated with the use of traditional knowledge and TCEs;
 - Building IPLCs skills for negotiation and contract formulation;
 - Raising IPLCs awareness and disseminating information on repealed and amended laws or any relevant legal matter that can affect them; and
 - Developing out of school outreach field and cultural education programmes, organising learning visits and promoting talent.
- ❖ Developing a marketing strategy that includes:
 - Income generating activities;



- The setting up of cooperatives; and
- A value chain development strategy.
- ❖ Foster stakeholder engagement by:
 - Developing relationship with research institutions;
 - Linking communities with national IP offices/organisations;
 - Requiring external parties to engage with IPLCs through the existing community structure; and
 - Engaging and working with government services involved in/dealing with issues related to the protection of traditional knowledge and TCEs to develop a strategy to document traditional knowledge and TCEs.

Plenary Discussion

After sharing the results of their group discussions and experiences, IPLCs debated further on the identified challenges and what could be strategically done at national level to address them to both improve the well-being of IPLCs and economic opportunities. The following is a summary of the main points raised:

- *Climate Change*: Some participants indicated that when flagging climate change as a challenge, it was essential to explain that communities are displaced due to climate change and lose their traditional knowledge and TCEs as a direct result of this.
- *Assimilation, Sense of Place and Identity*: A number of participants highlighted that assimilation, the loss of a sense of place and the loss of identity were other challenges faced by some IPLCs. For example, some small communities, like the Batwa communities, have never been given the opportunity of fully exploiting their identity. This is mainly due to the lack of access to their ancestral lands. Displaced IPLCs lose their sense of place, their belief systems, traditions and way of life. Others, like the Khoi and San People of Southern Africa, are experiencing difficulties and a deep disruption as a community. How could the law assist with reconnecting communities who have lost their sense of place and identity?
- *Recognition of Customary Law and Rights in National Legislation*: Some participants drew attention to the fact that customary laws were crucial and inextricably linked with the dissemination and use of traditional knowledge and TCEs. They pointed out that according to Article 12 of the Nagoya Protocol, Parties, in implementing their obligations, 'shall in accordance with domestic law take in consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources'. Customary law should therefore be recognised or alternatively considered or referred to in national legislation. Other participants suggested the possibility of integrating customary laws in positive law which recognises specific rights for an individual or group or norms such as community protocols. This could be reflected in national law. They also noted that customary law had a positive status in certain countries. In fact, diverse forms of recognition of customary law can be observed in some countries and include, among others, the recognition of customary law in relation to other areas of law (family law, human rights law, etc.); constitutional recognition, administrative recognition, recognition as the source of law or as directly applicable law.



- *Documentation of Traditional Knowledge*: Some participants felt that they had the responsibility to document traditional knowledge to preserve it and prevent its irreversible loss. Among the many reasons, they highlighted that an increasing number of communities were disappearing before their knowledge could have been transmitted. At the same time, younger generations are not interested in learning and keeping traditional knowledge alive. They explained that social media and modern lifestyles had badly affected the existence of traditional knowledge. Others said that putting value on traditional knowledge may be the only way to retain the interest of the youth. All therefore agreed that documentation was crucial as it may serve one day for some other generations who may be more interested in learning about it. Yet, it was also highlighted by the workshop organisers that documenting traditional knowledge was a challenging undertaking and that from an intellectual property law perspective, it could in some instances be a risky thing to do. It was explained that some of the major concerns were that the documentation of traditional knowledge makes it more available and accessible to the general public and consequently more vulnerable to misuse or misappropriation. It is therefore critical that IPLCs understand the different options available to them prior to embarking on the process of documenting their traditional knowledge. Participants were then informed that the risks and opportunities of documenting traditional knowledge would be discussed in more detail and illustrated through various case studies during the second part of the workshop.
- *Lack of Engagement with Governments*: Participants reported a lack of strategic relationships and collaboration with governments to address the different challenges. It was once again highlighted that this workshop was an opportunity for participating IPLC representatives to engage with government officials and patent officers to convey their concerns and discuss potential avenues to address them.

Conclusion

The various discussions and results of the group work highlighted the complex and multi-faceted nature of traditional knowledge as well as the difficulty in ensuring its protection. These discussions also highlighted the need to find the right balance between the three main issues under consideration: the preservation of traditional knowledge and TCEs, their protection against misappropriation and the utilisation and valorisation of traditional knowledge associated with genetic resources to develop sustainable value chains that will benefit IPLCs. This first round of discussions also drew attention to the importance for IPLCs to understand the issues related to the interface between intellectual property and ABS as well as the different options or the combination of options available to them to start addressing and filling the gaps in intellectual property law in order to adequately protect traditional knowledge and TCEs.



Part Two: Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/Folklore

Official Opening

Welcoming Remarks

Suhel al-Janabi, Co-Manager of the ABS Initiative, welcomed the participants to the workshop on behalf of the ABS Initiative. Mr al-Janabi told the participants that the ABS Initiative has been supporting Africa on ABS matters since 2006. Its work has since evolved and extended to the Caribbean and Pacific countries members of the ACP Group of States with the objective to advance a harmonised implementation of the Nagoya Protocol in these regions. Today, the ABS Initiative has shifted the focus of its work to concentrate on targeted support to national level activities such as the development of sound and functioning ABS regulatory frameworks, the development of ABS-compliant value chains and the participation of IPLCs in ABS processes. Mr al-Janabi highlighted that ABS was about innovation and that benefit-sharing was triggered by 'utilisation' of genetic resources as defined in Article 2 of the CBD and the Nagoya Protocol. This means that the outcomes of research are intimately linked to intellectual property. It is therefore essential that Intellectual property rights are addressed in MAT and PIC. Similarly, it is essential that providers of genetic resources, especially IPLCs as traditional knowledge is often the basis for targeted research and development, know about and understand the various intellectual property instruments i.e. patents, trademarks, trade secrets, copyrights and geographical indications that are relevant to ABS. Mr al-Janabi concluded by drawing attention to the fact that the ABS Initiative was now joining forces with WIPO, ARIPO and the Organisation Africaine de la Propriété Intellectuelle (OAPI) to build capacity on these crucial issues and support a sharing of the benefits that is fair and equitable for both users and providers, particularly ILPCs. He then thanked the government of Namibia for hosting this first workshop on intellectual property and genetic resources, traditional knowledge and TCEs co-organised with WIPO and wished participants fruitful deliberations.

Wend Wendland, Director of the Traditional Knowledge Division at WIPO, also welcomed all the participants to the workshop. He briefly explained that the mission of WIPO was to promote innovation and creativity for the economic, social and cultural development of all countries through a balanced and effective evolution of the international intellectual property system. He then highlighted that for the past 18 years, one of the core activities of WIPO has been its work on the protection of traditional knowledge and TCEs. Traditional knowledge and TCEs are economic and cultural assets of IPLCs throughout the world. However, current intellectual property instruments do not fully cover the specific features of traditional knowledge and TCEs. WIPO's work therefore addresses the role that intellectual property principles and systems can play in protecting traditional knowledge and TCEs from misappropriation or misuse and in the equitable sharing of the benefits from their commercialisation. This work also looks at the role of intellectual property in access to and benefit-sharing of genetic resources. Mr Wendland stated the workshop was a pioneering attempt to begin a long overdue conversation between the two worlds of intellectual property and the environment, in particular the conservation of biodiversity and ABS. So far, these areas had existed comfortably in their silos but more integrated, multi-dimensional and holistic approaches were now needed. He went on to say that just as this workshop aimed to build bridges between *issues*, it also aimed to build bridges between *people* by facilitating further dialogue and understanding between government officials from different ministries and between IPLCs and government officials. Mr Wendland stated that it was significant and appropriate that this first ABS-WIPO



multi-stakeholder workshop took place in Africa whose great biodiversity is extremely vulnerable to misappropriation and misuse. Mr Wendland concluded by informing the participants that the African Group was very engaged and active in the discussions related to the protection of traditional knowledge, TCEs and genetic resources at WIPO.

Theofilus Nghitila, Environmental Commissioner from the Namibian Ministry of Environment and Tourism, extended a warm welcome to all the participants on behalf of the government of Namibia. He then drew attention to the fact that Namibia, which is home to a very unique biodiversity, played a critical role in the negotiations that led to the adoption of the Nagoya Protocol, especially regarding the use of traditional knowledge associated with genetic resources and the formulation of the text of the Protocol on these issues. Mr Nghitila went on to say that local communities were very important in Namibia. The Namibian government therefore gives special attention to the development of the natural product industry and maximises its potential by using a community-based natural resources management (CBNRM) approach that places the IPLCs of Namibia at the centre of this economic development strategy while ensuring that benefits resulting from the use of biodiversity and traditional knowledge flow back to them. He informed the participants that a few national workshops on ABS related issues had been organised throughout the past year, the last one taking place a week prior the beginning of this workshop, the main focus of which was to look at the linkages between Intellectual property rights and traditional knowledge. He highlighted the importance of organising and training communities on these complex issues effectively before they approach the private and research sector. He was very happy to say that the above strategy had contributed greatly to bring the implementation of the Nagoya Protocol in Namibia a step closer. The country now looks forward to the adoption of its ABS Bill by the end of 2015. Mr Nghitila concluded by wishing the participants very productive discussions throughout the workshop.

Lena Fey, Programme Manager IPLCs at the ABS Initiative, greeted the participants and presented the objectives and the programme of the workshop.

Getting to Know Each Other

A short introduction exercise on who is who also enabled the participants to express and formulate their expectations of the workshop. These are summarised in the box below.

Participants' Expectations

- Learn about and understand the interface between intellectual property and ABS, traditional knowledge and TCEs and how they can work together;
- Become clear on the rights of traditional knowledge holders, ABS processes and national implementation;
- Learn from other countries with respect to ABS implementation;
- Understand how TCEs are related to ABS processes;
- Exchange experiences on how to empower IPLCs on ABS processes;
- Discuss on how mainstreaming ABS and intellectual property systems at different levels, especially at local level to IPLCs;
- Learn and exchange experiences on procedures for IPLCs to engage more with researchers and industries using genetic resources and associated traditional knowledge;



- Discuss effective coordination approaches at national level;
- Explore how to protect traditional knowledge with IP systems;
- Explore how to valorise traditional knowledge associated with genetic resources through intellectual property systems; and
- Learn about each other and exchange best practices on all the above listed issues

Setting the Scene: “People, Plants and Profit”

Introduction

Before going in depth into the topic of the interface between IP and genetic resources, traditional knowledge and TCEs, the objective of this introductory session was to bring participants up-to-speed with ABS through the screening of the movie “People, Plants and Profit” which explains the basic principles of ABS in the context of the Nagoya Protocol and uses three African ABS case studies: hoodia (South Africa), argan (Morocco) and teff (Ethiopia) as illustrations.

ABS: Setting the Scene

Following the screening of the movie “People, Plants and Profits,” *Lena Fey from the ABS Initiative* provided a brief presentation on the background of the negotiations that led to the adoption in 2010 and the entry into force in 2014 of the Nagoya Protocol. Ms Fey informed the participants that the Protocol had currently 62 Parties, of which many are African countries. She highlighted that the Nagoya Protocol provides legal clarity and certainty to both users and providers of genetic resources by establishing a framework for regulating the utilisation of such resources and the traditional knowledge that may be associated with them. She then briefly reviewed and clarified some of the obligations under the Protocol, providing at the same time a general overview of the interplay between users and providers of genetic resources. First, PIC and MAT have to be established to obtain a permit from the Competent National Authority (CNA) of the provider country. All this information should subsequently be forwarded to the ABS Clearing House. The permit obtained in the provider country then becomes an Internationally Recognised Certificate of Compliance (IRCC). In the user country, checkpoints must be established so that it is possible to control whether users comply with the ABS laws in the provider country. Benefits, monetary or non-monetary, should then flow back to the user country. Depending on national legislation, benefits should also flow back to the providers of genetic resources and traditional knowledge holders where relevant.

Plenary Discussion

The following is a highlight of the issues discussed in the plenary:

- *The Establishment and Role of Checkpoints:* Participants were explained that there had been long discussions on the ability of countries to verify that the IRCC had been obtained appropriately. All Parties to the Nagoya Protocol are obliged to establish checkpoints, which collect all the necessary information to make sure that users have exercised due diligence, i.e. complied with the provider country’s ABS regulations. Article 17 of the Nagoya Protocol on monitoring the utilisation of genetic resources gives some latitude on this point: Countries are free to designate which institution or body can fulfil the functions of the checkpoints so long as the designated institution/body is capable and functional as regard to discharging the functions envisaged for the checkpoints. For example, some countries suggested that



patent offices and research institutions could act as a checkpoint. In the European Union (EU) ABS Regulation,² the reception of research funds is regarded as one suitable checkpoint.³ This means that a checkpoint can also be a point in time: as soon as users receive research funds, they have to report it to the CNA which is in charge of monitoring compliance. Generally speaking, an organisation can be a checkpoint only if they have the mandate to verify whether PIC and MAT have been obtained. For example, it is unlikely that a Fair Trade Certification organisation would be used as a checkpoint.

- *Compliance Measures with Domestic Legislation or Regulatory Requirements on ABS:* Compliance measures are outlined in Articles 15 and 16 of the Nagoya Protocol. However, the text of the Protocol suggests that compliance measures only apply to genetic resources. This is a mistake made during the negotiations. Articles 7 and 12 do provide for compliance measures which also apply when traditional knowledge associated with the utilisation of genetic resources leaves the country of origin and is used in another country. Furthermore, the general provisions contained in Articles 5 and 6, especially the provisions which provide for compliance with both PIC and MAT, are provisions which mirror compliance provisions provided in Articles 15 and 16.
- *Involvement of IPLCs in PIC and MAT Measures in National ABS Legislation:* Article 6 of the Nagoya Protocol envisions a whole process for accessing genetic resources that includes PIC and MAT. Article 6 also contains an obligation to involve IPLCs in the procedure for obtaining PIC and MAT, where applicable and where stipulated by national legislation. This means that when traditional laws or the rights of IPLCs to genetic resources are recognised in national legislation, there is an obligation to involve IPLCs in all ABS processes that affect or concern them. Furthermore, the Nagoya Protocol allows the establishment of national mechanisms to facilitate the participation of IPLCs in decision-making at the level of the CNA. For example, South Africa involves IPLCs to make sure that consent has effectively been given by the concerned communities.

Conclusion

This first session of the workshop allowed familiarising the participants with the basic principles of ABS in the context of the Nagoya Protocol while touching briefly upon, through the three case studies presented in the movie “People, Plants, Profit”, the various issues related to the interface between ABS and intellectual property.

Topic 1: Introduction to Intellectual Property

Introduction

The objective of this session was to provide the participants with a general introduction to the basic principles of intellectual property. Case studies were used to facilitate the understanding of the main intellectual property tools, such as patents, copyright, trademarks, trade secrets and geographical indications, the kind of rights they provide and how they relate to the protection of traditional knowledge and TCEs.

² Regulation (EU) N°511/2014.

³ Regulation (EU) N°511/2014, Preamble (25).



Basic Principles of Intellectual Property

The presentation of *Ms Hai-Yuean Tualima, Indigenous Fellow at WIPO* provided a brief but comprehensive overview of the basic principles of intellectual property. She explained that intellectual property refers to the creations of the mind such as inventions, literary and artistic works, designs and brands, symbols, names and images and that the aim of intellectual property is to safeguard the interests of creators and other producers of intellectual property goods and services by granting them certain time-limited rights to control the use made of their productions. Ms Tualima highlighted that the two main principles of intellectual property law were to promote innovation and creativity, and to ensure the integrity of the market place. Her presentation then covered the main intellectual property tools using various examples so that the participants acquired a better understanding of how the intellectual property system works, emphasising that each tool also contains built-in limitations and well-defined criteria. The main intellectual property tools include patents (time bound monopoly, generally 20 years within specific geographical zones in exchange for the disclosure of technical information), copyright (lasting for not less than 50 years after the creator's death), trademarks (exclusive rights renewable every 7 or 10 years indefinitely) and geographical indications (valid until the registration is cancelled). More details on the main intellectual property tools can be found in Annex 1: "Introduction to Intellectual Property."

Plenary Discussion

In the plenary discussion that followed, participants inquired on the procedure for filing a patent and on how to ensure that an invention is novel and inventive. It was explained that countries are bound by international and national laws on patents but that there is no such thing as an international patent. Patent protection is territorial and patents may be sought in many different jurisdictions. Participants were told that WIPO offers a service through which one can file for a patent in various countries through one application and for one fee (WIPO's Patent Cooperation Treaty service). However, the granting of patents remains under the control of the national or regional patent offices. In Africa, patent applications can also be filed for various jurisdictions through ARIPO or OAPI, its Francophone counterpart. To be patented, an invention must fulfil the patentability requirements of novelty, inventiveness and industrial applicability. A patent application has therefore to disclose how an invention is made and demonstrate the inventive steps in detail. The inventive steps must be non-obvious to a person skilled in the art. Patent examiners have to determine through research and examination if the invention is novel and inventive – or whether it is "prior art".⁴ If some elements are known, the patent may not be able to be granted. Participants' attention was drawn to the fact in the search for prior art, patent applications cannot easily be checked against oral knowledge. It was also pointed out that patent rights are not absolute rights like property rights to land. However, there is a balance between rights granted by the various intellectual property tools (i.e. a balance between the interests of inventors, the public and third party competitors). For example, rights under copyright tend to be weak but last longer. Patents grant exclusive rights but they last shorter. Intellectual property rights are subject to exceptions and limitations, and the "public domain" is an important part of the balance inherent in intellectual property systems. The plenary discussion concluded with some remarks on the relation between intellectual property rights and property rights to tangibles such as land. Property rights to land are absolute, whereas rights to intangible properties are

⁴ Prior art is a term used in patent law to broadly describe the entire body of knowledge from the beginning of time to the present. In most systems of patent law, prior art constitutes all information that has been made available to the public in any form before a given date that might be relevant to a patent's claims of originality. If an invention already exists, it constitutes prior art and a patent on that invention cannot be granted.



not. This is why the intellectual property system comprises various exceptions and limitations. This does not mean, however, that land and traditional knowledge are not strongly intertwined.

Case Studies Analysis through Group Exercise

This group exercise aimed at applying the basic principles of intellectual property and intellectual property instruments that had just been presented through the use of case studies involving traditional knowledge and TCEs. More specific objectives were to make participants more comfortable with their use and increase their understanding of the multifaceted challenges and opportunities of using intellectual property tools to protect the creations of the mind and in particular, the creations of the mind based or linked to traditional knowledge or TCEs. Participants were divided into three groups composed of one participating IPLC representative, one intellectual property officer, one person from a ministry of environment and one person from development and planning or science and technology or any other organisation participating in the meeting. Each group was assigned a case study. Each of the three case studies illustrated one of the main areas of intellectual property that usually raises some issues in the use of traditional knowledge and TCEs. The first group was asked to reflect on trademark related issues in relation to the word “Rooibos”. The second group was asked to consider patent related issues in relation to a patent application related to Rooibos filed by a subsidiary of Nestlé with the European Patent Office. The third group was asked to look at copyright issues arising from the Waka Waka FIFA World Cup 2010 anthem performed by Shakira and the Cameroonian Zangaleza popular song from the 1980s, itself based on a hymn sung by Cameroonian riflemen. Each group was provided with a set of guiding questions. A rapporteur from each group was designated to report back on the results of each group discussions. More details on each case study and guiding questions can be found in Annex 2 of this report.

Plenary Discussion

Following the presentation of the results of the group discussions, participants reflected further on the use of trademarks, patents and copyright and on the possibility to use these intellectual property tools or parts of them to protect traditional knowledge associated with genetic resources and TCEs.

- **Trademarks:** Some participants suggested that words like “Rooibos” or “Maasai” could also be protected using the copyright notion of “moral rights” which would help to slightly push the boundaries further to prevent the misappropriation, distortion, modification of or any other derogatory use of these words. Hence, moral rights derived from copyright law could be adapted to these two examples. Participants then looked at national laws and regional instruments which could protect traditional knowledge and TCEs. For example, New Zealand has passed a law that forbids the use of any expression that is offensive to Maori people. In Africa, the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, which entered into force in May 2015, aims to protect traditional knowledge holders against any infringement of their rights and the expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.⁵
- **Patents:** Some participants suggested that patent offices should fulfil the role of checkpoints under the Nagoya Protocol (i.e. that patent offices should check compliance with ABS systems). They added that patent offices should also look beyond patent laws to assess the patentability of some applications. They were informed that this issue was very controversial as there is disagreement on whether patent offices have the mandate or the expertise to do so. They were further explained that any application must first

⁵ Article 1.1, Section 1, Part 1.



pass the test of patentability (i.e. novelty, inventiveness and industrial applicability). If all requirements are fulfilled, the patent will usually be granted even if a PIC was not obtained because PIC is not part of patent law. In some cases, the requirements of morality must be addressed, because patent laws generally prohibit the granting of patents which are contrary to the *ordre public* or morality. A few participants then raised the issue of disclosure of origin in patent applications. They were told that many countries had specific disclosure requirements related to genetic resources and traditional knowledge in their national patent laws. In addition, it was highlighted that the nature of patents and the whole purpose of the patent system were about disclosure. However, not all countries were agreed that specific disclosure requirements for traditional knowledge and/or genetic resources were necessary. Participants were further informed that “prior art” was defined differently in different parts of the world. The Indian Traditional Knowledge Digital Library (TKDL) is treated as part of the searchable prior art in electronic format. Participants also learnt from ARIPO that oral traditional knowledge is considered as prior art under Article 10 (c), Section 3 of the Harare Protocol on Patents and Industrial Designs within the Framework of the ARIPO and its regulations as last amended in 2013. Article 10 (c) states that “everything available to the public anywhere in the world by means of a written (including drawings and other illustrations), an oral disclosure or by use or an exhibition, shall be considered prior art [...]”. This means that, under certain conditions, the use of a tape on which oral traditional knowledge has been recorded can revoke a patent wrongly granted. Finally, participants were cautioned about the risks of documenting traditional knowledge, as documenting it may destroy “novelty” (as understood in patent law) and thus undermine the intellectual property interests and rights of the traditional knowledge holders. Documentation of traditional knowledge, including TCEs, must therefore be done with the right intellectual property strategy in mind and considerations must be given to the specific circumstances of a country and its IPLCs.

- **Copyright:** Participants inquired on the circumstances in which one can talk about a legitimate appropriation. They were told that there was a very fine line between a legitimate and an illegitimate appropriation. For example, one may not “copy” or “adapt” a song but one can be “inspired by” it. This is what judges have to decide on when considering a claim. However, this can prove very tricky to do. Considering the Waka Waka song for example, did Shakira reproduce, copy or was she inspired by the Zangaleza song? Generally speaking, all music, stories or academic work build on previous work. Nothing indeed is really new. The general rule of thumb is that when one “borrows from” something (but does not copy it), it is allowed by copyright laws. Copyright has many exceptions. There are, for example, exceptions for educational activities, libraries and archives, or the use by disabled persons, particularly visually impaired persons. In any case, though, everyone who benefits from these exceptions is obliged to cite and acknowledge the source of inspiration.

Conclusion

Presentations and discussions in this first thematic session highlighted that although the intellectual property system was not designed with traditional knowledge systems in mind, parts of it could be used for its protection. The general feeling was that it was therefore important to understand how to use the classical intellectual property system and tools to start protecting traditional knowledge and TCEs against misappropriation and as cultural assets for economic development.

Topic 2: Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions



Introduction

This second thematic session aimed to provide participants with a better understanding of the ICG at WIPO on the protection of traditional knowledge and TCES and a detailed overview of the challenges encountered.

Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions at the World Intellectual Property Organization

Wend Wendland from WIPO gave a comprehensive overview of WIPO's work on the protection of traditional knowledge and TCES, more particularly of the work of the IGC on the development of an international legal instrument (or instruments) for the effective protection of genetic resources, traditional knowledge and TCES. Mr Wendland highlighted that the IGC process was significant for two reasons. First, from an intellectual property law making perspective, it entails a profound and an unprecedented re-imagining of the intellectual property system and it is the first time that mainly developing countries are leading a normative process of this breadth and complexity. Second, from an IPLCs' perspective, the work of IGC may for the first time lead to a new collective right to prevent unauthorised use of traditional knowledge and to share economic, social and cultural benefits internationally. Hence, the ultimate goal of this huge and complex undertaking is to develop a model of protection for traditional knowledge or indigenous knowledge using specially-adapted intellectual property principles and tools that will address the different features of traditional knowledge. In other words, protecting traditional knowledge through a special system based on the kinds of rights, measures, principles and trade-offs that are found in the international intellectual property system and adapted to respond to the multifaceted nature of traditional knowledge. Although this process encounters several challenges such as (i) the little experience at national and regional levels on protecting traditional knowledge; (ii) the existence of many competitive interests with different objectives reflecting different points of view; and (iii) the complex interface with other international instruments and processes, the role played by the African Group in this historical developing country-led process in intellectual property was highly commended. The presentation then discussed in more detail the current status of the IGC's text(s), highlighting the four main issues to resolve, including (i) the scope of the subject matter (i.e. definition of traditional knowledge), (ii) who are the beneficiaries, (iii) the scope of rights of the identified beneficiaries and (iv) what exceptions and limitations on those rights are ought to be. Mr Wendland also illustrated the strategically defensive and/or proactive roles of intellectual property tools: using intellectual property tools as a "shield", traditional knowledge and TCES could be protected from misappropriation, while using them as a "sword", traditional knowledge and TCES could be exploited, if IPLCs so decided, as cultural assets for economic development. Mr Wendland briefly discussed the risks and opportunities of documenting traditional knowledge, touching on intellectual property issues and opportunities in ABS agreements while discussing the different forms of traditional knowledge and the nature of the different Intellectual property rights to be taken into consideration. Finally, participants were informed of the uncertainty about the future of the IGC and that its role should be clarified at the next WIPO General Assembly later this year.

Plenary Discussion

Participants discussed the level of participation of IPLCs in the IGC. They were informed that IPLCs were participating in the IGC as observers along with various industries concerned, intergovernmental and non-governmental organisations and other relevant stakeholders. Additionally, each IGC is preceded by an indigenous caucus meeting to allow for IPLCs to prepare and discuss issues for the IGC. Participants were also told that some countries were very good at consulting their IPLCs and reporting back to them. For example, in



South Africa, the various responsibilities are shared among the different ministries and departments: South African Foreign Affairs coordinates all actions while the Department of Science and Technology deals with traditional knowledge and TCEs and the Department of Environmental Affairs manages biodiversity related issues. Ministries and departments consult each other to come with a single position to the IGC and keep in contact with IPLCs at all times to capture their position. Some participants felt inspired by how Africans were engaged in the IGC processes and reassured to see that Africa was at the forefront to protect its assets by taking the lead in these negotiations. A few participants pointed out that it was still unclear to them how TCEs were linked to ABS and the Nagoya Protocol. A few more mentioned that they were starting to reflect on how to pass on this new knowledge and create awareness about intellectual property related issues in their countries. Finally, most participants agreed that these two first sessions were useful to meet and engage with each other and more particularly to learn how to engage IPLCs on these issues.

Conclusion

This second thematic session highlighted the complexity, significance and potential of the IGC process, the link between governance and IPLCs, and the need to bridge the gaps between protecting and documenting traditional knowledge. This session also served at shedding light on the linkages between intellectual property and ABS.

Topic 3: Intellectual Property and Genetic Resources

Introduction

This third thematic session looked at the interface between intellectual property and ABS with the aim to familiarise participants with the utilisation of intellectual property tools in the context of ABS. To do so, intellectual property instruments predominantly used by the different sectors utilising genetic resources were discussed in detail and illustrated through the use of case studies. Practical intellectual property features and useful clauses to be considered in ABS agreements were then thoroughly reviewed. Finally, an intellectual property approach to ABS national implementation was advocated as a means to unlock the economic potential of genetic resources, traditional knowledge and TCEs.

Genetic Resources and Intellectual Property

The presentation of *Mr Suhel al-Janabi from the ABS Initiative* aimed at providing a better understanding of the linkages between intellectual property and ABS and of the various intellectual property instruments predominantly used by the different sectors using genetic resources. Mr al-Janabi first highlighted that the concept “utilisation of genetic resources” in the context of the CBD and its Nagoya Protocol differentiates between the various types of genetic resources: animal genetic resources, plant genetic resources and microbe genetic resources, the different purposes of utilisation (commercial or non-commercial) and different types of users operating in different sectors, each with their own characteristics. He explained that all these sectors (pharmaceuticals, cosmetics, the food industry, agriculture, etc.) were dependent on biological diversity, more particularly genetic resources, to develop their products. He then gave a detailed overview of the various research and development patterns for each sector, indicating the types of intellectual property tools usually linked to the outcomes of research in each sector. For example, patents are generally associated with the biotechnology and pharmaceutical industries while trademarks and trade secrets are more relevant in the cosmetic sector. Mr al-Janabi drew participants’ attention to the fact that, depending on the type of industry, it



could take a number of years before any research outcomes could be commercialised. Hence, understanding the product development cycle (pre-access, research and development, business plan, production and marketing) of each sector is critical to plan and anticipate the timing and contents of PIC and MAT. Furthermore, for every value chain developed, especially value chains based on traditional knowledge, various intellectual property-related issues must be taken into consideration. These are discussed below in the summary of the presentation on 'Practical Intellectual Property Considerations in Access and Benefit-Sharing Agreements'. Similarly, in the agriculture industry, access to traditional practices and plants bred by small farmers must take into account farmers' rights and/or plant breeders' rights. Hence, legal certainty forms the basis of research and development, regardless of the sector and user of genetic resources or genetic resources associated with traditional knowledge. Mr al-Janabi concluded by underlining that since many biodiversity hot spots, and therefore the wealth of genetic resources, were generally found in the equatorial belt and surrounding countries, it was critical that provider countries of the ACP Group of States implement effective ABS national legislations.

Plenary Discussion

In the plenary discussion that followed, participants were told that the presentation only gave an indication of which forms of intellectual property were typically used by each sector and that additional studies should be done to get a clearer picture. Comprehensive surveys about the existence of traditional knowledge also need to be done in the pre-access phase. In some sectors, the time spent between the research and development phase and the commercialisation of the product can take as long as twenty years and necessitate high investments. The filing of the patent is therefore time sensitive. These high investments have to be beneficial for the company and the providers of genetic resources, and IPLCs if traditional knowledge is involved. Participants then asked for additional explanations on the link between TCEs and ABS and how TCEs fitted into the ABS and intellectual property processes. They were explained that TCEs were not directly addressed in the Nagoya Protocol. However, they are relevant in the WIPO context. There is indeed a very clear reason to discuss them together. From an IPLCs perspective, it makes sense to develop rules to access TCEs at the same time as rules for accessing genetic resources and traditional knowledge associated with genetic resources are being developed. Furthermore, as WIPO clarifies: 'traditional knowledge in a general sense embraces the content of knowledge itself as well as TCEs, including distinctive signs and symbols associated with traditional knowledge. In international debate, "traditional knowledge" in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.'⁶ Most participants agreed that this clarification enhanced their understanding on the link between TCEs and genetic resources. They concluded that TCEs were an expression of traditional knowledge. As the Nagoya Protocol covers traditional knowledge associated with genetic resources, the questions now are: Could it also cover other expressions of traditional knowledge? Could a pre-understanding of traditional knowledge integrate TCEs in it?

ABS and Intellectual Property Explained through Cases Studies (Interactive session)

To complement the information provided in the presentation on genetic resources and intellectual property, participants were invited to take part in a short interactive exercise on the application of the basic principles of intellectual property involving genetic resources and associated traditional knowledge. They were asked to look back at the three case studies presented in the movie "People, Plants and Profits," screened at the beginning of

⁶ WIPO's Glossary of Terms (<http://www.wipo.int/tk/en/resources/glossary.html>).



the second part of the workshop, and to reflect on (i) the various forms of intellectual property and types of benefit-sharing used in each case and (ii) what could have been done differently to avoid any of the problems encountered. The results of this interactive exercise are summarised in the table below.

Cases	IP Options Used/Benefit-Sharing	What could have been done differently?
Hoodia	<p>Misappropriation of traditional knowledge Research and development in provider country Benefit-sharing agreement on intellectual property Patent based on traditional knowledge!? Benefit-sharing negotiated retroactively Lead: traditional knowledge (San) – Benefit-sharing between the San and Nama as shared traditional knowledge IPLCs consent</p>	<p>The Council for Scientific and Industrial Research (CSIR) to consult traditional knowledge holders before starting research and development. Government to provide more support More awareness raising (especially government officials) More investments more quickly Pharmaceutical companies to work closely with traditional knowledge holders Include traditional knowledge holders in value chain Transboundary /shared traditional knowledge: <ul style="list-style-type: none"> - How to identify traditional knowledge holders? - How to ensure their participation? </p>
Teff	<p>ABS agreement Netherlands (Company) and Ethiopia: Intellectual property clause limiting partners to obtain patents Creation of jobs Knowledge transfer to communities Ban on teff export</p>	<p>More awareness of intellectual property law and genetic resources Better and more training for IPLCs so they can take part in negotiations or negotiate themselves Revision of legal framework Add clause on potential bankruptcy or any new owner No ABS contract negotiation without support of a good commercial lawyer</p>
Argan	<p>Research and development done in provider country Biotrade and Fair Trade marketing of argan oil Benefits to community and employment creation Capacitated communities to deal with private sector Women cooperatives</p>	<p>ABS legislation strengthening the benefit-sharing aspects and the link to IPLCs Valorisation strategy Stakeholders consultation Geographical indication <ul style="list-style-type: none"> > Would prevent misappropriation of name “argan” by Pierre Fabre > IPLCs organising themselves better in dealing with corporations. </p>

Plenary Discussion

Some participants highlighted the fact that the Hoodia case was a very good example on how to deal with shared resources and shared traditional knowledge. Others underlined the importance for pharmaceutical companies or research institutions to work more closely with IPLCs. For example, in the Hoodia Case, this was one of the big lessons learnt by the CSIR of South Africa. Since then, the CSIR has adjusted its policy and



practices. Finally, most participants noted the importance of creating benefits, value and sustainable value chains from intellectual property generated in Africa or exported from Africa.

Practical Intellectual Property Considerations in Access and Benefit-Sharing Agreements

Mr Olivier Rukundo from the ABS Initiative provided a presentation on the types of intellectual property clauses or features that can be used or considered in ABS agreements. Mr Rukundo first explained that dealing with contracts meant dealing with different practices in different jurisdictions. He then highlighted that intellectual property management in an ABS agreement can greatly influence how parties to a given agreement achieve their goals and serve their mutual interests. He further underlined that when negotiating ABS agreements, various aspects should be taken into consideration. These are, among others, preliminary confidentiality agreements; a shared understanding of the value of the genetic resources and traditional knowledge associated with genetic resources, of the research, development and risks; legal landscapes and the nature of the agreement. The presentation also highlighted that it is essential to consider which intellectual property may result from access and utilisation, what should be excluded, what conditions or which restrictions may apply, what type of ownership entitlements and benefit-sharing from the exploitation of Intellectual property rights can be envisaged, etc. The presentation also highlighted how specific uses may also entail specific intellectual property considerations (how risks or opportunities differ due to approaches and practice in non-commercial and commercial research and between economic sectors, timeline and duration of intellectual property). Mr Rukundo then provided examples on how to use typical intellectual property clauses in ABS agreements and which practical intellectual property questions one should ask when negotiating/concluding an ABS contract. Examples of confidential information and change of intent clauses as well as examples of other best practices when developing ABS agreement were also provided.

Plenary Discussion

In the plenary discussion that followed, participants further explored the various forms of intellectual property relevant to ABS, focussing particularly on patent related issues. It was reiterated that since patents are territorial in nature, their exclusive rights are only applicable in the countries in which the patent has been granted. Hence, the invention that is protected by the patent cannot be sold or otherwise exploited by anybody else in any of the countries where the patent applies. Participants then asked for some clarifications on the differences between the sharing of benefits from intellectual property and the sharing of benefits from royalties. They were explained that having an IPR did not generate benefits. It is the commercial exploitation of patents that generates revenues which in turn may be shared through royalties. They were also told that the owner of a patent is not necessarily the inventor, although the names of all the inventors have to be disclosed in the patent application. In the case of co-ownership or joint ownership of a patent, benefits arising from its commercial application obviously have to be shared. However, some jurisdictions have certain limitations on co or joint ownership of patents. Participants also inquired on how to address in contracts the potential publication of the outcomes of a research that implicates their traditional knowledge by a student, a professor or a university. The explanation provided was that in such cases, a mechanism for considering copyright issues should be included in the contract. Finally, participants were warned that a contract could be passed on from an institution or organisation to another. A contract must therefore provide for this. Providers and traditional knowledge holders must be aware of the array of issues to be taken into consideration when establishing an ABS contract to counteract lawyers that a company may employ to negotiate it to the best of their client's interests.



Approaches to Intellectual Property and the Implementation of the Nagoya Protocol

Mr Pierre du Plessis from the ABS Initiative highlighted how adopting an intellectual property approach to ABS national implementation was key to unlock the economic potential of genetic resources and associated traditional knowledge. From the perspective of provider countries or traditional knowledge holders, intellectual property is generally seen as a tool of misappropriation. But intellectual property could also be used as a tool to encourage and protect innovation for socio-economic development, technology transfer and empowerment. Indeed, such an approach to ABS implementation would be a great stepping stone towards a knowledge economy. Mr du Plessis explained that in the negotiations leading to the Nagoya Protocol, intellectual property was initially mainly considered as a checkpoint. He then called attention to the fact that intellectual property and intellectual property instruments were in fact critical to ABS national implementation because they provide rights to people. The international intellectual property information, database and architecture could also help to track and trace the utilisation of genetic resources and traditional knowledge associated with genetic resources. The disclosure of the source could be one of the requirements to be included in ABS contracts so that patents disclose the origin of the genetic resources and associated traditional knowledge that contributed to the invention. For example, the African Union Strategic Guidelines on the Coherent Implementation of the Nagoya Protocol on ABS (African Union Guidelines) recommend that the disclosure of the source should be a contractual obligation in MAT and a condition to obtain access and that legal remedies would be available if this contractual obligation is violated in any jurisdiction. The African Union Guidelines also recommend the use of national and regional intellectual property offices as optional checkpoints. Mr du Plessis also highlighted the importance of taking into consideration the interface between intellectual property, ABS and all other relevant regional and international processes such as those, among others, of the ITPGRFA or the Commission on Genetic Resources for Food and Agriculture (CGRFA). He explained that the reason for that was that regional and international processes provide a better understanding of national rights and what should be done at national level to materialise them. Most of the time, however, these processes, which include negotiations of instruments, international normative work, policy making and national implementation of international or regional instruments, happen in silos with no coordination taking place between the different fora. It would therefore be very useful to have a common conversation about and between these different processes to allow for the effective and coordinated implementation of international treaties, in this particular case, the Nagoya Protocol.

Comments from the Floor

Some participants provided a brief overview of some relevant regional and international processes and their link to intellectual property and ABS. The following is a summary of their contributions:

- *The Swakopmund Protocol Process in a Nutshell*: ARIPO put forward that it was possible to protect traditional knowledge associated with genetic resources through intellectual property. To allow this, the definitions of ‘utility model’⁷ and ‘prior art’ were initially amended. But this was not enough to protect

⁷ WIPO defines a utility model as “an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorisation, for a limited period of time. In its basic definition, which may vary from one country (where such protection is available) to another, a utility model is similar to a patent. In fact, utility models are sometimes referred to as “petty patents” or “innovation patents.” For more information on the difference between a utility model and a patent, please see WIPO’s website at: http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm and the Glossary of Terms located in Annex 3 of this report.



traditional knowledge effectively. The development of a '*sui generis*' system⁸ was then considered and ARIPO started to work on the Swakopmund Protocol with the view to avoid the infringement of rights of traditional knowledge holders and prevent misappropriation of traditional knowledge and TCEs. Six Member States have so far ratified the Protocol. The Swakopmund Protocol is also open to the member countries of the COMIFAC and OAPI. ARIPO is now focussing on developing a Traditional Knowledge Digital Library.

- *The African Group in the IGC at WIPO*: The African Group has been particularly active in the IGC negotiations and exhibits a high level of coordination. The key to its effectiveness is that all countries agree on a mandate before going to any negotiation. Pre-meetings with ambassadors to present the position of the African Group are generally arranged. The cohesion of the Group is rather effective and the most coercive work in the IGC. Unfortunately, consultations taking place during the preparatory work of the African Group do not necessarily include experts on ABS. The IGC seeks to harmonise its work with other processes, so that the outcomes of its deliberations will not be in contradiction to the work pursued in other fora. Nevertheless, the WIPO General Assembly still needs to make a decision on the programme of work for the IGC and be more precise on its objectives.
- *CBD*: Besides the discussions on the Nagoya Protocol, there is also a discussion on Article 8(j) and related matters and the establishment of a *sui generis* system for the protection of TK and specific tasks to support the national implementation of the Nagoya Protocol. Under the discussions on article 8 (j) and related matters, task 12 specifically states that these mechanisms could include *sui generis* systems could be considered as mechanisms to protect traditional knowledge. Tasks 7 and 10 both call for specific actions that logically fall within the broad scope of task 12. Task 7 specifically calls on the Working Group on article 8 (j) to develop guidelines for appropriate initiatives, such as legislation, to ensure (1) that IPLCs equitably share in benefits arising from the use of their traditional knowledge; and (2) that institutions interested in such knowledge obtain "prior informed approval" of IPLCs. Task 10 directs the Working Group to develop standards for reporting and prevention of unlawful appropriation of traditional knowledge and related genetic resources. The CBD also collaborates with various Secretariats such as that of the ITPGRFA and CGRFA to ensure mutual supportiveness in their respective actions.
- *IPLCs Fora*: IPLCs have organised themselves into the International Indigenous Forum on Biodiversity (IIFB)⁹ to coordinate their full and effective participation in international environmental processes such as the CBD. The IIFB promotes a wider dissemination of information on indigenous perspectives and IPLCs' rights to their knowledge and resources. The IIFB also helps coordinate indigenous strategies at international environmental meetings and provides a platform through which IPLCs can express their views and positions on topics that concern them such as, among others, ABS, Article 8 (j) of the CBD, biodiversity and climate change, protected areas, agricultural biodiversity, etc. Finally, the IIFB actively reaches out to IPLCs through existing indigenous networks and fora and encourages them to voice their concerns and any recommendations they may have to address them. It is therefore very important that IPLCs in Africa connect with those existing networks and fora to convey the various issues they encountered, in this particular case, in relation to the protection of their genetic resources, traditional knowledge and TCEs.

⁸ Black's Law Dictionary defines "*sui generis*" as "[Latin] of its own kind or class; unique or peculiar". The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For a complete definition and explanation of the terms "*sui generis*", please see the Glossary of Terms located in Annex 3.

⁹ The IIFB was established during the Third Conference of the Parties to the CBD in Buenos Aires, Argentina, in November 1996.



Plenary Discussion

Participants all agreed on the importance of better coordinating themselves at both national and international level and building capacity and expertise on issues related to ABS, intellectual property and traditional knowledge among IPLCs in Africa. Then, they discussed the different funding options available for relevant stakeholders, especially IPLCs to participate in the various regional and international processes. They were informed that the WIPO Voluntary Fund covers IPLC participation in the WIPO IGC. Identifying key stakeholders or representatives of the various interest groups in each country is therefore crucial. For other processes, too, there are special funds to support the participation of IPLCs. For example, the United Nations Voluntary Fund for Indigenous peoples provides grants to representatives of IPLCs' organisation to take part in the sessions of the United Nations Permanent Forum on Indigenous Issues and other related meetings. The CBD has a voluntary fund to assist IPLC representatives in meetings held under the Convention. IPLCs can alternatively fundraise to attend any international meetings of interest to them. Participating IPLC representatives also said that there was a need for conceptualising issues like ABS and intellectual property in a way that IPLCs could relate to. Finally, a number of participants felt that they still needed to be better informed on the various processes and issues, including on the different elements and sequencing of the value chain. They added that more awareness raising and capacity building was needed to build up some local expertise on ABS and intellectual property.

Conclusion

This last thematic session showed how intellectual property and ABS are inextricably linked and how applying an intellectual property approach to the national implementation of the Nagoya Protocol is key to harness the potential of genetic resources and associated traditional knowledge. The discussion also highlighted the need for coordinating more effectively relevant regional and international processes and for a better understanding of their linkages with intellectual property and ABS.

National Level Meetings

Introduction

This last session of the workshop aimed to initiate a debate and a common reflection in the participating national teams on how to advance the development of comprehensive ABS systems using intellectual property tools to unleash the economic potential of genetic resources and associated traditional knowledge.

Country Group Exercise

The objective of this exercise was to identify the next steps at the national level as to how intellectual property principles and tools could be effectively used to protect and valorise genetic resources, traditional knowledge and TCEs and support national ABS implementation. To do so, participants were asked to work in their respective national groups. Each group was advised to take into account the full range of intellectual property tools and principles that were introduced and discussed during the workshop and to feel free to discuss any other issue they felt was relevant or important for the purposes of the exercise. To guide country groups in their discussion, a list of indicative questions was provided as follows:



- With regard to national experiences and on-going projects related to genetic resources, traditional knowledge and TCEs in your country:
 - a) Who is doing what, with which genetic resources, traditional knowledge and TCEs – and with which communities?
 - b) Are all the essential stakeholders involved in national processes?
- How could IP be used to protect, add value to and maximise economic and development opportunities associated with genetic resources, traditional knowledge and TCEs?
 - a) Do you have a national policy and/or strategy on how IP should be owned and used? If not, do you need it?
 - b) Who should be involved in developing it?
- What specific steps could be taken using IP to protect, add value to, and maximise the economic opportunities associated with genetic resources, traditional knowledge and TCEs?
 - a) Identify small, realistic and immediate steps and decide who should take them, by when, using which resources and/or existing institutions.
 - b) If possible, identify bigger steps that can be taken later and outline longer-term processes.
- Pending agenda regarding genetic resources, traditional knowledge and TCEs in your country:
 - a) Is there any existing plan or required plans?
 - b) How can your national actions contribute to wider learning and African coordination?

The results shared in the plenary discussion first showed that the six countries were at different stages of the implementation of the Nagoya Protocol. The results also revealed that a majority of countries had to some extent considered the use of intellectual property for the protection of traditional knowledge and TCEs. However, not all countries had necessarily linked intellectual property to the utilisation of genetic resources or incorporated it into a long term strategy to maximise the economic and development opportunities associated with the valorisation of genetic resources, traditional knowledge and TCEs. Nevertheless, work towards this objective was planned or underway in most countries.

Some countries indicated that they had an intellectual property law in place. For example, Cameroon reported that the next step to complement its current legislation on intellectual property was to draft an action plan for considering the inclusion of intellectual property in the national ABS strategy currently being developed. Other countries said that they were in the process of amending, harmonising or developing a legislative framework for the protection of traditional knowledge and TCEs that will address the interface between intellectual property and ABS.

Some other countries specified that they were still in the process of drafting an intellectual property policy with the view of later developing a strategy that will incorporate intellectual property and ABS related issues. Kenya, for instance, informed the plenary that following the policy on traditional knowledge issued in 2009, the country had worked on the development of a legislative framework for the protection of traditional knowledge and TCEs. Subsequently, some consultative work was also initiated to develop a Bill on genetic resources in order to accommodate the gap that could not be covered under the Bill on traditional knowledge and TCEs.



South Africa declared that it was working on the harmonisation of its current legislation to establish a fully functional regulatory framework that links ABS and Indigenous Knowledge Systems (IKS) with the intellectual property system. Both Ethiopia and Uganda indicated that a national intellectual property policy was currently being drafted, although none had currently a clear link to ABS. Namibia indicated that it was focussing on finalising its national ABS legislation which will cover intellectual property related issues and the valorisation of genetic resources, traditional knowledge and TCEs.

Few countries presented some resources with already well-developed value chains, detailed information on the use of traditional knowledge and the forms of intellectual property utilised to add value to the exploitation of these resources. All countries highlighted the importance of raising awareness and training all relevant stakeholders on these issues all the way down to IPLCs. They further underlined the importance of consulting and involving IPLCs in all relevant national processes. Finally, some countries reported to plan or to be in the process of planning a strategy for documenting traditional knowledge. Various options were presented from the establishment of a digital library similar to the Indian TKDL, which advocates a defensive approach to the protection of traditional knowledge and TCEs, to a multi-media and interactive system such as the South African National Recordal System (NRS) which combines a defensive and positive approach to the documentation of traditional knowledge.

Plenary Discussion

- *The Use of Copyright to Protect Traditional Knowledge:* Participants asked for some clarifications on the use of copyright to protect documented traditional knowledge and TCEs. They were explained that copyright only protects how ideas are expressed and not the contents/ideas themselves. The knowledge itself that is in the document will not be protected. Therefore, it is risky to use copyright as a form of intellectual property to protect traditional knowledge as such.
- *Intellectual Property Clauses in ABS Contracts/Agreements:* Participants were told that mandatory intellectual property clauses could be required through legislation. They were informed that the African Union Guidelines provided some examples of clauses to use as reference and adapt to the national circumstances of a country. The Guidelines also include a model application form for a permit to utilise genetic resources and traditional knowledge associated with genetic resources, an outline of a basic ABS agreement, some commentary on key elements of a complete ABS agreement and basic principles for community involvement in ABS.
- *The South African National Recordal System:* Participants were informed that the NRS was an ambitious initiative of the Department of Science and Technology aimed at preserving, protecting, recording and promoting South Africa's wealth of indigenous knowledge for the socio-economic and development benefits of local communities. The NRS has been developed as part of the bio-economy strategy with the objective to unleash the potential of South African biodiversity by focussing, among others, on the valorisation of genetic resources, the development of value chains and the establishment of a National Compound Library which will be linked to the NRS. The NRS operates an online repository platform for oral forms of indigenous knowledge and creates a legal framework for the dissemination of this knowledge in support of the national ABS framework. The collection of unrecorded indigenous knowledge is facilitated by the introduction of innovative and new technologies and the use of a bottom up approach which promotes the respect of the cultural and traditional rules of knowledge holders. There are three levels of security to access traditional knowledge, including confidential agreements. The first level of security



concerns the knowledge that is common knowledge and is free to access. The second level of security concerns the indigenous knowledge that is confidential. Its access is restricted. The third level of security concerns the indigenous knowledge that is secret. Only the owner of the knowledge can access it. One of the main lessons learnt when building such a system is to make sure that access law does not override the regulation of the recording system itself. Intellectual property is a key element of the bio-economy strategy with indigenous knowledge systems as the main pillar to lead innovation. Ultimately, the aim is to transform the NRS into a metadata tool and a one stop shop that will also be open for free to other African countries.

- *Preventing the Loss of Traditional Knowledge and TCEs through Documentation:* Participants noted that more and more provider countries were looking at the various and viable options to document traditional knowledge and TCEs and were encouraging IPLCs to come and record them in different types of databases. Different approaches to the documentation of traditional knowledge and TCEs can be observed around the world. Some of the prominent examples are the Indian TKDL, the Peruvian system of Registers and the recently developed South Africa NRS described above. Although all these tools primarily aim at documenting traditional knowledge and TCEs, participants' attention was drawn to that fact that the approach adopted by each tool was different. For example, the Indian TKDL is a defensive instrument, while the South African NRS uses a combination of a defensive and positive approaches and also aims at the valorisation of this knowledge and traditions. Some participants pointed out that a number of IPLCs did not want to get exposed and were opposing any form of documentation of their knowledge. This raised the question of whether documenting or recording traditional knowledge and TCEs were the only or most appropriate solution to protect them. An intellectual property strategy is necessary before documenting starts. An intellectual property strategy is therefore very useful to select the most appropriate option for documenting traditional knowledge and TCEs
- *IPLCs Involvement and Empowerment in ABS Processes:* Participants highlighted that the recognition of IPLCs by national governments was critical to advance development. It is essential to involve them at national and international level on the various instruments that are being developed and that concern them. It is also essential that IPLCs understand all the processes that affect them. IPLCs have indeed a critical role to play in all these processes. In the field of innovations and value chain development based on genetic resources, traditional knowledge and TCEs, it is essential to build a community of trust between them and their governments. A more active role of governments in the empowerment of IPLCs, through approaches such as CBNRM, is also vital to alleviate poverty. Alternatively, IPLCs need to be organised in lobbying organisations that are coordinated and not in small groups acting on their own. The San People are one very good example of organised IPLCs.
- *ABS & Intellectual Property Expertise in Africa:* While some participants highlighted the lack of ABS and intellectual property expertise in Africa, others were of the opinion that the real issue was more how to make the existing expertise available to Africa. Some suggested that there was a need to involve more African lawyers in ABS agreement negotiations. A few participants pointed out that although most African lawyers had little expertise in ABS, there were enough lawyers with expertise in contract law to help developing effective ABS contracts.



Conclusion

The results of this exercise showed the potential of future economic activities based on biodiversity such as, among others, bioprospecting, biotechnology, bioinformatics or value chain development on some resources that are already well-exploited but with more opportunities to come. The results also pointed out the central role that innovation plays in the emerging sector of the bio-economy and the importance of intellectual property to protect and commercialise these inventions. This, in turn, can contribute to uplifting the living standards of everyone, including IPLCs'. Innovation is what drives progress and can alleviate poverty. In the ABS context, it is therefore essential to ensure that IPLCs benefit from the intellectual property generated from their genetic resources and the traditional knowledge associated with them through ABS contracts. It is also essential to highlight and understand the role of the private sector in funding and bringing innovations to the market. Similarly, one cannot over-emphasise the role of small, medium and micro-sized enterprises (SMMEs) in the economic development of a country, which will allow African bio-innovations and biodiversity based businesses to be competitive internationally. Governments have an important role to play in supporting these SMMEs to participate in the global economic system. Additionally, the results of this exercise showed that governments have recognised the importance of developing legal frameworks and tools to protect aTK and are taking initial steps in this regard. Yet, for these undertakings to be successful, it is important to increase the role of IPLCs in policy development processes and transfer more of the decision-making to them so that economic benefits flow down to their communities in a more systematic manner. Overall, African countries need to reflect on how to better interact and build sustainable relationships with users of genetic resources and associated traditional knowledge and on how to unlock the economic potential of these resources to support economic development in Africa. To unlock this wealth, a proactive approach to the valorisation of bio-resources is critical. This includes the effective use of intellectual property in ABS contracts. The next steps, therefore, must focus on developing, building and strengthening the capacity of all the stakeholders, at all levels, on legal and contractual aspects of what a good ABS contract is. Better ABS contracts will increase the value of African genetic resources, traditional knowledge and TCEs and the African heritage as a whole.

Final Remarks from the Floor

Ms Kauna Schroder from the Namibian Ministry of Environment and Tourism highlighted that it was important to involve all the actors and have a coordinated approach. The principle of inclusiveness is essential. It is also important to develop legal frameworks which effectively address access to genetic resources, traditional knowledge and TCEs and the fair and equitable sharing of benefits arising from their utilisation. The loss of cultural systems is partly the cause of the disappearance of traditional knowledge. This is why it is crucial to protect indigenous knowledge systems and the communities in which traditional knowledge thrives. The focus should particularly be placed on women who are core to the transmission of traditions to youth. Traditional knowledge can empower and enrich poor communities. Ensuring the development of their capacity on these issues is essential as is encouraging more political support nationally and in the region. It is critical to take what has been learnt in this four day workshop in the six countries participating and empower the IPLCs of these countries.

Closure



Presentations

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

Day 2

ABS: Setting the Scene – Lena Fey and Olivier Rukundo, ABS Capacity Development Initiative (ABS Initiative).

Introduction to Intellectual Property – Hai-Yuean Tualima, Indigenous Fellow, Traditional Knowledge Division, World Intellectual Property Organization (WIPO).

Intellectual Property and Traditional Knowledge and Traditional Cultural Expressions – Wend Wendland, Director, Traditional Knowledge Division, World Intellectual Property Organization (WIPO).

Day 3

Genetic Resources and Intellectual Property – Suhel al-Janabi, ABS Capacity Development Initiative (ABS Initiative).

Practical Intellectual Property Considerations in ABS Agreements – Olivier Rukundo, ABS Capacity Development Initiative (ABS Initiative).



Further Reading

What is intellectual property?

http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf

Information booklet: Overview on intellectual property and genetic resources, traditional knowledge and traditional cultural expressions

http://www.wipo.int/freepublications/en/tk/933/wipo_pub_933.pdf

Background Brief on Traditional Knowledge and Intellectual Property

http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background_brief_on_tk.pdf

Frequently Asked Questions

<http://www.wipo.int/tk/en/resources/faqs.html>

Interlinkages between Biodiversity and Customary Law – Biodiversity, intellectual property, customary law, and traditional knowledge

http://www.abs-initiative.info/fileadmin//media/Knowledge_Center/Publications/Biodiversity/2012_Biodiversity_IP_Customary_Law_TK_final_web_small.pdf

United Nations Conference on Trade and Development – UNCTAD (2014): The Convention on Biological Diversity and the Nagoya Protocol: Intellectual Property Implications – A Handbook on the Interface between Global Access and Benefit Sharing Rules and Intellectual Property

http://www.abs-initiative.info/fileadmin//media/Knowledge_Center/Publications/Intellectual_Property/CBD_Handbook_IP_Unit_2_.pdf

Video: ABS and the Nagoya Protocol – simply explained in 5 minutes

http://www.abs-initiative.info/fileadmin/media/Knowledge_Center/Multimedia/videos/Animated%20Video%20ABS%20Simply%20Explained/ABS%20Simply%20Explained%20-%20English.mp4

WIPO draft guidelines on intellectual property clauses in ABS Agreements:

http://www.wipo.int/export/sites/www/tk/en/resources/pdf/redrafted_guidelines.pdf

WIPO TK documentation toolkit:

<http://www.wipo.int/tk/en/resources/tkdocumentation.html>

For additional information, you may wish to consult:

Bioscience at a Crossroads: Access and Benefit Sharing in a Time of Scientific, Technological and Industry Change

<https://www.cbd.int/abs/policy-brief/default.shtml/>

Factsheet on the Nagoya Protocol:

<https://www.cbd.int/abs/doc/protocol/factsheets/abs-en.pdf>



Indigenous Portal of the Traditional Knowledge Division website

<http://www.wipo.int/tk/en/indigenous/>

Website of the ABS Initiative

<http://www.abs-initiative.info/stakeholders-and-topics/intellectual-property-rights/>



Annotated Agenda

Monday 17 th August 2015: Day for IPLCs only	
09.00	Registration
09.30 10h00	Indigenous Opening Welcome Addresses by: <i>Ms Lena Fey, Programme Manager IPLCs, ABS Initiative</i> <i>Ms Hai-Yuean Tualima, WIPO Indigenous Fellow, Traditional Knowledge Division, WIPO</i>
10h30	Getting to Know One Another Facilitator: <i>Ms Lucy Mullenkei, Executive Director, Indigenous Information Network (IIN)</i>
11.00	Coffee / tea
11.30	Getting to Know One Another (Cont'd) Facilitator: <i>Ms Lucy Mullenkei, IIN</i>
12.30	Lunch
14.00	Identifying Issues Group Work Facilitator: <i>Ms Lucy Mullenkei, IIN</i> <ul style="list-style-type: none"> ▪ What challenges is your community currently facing regarding Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)? ▪ Which Steps could be taken by IPLCs at the community level to promote the protection, add value and maximise the economic opportunities associated with TK and TCEs?
15.00	Coffee / tea
15.30	Reports of Group Work
16.00	Plenary Discussion to strategise on what could be done at national level Facilitator: <i>Ms Lucy Mullenkei, IIN</i>
17.30	Wrap-up
18.00	End of Programme

Tuesday 18 th August 2015: All the participants from now on	
	Facilitators for the Day: Mr Suhel al-Janabi and Ms Lena Fey, ABS Initiative
09.00	Opening Welcome Remarks <i>Mr Theofilus Nghitila, Environmental Commissioner, Host Government</i>



	<p><i>Mr Suhel al-Janabi, Co-Manager, ABS Initiative</i> <i>Mr Wend Wendland, Director, Traditional Knowledge Division, WIPO</i></p>
9.30	Objectives and Agenda of the Workshop & Getting to Know Each Other
10.30	Coffee / tea
11.00	<p>Setting the Scene: “People, Plants and Profits” Overview and Key Elements <i>Led by Ms Lena Fey and Mr Olivier Rukundo, ABS Initiative</i> Discussion</p>
12.00	<p>Topic 1: Introduction to Intellectual Property Overview and Key Elements <i>Presentation by Ms Hai-Yuean Tualima, WIPO</i> Discussion</p>
13.00	Lunch
14.30	<p>Case Studies on Patents, Trade Marks and Copyright (Parallel Group) <i>Led by Ms Hai-Yuean Tualima and Mr Wend Wendland, WIPO</i></p>
16.30	Coffee / tea
17.00	<p>Topic 2: Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions Overview and Key Elements <i>Presentation by Mr Wend Wendland, WIPO</i> Discussion</p>
17.45	Wrap-up
18.00	End of Programme
18.30	<p>Namibian (Bio-) Cultural Evening</p> <p>Statements by:</p> <p>His Excellency Mr Pohama Shifeta, Minister, Ministry of Environment and Tourism Mr Christian Grün, Head of Cooperation, Embassy of the Federal Republic of Germany Lazarus Kairabeb, Representative of Indigenous Peoples and Local Communities</p>

Wednesday 19th August 2015: Field Trip	
	Facilitators for the Day: Ms Hai-Yuean Tualima and Mr Wend Wendland, WIPO
9.00	Recap of Tuesday
9.30	<p>Topic 3: Intellectual Property and Genetic Resources Linkages between Intellectual Property Rights and ABS <i>Presentation by Mr Suhel al-Janabi and Mr Pierre du Plessis (Advisor to the African Union Commission), ABS Initiative</i></p>



	Discussion
10.30	Coffee / tea
11.00	Case Study: ABS and Intellectual Property <i>Presentation by Ms Lena Fey and Mr Olivier Rukundo, ABS Initiative</i>
12.30	Lunch
14.00	Overview of Relevant Regional and International Processes <i>Moderated by the ABS Initiative</i> Panel Discussion
15.00	Coffee / tea
15.30	Approaches on Intellectual Property and the Implementation of the Nagoya Protocol <i>Led by Pierre du Plessis, ABS Initiative</i> Discussion
16.30	National Level Meetings Suggested topics for discussion: <ul style="list-style-type: none"> ▪ National experiences and on-going projects related to Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in your country. ▪ How could Intellectual Property be used to protect, add value and maximise economic and development opportunities associated with Traditional Knowledge, traditional Cultural Expressions and Genetic Resources?
18.00	End of Programme

Thursday 20th August 2015	
	Facilitators for the Day: Ms Lena Fey and Mr Suhel al-Janabi, ABS Initiative
9.00	Recap of Wednesday
9.30	National Level Meetings (Cont'd) Suggested topics for discussion: <ul style="list-style-type: none"> ▪ What specific steps could be taken using Intellectual Property to protect, add value and maximise the economic opportunities associates with Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources? ▪ Pending agenda regarding Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in your country.
12.30	Lunch
11.00	Report of National Groups <i>Cameroon</i> <i>Ethiopia</i> <i>Kenya</i> <i>Namibia</i>



15.30	Coffee / tea
16.00	Report of National Groups (Cont'd) <i>South Africa</i> <i>Uganda</i>
17.00	Wrap-up and Plenary Discussion <i>Facilitated by Pierre du Plessis, ABS Initiative</i>
17.45	Closing Remarks <i>Ms Kauna B Schroder, Principal Project Coordinator and Advisor to the Environmental Commissioner Office, Ministry of Environment and Tourism, Namibia</i> <i>Ms Lena Fey, ABS Initiative</i> <i>Mr Wend Wendland, WIPO</i> <i>IPLCs Representative</i>
18.00	End of Workshop



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Annex 1: Introduction to Intellectual Property¹⁰

What is Intellectual Property?

Intellectual property refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property is divided into two categories:

- *Industrial Property* included patent for inventions, trademarks, industrial designs and geographic indications.
- *Copyright* covers literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performances, producers of phonograms in their recordings, and broadcasters in their radio and television programmes.

What are intellectual property rights?

Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.

Why promote and protect intellectual property?

There are several compelling reasons. First, the progress and well-being of humanity rest on its capacity to create and invent new works in the areas of technology and culture. Second, the legal protection of new creations encourages the commitment of additional resources for further innovation. Third, the promotion and protection of intellectual property spurs economic growth, creates new jobs and industries, and enhances the quality and enjoyment of life.

An efficient and equitable intellectual property system can help all countries to realise intellectual property's potential as a catalyst for economic development and social and cultural well-being. The Intellectual property system helps strike a balance between the interest of innovators and the public interest providing an environment in which creativity and invention can flourish, for the benefit of all.

What is a Patent?

A patent is an exclusive right granted for an invention – a product or process that provides a new way of doing something, or that offers a new technical solution to a problem. Abridged

A patent provides patent owners with protection for their inventions. Protection is granted for a limited period, generally 20 years.

¹⁰ **Disclaimer:** The content of this annex is an abridged version of the WIPO publication N°450(E) titled “What is Intellectual Property?” The online PDF version of this publication can be found at http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf.



Why are patents necessary?

Patents provide incentives to individuals by recognising their creativity and offering the possibility of material reward for their marketable inventions. These incentives encourage innovation, which in turn enhances the quality of human life.

What kind of protection do patents offer?

Patent protection means an invention cannot be commercially made, used, distributed or sold without the patent owner's consent. Patent rights are usually enforced in courts that, in most systems, hold the authority to stop patent infringement. Conversely, a court can also declare a patent invalid upon a successful challenge by a third party.

What rights do patents owners have?

A patent owner has the right to decide who may – or may not – use the patented invention for the period during which it is protected. Patent owners may give permission to, or license, other parties to use their inventions on mutually agreed terms. Owners may also sell their inventions rights to someone else, who then becomes the new owner of the patent. Once a patent expires, protection ends and the invention enters the public domain. This is also known as becoming off patent, meaning that the owner no longer holds exclusive rights to the invention, and it becomes available for commercial exploitation by others.

What role do patents play in everyday life?

Patented inventions have pervaded every aspects of human life, from electric lighting (patents held by Edison and Swan) and sewing machines (patents held by the Howe and Singer), to magnetic resonance imaging (MRI) (patents held by Damadian) and the iPhone (patents held by Apple).

In return for patent protections, all patents owners are obliged to publicly disclose information on their inventions in order to enrich the total body of technical knowledge in the world. This ever-increasing body of public knowledge promotes further creativity and innovation. Patents therefore provide not only protection for their owners but also valuable information for future generations of researchers and inventors.

How is a patent granted?

The first step in securing a patent is to file a patent application. The application generally contains the title of the invention, as well as an indication of its technical field. It must include the background and a description of the invention, in clear language and enough detail that an individual with an average understanding of the field could use or reproduce the invention. Such descriptions are usually accompanied by visual materials – drawing, plans or diagrams – that describe the invention in greater detail. The application also contains various “claims”, that is, information to help determine the extent of protection to be granted by the patent.

What kinds of inventions can be protected?

An invention must, in general, fulfil the following conditions to be protected by a patent. It must be of practical use; it must show an element of “novelty,” meaning some new characteristic that is not part of the body of existing knowledge in its particular technical field. That body of existing knowledge is called “prior art”. The invention must show an “inventive step” that could not be deduced by a person with average knowledge of the technical field. Its subject matter must be accepted as “patentable” under law. In many countries, scientific



theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods or methods of medical treatment (as opposed to medical products) are not generally patentable.

Who grants patents?

Patents are generally granted by national patent offices or by regional offices that carry out examination work for a group of countries – for example, the European Patent Office and OAPI. Under such regional systems, an applicant requests protection for an invention in one or more countries, and each country decides whether to offer patent protection within its borders. The WIPO-administered Patent Cooperation Treaty provides for the filing of a single international patent application that has the same effect as national applications filed in the designated countries. An applicant seeking protection may file one application and request protection in as many signatory states as needed.

What is a Trademark?

A trademark is a distinctive sign that identifies certain goods or services produced or provided by an individual or a company. Its origin dates back to ancient times when craftsmen reproduced their signatures or “marks”, on their artistic works or products of a functional or practical nature. Over the years, these marks have evolved into today’s system of trademark registration and protection. The system helps consumers to identify and purchase a product or service based on whether its specific characteristics and quality – as indicated by its unique trademark – meet their needs.

What do trademarks do?

Trademark protection ensures that the owners of marks have the exclusive right to use them to identify goods or services, or to authorise others to use them in return for payment. The period of protection varies, but a trademark can be renewed indefinitely upon payment of the corresponding fees. Trademark protection is legally enforced by courts that, in most systems, have the authority to stop trademark infringement.

In a large sense, trademarks promote initiative and enterprise worldwide by rewarding their owners with recognition and financial profit. Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior products or services. The system enabled people with skill and enterprise to produce and market goods and services in the fairest possible conditions, thereby facilitating international trade.

What kinds of trademarks can be registered?

Trademarks may be one or a combination of words, letters and numerals. They may consist of drawings, symbols or three dimensional signs, such as the shape and packaging of goods. In some countries, non-traditional marks may be registered for distinguishing features such as holograms, motion, color and non-visible signs (sound, smell or taste).

In addition to identifying the commercial source of goods or services, several other trademark categories also exist. Collective marks are owned by an association whose members use them to indicate products with a certain level of quality and who agree to adhere to specific requirements set by the association. Such associations might represent, for example, accountants, engineers or architects. Certification marks are given for compliance with defined standards but are not confined to any membership.



They may be granted to anyone who can certify that their products meet certain established standards. Some examples of recognised certification are the internationally accepted “ISO 9000” quality standards and Ecolabels for products with reduced environment impact.

How is a trademark registered?

First, an application for registration of a trademark must be filed with the appropriate national or regional trademark office. The application must contain a clear reproduction of the sign filed for registration, including any colours, forms or three-dimensional features. It must also contain a list of the goods or services to which the sign would apply. The sign must fulfil certain conditions in order to be protected as a trademark or other type of mark. It must be distinctive, so that consumers can distinguish it from trademarks identifying other products, as well as identify a particular product with it. It must neither mislead nor deceive customers nor violate public order or morality.

Finally, the rights applied for cannot be the same as, or similar to, rights already granted to another trademark owner. This may be determined through search and examination by national offices, or by the opposition of third parties who claim to have similar or identical rights.

How extensive is trademark protection?

Almost all countries in the world register and protect trademarks. Each national or regional office maintains a Register of Trademarks containing full application information on all registrations and renewals, which facilitates examination, search and potential opposition by third parties. The effects of the registration are, however, limited to the country (or, in the case of regional registration, countries) concerned.

To avoid the need to register separate applications with each national or regional office, WIPO administers an international registration system for trademarks. The system is governed by two treaties: the Madrid Agreement Concerning the International Registration of Marks and the Madrid Protocol. Persons with a link (be it through nationality, domicile or establishment) to a country party to one or both of these treaties may, on the basis of a registration or application with the trademark office of that country (or related region), obtain an international registration having effect in some or all of the other countries of the Madrid Union.

What is a geographical indication?

A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation due to that place of origin. Most commonly, a geographical indication consists of the name of the place of origin of the goods. Agricultural products typically have qualities that derive from their place of production and are influenced by specific local geographical factors, such as climate and soil. Whether a sign functions as a geographical indication is a matter of national law and consumer perception. Geographical indications may be used for a wide variety of agricultural products, such as, for example, “Tuscany” for olive oil produced in a specific area of Italy, or “Roquefort” for cheese produced in that region of France.

The use of geographical indications is not limited to agricultural products. They may also highlight specific qualities of a product that are due to human factors found in the product’s place of origin, such as specific manufacturing skills and traditions. The place of origin may be a village or town, a region or a country. An example of the latter is “Switzerland” or “Swiss”, perceived as a geographical indication in many countries for products made in Switzerland and, in particular, for watches.



What is an appellation of origin?

An appellation of origin is a special kind of geographical indication used on products that have a specific quality exclusively or essentially due to the geographical environment in which the products are produced. The term geographical indication encompasses appellations of origin. Examples of appellations of origin that are protected in states party to the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration are “Bordeaux” for wine produced in the Bordeaux region of France, “Prosciutto di Parma” – or Parma ham – for ham produced in the Parma province of Italy or “Habana” for tobacco grown in the Havana region of Cuba.

Why do geographical indications need protection?

Geographical indications are understood by consumers to denote the origin and quality of products. Many of them have acquired valuable reputations which, if not adequately protected, may be misrepresented by commercial operators. False use of geographical indications by unauthorised parties, for example “Darjeeling” for tea that was not grown in the tea gardens of Darjeeling, is detrimental to consumers and legitimate producers. The former are deceived into believing they are buying a genuine product with specific qualities and characteristics, and the latter are deprived of valuable business and suffer damage to the established reputation of their products.

What is the difference between a geographical indication and a trademark?

A trademark is a sign used by a company to distinguish its goods and services from those produced by others. It gives its owner the right to prevent others from using the trademark. A geographical indication guarantees to consumers that a product was produced in a certain place and has certain characteristics that are due to that place of production. It may be used by all producers who make products that share certain qualities in the place designated by a geographical indication.

What is a “generic” geographical indication?

If the name of a place is used to designate a particular type of product, rather than to indicate its place of origin, the term no longer functions as a geographical indication. For example, “Dijon mustard”, a kind of mustard that originated many years ago in the French town of Dijon, has, overtime, come to denote mustard of that kind made in many places. Hence, “Dijon mustard” is now a generic indication and refers to a type of product, rather than a place.

How are geographical indications protected?

Geographical indications are protected in accordance with national laws and under a wide range of concepts, such as laws against unfair competition, consumer protection laws, laws for the protection of certification marks or special laws for the protection of geographical indications or appellations of origin. In essence, unauthorised parties may not use geographical indications if such use is likely to mislead the public as to the true origin of the product. Applicable sanctions range from court injunctions preventing unauthorised use to the payment of damages and fines or, in serious cases, imprisonment.

What is WIPO’s role in the protection of geographical indications?

WIPO administers a number of international agreements that deal partly or entirely with the protection of geographical indications (in particular, the Paris Convention and the Lisbon Agreement). WIPO meetings offer



Member States and other interested parties the opportunity to explore new ways of enhancing the international protection of geographical indications.

What are Copyright and Related Rights?

Copyright laws grant authors, artists and other creators protection for their literary and artistic creations, generally referred to as “works”. A closely associated field is “related rights” or rights related to copyright that encompass rights similar or identical to those of copyright, although sometimes more limited and of shorter duration. The beneficiaries of related rights are: performers (such as actors and musicians) in their performances; producers of phonograms (for example, compact discs) in their sound recordings; and broadcasting organisations in their radio and television programmes.

Works covered by copyright include, but are not limited to: novels, poems, plays, reference works, newspapers, advertisements, computer programmes, databases, films, musical compositions, choreography, paintings, drawings, photographs, sculpture, architecture, maps and technical drawings.

What rights do copyright and related rights provide?

The creators of works protected by copyright, and their heirs and successors (generally referred to as “right holders”), have certain basic rights under copyright law. They hold the exclusive right to use or authorise others to use the work on agreed terms. The right holder(s) of a work can authorise or prohibit:

- its reproduction in all forms, including print form and sound recording;
- its public performance and communication to the public;
- its broadcasting;
- its translation into other languages; and its adaptation, such as from a novel to a screenplay for a film.

Similar rights of, among others, fixation (recording) and reproduction are granted under related rights.

Many types of works protected under the maws of copyright and related rights require mass distribution, communication and financial investment for their successful dissemination (for example, publications, sound recordings and films). Hence, creators often transfer these rights to companies better able to develop and market the works, in return for compensation in the form of payments and/or royalties (compensation based on a percentage of revenues generated by the work).

The economic rights relating to copyright are of limited duration – as provided for in the relevant WIPO treaties – beginning with the creation and fixation of the work, and lasting for not less than 50 years after the creator’s death. National laws may establish longer terms of protection. This term of protection enables both creators and their heirs and successors to benefit financially for a reasonable period of time. Related rights enjoy shorter terms, normally 50 years after the performance, recording or broadcast has taken place. Copyright and the protection of performers also include moral rights, meaning the right to claim authorship of a work, and the right to oppose changes to the work that could harm the creator’s reputation.

Rights provided for under copyright and related rights laws can be enforced by right holders through a variety of methods and fora, including civil action suits, administrative remedies and criminal prosecution. Injunctions,



orders requiring destruction of infringing items, inspection orders, among others, are used to enforce these rights.

What are the benefits of protecting copyrights and related rights?

Copyright and related rights protection is an essential component in fostering human creativity and innovation. Giving authors, artists and creators incentives in the form of recognition and fair economic reward increases their activity and output and can also enhance the results. By ensuring the existence and enforceability of rights, individuals and companies can more easily invest in the creation, development and global dissemination of their works. This, in turn, helps to increase access to and enhance the enjoyment of culture, knowledge and entertainment the world over and also stimulates economic and social development.

How have copyright and related rights kept up with advances in technology?

The field of copyright and related rights has expanded enormously during the last several decades with the spectacular progress of technological development that has, in turn, yielded new ways of disseminating creations by such forms of communication as satellite broadcasting, compact discs and DVDs. Widespread dissemination of works via the Internet raises difficult questions concerning copyright and related rights in this global medium. WIPO is fully involved in the on-going international debate to shape new standards for copyright protection in cyberspace. In that regard, the Organisation administers the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), known as the “Internet Treaties”. These treaties clarify international norms aimed at preventing unauthorised access to and use of creative works on the Internet.

How are copyright and related rights regulated?

Copyright and related rights protection is obtained automatically without the need for registration or other formalities. However, many countries provide for a national system of optional registration and deposit of works. These systems facilitate, for example, questions involving disputes over ownership or creation, financial transactions, sales, assignments and transfer of rights. Many authors and performers do not have the ability or means to pursue the legal and administrative enforcement of their copyright and related rights, especially given the increasingly global use of literary, music and performance rights. As a result, the establishment and enhancement of collective management organisations, or “societies”, is a growing and necessary trend in many countries. These societies can provide their members with efficient administrative support and legal expertise in, for example, collecting, managing and disbursing royalties gained from the national and international use of a work or performance. Certain rights of producers of sound recordings and broadcasting organisations are sometimes managed collectively as well.



Annex 2: Case Studies Analysis

Rooibos¹¹

Background

Deep in the Cederberg Mountains, north of Cape Town in South Africa, red bushes dot the landscape. Known as “Rooibos” (“red bush” in the Afrikaans language), these shrub-like plants hold remarkably beneficial nutritional and health properties. The scientific name of Rooibos is *Aspalathus linearis*.

The plant has been used for generations by the region’s indigenous peoples – the Khoi and the San – to treat a wide range of ailments.

The plant is endemic to the Cederberg region and requires the very specific geographical conditions found there to grow and which provide it with its many unique features.

While the Khoi and San Peoples were the original harvesters and consumers of Rooibos, and some small scale farmers still cultivate it according to traditional methods, Rooibos has become a modern and streamlined multi-million dollar industry featuring Rooibos tea and a range of cosmetics and skin care products. By the early 1990’s, a company in South Africa called Rooibos Limited had been established and in 2005, the South African Rooibos Council was formed to promote the interests of the South African Rooibos industry locally and internationally.

Enter Intellectual Property

Trademark Issues

In 1993, a company called Forever Young filed an application for the word “Rooibos” in the United States of America. The mark was registered in the United States of America in 1994.

The South African Rooibos Council objected to the registration, arguing that the word “Rooibos” is generic and descriptive in Afrikaans and therefore cannot be registered as a trademark because it lacks distinctiveness.

Eventually, in 2005, after many years and substantial expenses, a settlement was reached and the “Rooibos” trademark in the USA was cancelled – meaning that no one can now claim an exclusive right to use the word “Rooibos”.

Questions

1. Can words such as “Rooibos” be protected under existing IP Laws? If so, which IP tools are relevant?
2. As far as you are aware, is there legislation for “traditional knowledge” or “traditional cultural expressions” applicable in your country which protects words such as “Rooibos”?
3. What other legislative, practical or political steps could governments take to protect words, names and indications such as “Rooibos”? How can IPLCs be involved?

Patent Issues

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¹¹ The facts of the cases have been simplified and shortened for the purpose of the exercise.



In June 2008, Nestec S.A., a Swiss company subsidiary of Nestlé, filed an application with the European Patent Office (EPO) for a patent related to Rooibos (see below).

1. Publication Number: EP 2133088
2. Title: Rooibos and Inflammation
3. Claim: “Use of a composition comprising *Aspalathus linearis* or an extract thereof for the preparation of a product to treat and/or prevent inflammatory disorders”.

The application disclosed that Rooibos is a bush found in South Africa and that it is known for its health benefits but claimed that the inventors had found that it “also possesses potent anti-inflammatory properties”.

In terms of South Africa’s prevailing access and benefit-sharing legislation (National Environmental Management: Biodiversity Act 10 of 2004), the discovery and commercialisation phases of bioprospecting involving any indigenous biological resources requires a permit issued by the Government. Such a permit is provided only upon evidence that the consent to the bioprospecting of interested stakeholders has been provided and that there are material transfer and benefit-sharing agreements in place. There was no indication that Nestec S.A. had obtained such a permit.

Several Non-Governmental Agencies raised objections to these applications on two main grounds:

1. The invention did not meet the patentability requirements of novelty and inventiveness; and
2. The failure by Nestec S.A. to obtain the necessary permits in terms of the South African National Environmental Management: Biodiversity Act 10 of 2004.

Questions

1. On the facts, do you think that the invention was patentable?
2. Why are “novelty” and “Inventive step” important patentability criteria?
3. When examining a patent application, do you think that a patent examiner should take into account whether or not national bioprospecting legislation has been complied with (for example, as in the case above, where the patent applicant had not obtained the necessary ABS permits)? Or should the examiner limit himself / herself to the existing patentability criteria?
4. What other ideas are there to prevent the granting of “wrong” patents? For example, should patent law be amended to require further disclosures in patent applications and/or should databases play a role?
5. Some view this case as an example of misappropriation and “biopiracy”, while others argue that bioprospecting can lead to innovations which benefit all humankind (such as medical breakthroughs) and that the negative impact on communities is exaggerated – what do you think?



Waka Waka Song¹²

Background

In 1985, the Golden Sounds, a popular group from Cameroon, released a song called *Zangalewa*. The song *Zangalewa* quickly became a national and international hit, including in Colombia.

Zangalewa was based on a hymn sung by Cameroonian “tirailleurs” or riflemen during World War II. Though there seems to be no written record or recording of the riflemen’s song, it seems to have been preserved and passed in orally.

Fast forward to 2010, South Africa is hosting the FIFA Soccer World Cup. As with any sporting event of this magnitude, the anthem is always crucial for entertainment value and commercial purposes.

Sony and FIFA chose the *Waka Waka (This time for Africa)* written by Colombian Shakira as the official anthem of the 2010 FIFA Soccer World Cup. Shakira performed the song with South African band Freshlyground. *Wakawaka* was chosen reputedly because it represented the vitality and energy of South Africa and Shakira was quoted saying:

“The FIFA World Cup is a miracle of global excitement, connecting every country, race, religion and condition around a single passion. It represents an event that has the power to unite and integrate and that’s what this song is about.”

When the song was first aired, it was familiar to many people from Africa and it was a surprise to the Golden Sounds who initially sang the *Zangalewa* and who heard it on radio for the first time during the World Cup.

Questions

- Which area(s) of intellectual property apply to the facts of this case?
- What are the issues?
- Where is the harm?
- Which possible “misappropriations” are there in this case?
- Which (if any) of the songs/hymn in the facts do you consider to be a “traditional cultural expression/expression of folklore”? If so, why? Which are works protected by copyrights and why?
- In general, what do you think is the difference between a “legitimate appropriation” and an “illegitimate misappropriation”?

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¹² The facts of the case have been simplified and shortened for the purpose of this exercise.



Annex 3: Glossary of Key Terms

This glossary lists the key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions.¹³

Access to Genetic Resources: “Access” is defined in Article 1 of the Decision 391 on Access to Genetic Resources of Andean Community (1996) as “the obtaining and use of genetic resources conserved in situ and ex situ, of their by-products and, if applicable, of their intangible components, for purposes of research, biological prospecting, conservation, industrial application and commercial use, among other things.”

Biological Diversity: Article 2 of the CBD defines the term “biological diversity”, often shortened to “biodiversity”, as meaning the “variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”

Biological Resources: As defined in Article 2 of the CBD, this term “includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.” Genetic resources form, therefore, one category of biological resources.

Article 1 of the Decision 391 on Access to Genetic Resources of Andean Community defines the term as “individuals, organisms or parts of them, populations or any biotic component of value or of real or potential use that contains a genetic resource or its by-products.”

Biotechnology: Article 2 of the CBD defines the term as “any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.” The Nagoya Protocol uses the same definition in its Article 2.

The term “modern biotechnology” is also defined in Article 3 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, adopted in 2000, as “the application of: a) in vitro nucleic acid techniques, including recombinant deoxyribonucleic acid and direct injection of nucleic acid into cells or organelles, or b) fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection.”

Clearing House Mechanism: A Clearing House Mechanism is a mechanism which facilitates and simplifies exchange of information or transactions among multiple Parties (United Nations Environment Programme (UNEP) Glossary). The Clearing House Mechanism of the CBD was established further to Article 18.3 of the Convention. Its mission is to contribute significantly to the implementation of the Convention through the promotion and facilitation of technical and scientific cooperation, among Parties, other Governments and stakeholders.

¹³ **Disclaimer:** The present online Glossary is an abridged version of document “[Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions](http://www.wipo.int/tk/en/resources/glossary.html)”. The proposed definitions it contains are not exhaustive or necessarily authoritative; other terms may also be relevant to intellectual property and genetic resources, traditional knowledge, and traditional cultural expressions and the terms selected may also be defined in other ways. The selection and proposed definitions are not necessarily agreed upon by participants in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The present online Glossary is an information document informally made available on the WIPO website (<http://www.wipo.int/tk/en/resources/glossary.html>) for information purposes only and does not constitute legal advice or should be considered as an authoritative source.



Country of Origin of Genetic Resources: According to Article 2 of the CBD: “country of origin of genetic resources” means “the country which possesses those genetic resources in in-situ conditions.” Other definitions include genetic resources in ex-situ conditions. For instance, country of origin is defined by Article 1 of the Decision 391 on Access to Genetic Resources of Andean Community as a “country that possesses genetic resources in in-situ conditions, including those which, having been in in-situ conditions, are now in ex-situ conditions.”

According to Article 2 of the CBD: “country providing genetic resources” means “the country supplying resources collected from in-situ sources, including populations of both wild and domesticated species, or taken from ex-situ sources, which may or may not have originated in that country.”

Customary Law and Practices: Black’s Law Dictionary defines “customary law” as law “consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.” Customary law has also been defined as “locally recognised principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.” (Protection Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May, 2005.)

The ways in which customary laws are embodied differ from one another. For instance, the laws can be codified, written or oral, expressly articulated or implemented in traditional practices. Another important element is whether these laws are actually “formally” recognised by and/or linked to the national legal systems of the country in which a community resides. A decisive factor in determining whether certain customs have status as law is whether they have been and are being viewed by the community as having binding effect, or whether they simply describe actual practices.

Customary laws concern many aspects of communities’ lives. They define rights and responsibilities of community members on important aspects of their life, culture and world view: customary law can relate to use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters.

“Customary practices” may be described as the acts and uses governing and guiding aspects of a community’s life. Customary practices are engrained within the community and embedded in the way it lives and works. They cannot be perceived as stand-alone, codified “laws” as such (“WIPO, Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues”).

Derivative: Article 2(e) of the Nagoya Protocol provides the following definition: “a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.”

Disclosure Requirements: Disclosure is part of the core rationale of patent law. Patent law imposes a general obligation on patent applicants, as referred to in Article 5 of the Patent Cooperation Treaty, “to disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art”.

However, “disclosure requirements” is also used as a general term for reforms made to patent law at the regional or national level, and proposals to reform international patent law, which would specifically require patent applicants to disclose several categories of information concerning traditional knowledge and/or genetic



resources when these are used in developing the invention claimed in a patent or patent application. (For further information, see document WIPO/GRTKF/IC/16/6, Annex I, pages 7 to 11 and WIPO, Traditional Knowledge Division, database on national and regional legislative measures in patent law.)

Three broad functions have been considered for disclosure methods relating to genetic resources and traditional knowledge:

- to disclose any genetic resources/traditional knowledge actually used in the course of developing the invention (a descriptive or transparency function, pertaining to the genetic resources/traditional knowledge itself and its relationship with the invention);
- to disclose the actual source of the genetic resources/traditional knowledge (a disclosure function, relating to where the genetic resources/traditional knowledge was obtained) – this may concern the country of origin (to clarify under which jurisdiction the source material was obtained), or a more specific location (for instance, to ensure that genetic resources can be accessed, so as to ensure the invention can be duplicated or reproduced); and
- to provide an undertaking or evidence of prior informed consent (a compliance function, relating to the legitimacy of the acts of access to genetic resources/traditional knowledge source material) - this may entail showing that genetic resources/traditional knowledge used in the invention was obtained and used in compliance with applicable laws in the country of origin or in compliance with the terms of any specific agreement recording prior informed consent; or showing that the act of applying for a patent was in itself undertaken in accordance with prior informed consent (WIPO Technical Study on Patent Disclosure Requirements related to Genetic Resources and Traditional Knowledge, WIPO Publication No. 786(E), p. 65).

Documentation: The Oxford English Dictionary defines “documentation” as the accumulation, classification and dissemination of information; the material as collected. Documenting traditional knowledge and traditional cultural expressions may include recording them, writing them down, taking pictures of them or filming them— anything that involves recording them in a way that preserves them and could make them available for others.

It is different from the traditional ways of preserving and passing on traditional knowledge and traditional cultural expressions within the community. (Summary and Introduction to the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources, document WIPO/GRTKF/IC/5/5.)

Registers of Traditional Knowledge: Registers can be analysed from many different perspectives. According to their legal nature, registers can be termed either declarative or constitutive, depending upon the system under which they are established.

A declaratory regime relating to traditional knowledge recognises that the rights over traditional knowledge do not arise due to any act of government but rather are based upon pre-existing rights, including ancestral, customary, moral and human rights. In the case of declarative registers, although registration does not affect the existence of such rights, it may be used to assist patent officials in analysing prior art, and to support challenges to patents granted which may have directly or indirectly made use of traditional knowledge. In circumstances where these registers are organised in an electronic form and available through the Internet, it is important to establish a mechanism that ensures that entry dates of traditional knowledge are valid when carrying out searches related to novelty and inventiveness. A third function that these registers may have is to facilitate benefit-sharing between users and providers.



Constitutive registers form part of a legal regime which seeks to grant rights over traditional knowledge. Constitutive registers will record the granting of rights (i.e. exclusive property rights) to the traditional knowledge holder as a means to ensure their moral, economic and legal interests are protected and recognised. Most model constitutive registers are conceived as public in nature, run by a national entity and under a law or regulation which clearly determines how valid registration of traditional knowledge can take place and be formally recognised and accepted. As such they may be more controversial and difficult to design and face some critical challenges and questions in moving from concept to practice (The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis. UNU-IAS Report, January 2004, p. 32).

Expressions of Folklore: In the WIPO-UNESCO Model Provisions, 1982, “expressions of folklore” are productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of a country or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- Verbal expressions, such as folk tales, folk poetry and riddles;
- Musical expressions, such as folk songs and instrumental music;
- Expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- Tangible expressions. (Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, Section 2.)

In the context of the IGC, the terms “traditional cultural expressions” and “expressions of folklore” are synonyms and used interchangeably.

Folklore: As defined in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore (1989), “folklore (or traditional and popular culture) is the totality of tradition-based creations, of a cultural community, expressed by a group or individuals and recognised as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

Genetic Resources: Article 2 of the CBD defines “genetic resources” as “genetic material of actual or potential value.” It further defines “genetic material” as “any material of plant, animal, microbial or other origin containing functional units of heredity.”

Indigenous and Local Communities: The term “indigenous and local communities” has been the subject of considerable discussion and study and there is no universal, standard definition thereof. The term is used in the CBD and also in the Nagoya Protocol. The CBD uses the term “indigenous and local communities” in recognition of communities that have a long association with the lands and waters that they have traditionally live on or used (“The Concept of Local Communities”, Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues for the Expert Workshop on the Disaggregation of Data (PFII/2004/WS.1/3/Add.1); see also UNEP/CBD/WS-CB/LAC/1/INF/5.).

Local communities may be defined as “the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed



or acquired traditional knowledge as a result of this dependence, including farmers, fisher folk, pastoralists, forest dwellers and others” (See UNEP-CBD *Sui generis* workshop, UNEP/CBD/WG8J/4/INF/18, p.2.).

Indigenous Knowledge: Indigenous knowledge is knowledge held and used by communities, peoples and nations that are ‘indigenous’. In this sense, “indigenous knowledge” would be the traditional knowledge of indigenous peoples. Indigenous knowledge is, therefore, a part of the traditional knowledge category, but traditional knowledge is not necessarily indigenous. Yet the term is also used to refer to knowledge that is itself “indigenous”. In this sense, the terms “traditional knowledge” and “indigenous knowledge” may be interchangeable (WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, p.23; see also List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), paragraph 41 of Annex).

Indigenous Peoples: The term “indigenous peoples” has been the subject of considerable discussion and study and there is no universal, standard definition thereof.

The United Nations Declaration on the Rights of Indigenous Peoples (2007) acknowledges the equal human rights of indigenous peoples against cultural discrimination and seeks to promote mutual respect and harmonious relations between the indigenous peoples and States. However, it does not provide a definition of “indigenous peoples.”

Misappropriation: In the field of intellectual property, Black’s Law Dictionary defines “misappropriation” as “the common-law tort of using the non-copyrightable information or ideas that an organisation collects and disseminates for a profit to compete unfairly against that organisation, or copying a work whose creator has not yet claimed or been granted exclusive rights in the work. [...] The elements of misappropriation are: (1) the plaintiff must have invested time, money, or effort to extract the information, (2) the defendant must have taken the information with no similar investment, and (3) the plaintiff must have suffered a competitive injury because of the taking.”

The tort of misappropriation is part of unfair competition law in the common law system. Misappropriation thus entails the wrongful or dishonest use or borrowing of someone’s property, and is often used to found action in cases where no property right as such has been infringed. Misappropriation may refer to wrongful borrowing or to the fraudulent appropriation of funds or property entrusted to someone’s care but actually owned by someone else.

Misuse: In the field of patents, Black’s Law Dictionary defines “misuse” as “the use of a patent either to improperly extend the granted monopoly to non-patented goods or to violate antitrust laws.” In general, Black’s Law Dictionary states: “improper use, in an unintended or unforeseeable manner.” Dictionaries generally define misuse as a wrong, incorrect or improper use, or misapplication. Misuse may also refer to improper or excessive use, or to acts which change the inherent purpose or function of something.

Mutually Agreed Terms: Besides recognising the authority of national governments to determine access to genetic resources, Article 15(4) of the CBD provides that “access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article”. The Executive Secretary of the Convention has noted that contracts are the most common way of recording mutually agreed terms. (See document UNEP/CBD/COP/4/22, paragraph 32) The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization indicate some basic requirements for mutually



agreed terms in Articles 41 to 44. Article 18 of the Nagoya Protocol specifically deals with compliance with mutually agreed terms.

Preservation: Preservation has two broad elements – first, the preservation of the living cultural and social context of traditional knowledge and cultural expressions, so that the customary framework for developing, passing on and governing access to traditional knowledge or cultural expressions is maintained; and second, the preservation of traditional knowledge and cultural expressions in a fixed form, such as when they are documented.

Preservation may have the goal of assisting the survival of the traditional knowledge or cultural expressions for future generations of the original community and ensuring their continuity within an essentially traditional or customary framework, or the goal of making them available to a wider public (including scholars and researchers), in recognition of their importance as part of the collective cultural heritage of humanity. (Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), paragraph 37)

Non-intellectual property laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with intellectual property protection. Other international legal systems, such as the CBD and the UNESCO deal with aspects of conservation, preservation and safeguarding of traditional knowledge and traditional cultural expressions within their specific policy contexts (The Protection of Traditional Knowledge: Draft Gap Analysis: Revision, WIPO/GRTKF/IC/13/5(b) Rev. Annex I, p. 6).

Prior Informed Consent: A right or principle of “prior informed consent” or sometimes “free, prior and informed consent” is referred to or implied in several international instruments, particularly in the environmental field, such as Article 6(4) of the Basel Convention on the Transboundary Movement of Hazardous Wastes, 1989, and the CBD.

The term flows from the implementation of the general principle of participation of indigenous peoples in decision-making, involvement in the formulation, implementation and evaluation of programs affecting them. (Art.32 (2), United Nations Declaration on the Rights of Indigenous Peoples; See also United Nations Development Group, Guidelines Related to Indigenous Peoples.)

The purpose of the use of the adjective “free” is to ensure that no coercion or manipulation is used in the course of negotiations, while inclusion of “prior” acknowledges the importance of allowing time to indigenous to fully review proposals respecting the time required for achieving consensus. It also anticipates the reality that decisions, especially those relating to major investments in development, are often taken in advance with indigenous people. The notion of “informed” consent reflects the growing acceptance that environment and social impact assessment are a pre-requisite for any negotiation process and allow all parties to make balanced decisions.

“Consent” is a process whereby permission is given, based on a relationship of trust. An informed consent implies that clear explanations are provided, along with contract details, possible benefits, impacts and future uses. The process should be transparent, and the language fully understood by indigenous peoples (Stephen Allen and Alexandra Xanthaki, “Reflections on the UN Declaration on the Rights of Indigenous Peoples”, Oxford and Portland, Oregon, p.49; see also “United Nations Economic and Social Council Permanent Forum on



Indigenous Issues”, Fourth Session, and “Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples”, E/C.19/2005/3. p.8).

Prior Art: Prior art is, in general, all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written and oral disclosure. In some legal instruments there is a differentiation between printed publications, oral disclosures and prior use and where the publications or disclosure occurred (WIPO Intellectual Property Handbook, WIPO Publication No. 489 (E), 2008, p. 19).

For the purposes of the Patent Cooperation Treaty, prior art is defined by Rule 33.1 of the Patent Cooperation Treaty Regulations as “everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e. that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date.”

In Europe, Article 54(2) of the European Patent Convention defines the equivalent term “the state of the art”. Section 35 of the United States Code 102 defines prior art indirectly through the concept of “novelty”. Section 29 of Japanese Patent Law indirectly defines “prior art”.

Protection: “Protection” in the work of the IGC has tended to refer to protection of traditional knowledge and traditional cultural expressions against some form of unauthorised use by third parties. Two forms of protection have been developed and applied.

Positive Protection: Two aspects of positive protection of traditional knowledge and traditional cultural expressions by intellectual property rights are explored, one concerned with preventing unauthorised use and the other concerned with active exploitation of the traditional knowledge and traditional cultural expressions by the originating community itself.

Besides, the use of non-intellectual property approaches for the positive protection of traditional knowledge and traditional cultural expressions can be complementary and used in conjunction with intellectual property protection. For instance, positive protection of traditional knowledge and traditional cultural expressions may prevent others from gaining illegitimate access to traditional knowledge and traditional cultural expressions or using them for commercial gain without equitably sharing the benefits, but it may also be used by traditional knowledge and traditional cultural expressions holders to build up their own enterprises based on their traditional knowledge and traditional cultural expressions.

Defensive Protection: Defensive protection refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded intellectual property rights over traditional cultural expressions, traditional knowledge subject matter and related genetic resources. Defensive protection of traditional knowledge includes measures to pre-empt or to invalidate patents that illegitimately claim pre-existing traditional knowledge as inventions (More information is available in “Overview of Activities and Outcomes of the Intergovernmental Committee” (WIPO/GRTKF/IC/5/12)).

Providers and Recipients of Genetic Resources: Providers and recipients of genetic resources may include the government sector (e.g., government ministries, government agencies (national, regional or local), including those responsible for administration of national parks and government land); commerce or industry (e.g., pharmaceutical, food and agriculture, horticulture, and cosmetics enterprises); research institutions (e.g., universities, gene banks, botanic gardens, microbial collections); custodians of genetic resources and traditional



knowledge holders (e.g. associations of healers, indigenous peoples or local communities, peoples' organisations, traditional farming communities); and others (e.g., private land owner(s), conservation group(s) etc.).

Public Domain: In a copyright context, a work is considered to be in the public domain if there is no legal restriction for its use by the public.

Black's Law Dictionary defines the public domain as "the universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement" (Black's Law Dictionary 1027 (8th ed. 2005)).

The public domain has been defined in the field of copyright and related rights as "the scope of those works and objects of related rights that can be used and exploited by everyone without authorisation, and without the obligation to pay remuneration to the owners of copyright and related rights concerned – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country" (WIPO Guide to the Copyright and Related Rights Treaties by WIPO and Glossary of Copyright and Related Rights Terms).

The public domain in relation to patent law consists of knowledge, ideas and innovations over which no person or organisation has any proprietary rights. Knowledge, ideas and innovations are in the public domain if there are no legal restrictions of use (varying in different legislations and forming, therefore, different public domains), after expiration of patents (regularly 20 years), in consequence of non-renewal, after revocation and after invalidation of patents (See document SCP/13/5).

Sui generis: Black's Law Dictionary defines "*sui generis*" as "[Latin "of its own kind"] of its own kind or class; unique or peculiar. The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a *sui generis* statute designed for that purpose."

A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. There are already several examples of *sui generis* intellectual property rights such as plant breeders' rights—as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 ("the UPOV Convention")—and the intellectual property protection of integrated circuits—as reflected in the Treaty on Intellectual Property in respect of Integrated circuits, 1989 ("The Washington Treaty"), among others.

Traditional Cultural Expressions: WIPO uses the terms "traditional cultural expressions" and "expressions of folklore" to refer to tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms "traditional cultural expressions" and "expressions of folklore" are used as interchangeable synonyms, and may be referred to simply as "traditional cultural expressions," often in its abbreviated forms "TCEs." The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.



Traditional Knowledge: There is as yet no accepted definition of traditional knowledge at the international level.

“Traditional knowledge,” as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.

In international debate, “traditional knowledge” in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc. (See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999 & Intellectual Property Needs and Expectations of Traditional Knowledge”, at p. 25).

Codified Traditional Knowledge: Codified traditional knowledge is “traditional knowledge which is in some systematic and structured form, in which the knowledge is ordered, organised, classified and categorised in some manner” (List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), paragraph 16 of Annex).

In the field of traditional medicine, for example, the Traditional Medicine Team of the World Health Organisation distinguishes between (a) codified systems of traditional medicine, which have been disclosed in writing in ancient scriptures and are fully in the public domain, e.g. Ayurveda disclosed in ancient Sanskrit scriptures or Traditional Chinese Medicine disclosed in ancient Chinese medical texts; and (b) non-codified traditional medicinal knowledge which has not been fixed in writing, often remains undisclosed by traditional knowledge holders, and is passed on in oral traditions from generation to generation. In South Asia, for instance, the codified knowledge systems include the Ayurvedic system of medicine, which is codified in the 54 authoritative books of the Ayurvedic System, the Siddha system, as codified in 29 authoritative books, and the Unani Tibb tradition, as codified in 13 authoritative books.

Disclosed Traditional Knowledge: “Disclosed traditional knowledge” refers to “[traditional knowledge which is accessible to persons beyond the indigenous or local community which is regarded as the ‘holder’ of the [traditional knowledge]. Such [traditional knowledge] might be widely accessible to the public and might be accessed through physical documentation, the internet and other kinds of telecommunication or recording. [Traditional knowledge] might be disclosed to third parties or to non-members of the indigenous and local communities from which [traditional knowledge] originates, with or without the authorisation of the indigenous and local communities” (List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), paragraph 4 of Annex).

Publicly Available Traditional Knowledge: The experts at the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing discussed the terms “public domain” and “publicly available” with special reference to traditional knowledge associated with genetic resources: “the term public domain, which is used to indicate free availability, has been taken out of context and applied to [traditional knowledge] associated with genetic resources that is publicly available. The common understanding of publicly available



does not mean available for free. The common understanding of public availability could mean that there is a condition to impose mutually agreed terms such as paying for access. [Traditional knowledge] has often been deemed to be in the public domain and hence freely available once it has been accessed and removed from its particular cultural context and disseminated. But it cannot be assumed that [traditional knowledge] associated with genetic resources that has been made available publicly does not belong to anyone. Within the concept of public availability, prior informed consent from a [traditional knowledge] holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable, including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State.” (See UNEP/CBD/WG-ABS/8/2, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing.)

Traditional Knowledge Associated with Genetic Resources: The term “traditional knowledge associated with genetic resources” is used in the CBD. Some experts at the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing suggested that “traditional knowledge associated with genetic resources” refers to “traditional knowledge which is specific or general in its relationship to genetic resources.” (See UNEP/CBD/WG-ABS/8/2, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing, paragraph 12 of Annex) Some molecules/properties/active ingredients of genetic resources may be identified in genetic materials without the support of traditional knowledge and others with the support of traditional knowledge.

Although in most cases genetic resources seem to have associated traditional knowledge, it was also recognised that not all genetic resources have associated traditional knowledge. Article 37 of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization provides that “permission to access genetic resources does not necessarily imply permission to use associated knowledge and vice versa.”

Traditional Medicine: The World Health Organisation defines the term as “the sum total of the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health, as well as in the prevention, diagnosis, improvement or treatment of physical and mental illnesses.” (World Health Organisation General Guidelines for Methodologies on Research and Evaluation of Traditional Medicine (WHO/EDM/TRM/2000.1), p. 1) The World Health Organisation also defines “traditional medicine” as “including diverse health practices, approaches, knowledge and beliefs incorporating plant, animal, and/or mineral based medicines, spiritual therapies, manual techniques and exercises applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness” (World Health Organisation Traditional Medicine Strategy 2002-2005, p. 7).

Tradition-Based Creations and Innovations: Traditions are a set of cultural practices and ideas, which are considered to belong to the past and which are designated a certain status (Draft Glossary, National Commission for UNESCO). Tradition-based creations or innovations refer to innovations and creations based on traditional knowledge as such, developed and innovated beyond a traditional context. (See Articles 10-13 of the ITPGRFA) Traditional knowledge as such refers to “knowledge systems, creations, innovations and cultural expressions that: have generally been transmitted from generation to generation; are generally regarded as



pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and, are constantly evolving in response to a changing environment” (See WIPO Document WIPO/GRTKF/IC/3/9.).

Tradition-based innovation refers the case where tradition is a source of innovation by members of the relevant cultural community or outsiders, and can also identify others uses of tradition relevant to an intellectual property analysis (Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, paragraph 57).

United Nations Declaration on the Rights of Indigenous Peoples: The United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples in 2007. The Declaration acknowledges the equal human rights of indigenous peoples against cultural discrimination and seeks to promote mutual respect and harmonious relations between the indigenous peoples and States.

In relation to traditional knowledge, traditional cultural expressions and genetic resources, Article 31.1 states that: “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.

They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” Article 31.2 further provides that “in conjunction with indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.” On traditional medicine, Article 24 provides that “indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”

Utilisation: The Nagoya Protocol defines at Article 2(c) as follows: “to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention.”