

10th Pan African Workshop on Access and Benefit-Sharing

6th – 10th March 2017, Dakar, Senegal

Hosted by the Direction des Parcs Nationaux du Sénégal

REPORT







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List of Acronyms

ABS	Access and Benefit-Sharing
ASPSP	Association Sénégalaise des Producteurs de Semences Paysannes
AU	African Union
BBNJ	Biodiversity Beyond National Jurisdiction
BCP	Biocultural Community Protocols
CBD	Convention on Biological Diversity
CGRFA	Commission on Genetic Resources for Food and Agriculture
CNA	Competent National Authority
COP	Conference of the Parties (to the Convention on Biological Diversity)
DRC	Democratic Republic of the Congo
DSI	Digital Sequence Information
EU	European Union
IFAN	Institut Fondamental d’Afrique Noire (African Institute of Basic Research)
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IPLCs	Indigenous Peoples and Local Communities
IRCC	Internationally Recognised Certificate of Compliance
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
MAT	Mutually Agreed Terms
MOP	Meeting of the Parties (to the Nagoya Protocol)
PGRFA	Plant Genetic Resources for Food and Agriculture
PIC	Prior Informed Consent
SCBD	Secretariat of the Convention on Biological Diversity
TCEs	Traditional Cultural Expressions
UNCLOS	United Nations Convention on the Law of the Sea
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation



Background

Since the coming into force of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization in 2014, African countries have intensified activities to adapt or develop their domestic access and benefit-sharing (ABS) systems. At the regional level, guidance is provided by the 2015 African Union Guidelines for a Coordinated Implementation of the Nagoya Protocol (AU Guidelines). At the same time, the African Group continues to play an important role in the negotiations at the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) and the Meeting of the Conference of the Parties to the CBD serving as the Meeting of the Parties to the Nagoya Protocol (COP MOP). The recent implementation of ABS measures in countries and regions where the rate of utilisation of genetic resources is high, such as the European Union (EU) and its Member States, is resulting in an increasing demand for ABS-compliant access to genetic resources and associated traditional knowledge from African countries, reiterating the need for functioning national ABS systems.

The ABS Capacity Development Initiative (ABS Initiative or Initiative) supports the elaboration of institutional and regulatory ABS frameworks, the development of ABS-compliant value chains and the involvement of indigenous peoples and local communities (IPLCs) in ABS processes in its African partner countries. The Initiative also offers capacity building services on ABS and related topics to stakeholders from all other African countries and from countries in the Caribbean and Pacific regions while supporting their involvement in ABS-related international processes.

As an active member of the African Group, Senegal has, from the early stages, contributed significantly to the ABS negotiations under the CBD leading to the adoption of the Nagoya Protocol. In that capacity, Senegal has also participated in the Steering Committee of the ABS Initiative since 2009 and thus helped shaping capacity development activities on ABS across the continent. In June 2016, the country officially became a Party to the Nagoya Protocol.

Approach and Objectives

This 10th Pan-African ABS Workshop aimed at providing a forum for National ABS Focal Points and representatives of all relevant stakeholder groups – including IPLCs, research and the private sector – to obtain information, exchange experiences and discuss potential strategies for the implementation of ABS from an African perspective.

More specifically, the objectives of this 10th Pan African ABS Workshop were to:

- Update participants on international and regional processes on ABS and related fields, particularly on the outcomes of COP 13 and COP MOP 2 which took place in Cancún, Mexico in December 2016 and prepare the way forward to COP 14 and COP MOP 3 (Egypt 2018);
- Share the experience gained by African countries, partners of the ABS Initiative, moving forward with their national implementation processes, including the development of ABS-compliant value chains and approaches facilitating the involvement of IPLCs in national ABS systems; and
- Reflect on key concepts of ABS and the interplay between users and providers of genetic resources and associated traditional knowledge and discuss key topics such as systematic approaches to developing institutional and regulatory ABS frameworks or monitoring and compliance mechanisms.



One day of the workshop programme was entirely dedicated to the presentation of three case studies from Senegal. That day provided an opportunity to learn about the Senegalese domestic context of ABS and apply the theoretical elements of the workshop programme by discussing specific practical examples.

During the five-day workshop, resource people from the ABS Initiative and several partner organisations provided an opportunity for participants to seek targeted and personal advice on relevant topics.

Participants

In total, 103 participants from 50 countries included National Focal Points, representatives of Competent National Authorities (CNA) and other government institutions, relevant regional and international organisations and IPLCs, as well as stakeholders from civil society, research and the private sector involved in biotrade and bioprospecting. Simultaneous translation in French and English was provided during plenary sessions.



Outcomes

This 10th Pan African ABS workshop, marking the 10th Anniversary of the ABS Initiative, was specifically designed to encourage the exchange of experiences on the national implementation of the Nagoya Protocol and peer-to-peer learning on the challenges and lessons learnt along the way. Another focus of the workshop was to revisit the provider-user interplay as well as the basic elements and core provisions of the Nagoya Protocol, notably Prior Informed Consent (PIC), Mutually Agreed Terms (MAT), permit, and compliance. Practical options on how to get started with the implementation process of the Protocol and on how to establish efficient and effective ABS measures were discussed. Looking at the outcomes of the Rooibos Restitution Case, participants also explored the role of traditional knowledge holders in the provider-user interplay. The discussions further highlighted the key role of the ABS Clearing-House in facilitating the implementation of the Protocol and helping to ensure compliance with ABS measures and transparency in monitoring the utilisation of genetic resources along the value chain. Tutorial sessions on ABS contracts and intellectual property rights provided participants with new insights on the links between intellectual property and ABS as well as on how to negotiate and establish successful ABS contracts. Finally, case studies from Senegal allowed participants to discuss new issues for policy development such as digital sequence information on genetic resources (DSI) or pathogens and initiate reflections on an African common position submission for the assessment and review of the effectiveness of the Nagoya Protocol at COP13 / COP MOP 3.

Constructive exchanges, group discussions and activities provided participants with:

- A comprehensive summary of the outcomes of COP MOP 2;
- A better understanding of the linkages and synergies between the different international processes relevant to the implementation of the Nagoya Protocol, in particular the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) as well as the EU ABS Regulation;¹
- A better understanding of the provider-user interplay and of the role of the ABS Clearing-House in the implementation process of the Nagoya Protocol;
- Opportunities for mutual learning based on national experiences in implementing the Nagoya Protocol;
- A better grasp of the linkages between intellectual property and ABS;
- A better understanding of the key elements to consider when negotiating ABS contracts as well as valuable and practical advice on how negotiating and developing successful ABS contracts;
- A better understanding of the emerging and strategic policy issues to be considered for a common African submission for the assessment and review of the effectiveness of the Nagoya Protocol at COP MOP 3;

¹ Official title: Regulation (EU) N° 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union. The full document is available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32014R0511>.



- New insights on how to involve IPLCs in ABS processes, build their capacity on ABS-related issues and empower them to successfully negotiate fair and equitable ABS agreements.

Finally, a key aim of the 10th Pan African Workshop on ABS was to facilitate discussion among participants on key issues and foster a climate of information sharing among them that will hopefully extend beyond the workshop itself.

A preliminary summary of the key outcomes of the workshop, developed by the organisers and shared with all participants directly after the meeting, can be found in Annex 1 of this report.



Process

Technical Opening

Samuel Diemé from the Direction des Parcs Nationaux du Sénégal welcomed the participants to the 10th Pan African ABS Workshop. Mr Diemé first commended the work carried out by the African Group during the negotiations leading to the adoption of the Nagoya Protocol in 2010 and its ratification by many African countries which, in turn, contributed to its entry into force in 2014. He then informed the participants that the work of the African Group was now focussing on the implementation of the Protocol for the benefits of African countries, their population and the environment. A coordinated implementation in Africa is therefore essential. To do so, African countries must take into account the AU Guidelines. Mr Diemé concluded by encouraging participants to continue their work to gain the support of their government and wished them a week of fruitful discussions.

Matthew Dias from the Secretariat of the CBD (SCBD) greeted all the participants stating that this was an exciting time in the life of the Nagoya Protocol as more and more countries were becoming Parties to it and taking steps to implement it. However, further efforts are still needed to make the Nagoya Protocol operational. As countries carry on with their national implementation process, it is important that they also publish ABS-related information on the ABS Clearing-House. Mr Dias thanked all the participants for their commitment to achieving the third objective of the CBD and wished them well in their deliberations.

Andreas Drews from the ABS Initiative warmly welcomed the participants to the 10th Pan African ABS Workshop which also marked the 10th Anniversary of the ABS Initiative. He highlighted that since 2006, the Initiative has gone through different phases of work, all of which aimed at advancing the third objective of the CBD. He then reminded the participants that since 2015, the Initiative is pursuing a programme of work which placed a strong focus on national implementation. The Initiative is particularly active in supporting its partner countries in developing functioning ABS systems, focussing on, among others, the participation of IPLCs, establishing effective ABS contracts and developing ABS-compliant and sustainable value chains. Lessons learnt in these countries will inform developments in other countries. At the same time, the Initiative is making sure that all countries in Africa are duly informed about the various changes happening in the ABS field. Mr Drews noted that practical expertise in ABS and examples of how ABS can work on the ground were increasing. As a result, the programme of work of this Pan African workshop was designed in a slightly new format in order to better tap into the capacities built in African countries over the past years, placing a strong emphasis on interactive discussions, exchange of knowledge, experiences, good practices and expertise between the participants. The agenda of this workshop was also designed to address requests received from participants as much as possible. Mr Drews encouraged all the participants to learn from each other and invited them to address any questions to the ABS Initiative's resource people. He then thanked the Direction des Parcs Nationaux du Sénégal for their close collaboration with the Initiative in the organisation of this event and wished the participants fruitful exchanges and a productive workshop.

Updates on International Processes

The Convention on Biological Diversity

Matthew Dias from the SCBD provided a comprehensive overview of the outcomes of COP MOP 2. The presentation focussed on some of the main decisions adopted to advance the implementation of the Nagoya



Protocol and relevant for the region. These included achieving Aichi Target 16,² making all mandatory information available on the ABS Clearing-House³ and reporting to the Compliance Committee. Furthermore, Parties decided on measures for capacity building in relation to key identified areas such as supporting the ratification of the Protocol and implementation of national ABS strategic frameworks, providing technical support on the use of the ABS Clearing-House and the development of guidance material and facilitating the mutually supportive implementation with the ITPGRFA.⁴ Other key decisions focussed on assessing progress made towards implementation. In this regard, Parties and non-Parties are invited to report on the implementation of their obligations and submit interim national reports via the ABS Clearing-House in preparation of the assessment and review of the effectiveness of the Nagoya Protocol at COP MOP 3 in 2018.⁵ Finally, some decisions also addressed key policy development issues such as DSI on genetic resources,⁶ the global multilateral benefit-sharing mechanism established by Article 10⁷ and the cooperation with other international forums such as the World Health Organisation (WHO).⁸

The Food and Agricultural Organisation of the United Nations

Kent Nnadozie from the Secretariat of the ITPGRFA updated the participants on the latest developments related to the implementation of the ITPGRFA. He highlighted that all countries were interdependent and reliant on plant genetic resources for food and agriculture (PGRFA) for food security and sustainable development. However, PGRFA would cease to exist without their active management. The essence of the ITPGRFA is the creation of a multilateral system to facilitate the access to and the exchange of PGRFA as well as the fair and equitable sharing of the benefits arising from their use. Its objectives are different but in harmony with those of the CBD and the Nagoya Protocol. The concept of an international ABS regime is broader than the Nagoya Protocol or the ITPGRFA individually. Any successful implementation of the Nagoya Protocol will therefore require close cooperation and coordination with the ITPGRFA. This means clarifying respective legal obligations, developing concrete interfaces between the two processes and establishing an institutional collaboration to structure those interfaces. It is hoped that more international cooperation between the two instruments will take place to enhance the multilateral system of the ITPGRFA. Mr Nnadozie concluded his presentation with a list of challenges to be addressed and an overview of the future activities related to the implementation of the ITPGRFA.

The World Intellectual Property Organisation

Claudio Chiarolla from the Traditional Knowledge Division at WIPO gave a brief update on the state of the negotiations at the IGC and provided some clarifications on the nature of the linkages between intellectual property and ABS. Mr Chiarolla informed the participants that the 2016-2017 mandate of the ICG was to reach “an agreement on an international legal instrument(s), without prejudging the nature of the outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions (TCEs)”. However, views diverge on the necessity to

² Decision COP XIII/1, NP 2/1: Review of progress towards Aichi Biodiversity Target 16 which states that “[b]y 2015, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation”.

³ Decision NP 2/2: The Access and Benefit-Sharing Clearing-House and Information-sharing (Article 14).

⁴ Decision NP 2/8: Measures to assist in capacity-building and capacity development (Article 22).

⁵ Decision NP 2/4: Assessment and review of the effectiveness of the Protocol (Article 31).

⁶ Decision COP XIII/16, NP 2/14: Digital sequence information on genetic resources.

⁷ Decision NP 2/10: The need for and modalities of a global multilateral benefit-sharing mechanism (Article 10).

⁸ Decision NP 2/5: Cooperation with other international organisations, conventions and initiatives.



have a legally binding treaty. Innovations based on traditional knowledge can be protected through existing intellectual property tools such as patents and copyrights. Yet, gaps still remain in the classic intellectual property system to protect the ‘underlying’ traditional knowledge adequately. Nevertheless, different options can be considered. Traditional knowledge can be protected through a positive or defensive approach or a combination of the two. A positive protection means granting rights that empower communities or nations to promote their traditional knowledge and TCEs, control their uses by third parties and benefit from their commercial exploitation. A defensive protection means preventing people outside the community or nation from acquiring intellectual property rights over traditional knowledge or TCEs. The significance of the WIPO process lies in the creation of new collective rights that never existed before. It is therefore a profound re-imagining of the intellectual property system. It is also the first developing countries-led normative process of this breadth and complexity. Finally, participants were informed about the main technical and policy issues to resolve. The main issues deliberated upon at this stage of the process are (i) preventing the misappropriation of genetic resources and associated traditional knowledge and erroneously granted patents, (ii) ensuring compliance with ABS frameworks, (iii) defining traditional knowledge and (iv) the objectives of the instrument(s).

Plenary Discussion

The plenary discussion focussed on the importance of the interrelationships between international ABS-related processes. Some participants highlighted that it was essential that delegates attending international meetings under these different treaties understand how these processes are related to each other and provide feedback on what they have learnt back home. Others emphasised the importance of taking advantage of the synergies and complementarities between the different instruments and processes to build capacity at national level through joint activities and funding. For example, some workshops and projects are being carried out on the mutually supportive implementation of the Nagoya Protocol and the ITPGRFA by the ABS Initiative and Bioversity International. Finally, the discussion highlighted the importance of informing countries on the different forums and processes for a more coordinated and comprehensive approach to implementing and designing efficient and effective national ABS systems.

Reporting on COP MOP 2: An African Perspective

Pierre du Plessis from the ABS Initiative reflected on the strategic implications of the outcomes of COP MOP 2 for ABS implementation in Africa and the importance for African countries to start preparing for COP MOP 3 in a coordinated way. He highlighted the importance for African countries to submit their national reports on the implementation of the Nagoya Protocol, due by 1st November 2017 as per Article 31,⁹ as these reports will inform the assessment and the review of the effectiveness of the Nagoya Protocol at COP MOP 3 and provide insights on how to move the implementation process forward (be strategic!). National reports are also important to inform decisions regarding issues such as compliance measures for associated traditional knowledge, access to justice in user countries and the need for a global multilateral benefit-sharing mechanism as per Article 10 of the Protocol.¹⁰ Mr du Plessis called participants’ attention to the fact that the inclusion of

⁹ Article 31 of the Nagoya Protocol says that “[t]he Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, four years after the entry into force of this Protocol and thereafter at intervals determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, an evaluation of the effectiveness of this Protocol”.

¹⁰ Article 10 of the Nagoya Protocol states that “Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilisation of genetic



Article 31 and Article 10 were key to the African acceptance of the Nagoya Protocol and that national reports as well as the submission of views on the way forward regarding Article 10 were of strategic importance for Africa and needed to be coordinated. Finally, Mr du Plessis advised that a common African position was also essential on issues such as cooperation with specialised ABS instruments as per Article 4.4,¹¹ synthetic biology and DSI on genetic resources.

Plenary Discussion

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

- *Preparing for COP MOP 3:* Adopting a coordinated approach to the submission of national reports and developing a common position on DSI, synthetic biology, the global multilateral benefit-sharing mechanism, capacity building and financing was seen as essential to provide an African perspective on the future of the Nagoya Protocol. This process of coordination should start now, since an inclusive and coordinated preparation takes time.
- *Article 10 of the Nagoya Protocol:* The need for a global multilateral benefit-sharing mechanism should be illustrated with specific cases. The African Group should be proactive in this regard and develop a full proposal by COP MOP 3, providing concrete and constructive suggestions for the implementation of Article 10.
- *IPLC Involvement:* IPLC representatives reminded the African Group negotiators that IPLCs, being the custodians of traditional knowledge and genetic resources and often acting as providers, have experiences and views that are valuable for the development of African positions in the COP MOP-related processes. Negotiators were encouraged to trust the capacities of IPLCs and actively involve them in their discussions.
- *DSI and Synthetic Biology:* DSI and synthetic biology are new, complex and fast evolving issues. A better understanding of these issues is essential to develop a common position to submit at COP MOP 3. The use of DSI and synthetic biology by users can hardly be fully avoided. From a contractual perspective, it is not advisable to prohibit the use of DSI (or any other action, for that matter) in a contract, as negatively phrased clauses are difficult to enforce. For example, instead of phrasing “user should not make use of DSI” rather phrase it positively and say what the consequence of the use of DSI would be.
- *Financing/Resource Mobilisation:* More efforts must be made at country level to finance the implementation of the Nagoya Protocol and the participation of African representatives/delegates in international ABS related processes, especially COP MOPs.

resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally”.

¹¹ Article 4.4 of the Nagoya Protocol provides that the Protocol “is the instrument for implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument”.



- *Interlinkages between International ABS-related Processes:* Effective communication between government institutions in charge of these processes at national level is essential to ensure a consistent African position.

The Provider-User Interplay in ABS

Providing a background for the subsequent panel discussion, *Lena Fey from the ABS Initiative* presented a schematic model of the interplay between providers, users, and regulators as established by the Nagoya Protocol and the AU Guidelines. The objective of developing such a model was to illustrate in a simple manner how these different groups of stakeholders interact to ensure that ABS partnerships are implemented consistently and benefits shared in a fair and equitable way. The schematic model puts forward the key role played by the ABS Clearing-House to facilitate the necessary flow of information between the users and providers of genetic resources, whether Parties or non-Parties to the Protocol, and hence to the functioning of the overall monitoring and compliance system. Finally, the schematic model also draws attention to the importance of establishing PIC and MAT and issuing permits as well as the key role of the Internationally Recognised Certificate of Compliance (IRRC) in monitoring the use of genetic resources and the compliance with MAT.

Panel Discussion

The objective of the following panel discussion was to discuss the functioning of the provider-user interplay from the perspectives of different stakeholder groups and to explore to what extent the mechanism presented in the schematic model meets the current “reality of ABS”. The panel comprised representatives of four stakeholder groups, i.e. users (private sector), providers (IPLCs) and regulators from so-called user and provider countries (Germany & Madagascar). Regardless of their capacity, all the panellists emphasised the importance of publishing ABS-related information on the ABS Clearing-House. In Germany, for example, the core duty of regulators is to check the compliance of users with the legislation of provider countries as long as utilisation happens within the scope of the EU ABS Regulation. As such, users and regulators are both heavily reliant on the information provided by the provider countries to the ABS Clearing-House. However, it is usually challenging to obtain any useful information to comply with national legislation of the provider country. ABS Focal Points in provider countries are difficult to get hold of and no information can be retrieved from the ABS Clearing-House. On the other hand, all panellists acknowledged that developing a national ABS regulatory framework was a lengthy process and that relevant information could only be published on the ABS Clearing-House once the national legislative and regulatory frameworks were finalised. The fact that only very few access regulations are currently available on the ABS-CH thus reflects the situation that most countries do not have validated and adopted ABS measures yet. Madagascar, for example, has decided to implement interim measures to address access demands while a fully-fledged ABS law is still under development. Yet, even this information cannot be published on the ABS-CH before the interim measure is adopted. The ABS Focal Point, in collaboration with the publishing authority, is in charge of publishing and updating this information on the ABS Clearing-House, as well as any change that may occur in relation to the national ABS legal framework. From a user's point of view, the ABS Clearing-House is a very important source of information. Before it was put online, it was very difficult to find any relevant information on ABS and on the measures in place in provider countries, but this tool can indeed link up providers and users of genetic resources. Concluding the panel discussion, the representative of the Endorois community from Kenya drew attention to the fact that, in many instances, IPLCs were not aware of ABS and that most of them did not have access to new technologies. Specialised awareness-



raising and capacity building activities are essential to ensure that communities are knowledgeable on ABS matters and maximise their chances to give PIC and negotiate MAT that will benefit them in a fair and equitable way.

Plenary Discussion

In the plenary, participants further discussed the key role of the ABS Clearing-House in making the global ABS system functional and why exchanging ABS-related information through this platform was essential to make it more effective. The following is a highlight of the issues discussed in the plenary:

- *National Users:* Provider countries are usually underestimating the number of national users. National legislation should therefore cater for them, too.
- *The Role of ABS Focal Points in Providing Information to Users of Genetic Resources:* ABS Focal Points in provider countries are perceived as not answering access queries. Even in the absence of national ABS legislation, it is important that ABS Focal Points reply to information requests. That said, the fact that information on access procedures and regulations is not yet on the ABS Clearing-House should not be used as an excuse not to comply with the legislation in place or national requirements, if any. Users must gather all the necessary information prior to requiring access.
- *The Reference Records Section of the ABS Clearing-House:* Governments publish the mandatory information required in the Nagoya Protocol as “national records” on the ABS Clearing-House, e.g. information on the Competent National Authority, on national legislation or on access permits. This information is validated and published by the countries themselves through their national publishing authorities. The CBD Secretariat has no influence on these contents. The “reference records” section of the ABS Clearing-House, on the other hand, is reserved for all other information that is considered relevant by any stakeholders and that does not need to be approved by the national publishing authorities. Such resources can be submitted by any registered user of the ABS Clearing-House (Parties, non-Parties, governments, international organisations, IPLCs and relevant stakeholders) and will be validated and published by the CBD Secretariat. The virtual library records include, among others, general literature on ABS, awareness raising materials, case studies, videos, etc. Information on capacity-building initiatives at national, regional and international levels can be shared to promote synergies and coordination on capacity building and development for ABS. Model contractual clauses, codes of conduct, guidelines, best practices and/or standards can also be published in this section as well as information and examples of community protocols and procedures or customary laws.¹²
- *The ABS Clearing-House and the Protection of Traditional Knowledge:* The Nagoya Protocol is not concerned with the protection of any intellectual property rights. This issue is relevant to WIPO. The role of the ABS Clearing-House is therefore not to protect traditional knowledge. It is also not concerned with the monitoring of the utilisation of traditional knowledge associated with genetic resources. This is each country’s own responsibility.
- *EU ABS Regulation:* The scope of the EU’s compliance regulation only covers cases where genetic resources have been accessed in a country that is a Party to the Nagoya Protocol and that has an ABS regulatory framework in place (to name but two major conditions). When genetic resources are accessed in a non-Party country or a Party that has no legislation in place yet, the EU checkpoints are

¹² For more information on this subject, see the ABS Clearing-House at <https://absch.cbd.int/>.



not obliged to control whether access was based on PIC and MAT. However, this does not mean that access to resources in non-Parties or Parties without ABS legislation is free for users from the European Union. Any user is still obliged to comply with all provider country rules – be they an ABS law in a non-Party country or a contract simply governed by contract law, concluded in a country that has no ABS legislation yet. The only difference is that the EU checkpoints will not control this. Furthermore, it is up to the provider countries to monitor conformity with their respective legislation and also to monitor the utilisation of the genetic resource in the user country. The checkpoint in the EU will only check whether PIC was obtained and MAT negotiated and make this information available to the provider country. That information can serve as leads for the actual monitoring activities conducted by the provider country.

Some practical experiences were also shared:

- *IPLCs – The Endorois Experience in Kenya*: The Endorois community has progressed a lot on ABS issues compared to other communities and is currently in the process of developing a bio-cultural community protocol (BCP). The community has now the necessary information – which was translated into local languages – to engage with researchers or other users of genetic resources and/or associated traditional knowledge. When access to genetic resources takes place in protected areas, the State provides support to the local communities in granting PIC and negotiating MAT. Building the capacity of IPLC institutions is therefore essential to help them interact with the various stakeholders.
- *IPLCs – The Madagascar Experience*: Local communities have always played an important role in the management and supply of biological resources. A benefit-sharing process had been implemented informally long before ABS processes were implemented. The development of a national ABS regulatory framework has put more emphasis on the critical role of local communities. Implementing a strategy to raise awareness and build the capacity of IPLCs on ABS related issues became essential. In order to formalise and institutionalise IPLC involvement, their role in the management of biological resources, as well as the importance of traditional knowledge and the role of traditional healers, must be recognised in the national ABS law. Local communities are currently working with some research institutions to identify resources with potential.

Experiences in ABS Implementation

Sharing and Learning: ABS Implementation Experiences in 10 African Partner Countries

In this session, participants were invited to attend different presentations prepared and designed by their peers to present the approach taken by their countries to implement the Nagoya Protocol and share experiences on the challenges encountered and lessons learnt along the way. The presentations were led by participants from the ten partner countries of the Initiative, namely Algeria, Benin, Cameroon, Kenya, Madagascar, Morocco, Namibia, The Democratic Republic of the Congo, South Africa, and Uganda and focused on 1-3 topics selected by the presenters themselves, as indicated in the list below.

- *Algeria*: Experiences from setting up a national ABS project: National strategy and regulatory / institutional framework on ABS.
- *Benin*: ABS activities at the community level: community protocols, people's biodiversity register, IPLC competent national authority.



- *Cameroon*: How to negotiate MAT with a local community when there is no legislation on ABS.
- *Kenya*: Establishing ABS committees for effective implementation of the Nagoya Protocol.
- *Madagascar*: (i) Elaboration of a biannual ABS road map; (ii) The ABS Committee; (iii) Participation of local communities in ABS.
- *Morocco*: (i) Creation of a steering committee for the ABS/Nagoya project by UNDP, GIZ, GEF; (ii) Valorisation strategy for genetic resources, the mechanisms for its implementation and setting up a national legal framework for ABS (GIZ Morocco); (iii) Communication plan and tools for supporting the implementation of the Nagoya Protocol and its ABS mechanism in Morocco (GIZ Morocco).
- *Namibia*: Towards the development of a Biocultural Community Protocol – Namibia’s experience.
- *Democratic Republic of the Congo (DRC)*: (i) Progress made by the DRC in the implementation of its national ABS framework; (ii) Valorisation of biological / genetic resources in DRC.
- *South Africa*: (i) Establishment of a task team to drive the amendment of the national legislation for ABS; (ii) Establishment of the National Bioprospecting Forum; (iii) Development of an implementation plan for the National Biodiversity Economy Strategy.
- *Uganda*: (i) Engagements with the Private Sector (sandalwood harvesting in Moroto); (ii) The legal and institutional framework development for ABS; (iii) Next steps (review and capacity building).

Brief summaries of these presentations and related discussions can be found in Annex 2 of this report.

Plenary Discussion

Back in plenary, participants provided the following feedback:

- The sharing of rich and concrete experiences, challenges and lessons learnt allowing for mutual learning was very useful.
- This exchange of experiences highlighted the difficulty to address the protection of traditional knowledge and related issues. It also highlighted the importance of IPLCs’ participation in ABS processes and the need for governments to put more efforts into building their capacity on ABS-related issues. Supporting the development of BCPs was perceived as the suitable approach to empower IPLCs on ABS-related issues.
- The presentations showed that a number of issues are common to most countries. These are, for example, communication challenges, capacity building, finance, political will, documentation of traditional knowledge, establishing ABS contracts, etc. A regional and coordinated approach to ABS implementation as encouraged by the AU Guidelines is therefore relevant and will ensure that African countries do not compete with one another as provider countries.
- The presentations also revealed that several countries have interim measures in place or are currently working on them.

ABS Measures: Options for Getting Started

In this session, held partly in plenary, partly as a parallel session to the tutorial sessions on ABS contracts and intellectual property, participants discussed the different options available for getting started with the



establishment of ABS measures. *Pierre du Plessis from the ABS Initiative*, who facilitated the session, reminded everyone that the success of the Nagoya Protocol, which fleshes out the ABS principles and obligations of Parties initially proposed in Article 15 of the CBD, requires effective implementation at national level. The establishment of legislative, administrative and policy measures is therefore key for the Protocol to be operational. This also means that in the absence of ABS measures, access to genetic resources and associated traditional knowledge is not regulated. Nevertheless, even in such circumstances, some benefit-sharing is still possible, if agreed in a contract. Mr du Plessis then drew participants' attention to the fact that the AU Guidelines, which serve as a reference frame for all African countries in their Nagoya Protocol implementation processes, state that PIC and MAT are required for accessing genetic resources and associated traditional knowledge in all African countries, even in countries with no ABS laws or regulations in place.¹³ Therefore, the first and most basic ABS measure that African countries have to consider to prevent an assumption of free access to their genetic resources and associated traditional knowledge is to put a notification on the ABS Clearing-House that PIC and MAT are required pending further legislation.

Based on the above and their own experiences, participants reflected further on alternatives or complementary steps to design ABS measures that will suit their national circumstances such as:

- Using the AU Guidelines which provides practical guidance on how national ABS systems can be implemented in a regionally coordinated manner;
- Using or amending existing laws to anchor policy and administrative measures on ABS;
- Updating existing or developing new ABS measures aligned with the provisions of the Nagoya Protocol;
- Considering adopting interim measures to accommodate demands until fully-fledged legislation is adopted and learn from practical experience to develop effective ABS measures.

Participants also shared their thoughts on other core elements of ABS measures, such as:

- Designating competent national authorities and national focal points;
- Establishing rules and procedures for access (i.e. PIC, MAT and benefit-sharing);
- Designing compliance and monitoring measures;
- Developing specific measures for IPLCs (such as, e.g., the use of BCPs, the role of traditional authorities in granting access and the respect of customary laws).

Mr du Plessis concluded the session by highlighting that ABS contracts (e.g. material transfer agreements, MAT or benefit-sharing agreements) were key to make the ABS system work and could be negotiated and enforced even in the absence of a national ABS regulatory framework.

¹³ Article 9 of the AU Strategic Guidelines states that: "African Union Member States as countries of origin or as countries having acquired genetic resources in accordance with the Convention on Biological Diversity resolve that prior informed consent is required for access to their genetic resources and that such genetic resources shall only be utilised as authorised with their prior informed consent and specified in mutually agreed terms, in accordance with Article 6 of the Nagoya Protocol, unless the Member State providing genetic resources has expressly waived the prior informed consent requirement. Having or obtaining physical access to such genetic resources, including from ex situ collections, does not imply that prior informed consent for their utilisation has been granted or is not required. Utilisations without prior informed consent and without the establishment of mutually agreed terms are considered illegitimate. Member States shall cooperate to enforce their sovereign rights in this regard".



Parallel Session: ABS Contracts

This tutorial, facilitated by *Morten Walløe Tvedt from the Fridtjof Nansen Institute*, provided the participants with practical advice on how to negotiate and draft successful ABS contracts. Practical examples were used to explain and familiarise participants with the rules and key elements to consider when drafting an ABS contract, among others:

- Regardless of whether a regulatory framework on ABS is in place, ensure that ABS contracts are enforceable in provider countries and in countries where utilisation is foreseen to take place;
- Clearly identify parties to the agreement, on both the provider and user side, who have legal authority to sign the agreement in order to ensure that it holds the desired degree of accountability. Private persons should not sign ABS agreements;
- Avoid ambiguity and use a language that is clear, enforceable and understandable to leave as little room for interpretation or uncertainty as possible;
- Be specific and concrete regarding all substantive obligations and processes – the contract should cover all aspects of utilisation (purpose and scope of utilisation, traditional knowledge, material transfer conditions, benefit-sharing, research, product development, commercialisation, patenting, third party transfer, etc.), specify conditions for all potential activities and clearly stipulate consequences of breaches and dispute resolution mechanism;
- Be aware of contract law principles.

In general, participants noted that it was not sufficient to point out weak elements of contracts and improvements but that it would be necessary to draft good sample clauses to support future contract negotiations. The discussion also highlighted that the chances that users would come back to renegotiate the terms of the contract in cases of change of intent were slim. Forcing users to renegotiate the terms of a contract previously agreed is against the principles of contract law and unrealistic. Instead, asking for a bank deposit as security to support compliance of the user with the terms of the contract should be considered. Finally, it was generally agreed that contract negotiations should be accompanied by contract lawyers who are familiar with all relevant jurisdictions.

Parallel Session: Intellectual Property Rights

The tutorial by Claudio Chiarolla, Legal Officer at the WIPO Traditional Knowledge Division, gave the participants an opportunity to discuss issues related to intellectual property rights (IPRs) and ABS contracts. Questions focused in particular on the protection of traditional knowledge, intellectual property aspects in contractual agreements and on the possible role of WIPO in the protection of traditional knowledge and genetic resources. While responding to the participants' questions, Mr. Chiarolla gave an overview of the various intellectual property tools that may play a key role in protecting genetic resources and associated traditional knowledge against misappropriation. He stressed the importance of these tools for the equitable sharing of the benefits arising from their use. The main intellectual property tools relevant to the protection of genetic resources and TK are patents, copyright, trademarks, geographical indications, and trade secrets. In this context, Mr. Chiarolla highlighted that each intellectual property tool has well-defined criteria. In general, there are several options for the protection of genetic resources and traditional knowledge:



- Use of existing intellectual property tools such as copyright, geographical indications, trademarks, patents, industrial designs or trade secrets.
- Adaptation of existing intellectual property systems to better take into account the interests of traditional knowledge holders
- Development of a system of protection “*sui generis*” taking into account the specificities of traditional knowledge which would then be recognised as a form of intellectual property.

In the discussion, Mr Chiarolla drew attention to the fact that national intellectual property systems can support compliance with ABS, including by requiring disclosure of origin of genetic resources and associated traditional knowledge in patent applications. Further, the role of WIPO was clarified. As the UN Specialised Agency dealing with intellectual property, WIPO provides support to countries and regional organisations in all intellectual property related matters, including traditional knowledge and genetic resources.

Guidance was also sought by participants with respect to the Convention of the International Union for the Protection of New Varieties of Plants (UPOV). The UPOV Convention aims to encourage breeders to create new varieties of plants and provides a *sui generis* system of intellectual property protection specifically adapted to the plant-breeding sector. Participants were provided with a comparison between the protection of an invention by a patent and the protection of a new plant variety by plant breeder’s rights under the UPOV Convention. For example, the subject matter of protection of a patented invention is specifically defined by the patent claims and, under some national laws, may consist of genetic parts and components, while the subject matter of protection of breeder’s rights can only be a new plant variety in accordance with the requirements set out in the UPOV Convention. In addition, exceptions and limitations specific to the UPOV system are the so-called breeder’s exemption, which is mandatory under UPOV, and a voluntary farmers’ privilege that may apply to small-scale farmers to replant seeds and other propagating materials for non-commercial use on their own holdings. Finally, participants expressed their wish for model agreements that include intellectual property clauses for the fair and equitable sharing of benefits arising from the utilisation of genetic resources.

Plenary Discussion

Back in plenary, participants discussed further the various themes debated in the parallel sessions. The major part of the discussion focussed on developing IPLCs’ capacity on ABS. Understanding all the aspects and implications of the Nagoya Protocol takes time, therefore it is important to train and build IPLCs’ capacity on ABS-related issues. Otherwise, it will be very challenging for them to grant PIC and negotiate MAT. ABS Focal Points have the important role to clarify what the relevant existing laws and processes are. Small grants can help to bring communities together for them to start thinking and learning about ABS. The CBD can also help some community members to attend relevant meetings. This, in turn, helps to bring back knowledge to the local communities.

PIC, MAT, Permit: Clarifying Concepts

In this presentation, *Hartmut Meyer from the ABS Initiative* clarified the role and relationship of PIC, MAT, ABS permits and the Internationally Recognised Certificate of Compliance (IRCC) generated by the ABS Clearing-House, focussing on the basic elements of these different legal tools that are necessary to establish functioning national ABS systems. PIC, MAT and ABS permits are core to regulating the access to and utilisation of genetic



resources and associated traditional knowledge. Generally speaking, PIC includes a consultation and information process and a decision but may not always produce a separate document. Clarifying who provides PIC is essential but varies between countries. Before the consent, i.e. PIC, is granted, providers and users negotiate the conditions upon which access will be granted. This process results in a document commonly known as MAT – a bilateral private law contract which includes, among others, a description of intended utilisation, clauses on unintended utilisation and on restriction of utilisation, description of benefit-sharing and the consequences resulting from failure to comply with specific conditions. MAT must be enforceable in the provider country and the country where utilisation occurs. Once PIC has been granted and MAT negotiated, the CNA issues a permit confirming that the process has been completed. The permit, which (unlike the ABS contract/MAT) is only enforceable in the issuing country, provides detailed information on both users and providers; recognises the existence of PIC & MAT as well as the conditions for sampling, handling and export. It enables the user to legally utilise the genetic resource or knowledge in question as defined in the MAT. Finally, the IRCC is the explicit international recognition that an ABS permit has been issued and that PIC has been obtained and MAT established. It is automatically generated once the provider country's publishing authority publishes a defined set of information about the permit through a form on the ABS Clearing-House. Through the IRCC, the authorities in the user country are made aware that a user in their country has accessed material from the provider country in compliance with the provider country's legislation. All the above will make a national ABS system functional at the international level. It is important to keep the process as simple as possible and to avoid unnecessary redundancies between the different elements; e.g., countries should carefully consider how many different documents the permitting process should result in.

Plenary Discussion

- PIC and MAT negotiations run in parallel. However, PIC can only be given when the terms of the agreements are known. PIC is a process which does not necessarily result in a document.
- Being well-informed prior to giving consent is very important. Providers are responsible for gathering information about the users and getting (legal) advice to be able to make a real informed decision prior to allowing access to their resources and associated traditional knowledge.
- Producing a flow chart of the different steps and documents which are needed to complete the application process to get a permit helps understanding the interplay between PIC, MAT, and ABS permit and elaborating effective ABS systems.
- Benefit-sharing relies on three pillars: an effective MAT, a system for monitoring utilisation and a compliance system.
- The IRCC provides evidence at the international level that a permit has been issued by a country. It is not a contract or a permit and it is not enforceable but it plays a crucial role in the Nagoya Protocol's system for monitoring compliance. The IRCC is the link between the permit and the monitoring system.



Monitoring and Compliance

Compliance under the Nagoya Protocol and the Compliance Regulation of the EU

In his presentation introducing this session on monitoring and compliance, *Suhel al-Janabi from the ABS Initiative* provided a brief overview of the compliance provisions under the Nagoya Protocol and how those have been implemented in the EU. Under the Protocol, Parties are required to put in place legislative, administrative or policy measures to ensure that users within their jurisdiction comply with any access rules established in provider countries (as specified in Articles 15, 16, 17 & 18).¹⁴ The EU ABS Regulation, applicable as of 12 October 2014, transposes the compliance provisions of the Nagoya Protocol into the EU legal framework. The Regulation establishes compliance rules for users of genetic resources and associated traditional knowledge in accordance with applicable ABS legislation or regulatory requirements of the provider country. Participant's attention was particularly drawn to the fact that the EU ABS Regulation only applies to:

- Genetic resources over which States exercise sovereign rights;¹⁵
- Genetic resources and associated traditional knowledge in countries that are Parties to the Nagoya Protocol
- Genetic resources and associated traditional knowledge that are accessed in a country that has ABS measures (applicable ABS legislation or regulatory requirements) in place;¹⁶
- Genetic resources and associated traditional knowledge accessed after 12 October 2014;¹⁷
- Traditional knowledge associated with genetic resources that is relevant for the utilisation of those genetic resources and covered in MAT;¹⁸
- All users who utilise genetic resources and associated traditional knowledge within the EU territory.

Upcoming Capacity Building Tools and Resources on Intellectual Property and ABS

Claudio Chiarolla from the Traditional Knowledge Division at WIPO drew participants' attention to the fact that national intellectual property systems could support compliance with ABS obligations by requiring the disclosure of origin of genetic resources in patent applications. He then provided a preview of two upcoming publications. The first study, titled: 'Key Questions to Address in Developing Patent Disclosure requirements related to Genetic Resources and Traditional Knowledge', looks at patent disclosure requirements as a means

¹⁴ Under the Nagoya Protocol, Parties are to: (i) take measures providing that genetic resources, and associated traditional knowledge where relevant, utilised within their jurisdiction have been accessed in accordance with PIC, and that MAT have been established, as required by another contracting party; (ii) cooperate in cases of alleged violation of another contracting party's requirements, (iii) encourage contractual provisions on dispute resolution in MAT, (iv) ensure an opportunity is available to seek recourse under their legal systems when disputes arise from MAT; (v) take measures regarding access to justice and the utilisation of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral award; (vi) take measures to monitor the utilisation of genetic resources after they leave a country including by designating effective checkpoints at any stage of the value-chain: research, development, innovation, pre-commercialisation or commercialisation; (vi) review the effectiveness of procedures and mechanisms to promote compliance with the Protocol. The Protocol foresees the adoption of compliance procedures and mechanism that will help Parties to comply and address cases of non-compliance. These will be agreed at a later stage.

¹⁵ Article 2 (1) of the EU ABS Regulation.

¹⁶ Article 2 (4) of the EU ABS Regulation.

¹⁷ Article 2 (1) of the EU ABS Regulation.

¹⁸ Article 3(7) of the EU ABS Regulation.



for countries to support the monitoring of compliance with ABS. Patent offices would in this case be ideally positioned to fulfil the role of checkpoints under the Nagoya Protocol. The study reviews, complements and updates existing WIPO resources and research from leading scholars. It also identifies the key questions that all policy makers need to address in this area, discusses approaches in various developed and developing countries and presents policy options in a user-friendly format (graphics, case studies and further reading). Mr Chiarolla also presented on WIPO's new 'Guide on Intellectual Property Issues in Access and Benefit Sharing Agreements' which discusses the types of intellectual property rights that may be relevant in an ABS context and how selected industrial sectors, including pharmaceutical, agricultural and cosmetics sectors engage in the utilisation of genetic resources and associated traditional knowledge. The guide also analyses particular approaches to research and development, and how intellectual property may affect the negotiation of MAT in the above sectors.

The Role of the ABS Clearing-House

In this presentation, *Matthew Dias from the SCBD* gave a brief overview of the ABS Clearing-House established under Article 14 of the Nagoya Protocol. The ABS Clearing-House is a platform for exchanging information on ABS and a key tool for facilitating the implementation of the Protocol. It enhances legal certainty, transparency and clarity by allowing countries to share information on procedures for accessing genetic resources and traditional knowledge. It contributes to increase opportunities for sharing benefits from the use of genetic resources and traditional knowledge and helps to ensure compliance with ABS measures and transparency in monitoring the utilisation of genetic resources along the value chain (research, development, innovation, pre-commercialisation or commercialisation), including through the IRCC, checkpoints and checkpoint communiqués. By making relevant information on ABS available (country profiles, national records¹⁹ and reference records²⁰), the ABS Clearing-House therefore offers opportunities for connecting users and providers of genetic resources and associated traditional knowledge and create fair and equitable ABS agreements. To make this system work, Parties are thus encouraged to provide and update the information required as per their obligations under the Protocol to the ABS Clearing-House.

Plenary Discussion

Participants discussed the following issues:

- The EU ABS Regulation has to be implemented at national level. National legislation of EU Member States will therefore vary as per their circumstances and needs. For example, France is developing an ABS law that addresses its user/provider profile.
- Utilisation has to take place in the EU to be subjected to the compliance obligations under the EU ABS Regulation.
- A publication is not a checkpoint in the EU but the biggest publishers for scientific papers act more and more as informal checkpoints, in that they ask for evidence that PIC has been granted before publishing research on genetic resources. Checkpoints can be a) institutions, such as a patent office,

¹⁹ National records are only published by Governments and include required information on ABS National Focal Points, ABS measures, Competent National Authority, information on permits or equivalent (IRCC), checkpoints, checkpoint communiqués and interim national report.

²⁰ Reference records can be submitted by any user and include literature related to ABS, capacity building initiatives and material, community protocol or customary law or procedure, model contractual clause or codes of conduct, guidelines and best practices and/or standards.



but also b) points in time, as it is the case in the EU ABS Regulation (e.g. the moment of applying for public funding, or the moment of putting a product on the market).

- So far, African countries have mostly focused on setting up ABS measures from the point of view as a 'provider country', thus concentrating on access regulations. But all Parties to the Nagoya Protocol, including the typical 'provider countries', are obliged to also set up functioning compliance systems within their own jurisdictions, thus start looking at ABS from the angle of a 'user country'.
- The information that is required on the IRCC is clearly stated in Article 17 (4) of the Nagoya Protocol. The following information should be provided (as long as it is not confidential): issuing authority, date of issuance, the provider, unique identifier of the certificate, the person or entity to whom PIC was granted, subject matter or genetic resources covered by the certificate, confirmation that MAT were established, confirmation that PIC was obtained, and commercial and/or non-commercial intent.
- It is up to the provider and the user to decide what information is confidential.
- Third-party transfer can appear on the IRCC although it is not mandatory. This issue must also be clearly addressed in the permit and the MAT.
- The IRCC is a representation of the permit. It does not have more force than the permit.
- The checkpoint communiqué contains the information that must be collected by the checkpoint as indicated in Article 17 (1) of the Nagoya Protocol and includes: information related to PIC, to the source of the genetic resources, to the establishment of MAT and/or to the utilisation of genetic resources. Such information, including from IRCC where they are available, will be provided to relevant national authorities, to the Party providing PIC and to the ABS Clearing-House.
- If the user does not have any IRCC, the user has to indicate the name of the source country as well as information on PIC and MAT so that the checkpoint can revert to the source country.
- An EU checkpoint does not deal with a resource which is outside the scope of the Nagoya Protocol or the scope of the EU ABS Regulation or provided by a non-Party. However, the user can provide information voluntarily.
- When a user fails to comply, the ABS Clearing-House will only forward the information – no sanction will be delivered. Provider countries should provide for non-compliance measures and for compliance/non-compliance issues in their legislation and have to take responsibility on how they want to address this issue. The checkpoint has no obligation to sanction users who failed to comply. What is key here is whether the user is fulfilling the requirements of the provider countries. The CNA has the responsibility to deal with misappropriation - the IRCC cannot replace provider country's responsibility to trace the use of genetic resources. There is therefore a need for more action to track the use of genetic resources beyond the IRCC.



Traditional Knowledge

Rooibos Restitution

In this presentation, *Lesle Jansen from Natural Justice* reported on the latest developments regarding the 'Rooibos Robbery Case'²¹ after food giant Nestlé applied for five patents on the use of Rooibos and Honeybush, two plants endemic to South Africa commonly used to make herbal teas and well-known traditionally for their medicinal properties. Screening the trailer of the film "Rooibos Restitution" which is currently being developed by Natural Justice and its partners, Ms. Jansen informed the participants that years of advocacy came to a key stage with the signing of a benefit-sharing agreement between Nestlé and the Khoi and the San Peoples, holders of the traditional knowledge on rooibos. Other outcomes included the development of a BCP which helped the communities to organise themselves and assisted them in their decision-making process; the identification and formal recognition by the South African government of the Khoi and the San Peoples as the traditional knowledge holders; the payment of monetary benefits; and the start of a negotiation process around benefit-sharing with the whole South African rooibos industry. Key factors to such successful outcomes included, among others, South Africa's enabling legislative environment; the clear recognition and protection of traditional knowledge held by IPLCs within regulations; community mobilisation, on-going training of the communities on ABS-related issues as well as the proactive support by committed specialised lawyers and the relevant government authorities.

Plenary Discussion

Key discussion points included:

- The complexity of defining what a community is and finding funds, which remained on-going challenges throughout the duration of the negotiations.
- The importance to recognise traditional knowledge holders and take into account historical injustices. ABS provided a strong momentum for addressing communities' historical concerns.
- The specific scope of the South African Biodiversity Act as an enabling element: Predating the Nagoya Protocol, the South African ABS law applies to bioprospecting on 'indigenous biological resources', with the definition of 'bioprospecting' being relatively broad. This allowed the Khoi and San to enter into the benefit-sharing negotiations.
- The importance to extend some of the benefits received to environmental conservation and the preservation of the resources. In this specific case, there is no real issue of sustainability of the resource as rooibos is an indigenous resource that has been domesticated and farmed extensively. However, some of the benefits could be used for other environmental issues.
- The critical role played by the government in such lengthy processes to ensure that the law is respected, highlighting the need for political will and commitment to ABS.
- The importance to share the experience of the Khoi and the San Peoples to show what communities can achieve when they are well-informed and advised.

²¹ <http://naturaljustice.org/video/rooibos-robbery-a-story-of-bioprospecting-in-south-africa/>



Senegal Day

ABS in Senegal

Senegal ratified the Nagoya Protocol on 3 March 2016. Prior to ratifying the Protocol, Senegal had set up a national ABS committee and started developing a national strategy on ABS. Furthermore, an action plan was developed focussing on establishing ABS-related bodies and raising awareness on ABS-related issues. Senegal is planning to develop interim measures to be able to respond to current access demands and learn from that experience to establish an ABS regulatory framework before 2018. During this 'Senegal day', participants were introduced to three cases from Senegal relevant to ABS in different regards.

ABS and Historic Collections: First Indigenous Pharmacopoeia Study Mission in 'French West Africa'

In this presentation, *Mathieu Gueye from the Botany Laboratory of the Institut Fondamental d'Afrique Noire (IFAN), Université Cheikh Anta Diop* provided an overview of the oldest herbarium in French-speaking Africa. Created in 1942 and based essentially on unpublished data collected during the first ethnobotanical study on indigenous pharmacopoeia conducted in Senegal and other countries of the sub-region between 1935 and 1941. Today, it represents a collection of more than 60 000 specimens. The recent recording of data collected in those different countries in an electronic database has highlighted a number of plants with potential interests as well as the traditional knowledge associated with them. Potential options for the way forward include the possibility of initiating transboundary cooperation in line with Article 11 of the Nagoya Protocol and using this study as a basis to develop a strategy on how to valorise these resources in the region.

Public Health and International Research in Microbiology: Exchange of Biological Material and Benefit-Sharing

Aissatou Toure (Dakar) and Francis Delpeyroux (Paris) from the Institut Pasteur presented on the challenges related to the legal implications arising from the implementation of ABS measures in the use and the international exchange of pathogens relevant to public health and in the research and development of vaccines by commercial actors. With this in mind, they highlighted the need for specialised measures taking into account public health requirements, including the need for facilitated access covered under Article 8 of the Nagoya Protocol, not only in case of epidemic outbreaks but also for basic research done to prevent any threat to public health.

The Senegalese Association for the Promotion of Local Seed Varieties

This presentation by *Lamine Biaye, Association Sénégalaise des Producteurs de Semences Paysannes (ASPSP)* provided an overview of the activities carried out by ASPSP to promote the preservation and exchange of local seed varieties and farmer seeds in Senegal and across the sub-region. The discussion emphasised the need to raise awareness about the recognition of farmers' rights in the ITPGRFA, clarify the interface between the Treaty and the Nagoya Protocol and ensure their mutually supportive implementation at national level.

Concluding Plenary Discussion

These three case studies provided different positions and perspectives on how ABS may affect different sectors and their use of genetic resources. The IFAN sees challenges as well as opportunities arising from ABS, especially with regard to traditional knowledge, transboundary issues and research collaboration. The Institut Pasteur sees mostly challenges arising from ABS as it might impede on the current system of quick exchange of



pathogens for public health-related research. Local seed producers, on the other hand, mostly see opportunities arising from ABS. Both the Nagoya Protocol and the ITPRGFA acknowledge the role of IPLCs and local farmers in the conservation and management of biodiversity and traditional knowledge and recognise their right to freely exchange and use it in local / customary contexts. Furthermore, ABS can promote research on and commercialisation of local seed varieties, which can create additional income for the concerned local communities. The discussions in the plenary went on to kick-start initial reflections on how to integrate and accommodate such a diverse range of stakeholders and their respective needs into national ABS processes and systems and on how to strategically prepare the African Group's contribution at COP 14 / COP MOP 3. Topics suggested in this discussion have been merged with the outcomes of the group reflection exercise on the way forward below.

Communication and Knowledge Management

Updates on Products of the ABS Initiative

In this presentation, *Tobias Dierks from the ABS Initiative* provided an update on the various ABS communication and capacity building tools developed by the Initiative to support countries in their efforts to implement the Nagoya Protocol, focussing on new products such as the use of social media and new publications on the key ABS themes dealt with by the Initiative and partners. Participants were informed that many of the documents and media items were available in French and that all were available either in print or to download from the Initiative's website. In 2017, the ABS Initiative will focus on developing blended learning tools, documenting ABS cases and adapting the website to new requirements and user needs.

Road to COP 14 / COP MOP 3

Reflecting on the Outcomes of COP 13 / COP MOP 2

This session was introduced by *Valérie Normand from the SCBD*, who recapped the main outcomes of COP MOP 2 presented earlier during the week and drew participants' attention to the main forums²² and meetings²³ in the coming months which will provide opportunities to integrate the African position in the international debate leading to COP MOP 3. Mrs Normand also reiterated the importance for Parties to the Protocol to submit their interim reports by 1 November 2017 and provide their positions on topics such as Article 10, DSI or synthetic biology via the ABS Clearing-House. She concluded her intervention by informing the participants that views from stakeholders other than the Parties to the CBD or the Nagoya Protocol will also be taken into consideration.

²² These are: the World Health Organisation (WHO), ITPGRFA, the Commission on Genetic Resources for Food and Agriculture (CGRFA) or the United Nations Conventions on the Law of the Sea (UNCLOS) Preparatory Committee on Biodiversity Beyond National Jurisdiction (BBNJ).

²³ These are: the Informal Advisory Committee to the ABS Clearing House, the Informal Advisory Committee on Capacity Building for the implementation of the Nagoya Protocol the Compliance Committee, the Ad Hoc Technical Expert Group on Digital Sequence Information on Genetic Resources, the 22nd Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice and the 2nd Meeting of the Subsidiary Body on Implementation.



Group Reflection on the Way Forward

Participants were asked to reflect on and discuss in table groups what, in their views, were the main three issues or priorities to consider for the review of the Nagoya Protocol in Cairo in 2018 and for the African Group to work on in the process leading to COP 14 / COP MOP 3. The results of these table group discussions were later to inform a common reflection on the issues to be considered by the African Group and submitted for review at COP 14 / COP MOP 3.

Restitution of Group Reflection

The results of this first reflection highlighted the need to consider the following issues:

- Article 10 of the Nagoya Protocol on the Global Multilateral Benefit-Sharing Mechanism;
- Coordination of Article 8 (j) of the CBD with the Nagoya Protocol;
- Development of a definition of traditional knowledge associated with genetic resources;
- Protection and documentation of traditional knowledge associated with genetic resources;
- Development of a common approach to the valorisation of traditional knowledge associated with genetic resources and involvement of IPLCs in the process;
- Development of a common African position on DSI and synthetic biology;
- Broadening of the scope of the Nagoya Protocol to include derivatives (as defined in the Nagoya Protocol);
- ABS and public health (harmonisation of access to pathogens, development of a specialised regime for pathogens of main relevance for public health and coordination of national approaches);
- Awareness raising and capacity building, especially for IPLCs;
- IPLCs' involvement in ABS-related international forums and meetings;
- Greater consideration of intellectual property, especially in the development of value chains (based on successful past experiences such as the development of a value chain for shea butter);
- Support to national implementation through regional and sub-regional projects;
- Harmonisation of ABS standards;
- Harmonisation of national and regional legal frameworks on ABS;
- Article 25 of the Nagoya Protocol on Financial Mechanism and Resources;
- Establish an African ABS monitoring mechanism to ensure compliance;
- Inventory of genetic resources (and associated traditional knowledge) with partner countries and development of a coordinated and streamlined ABS permitting process;
- Transition from a provider country to a user/provider country;
- Capacity building on the mutually supportive implementation of the Nagoya Protocol and other international instruments such as the ITPGRFA.



In a closed session organised after the closure of the workshop and based on these first suggestions, African participants discussed the African Group's preparatory process towards COP 14 and COP MOP 3.

The Way Forward

In this last presentation of the workshop, *Andreas Drews from the ABS Initiative* provided a brief overview of the Initiative's draft work plan for 2017-18 by highlighting the major projects and activities envisaged. He informed the participants that the draft work plan would be presented to the Steering Committee, to be held on 11th and 12th March 2017, for approval. The approved work plan is to be implemented depending on available funds.

Closure



Presentations

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

Day 1

Key Outcomes from COP MOP 2 – [Matthew Dias](#), Secretariat of the Convention on Biological Diversity

Recent Developments in WIPO: the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions – [Claudio Chiarolla](#), Traditional Knowledge Division, World Intellectual Property Organisation

Update on the International Treaty on PGRFA – [Kent Nnadozie](#), Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture

Reflecting on COP 13 and COP MOP 2: Strategic Implications for African ABS Implementation – [Pierre du Plessis](#), ABS Initiative

The Provider-User Interplay in ABS (EN; FR) – [Lena Fey](#) (presenter), [Kathrin Heidbrink](#) and [Peter Schauerte](#), ABS Initiative

Day 2

Developing ABS Measures – [Pierre du Plessis](#), ABS Initiative

Drafting Successful ABS Contracts – [Tomme Rosanne Young](#) and [Morten Walløe Tvedt](#) (presenter), Fridtjof Nansen Institute

Day 3

Establishing Functioning ABS Systems: The Role and Relationship of PIC, MAT, Permits and the IRCC – [Hartmut Meyer](#), ABS Initiative

Compliance under the Nagoya Protocol and the Compliance Regulation of the EU – [Suhel al-Janabi](#), ABS Initiative

The ABS Clearing-House – [Matthew Dias](#), Secretariat of the Convention on Biological Diversity

Rooibos Restitution – Presentation; Trailer – [Lesle Jansen](#), Natural Justice



Day 4

APA et Collections Historiques: La Première Mission d'Etude de la Pharmacopée Indigène en AOF – Mathieu Gueye, Laboratoire de Botanique de l'Institut Fondamental d'Afrique Noire Cheikh Anta Diop

Santé Publique et Recherche Internationale en Microbiologie: Echange de Matériel Biologique et Partage de Avantages – Aissatou Toure, Unité d'Immunologie, Institut Pasteur, Dakar and Francis Delpeyroux, Unité de Biologie des Virus Entériques, Centre Collaborateur de l'OMS de Recherche sur les Entérovirus et Vaccins Viraux, Institut Pasteur, Paris

Agroécologie et Semences Paysannes et les Lois – Lamine Biaye, Association Sénégalaise des Producteurs de Semences Paysannes

Day 5

New Products & Channels 2015-2017 – Tobias Dierks, ABS Initiative

Key Outcomes of COP MOP 2 and Next Steps for the Nagoya Protocol – Valérie Normand, Secretariat of the Convention on Biological Diversity



Agenda

Monday, 6 March 2017: International Processes	
8h00	Registration
9h00	Welcome and Technical Opening
9h30	Introduction to the Workshop Getting to Know Each Other
10h30	<i>Coffee/Tea</i>
11h00	Updates on International Processes <ul style="list-style-type: none"> ■ CBD ■ WIPO ■ FAO
12h30	<i>Lunch</i>
14h00	Reporting from COP 13 / COP MOP 2
15h30	<i>Coffee/Tea</i>
16h00	The Provider-User Interplay in ABS
17h30	<i>End of Day One</i>
18h00	Official Opening and Reception

Tuesday, 7 March 2017: Experiences in ABS Implementation; Interim Measures	
9h00	Sharing and Learning: ABS Implementation Experiences in 10 African Countries
10h30	<i>Coffee/Tea</i>
11h00	Sharing and Learning : ABS Implementation Experiences in 10 African Countries (cont.)
12h30	<i>Lunch</i>
14h00	ABS Measures : Options for Getting Started
15h30	<i>Coffee/Tea</i>
16h00	Parallel Sessions: <ul style="list-style-type: none"> ■ ABS Measures: Options for Getting Started (cont.) ■ Tutorials: <ul style="list-style-type: none"> (a) ABS Contracts (b) Intellectual Property Rights
17h00	<i>End of Day Two</i>



Wednesday, 8 March 2017: PIC, MAT, Permit; Monitoring & Compliance; Traditional Knowledge	
9h00	PIC, MAT, Permit: Clarifying Concepts
10h30	<i>Coffee/Tea</i>
11h00	PIC, MAT, Permit: Clarifying Concepts (cont.)
12h00	<i>Lunch</i>
13h30	Monitoring & Compliance: The Role of the ABS Clearing-House
15h30	<i>Coffee/Tea</i>
16h00	Traditional Knowledge Role & Options for Holders of Traditional Knowledge in the Provider-User Interplay
18h00	<i>End of Day Three</i>

Thursday, 9 March 2017: Senegal Day	
8h30	ABS in Senegal
10h00	<i>Coffee/Tea</i>
10h30	ABS in Senegal (cont.)
12h30	<i>Lunch</i>
14h00	ABS in Senegal (cont.)
15h00	<i>End of Programme – Free Afternoon</i>

Friday, 10 March 2017: Road to COP 14 / COP MOP 3	
9h00	Road to COP 14 / COP MOP 3
10h30	<i>Coffee/Tea</i>
11h00	Road to COP 14 / COP MOP 3 (cont.)
12h30	<i>Lunch</i>
14h00	Updates on Products of the ABS Initiative
14h30	Closure
15h30	<i>End of Workshop</i>



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Annex 1:

Key Outcomes of the 10th Pan-African ABS Workshop (6 to 10 March, Dakar, Senegal)

Monday, 6 March 2017: International Processes

- National reports on the implementation of the Nagoya Protocol are due on 1 November 2017. These reports are of strategic importance, as they will inform the assessment and the review of the Nagoya Protocol on the occasion of COP MOP 3 in 2018. In fact, the assessment and the review were a precondition for the African Group to agree to the adoption of the Nagoya Protocol.
- Common positions of the African Group need to be prepared on topics such as digital sequence information (DSI), synthetic biology, the Global Multilateral Benefit-Sharing Mechanism, Capacity Building / Financing.
- Interlinkages between international ABS-related processes (CBD, FAO / ITPGRFA, WIPO): Ensure communication between the respective government institutions in charge of these processes at the national level to ensure consistent African ABS positions.
- Presentation of a schematic model of the interplay between providers, users and regulators according to the Nagoya Protocol and the African Union (AU) Guidelines; the ABS Clearing House is key for the necessary flow of information between the Parties of the Nagoya Protocol and hence the functioning of the overall compliance system. The importance of the ABS permits and the Internationally Recognised Certificate of Compliance (IRCC) was pointed out.

Tuesday, 7 March 2017: Experiences in ABS Implementation; ABS Measures

- “Market place” presenting key experiences in ABS implementation in the ABS Initiative’s ten partner countries, focusing on:
 - Algeria: Experiences from setting up a national ABS project: national strategy and regulatory/institutional framework for ABS
 - Benin: ABS activities at the community level: community protocols, people’s biodiversity register, IPLC competent national authority
 - Cameroon: How to negotiate MAT with a local community when there is no legislation on ABS
 - DRC: Progress made by DRC on the implementation of its national ABS framework; Valorisation of genetic/biological resources in DRC
 - Kenya: Establishing ABS committees for effective implementation of the Nagoya Protocol
 - Madagascar: Elaboration of a biannual ABS road map; The ABS Committee; Participation of local communities in ABS
 - Morocco: Creation of a steering committee for the ABS/Nagoya project by UNDP, GIZ, GEF; Valorisation strategy for genetic resources, the mechanisms for its implementation and setting up a national legal framework for ABS (GIZ Morocco); Communication plan and tools for supporting the implementation of the Nagoya Protocol and its ABS mechanism in Morocco (GIZ Morocco)
 - Namibia: Towards the development of a biocultural community protocol – Namibia’s experience
 - South Africa: Establishment of a task team to drive the amendment of the national legislation for ABS; Establishment of the national bioprospecting forum; Development of the implementation plan for the national biodiversity economy strategy
 - Uganda: Engagements with the private sector (sandalwood harvesting in Moroto); The legal and institutional framework development for ABS; Next steps (review and capacity building)



- Options for getting started with the development of national regulatory frameworks for ABS: Analyse existing laws, develop interim decrees; Use AU Guidelines; Consider putting even very basic requirements on the ABS-CH to avoid the assumption of free access to genetic resources and associated traditional knowledge (e.g. reference to AU Guidelines, simple notification that PIC and MAT are required pending further legislation, a process for obtaining PIC). Also, the need for complementing compliance measures for the monitoring of genetic resources in user countries was discussed.
- For the functioning of ABS, good contracts are key and can be negotiated and enforced even in the absence of a national ABS regulatory framework.
- Contracts (Anglophone group): Make sure that an ABS contract is enforceable in the provider country and in the country / countries where utilisation is foreseen to take place. Contract negotiations should thus be accompanied by contract lawyers that are familiar with all relevant jurisdictions. It is crucial to include those parties in the contract that are responsible for utilisation and who represent the user legally. The contract should cover all aspects of utilisation (research, product development, commercialisation, patenting, third party transfer etc.) and specify conditions for all potential activities. It is important to also specify consequences of non-compliance with the contract.
- IPRs & traditional knowledge (Francophone group): intellectual property instruments (e.g. patents, trademarks, geographical indications) can be used to protect the outcomes of the utilisation of traditional knowledge and genetic resources. Classic intellectual property instruments cannot protect traditional knowledge as such; to address this gap, the WIPO IGC discusses the development of an international *sui generis* system for the protection of traditional knowledge. The documentation of traditional knowledge bears potentials and risks; it is recommended to develop a national traditional knowledge documentation strategy with all relevant stakeholders that takes into account national needs, specificities and circumstances.

Wednesday, 8 March 2017: PIC/MAT/Permit; Monitoring & Compliance; Traditional Knowledge

- Clarification of the concepts PIC, MAT and permit and their interrelations: as also reflected in the AU Guidelines, **PIC** is a process, **MAT** are a document/contract, and a **permit** (or its equivalent) does not necessarily have to be a document, but will be in most cases. The permit provides evidence of PIC and MAT. When the authorities of the provider country provide information on the permit to the ABS-CH (through filling in a form), an IRCC is generated automatically by the ABS-CH. The IRCC provides evidence at the international level that a permit was granted.
- It is recommended to visualise the national interplay between PIC, MAT and ABS permit, including other relevant permits, in a flow chart. Such visualisations are useful for elaborating and presenting ABS systems.
- Benefit-sharing relies on three pillars: an effective contract (MAT), a system for monitoring utilisation, and a compliance system. The IRCC is the link between the permit and the monitoring system.
- The compliance system in the European Union: The EU does not control the utilisation of genetic resources as such; EU checkpoints control whether an ABS permit has been obtained in compliance with the provider country legislation. Note that associated traditional knowledge needs to be related to the utilisation of genetic resources and must be covered by MAT to be in the scope of the EU regulation.
- The EU compliance regulation only applies to cases where six conditions are met, the two most important conditions being: the genetic resources have been sourced from a Party to the Nagoya Protocol, and that Party has an ABS regulatory framework in place.
- In any case, it is up to the provider country to monitor the utilisation of genetic resources as specified in the respective MAT.



- As stated in the Nagoya Protocol, all Parties are obliged to set up national measures for the monitoring of compliance of users within their jurisdiction. This is considered as an upcoming field for capacity building and implementation of the Nagoya Protocol in Africa.
- National intellectual property systems can support compliance with ABS by requiring disclosure of origin of genetic resources in patent applications.
- WIPO provides support to countries in all IPR-related matters, including traditional knowledge and genetic resources.
- The ABS-CH is the key information sharing tool for the global ABS system.
- The IRCC cannot prevent misappropriation of genetic resources and associated traditional knowledge, but it is an instrument aiming at ensuring compliance with MAT and the provisions of the Nagoya Protocol.
- All Parties to the Nagoya Protocol are obliged to provide ABS-relevant information to the ABS-CH (National Focal Point, CNA, ABS regulatory system, information about permits granted).
- Respecting confidentiality clauses in MAT, it is up to countries to decide which permit-related information to provide to the ABS-CH.
- Users rely on sufficient information on the ABS-CH in order to be able to comply with provider country regulations.
- The Khoi and San / Nestlé case on rooibos from South Africa: The utilisation of traditional knowledge associated with the rooibos plant has been retroactively covered by an ABS contract, which led to a functioning benefit sharing scheme covering several Khoi and San communities as the holders of this traditional knowledge. Key success factors included the development of a bio-cultural community protocol helping the Khoi and San peoples to organise their decision making process, existence of a functioning ABS regulatory framework in South Africa, the support of specialised contract lawyers and the pro-active support through the relevant government authorities in South Africa.

Thursday, 9 March 2017: Senegal Day

- Presentation of three diverse cases with links to ABS:
 - The Herbarium of the IFAN (Institut Fondamental d'Afrique Noire) presented on an ethnobotanical study, conducted in Senegal and other countries of the subregion between 1936 and 1941, that has not yet been published. The recent recording of the data collected in different countries in an electronic database brought to light a number of plants that might be of interest for R&D. Options discussed for the way forward included initiating transboundary collaboration in line with Article 11 of the Nagoya Protocol and using this study to develop a strategy on how to valorise these resources in the region.
 - The Institut Pasteur (Paris and Dakar) presented on challenges related to the international exchange of pathogens relevant for public health, including R&D for vaccines by commercial actors, in the light of ABS. The discussion highlighted the need for specialised measures taking into account public health requirements including the need of rapid access, e.g. in case of epidemic outbreaks.
 - ASPSP (Senegalese association for the promotion of local seed varieties) presented on their activities to promote the preservation and exchange of local seed varieties in Senegal and across the sub-region. The discussion emphasised the necessity to clarify the interface to the ITPGRFA and to ensure its mutually supportive implementation with the Nagoya Protocol, including the recognition of farmers' rights.



- The diversity of the three cases was mirrored in their different positions with regard to ABS. The Herbarium sees challenges and opportunities arising from ABS, especially with regard to associated traditional knowledge, transboundary issues and research collaboration. The Institut Pasteur sees mostly challenges arising from ABS in that their system of quick exchange of pathogens for public health-related research might be hindered through the implementation of the Nagoya Protocol. The local seed producers instead see mostly opportunities arising from ABS in that research on and commercialisation of local seed varieties can create additional income for the concerned local communities. The discussion in the plenary kick-started initial reflections on how to integrate such diverse stakeholders and their respective needs into national ABS processes in Senegal and beyond, including the strategic preparation of COP 14 in 2018.

Friday, 10 March 2017: Road to COP 14 and COP MOP 3

- The ABS Initiative offers a variety of capacity building tools (awareness raising, publications on technical questions, training formats, website etc.) which are available in print and online.
- The main platforms and meetings providing the opportunity to integrate the African position in the international discussion were presented by the SCBD.
- Participants discussed and compiled issues to be considered by the African Group in the process towards COP 14 and COP MOP 3. Some of the relevant identified topics are: DSI, pathogens, Article 10 of the Nagoya Protocol, associated traditional knowledge, capacity building, awareness raising.
- In a closed session for African participants only, delegates elaborated on the African Group's preparatory process towards COP 14 and COP MOP 3.



Annex 2:

Sharing and Learning: ABS Implementation Experiences in 10 African Partner Countries

Algérie

Genèse de la Formulation d'un Projet National : « Stratégie Nationale et Cadre Réglementaire et Institutionnel sur l'APA »

L'Algérie a signé le Protocole de Nagoya sur l'APA en 2011 mais en l'absence d'un cadre juridique et institutionnel, la ratification du protocole a été reportée. En 2013, l'Algérie a co-organisé avec la GIZ un atelier régional sur la mise en œuvre du Protocole de Nagoya, dans l'objectif de formuler un projet régional. Malheureusement la concrétisation d'un projet régional n'a pas été possible à ce moment-là.

Suite à cet atelier, qui a suscité un intérêt pour l'APA, un projet a été initié avec un co-financement FEM-STAR 5, afin de mettre en place une stratégie nationale, un cadre juridique et institutionnel pour la mise en œuvre du Protocole de Nagoya.

La formulation de ce projet a été faite en concertation intersectorielle et multipartite (société civile et secteur privé). Le projet est aussi complémentaire avec les activités menées par la GIZ (Programme GENBI) et l'Initiative APA en Algérie, notamment le diagnostic pays, l'atelier de formation sur APA et le travail sur le montage d'une chaîne de valeur.

Le projet englobe deux composantes: i) L'élaboration d'une stratégie nationale et d'un cadre juridique et institutionnel de mise en œuvre du Protocole de Nagoya et ii) le renforcement des capacités des parties prenantes et la construction d'une stratégie de communication sur l'APA.

Les résultats attendus sont:

Pour la composante 1:

- Un cadre juridique national, global et cohérent sur l'APA et la protection des connaissances traditionnelles a été approuvé, est établi et opérationnel ;
- Un cadre institutionnel national cohérent avec les capacités et les mandats nécessaires a été approuvé, est établi et opérationnel ;
- Un mécanisme d'APA efficace et un modèle d'accord d'APA ont été élaborés.

Pour la composante 2:

- L'amélioration d'au moins 50% de la capacité des autorités nationales compétentes existantes ou nouvelles sur l'APA ;
- 80% des parties prenantes nationales concernées sont informées du cadre réglementaire et institutionnel relatif à l'APA, aux connaissances traditionnelles et ses différentes dimensions ;
- Au moins 5 projets de bioprospection ont été identifiés à la fin du projet.

Le projet a été lancé en Novembre 2016, et a l'ambition de finaliser le projet de cadre juridique et institutionnel sur l'APA au début de l'année 2018.



Bénin

Activités APA au Niveau Communautaire : Protocoles Communautaires, Registre Communautaire de Biodiversité, Autorité Nationale Compétente de Communautés

Dans le cadre des travaux de l'atelier d'échanges panafricain sur l'APA qui s'est ouvert le 06/03/2017 à Dakar au Sénégal, le Bénin a animé la place du marché sur la thématique suivante : Activités APA au niveau communautaire et plus précisément sur les protocoles communautaires, les registres communautaires de biodiversité, et les autorités nationales compétentes au niveau communautaire.

La place du marché a été animée par le point focal APA du Bénin, le directeur exécutif de l'ONG CeSaReN et du point focal TIRPGAA. Plusieurs représentants de pays ainsi que des représentants de l'Organisation Africaine de la Propriété Intellectuelle et du Programme des Nations Unies pour l'Environnement.

Les participants ont eu droit à une présentation du processus participatif qui a conduit à la l'identification des ressources génétiques et des connaissances traditionnelles associées d'une part et leur documentation d'autre part. Des règles communautaires ont été édictées en matière d'accès et de partage des ressources génétiques au niveau communautaires et des actes ont été pris par les autorités locales à cet effet.

Après les présentations, les participants ont fait part de plusieurs préoccupations relatives notamment à la protection des connaissances répertoriées dans le registre de biodiversité. Le représentant du Sénégal parcourant le document a fait part de ses inquiétudes relatives aux connaissances publiées dans le registre. Il a souhaité que ce document ne fasse pas l'objet d'une large diffusion. Il a donné l'exemple d'une plante qui est également utilisée pour les mêmes affections au Sénégal et qui est répertoriées avec la description des procédés dans le registre. Le représentant de l'OAPI lui emboitant le pas a donné des détails sur les différents niveaux de protection selon l'accord de Bangui.

Les participants ont été intéressés par le mode de désignation de l'autorité nationale compétente au niveau local. En réponse à cette préoccupation, les présentateurs ont rappelé que plusieurs séances d'internalisation ont été tenues avec les différentes parties prenantes dans les communes cibles du projet. Ces séances conduites par les chefs de collectivités et les sages des villages ont abouti à une désignation consensuelle de la personne la mieux outillée pour jouer le rôle. Le plus souvent il s'agit de tradi-thérapeutes reconnus pour leur probité et leur connaissance séculaire des ressources génétiques et de leur utilisation.

Plusieurs propositions ont été faites pour améliorer l'expérience du Bénin. Il s'agit de :

- Prendre les mesures pour la protection des procédés décrits dans le registre de biodiversité
- Intégrer les protocoles communautaires de Biodiversité dans les documents de planification au niveau local ;
- Rendre performant le mécanisme de partage des avantages en documentant les réels propriétaires des ressources génétiques et des connaissances traditionnelles associées ;
- Prendre les dispositions pour protéger les connaissances culturelles et cultuelles notamment celles relatives à la pratique du Vodun ;
- L'amendement des lignes directrices africaines pour l'APA pour prendre en compte les connaissances traditionnelles mais aussi, les pratiques cultuelles et culturelles relatives aux ressources génétiques.



Cameroon

How to Negotiate Mutually Agreed Terms with the Local Community When There is No Legislation on ABS?

Cameroon did not provide a summary of their market place session prior to the editorial deadline.

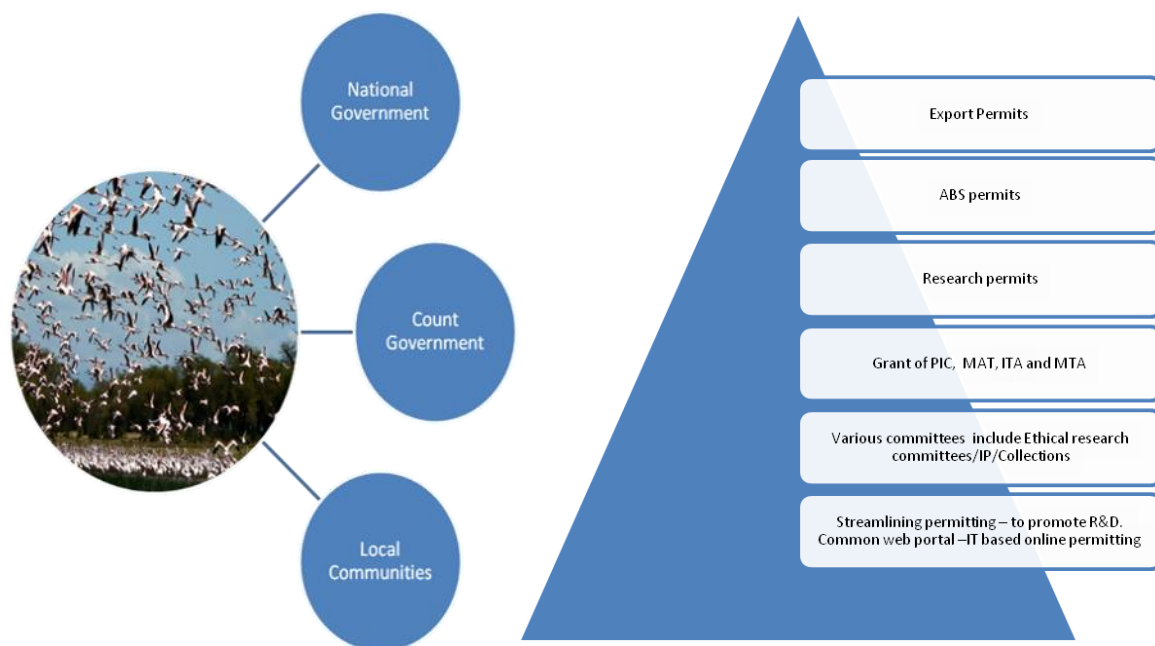


Kenya

Establishing ABS Committees for the Effective Implementation of the Nagoya Protocol

Kenya shared its experience on the need to establish ABS committee for the effective implementation of the Nagoya Protocol. The country recognises the role of R&D in the valorisation of the country's genetic resources which attract investments in biodiversity leading to effective conservation and livelihood improvement. The permit process plays a critical role in the utilisation of genetic resources as per the Nagoya Protocol.

Kenya is rich in biological resources. These are found in a wide range of habitats including, but not limited to, marine, mountain, tropical forests, soda lakes, semi deserts and dry lands. Kenya's biological resources are managed at different levels which include National Government, County Government and local communities which have varied roles and responsibilities as defined in the Constitution and domestic legislation. Kenya has also established an ABS National Focal Point, a Competent National Authority and Checkpoints and has made the according information available on the ABS Clearing-House.



Access to genetic resource and associated traditional knowledge for utilisation in R&D is governed by an ABS law and various domestic laws. It depends on whether access is requested by a foreigner or by a national and also on the movement of the genetic material or the associated information.

In general, the requirements are

1. PIC + MAT+ detail proposal + MTA/ITA from designated government resource providers and local communities
2. Research permit from National Council of Science and Technology – NACOSTI
3. ABS access permit from NEMA (= PIC+ MAT+ Research permit)
4. If for export, an export permit is required, supported by Phytosanitary if for plants or a health permits if for animal genetic resources.
5. Committee at the National Government / County government interface.



There are various committees which include IP/ABS, Bioethical committees in R&D, institutions for approvals at institution level, committees at providers level for granting PIC, committee at research permitting level, ABS permit committee drawn from multidisciplinary (providers and local communities, regulators, users (academia and industry)) and committees at export level.

The committees play a critical role in decision-making and also in conflict resolution. It is important to identify the permitting value chain and establish appropriate committees with clear roles and responsibilities. Effective legislation and policy is key in operationalisation of the committees. When particular committees are anchored in law, it gives them power to execute and implement the assigned duties effectively.

Key Challenges

- Time taken to process permits application due to many agents involved, i.e. multiple institution arrangements
- Processing fees
- Permitting institutions not linked
- High turnover of various desk officers and ABS experts
- No substantive ABS laws.

Interventions

- Need for a centralised or web portal permit application point; and
- Three ABS projects: i) The Soda lakes project; ii) The GIZ ABS Initiative (three areas, among them streamlining permitting through the creation of an online permitting system); and iii) the Global UNDP ABS project for capacity building on various ABS activities.

Group recommendations

- The ABS online permitting system is quite useful to streamline and promote R&D in the country
- Fees to be harmonised and be granted at the access permit point
- Develop clear flow chart of the process for users
- Challenges of establishing a community platform as competent authority.



Madagascar

- 1. Elaboration de la Feuille de Route Biennale APA**
- 2. Le Comité APA**
- 3. Participation des Communautés Locales dans l'APA**

1. La feuille de route biennale APA 2015-2016 de Madagascar a été élaborée dans le but d'avoir une mise en œuvre structurée du Protocole de Nagoya. Cette feuille de route comporte les activités prioritées par le pays pour les deux années. Les principales thématiques sont la mise en place de cadre juridique transitoire, le soutien à la valorisation de certaines ressources génétiques, l'appui à la protection et à la préservation des connaissances traditionnelles et aussi au renforcement des capacités des parties prenantes. L'évaluation de sa réalisation n'est satisfaisante que dans la mise en place du cadre juridique et le renforcement des capacités. Cela a été expliqué en majeure partie par le manque des ressources financières. Les leçons à tirer sont entre autre la prise en compte des priorités nationales malgré l'insuffisance des ressources et de focaliser les efforts dans l'atteinte de ces priorités.
2. Le Comité interministériel APA : il a été question de partage des expériences dans l'évolution institutionnelle de ce Comité. Si au début ce Comité était prévu évoluer en Autorité Nationale Compétente, il a été constaté que de nombreux paramètres sont importants à considérer tels que la confidentialité des demandes. Les membres du Comité APA sont des personnes issues de divers ministères et institutions travaillant dans le domaine des ressources génétiques, cette confidentialité serait difficile à respecter à cause du grand nombre des membres. Le Comité APA est donc actuellement voué à donner les grandes lignes de la mise en œuvre du Protocole et aussi à valider les référentiels dudit Protocole.
3. La participation des communautés locales dans l'APA : il a été question de présenter l'outil actuellement utilisé pour permettre la participation effective des communautés locales dans la mise en œuvre du Protocole de Nagoya, il s'agit des Protocoles Bioculturels (PBC). Ces PBC élaborés avec les communautés locales afin qu'elles puissent déterminer leur devenir en ayant un processus propre de prise de décision dans le processus.



Maroc

Le Maroc a été parmi les dix pays qui ont été contactés au préalable par les organisateurs de l'atelier Panafricain, afin de présenter aux participants des thèmes en relation avec l'état d'avancement dans la mise en œuvre de l'APA au niveau national.

Trois thèmes ont été proposés par le Maroc, portant sur :

- 1. La création d'un comité de pilotage du Projet APA-Nagoya PNUD – GIZ – FEM ;**
- 2. La stratégie de valorisation des ressources génétiques et les mécanismes pour sa mise en œuvre, et la mise en place d'un cadre juridique national approprié pour l'APA (GIZ-Maroc)**
- 3. Le Plan et les outils de communication en appui à la mise en œuvre du Protocole de Nagoya et son mécanisme APA au Maroc (GIZ-Maroc).**

L'équipe marocaine, constituée par Messieurs M. Mehdi, M. Menioui et A. Birouk, a présenté les principaux éléments relatifs aux trois thèmes choisis, en mettant en relief la complémentarité entre les projets menés par le programme GIZ Maroc et celui lancé par le FEM PNUD. Les exposés ont été appuyés par la distribution de diverses brochures et la projection d'un film sur l'APA au Maroc, préparés dans le cadre du Programme GIZ.

Les présentations et discussions ont eu lieu avec deux groupes successifs de représentants des autres pays et des organisations internationales. Les discussions avec les participants ont porté sur divers aspects, notamment :

- L'importance de l'avancée du Maroc dans la préparation de la mise en œuvre du Protocole de Nagoya ;
- L'approche pour la mise en place du cadre juridique, avec les défis surmontés et ceux qui restent pour y parvenir ; ainsi que l'intérêt de prendre en compte le niveau sous-régional, afin de disposer de cadres juridiques harmonisés entre les pays voisins au niveau de la sous-région ;
- Le défi de l'identification des détenteurs des connaissances traditionnelles associées à l'utilisation des ressources génétiques ;
- Les étapes de la stratégie de valorisation, et l'importance de disposer d'une base de données sur les ressources génétiques nationales qui offrent un potentiel de valorisation, et des chaînes de valeur qui leur sont associées, ainsi que le besoin d'identifier, dans cette stratégie, les niches au niveau du marché national et international ;
- L'importance de disposer d'outils diversifiés pour la communication sur l'APA, qui soient adaptés en fonction des groupes cibles et des diversités linguistiques et culturelles.



Namibia

Towards the Development of a Biocultural Community Protocol – Namibia's Experience

Namibia has embarked on an exercise to develop the first Biocultural Community Protocol (BCP) and document experience of this exercise to form the basis of lesson learning.

The first BCP to be developed is for the Khwe community living in the Bwabwata National Park situated in the Zambezi region bordering Angola, Botswana, Zambia and Zimbabwe. The Bwabwata National Park is known as a “people's park” as it supports both large numbers of wildlife and human population. The park consists of a Core area and a Multiple use area. The Core area is designated for special protection and controlled tourism.

The BCP is designed as an environmental management tool for the Khwe community. Through the process of developing of a BCP, the Khwe community was able to develop an inventory of plant and animal resources available in the area and outlined management activities and strategies, such as fire control measures, hunting activities and tracking. The BCP details responsible persons for all resources and social issues in the village, starting from observing the sustainable use of water, animal and plant resources by the villagers, carrying out hunting ceremony at the ritual place, mediating in cases of conflict, chairing the traditional court, punishing culprits and negotiating with outsiders.

The Khwe Custodian Committee was formed as an institution responsible for granting prior informed consent on matters pertaining to indigenous biological resources and related genetic resources as well as to other issues concerning intellectual property. The members of the Khwe Custodian Committee are representatives from all major villages.

Key issues raised

Can BCPs be used to protect traditional knowledge?

It was noted that the protection of traditional knowledge under the normal intellectual property regimes is difficult simply because of the way traditional knowledge is produced.

The platform provided an opportunity to primarily establish what is referred to as traditional knowledge to create a common understanding. The working definition of traditional knowledge adopted was - traditional knowledge means knowledge, practices, innovations or technologies created or developed over generations by cultural transmission on the conservation and utilisation of genetic resources.

It was concluded that BCP provides clear guidelines on how to access and use traditional knowledge. It provides information on the authority to grant/refuse access. It was agreed that countries need to develop mechanisms to protect traditional knowledge.

The Swakopmund Protocol is an instrument that can assist countries to protect traditional knowledge. It has as objectives:



- a) to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol; and
- b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.

It is expected that the Swakopmund Protocol will have the following effects:

- a) It will enable the knowledge holders and local communities in the Member States to register trans-boundary traditional knowledge and expressions of folklore at ARIPO;
- b) The knowledge holders and local communities Member States will also be able to submit for record purposes traditional knowledge and expressions of folklore in their territories. This can be done through the national competent authority;
- c) The knowledge holders and local communities Member States will be able to license their traditional knowledge and expressions of folklore lodged at ARIPO and obtain benefits arising from the commercial use of such knowledge and folklore and obtain fees from such licenses;
- d) The knowledge holders and local communities in the Member States will be able to use the alternative dispute settlement procedures at ARIPO to settle disputes arising from traditional knowledge and expressions of folklore shared by different communities across national boundaries as the need arise;
- e) It will enable ARIPO to establish databases on codified and non-codified traditional knowledge and expressions of folklore. The information in the databases will only be used upon prior informed consent from the knowledge holders. The consultation of the databases will also generate income for the member states.

Should BCP be specific in design and nature?

Clarity on the intention of a BCP was discussed to determine if a BCP should be designed on a case by case basis or should be a multiple use tool.

Based on the limited understanding and experience engagement with BCPs, it was agreed that a BCP could be a multiple use tool as it established procedure and processes for access to the resources and knowledge of a given communities based on customary and other national laws. The established structures to regulate access can provide leadership in other areas of interest.



République Démocratique du Congo

Les deux thèmes exploités portaient respectivement sur :

- 1. Les progrès accomplis dans la mise en place du cadre national APA en RDC, par M. Bienvenu Mupenda**
- 2. L'état des lieux de la valorisation des ressources génétiques en RDC, par Mme Odette Kabena.**

Dans le premier thème, il a été relevé notamment (i) les campagnes de sensibilisation et concertation auprès des parties prenantes impliquées dans le processus d'APA en vue de la mise en place du PIC/MAT et du Comité national APA ; les deux études qui ont menées sur l'état des lieux de texte juridique et la cartographie des acteurs sur APA ; (ii) l'existence des textes légaux sectoriels sur lesquels s'appuient les projets de différentes mesures d'applications sur APA ; (iii) les liens existants entre le processus APA et les autres thèmes connexes tels que REDD+, foresterie communautaire, etc.

En outre, s'agissant du deuxième thème, il était question de brosser succinctement les initiatives APA existantes dans les différents secteurs de la vie nationale qui ont conduit l'établissement de programmes ainsi que de centres de recherche pour la valorisation et la promotion des ressources génétiques tels que le programme national de promotion de la médecine traditionnelle et plantes médicinales (PNPMT-PM) ainsi que le centre de recherche sur le recensement, la valorisation des ressources biologiques de la République Démocratique du Congo et le partage des avantages liés à leur exploitation (REVAAPA).

Des échanges et discussions qui s'en sont suivis, il ressort la nécessité de mettre en place le comité national APA et les modèles de PIC et MAT ainsi que la stratégie de valorisation des ressources génétiques dans un bref délai consécutivement aux ressources financières à mobiliser.



South Africa

- 1. Establishment of Task Team to Drive the Amendment of the national Legislation on ABS**
- 2. Establishment of the National Bioprospecting Forum**
- 3. Development of the Implementation Plan for the National Biodiversity Economy Strategy**

Outcomes

1. Attendance in both session was satisfactory
2. Participants for both sessions showed interests in all the three topics due to their interrelationships
3. Very interactive sessions between South Africa and the participants
4. Few clarification questions raised were relating to:
 - a. Notable achievements since the creation of the National Bioprospecting Forum – Building confidence of the industries to government
 - b. Understanding the difference between bioprospecting and biotrade – Provided how South African legislation defines the two concepts
 - c. Funding of the Biodiversity Delivery Lab – Government
 - d. Monitoring and evaluation mechanism for the Lab initiatives – IT based monitoring & evaluation system is already in place
 - e. Main concern from the industry which was tabled in the Bioprospecting Forum – Number of permits requirements along the value chain

General Remarks:

- a. South African government deserve a noble prize for their commitment in the Biodiversity Delivery Lab
- b. South African government was commended for integrating biodiversity economy in the GDP
- c. Overall, the participants liked the South African approach and requested copies of all PowerPoint presentations.



Uganda

1. Engagements with the Private Sector (Sandalwood harvesting in Moroto)
2. The Legal and Institutional Framework Development for ABS
3. Next Steps (Review and Capacity Building)

During the sessions a brief outline on the issues were given to kick-start discussion as indicated below.

The Legal and Institutional Framework, development and implementation

Under the 1995 Constitution of the Republic of Uganda, the State is mandated to promote sustainable development, manage the utilisation of natural resources and take all measures to prevent damage and destruction.²⁴ This is applied under Section 44 of the National Environment Act, Cap 153, the Authority (NEMA) is mandated to liaise with other lead institutions to issue guidelines and prescribe measures for the sustainable management and utilisation of genetic resources in Uganda. NEMA's role is to initiate formulation of policy on access to genetic Resources, public awareness, capacity building, enforcement, development of guidelines for access and export of genetic resources and to advise on access to genetic resources outside protected areas.

The National Environment Access to Genetic Resources and Benefit Sharing Regulations S. I 30 of 2005 was crafted after the Bonn Guidelines, and accordingly makes NEMA the focal point for ABS. The guidelines specify the arrangements for access by non-citizens, fees payable, regulation of export, and mechanism of benefit sharing from genetic resources in Uganda.

The regulations also provide for and require one to obtain a PIC, MAT and permit before access. Specifically, the acquisition of a PIC does not entitle access to genetic resources but enable the applicant to proceed with an application for a permit. The regulation does not restrict or apply to exchange of genetic material by local communities for food or consumption. However, the law is silent on transit of genetic resources or material through Uganda and does not control access for plant breeders.

Regarding institutional arrangements, the Uganda National Council for Science and Technology is the competent and designated authority to receive and facilitate the process of applications to access genetic resources. The Council, which has established and maintains a depository for all material transfer agreements and associated accessory agreements, ensures that representative samples and specimens of genetic resources collected are deposited and advises on and approves a location for depositing of samples and specimens of the genetic resources collected. To support the Council, other institutions are mandated to monitor compliance. These include: Local governments, National Agriculture research Organization, Uganda Wildlife Authority, National forestry Authority, local communities, among others.

Engagements with Private Sector

The most recent cases of illegal trade in the Pangolin and the rare chameleons as genetic material could illustrate the need for private sector engagements to an extent. Sky Beam Limited was, however, selected as a case study on engagements with private sector because it was a permitted access. Although not a success story it works as an eye opener on measures needed to support ABS initiatives through engagements with private sector.

²⁴ State policy objective XXVII, Article 245 of the Constitution of the Republic of Uganda, 1995



Sky Beam Limited sought and obtained a permit to access *Osyris* Species (sandal wood) that grows wild in the Karamoja Region (North Eastern Uganda). Locally, two species were used for firewood, charcoal, and, to a small extent, medicinal purposes. There are four species (*Tenuffolia* and *Osyris lanceolata*, *Osyris whitina* and *Osyris compressa*). Although two species (*Tenuffolia* and *Osyris lanceolata*) were targeted because of the good quality of oil they yield, the company centrally to the permit approvals accessed all four species and did not follow the approval conditions.

It was observed that the project did not adequately benefit the community and although the company had undertaken to restock the species, there was no plan or initiative to do so. Also the value chain was not considered and measures to enforce and monitor the access permit conditions were weak.

Because of the loopholes, it is said that after stock was exhausted in Uganda, the company was illegally harvesting from Kenya to supply the production material. Although this matter was not investigated conclusively, it pointed to issues of transboundary and shared genetic resources that are not adequately legislated on.

The extracted oil was packed in drums for export and further processing.

Planned initiatives

The following interventions have been made and /planned;

- (i) Integration of ABS in the NBSAP II 2015/16 – 2019/2020 will support awareness creation, capacity Building, monitoring and documentation of ABS samples of materials accessed.
- (ii) The Proposed GEF 6 Project will support updating Guidelines; build capacity for protection of genetic resources through training of local communities, farmers and integration of ABS and other CBD measures into policy developments, programs and plans.

Discussions

During the discussions the following was noted:

- (i) The ABS legislation was developed and passed before the conclusion of the Nagoya Protocol which was acceded to in 2014. The legislation therefore requires review and updating to incorporate all the relevant provisions, rules and guidelines developed since then and applicable to the ABS mechanisms.
- (ii) Enforcement has been weak mainly because documentation is low and staffing is inadequate at all levels to consistently monitor and report.
- (iii) While the ABS focal point is based in NEMA, there is no supportive structure in place to handle the various aspects of ABS to logical conclusions.
- (iv) Measures to enforce and monitor ABS initiatives should include other biotrade institutions like Uganda Export Promotion Board and the Uganda registration Services Bureau.
- (v) Monitoring the product value chain and permit validity should involve PhytoTrade, ARIPO, WIPO, and URSB.
- (vi) There is need to develop the capacity of the traditional governing authorities and communities to increase their ability to measure benefits to the community.
- (vii) There is need to promote traditional knowledge since genetic resource access is triggered by traditional knowledge.