

"ABS Business Dialogue"

7th - 9th October 2009, Hammanskraal, South Africa

in cooperation with

the International Chamber of Commerce (ICC), PhytoTrade Africa and the Union for Ethical BioTrade (UEBT)

Report

Background

The negotiations for an international regime on Access and Benefit-Sharing of Genetic Resources (ABS) are entering a critical phase: October 2010 marks the deadline for "completing the elaboration, negotiating and submitting for consideration and adoption of such a regime"¹, at the 10th Conference of the Parties (COP 10) of the UN Convention on Biological Diversity (CBD) in Nagoya, Japan.

The seventh meeting of the ABS Working Group (WG-ABS 7) had revealed that several substantial issues still need to be resolved if the negotiations are to be concluded successfully. The various stakeholders have very diverse expectations and concerns. Some of the existing controversies are related to a lack of understanding between the stakeholders of their respective realities and needs. A better understanding of these realities is crucial for breathing life into ABS and arriving at an International Regime that is workable for all sides.

The dialogue between African negotiators and representatives from different industries involved with ABS was part of the ABS Capacity Development Initiative for Africa. Background information about the Initiative and full documentation of previous events is provided on www.abs-africa.info.

Objective and Approach

The dialogue was to help render the negotiations for an International ABS Regime more productive by

- promoting mutual understanding of users' and providers' realities and constraints regarding ABS;
- debating the pro's and con's of different scenarios;
- analyzing the potential for win-win solutions; and
- identifying options for the way forward.

The meeting brought together some 20 participants, representing individual experts from the African Group and different Businesses. It shed light on mutual expectations and concerns, and helped both sides to better understand each other's realities and constraints. The aim was to improve the conditions for constructive negotiations, by exploring perspectives, interests and options without pressure for immediate results. It is hoped that the insights and learnings from this dialogue will inform and enrich the ABS negotiation process. The participants also identified some initial ideas for the way forward.

Programme Outline

Wednesday 7 October: "Getting to know each other; Exploring perspectives and expectations"

- The first half day was to prepare the ground for a constructive dialogue. Participants got to know each other on a personal and professional level, and explored perspectives regarding both the meeting and ABS in general.

Thursday 8 October: "Exploring realities and concerns"

- The second day provided the opportunity for representatives of the African group and Business to explain in more detail their respective realities, hopes and concerns regarding ABS. A limited number of presentations from both sides provided the informational basis for an interactive dialogue. Towards the end of the day, participants jointly defined those issues that they wished to explore further during the next morning.

Friday 9 October: "Exploring options for the way forward"

- During this final half day, participants had the opportunity to explore options for the way forward. They discussed ideas and their implications, debated the pro's and con's of various options, and continued to exchange views.

The following report provides more details about the process and outcomes of each dialogue day.

¹ Mandate / decision XII on access and benefit sharing / COP 9

Wednesday 7 October: "Getting to know each other; Exploring perspectives and expectations"

Welcome addresses

Andreas Drews:

- Opened the meeting and introduced the ABS Initiative with its objectives and history.

David Hafashimana:

- Representing the African Group, spoke about the importance of business for benefit sharing and the importance of sustainable business for conservation and sustainable use of biodiversity.

Cyril Lombard:

- Representing Phytotrade Africa and on behalf of UEBT and ICC, supported David's approach and said that increasingly business wants to be sustainable and ethical.

Introduction to the workshop

Kathrin Heidbrink:

- Objectives; Procedures; Programme overview.

Suhel al Janabi:

- Introduced the objectives of the Dialogue and set the scene
- This is an informal event to support the formal process
- It is personal, we represent organizations and positions, but here we also speak for ourselves so you are not accountable to any group as such
- This event is to help develop trust and better mutual understanding between participants
- You have the freedom to speak or to keep silent
- Confidentiality

Kabir Bavikatte:

- Introduced the Chatham House Rule, and some proposals regarding the report.
- Report on contents of discussions, but no mention of who said what
- Plus: Presentations
- Plus: List of participants
- Plus: Some photos of the process
- To be jointly revisited and agreed at the end of the meeting
- Individual freedom not to appear on participants list or photos
- Including all group results – only the transcript
- Draft to all participants for approval
- Final version to all participants on www.abs-africa.info

Getting to know each other

- Personal introductions

Exploring topics and questions that participants bring to this dialogue

Participants met in buzz groups of business and African group representatives and were asked to come up with a list of questions they want to ask the other group (government or business) and what they would like to explain to the other group.

Questions from Business to the African Group

- What is the minimum ABS infrastructure required?
- How many transactions will the ABS framework capture in Africa/the world ?
- Is the aim of the ABS regime to facilitate commercialization of biodiversity?
- How will you manage unrealistic expectations for benefit sharing?
- How can IR promote balanced cooperation between developed and developing country institutions, to promote local development, innovation and production?
- What is the ultimate result you want to achieve in the IR?
- How will you manage national check-points with respect to ABS?
- What business practices should change? What works?
- How can you achieve equitable distribution of benefits derived from TK and who should receive these benefits?
- Additional question after discussion: How do you define biopiracy?

Things Business would like to explain to the African Group

- It is important to talk with industry and not about industry
- The international regime should promote coherent national regimes to avoid additional entry hurdles
- Many companies want to and do engage but roles should be clear and reasonable for all
- Benefit sharing does and should take place on basis of partnerships with range of benefits
- A complex and expensive ABS system will discourage business. In EU and Africa most businesses are micro and small
- Sustainable and successful commercialization is slow, expensive and risky, it is hard to be clear at the beginning
- Business needs legal certainty, predictability and transparency to make investment decisions
- For businesses to contribute to sustainable development in ABS projects, need governments to provide institutional support
- Great diversity of accessing and using biodiversity

Questions from the African Group to Business

- How would business want to deal with cases of unauthorized access?
- Why can't different sectors be accommodated in one regime?
- What are your concerns on ABS?
- How do you address the issue of benefit sharing in your business?
- How beneficial is it for an honest and fair business to deal with several national or a harmonized IR?
- Are you ready to share benefits arising from the use of products and derivatives of biological resources?
- Have you considered the implications of a G77 and china regime as an alternative?
- How important is new access?

Things the African Group would like to explain to Business

- Everybody is on a learning curve
- Biopiracy is unsustainable and unethical
- Access without fair sharing of benefits is like cutting a tree branch you are seated on
- We are willing to engage in a win-win situation between you, us and biodiversity
- Benefit sharing, access and conservation are inextricably linked
- A mechanism to access biological resources and TK
- The importance of associated TK
- The African position in the ABS negotiations
- Flexibility is possible if a strong international regime in place

Exploring expectations and needs regarding ABS

Participants were divided into two groups of business and two groups of African group representatives and were asked to discuss, from their respective points of view, the following questions: "Imagine it is 2011 and the world has reached some form of agreement/s on ABS: (i) What do you hope will be the advantages of having this agreement? (ii) What are your main concerns regarding ABS?"

Group 1: African Group

Advantages:

- Responsibilities, scope and rights clearly charted in a transparent, predictable and fair manner for all the stakeholders
- Biopiracy would become unnecessary and unattractive
- An international system for dispute resolution and mutual enforcement of court decisions
- Positive contributions towards achieving the other 2 objectives of CBD, mitigation and adaptation to climate change
- Contribution to poverty reduction
- Revitalization of TK
- Sustainable development

Concerns:

- Domestication of the regime at the national level
- Inadequate capacity at the national level
- Sensitization of indigenous and local communities
- Lack of political will
- Narrow look at ABS

Group 2: Business

Advantages:

- Clarification
- Structured process
- Legal basis / some international standards
- Recognized good principles
- Transparency
- Model Clauses
- Increase in trust between both parties
- Record of movement of material
- Training and technical assistance
- Funding and financial assistance
- Public/private partnerships

Concerns:

- Bureaucratic rules
- Unrealistic rules
- Hindering rather than promotion of innovation and R&D
- Not addressing sectoral differences and needs
- Problems with overlapping issues in other fora
- Insufficient financial and human resources
- Lack of or poor implementation
- Retroactivity
- Extent of benefit sharing requirements
- Challenges to confidentiality
- Broad inclusion of traditional knowledge

Group 3: African Group

Advantages:

- Compliance mechanism= Legal certainty for both sides = Investment
- IR provides clarity on structure of national framework, guidance of harmonisation national legislation
- Leads to more equitable benefit sharing
- Clarify terms and definitions
- Prevent race to the bottom

Concerns:

- Hollow regime
- Too much red tape= disincentive to innovation + investment
- IR may rely too much on national regime which may lead to a race to the bottom

Group 4: Business

Advantages:

- Legal certainty, transparency and predictability
- Coherence across nations
- Flexibility to take into account different sectors and future uses
- Cost efficient (for Governments and Users)
- Reduces costs and regulatory burdens/processes (e.g. through coherence of national regimes)
- State facilitation of local innovation and development through cooperation with business
- State honours its obligations towards TK holders, farmers, small state industries
- Facilitated access
- Recognize non-monetary benefits

Concerns:

- The regime is concluded in a hurry and incoherent
- Heavy administrative, bureaucratic, costly regime
- Communication not adequate
- IR requirements apply to billions of transactions over products with BR/GR elements
- IR fails to facilitate investments so that biodiversity and TK are lost
- Monetary benefits are not ring fenced, just general tax
- IR stifles business and innovation

Discussions on:

- *Transparency*
- *Clarity*
- *Innovation*
- *Tracking system and confidentiality*
- *Compliance, awareness*

Identifying key issues that arose from the discussion on hopes and concerns regarding ABS

In plenary, participants collected some key issues that require further discussion:

- Transparency and confidentiality
- Trust and collaboration
- Tracking and/or checkpoints
- Communication, public awareness and education (CEPA)
- Impacts on innovation
- Impacts on conservation and sustainable use
- Derivatives
- Optimal level of bureaucracy
- Balance between compliance measures and innovation
- Facilitated access
- International regime and implementation at national, regional+local+community levels
- TK
- Non-monetary benefits
- Flexibility
- Options for IP protection
- Change of use (non-commercial, commercial)
- Costs
- IR and links with other international fora

Thursday 8 October: "Exploring realities and concerns"

Background presentations: Africa

Overview of African realities, concerns and perspectives regarding ABS

"ABS in Africa: Realities, Opportunities, Challenges and Constraints"

- Pierre du Plessis, CRIAA SA-DC, Namibia

Presentation

- [\(Link to Pierre's ppt\)](#)

Discussions on:

- *Risk sharing*
- *Compliance mechanism*
- *Conservation of GR*

"Rationale behind the thinking of the African Group when it comes to sectoral approaches"

- Ossama al Tayyeb, ABS Focal Point, Egypt

Statement

- The mandate of COP describes an IR for ABS - which is one international rather than many national regimes.
- This stems from the idea of sustainable development and the IR on ABS should serve this purpose.
- A biological resource often extends beyond single uses (hence a sectoral approach is unworkable) and is generally also linked to TK.
- In fact ABS in the CBD was initially focused on GR, but when the whole CBD is taken as a package it was seen as important to link it to other aspects of BR and conservation and sustainable use as well as TK.
- A sectoral approach may lead to multiple rules, procedures and compliance mechanisms for the same resource, and the conflict between these systems may make it difficult for business to make a choice and some businesses may look for a soft spot here and end up with shopping for different rules.
- The CBD has established national sovereignty over GR – while free exchanges have been common for millennia. But because of the growth of biotech and the extension of patents into life forms, the CBD was seen as a defense against appropriation or privatization of life
- Satisfying the 3 objectives of the CBD is the key.

Discussions on

- *IP protection*
- *Compliance rules and sectoral approaches*
- *Common heritage versus national sovereign rights on biodiversity*
- *IR: an umbrella structure*

Background presentations: Business

Overview of realities, concerns and perspectives of different industries involved with ABS

"Business and Biodiversity"

- Daphne Yong d'Hervé, International Chamber of Commerce (ICC)

Presentation

- [\(Link to Daphne's ppt\)](#)

Discussions on:

- *Scope*
- *Non discrimination*
- *Disclosure*

"Access and Benefit Sharing for Beneficial Insects and Mites"

- Johannette Klapwijk, IBMA, Switzerland / The Netherlands

Presentation

- [\(Link to Johannette's ppt\)](#)

Discussion on:

- *TK*

"Sourcing with Respect" and "Example of a Proactive ABS from Namibia"

- Maria Julia Oliva, Union for Ethical Biotrade, Switzerland
- Cyril Lombard, PhytoTrade Africa, UK

Presentations

- [\(Link to Julia's ppt\)](#)
- [\(Link to Cyril's ppt\)](#)

Discussions on:

- *Local demand driven and convergence with national development objectives / Proactive policy*
- *Cost*
- *Regional tools*
- *Issues linked to conservation and sustainable use and benefit sharing*

Joint reflections on presentations

Participants were asked to gather in two groups (i) African Group and (ii) Business representatives, to discuss what they had heard/understood from other side and what that implies for them. Each group then selected two two delegates for a "Fishbowl" discussion.

("Fishbowl": Two representatives of the African Group and two representatives of business along with two facilitators sat in a circle and began to discuss key issues that had arisen from the previous reflections. Two empty chairs were open for other participants to take turns to sit on and contribute to the discussion.)

The outcomes of the fishbowl discussion were added to the key issues arising from Hopes and Concerns (cp. previous day):

Completed list of key issues at this point

- Transparency and confidentiality
- Trust and collaboration
- Tracking and/or checkpoints
- Communication, public awareness and education (CEPA)
- Impacts on innovation
- Impacts on conservation and sustainable use
- Derivatives
- Optimal level of bureaucracy
- Balance between Compliance measures and innovation
- Facilitated access
- International regime and implementation at national, regional+local+community levels
- TK
- Non-monetary benefits
- Flexibility
- Options for IP protection
- Change of use (non-commercial, commercial)
- Costs
- IR and links with other international fora
- Disclosure
- Sectoral approaches
- Non-discrimination
- Scope
- Compliance
- Certificates

Identifying key issues to explore further, in terms of options and possible implications

Participants now regrouped the list of key issues into four clusters. For each cluster, a task was defined for subgroups to work on during the next morning.

Cluster / Group 1: "Describe a possible road map"

- Disclosure
- Options for IP protection
- Certificate
- Compliance
- PIC and MAT
- Dispute resolution
- Tracking and/or checkpoints
- Transparency and confidentiality

Cluster / Group 2: Collect ideas on implementation mechanisms

- Sectoral approaches
- Links to other international fora
- Flexibility
- Optimal levels of bureaucracy
- Costs of implementation
- International regime and implementation at national, regional+local+community levels

Cluster / Group 3: Common understanding of a possible scope

- TK
- Scope
- Derivatives

Cluster / Group 4: Collect ideas on how to achieve best cooperation

- Facilitated access
- Balance compliance + innovation
- Change of use (academic research, commercial, commodities)
- Impacts on innovation
- Trust and collaboration
- Non-monetary benefits
- Non discrimination

Two more general elements were not clustered or addressed by the four groups:

- Impacts on conservation and sustainable use
- Communication, public awareness and education (CEPA)

Finally, participants formed 4 groups for the next day, based on individual interests and competence. The only criterion was that the groups had to be mixed, i.e. having both African and business representatives in each group.

Friday 9 October: "Exploring options for the way forward"

Brainstorming options for previously defined issues, and exploring possible implications

The four groups met to discuss the issues highlighted on the previous day. After the discussions, each group presented their proceedings.

Group 1: "Possible roadmap"

- 1) PIC and MAT- should be subject to national legislation, there needs to be objects of research, some countries will have MAT without PIC, and other countries both, some countries PIC and MAT at the same time, other countries with a time gap.
- 2) Certificates necessary if they facilitate tracking and not onerous, will be issued by National Competent Authority, debate whether it was certificate of origin, source or legal provenance/compliance.
- 3) Tracking (MAT, certificates, regularly reporting, disclosure during marketing or registration) and checkpoints (exit point, entry point (simple point of information) depending on the scope: voluntary, by random, all controls).
- 4) Transparency and confidentiality - confidentiality is key.
- 5) Disclosure happens first at the time of access (PIC and/or MAT), since much depends on MAT and if MAT is strong then it's fine.
- 6) Disclosure, secondly, at the level of the patent system: discussed at WIPO and WTO so cannot make recommendations.
- 7) Compliance – recourse to law can happen through the contract (contract law) if there is no contract then other kind of recourse.

Questions on:

- *Tracking system*
- *MAT, certificate and disclosure*
- *Checkpoints*
- *Dispute settlement system*

Group 2: "Ideas on implementation mechanisms"

Title: Comprehensive but flexible regime

- 1) Comprehensive:
 - a) Objectives
 - b) Rights and obligations
 - c) Definitions
 - d) Scope
 - e) Compliance
 - f) Specific exclusions (pointing to existing treaty systems for the uses/objectives foreseen in those systems e.g. multilateral system, FAO system, and commodities not marketed for their genetic traits)
- 2) Flexible:
 - a) Enabling clauses linked to implementation mechanisms e.g. single National Focal Point with different National Competent Authorities addressing different uses, references to community protocols
 - b) Flexible language in all sections to allow distinction between activities/sectors+ new science and technology
 - c) National implementation of requirements as appropriate to sectors and sizes

Group 3: "Possible scope"

- 1) Focus in uses e.g. modification or copy of genetic material- query- taking extract from biological resource- it is not an intention to capture commodity trade.
- 2) Scope will not include on going uses of pre-CBD access to resources – query on future uses of resources accessed, pre-CBD + the use of those resources in transition.
- 3) TK - difficult to know to who will distribute and to whom to distribute benefits. Examples of possible solutions, TK= difficult to make link between TK and modern approaches.
- 4) TK should logically be in the IR but is likely to be subject to national legislations due to national differences in treatment of traditional communities.

Questions on:

- *Commodity / biological extracts*
- *Transitional arrangement*

Group 4: "Ideas on how to achieve best cooperation

1) Non discrimination

a) Two agreements: (i) national agreement and (ii) international agreement.

If there is an ABS agreement with nationals then the special treatment or concession for nationals should be restricted to national markets. If nationals want to enter into the international market then they have to be treated the same as international users.

International users who enter national markets should be treated the same as national users.

b) Parties could be a company, institute or person; no differences are made.

2) Facilitated Access

i) Access point

a) definite department/contact person at national level and a standard procedure and institutional infrastructure

b) Permit (i) academic research (ii) research with intention of commercialization (iii) commercialization

c) Facilitated contact to provider/community by government - Competent National Authority as broker and quality control

ii) Proactive promotion by country

a) CBD- link to ABS national focal points

b) National mechanism to promote indigenous TK

c) Communication/network/marketing to generate interest

d) Local groups- GTZ, Sippo, Chamber of Commerce, trade shows

3) Trust and Collaboration

i) Project team - national representative, provider(s) and user(s) - that develops a framework for frequent meetings, milestone reports

ii) Target: long term sustainable benefits, skills, technology transfer, market skills, workplaces, st-up company

Project collaboration and benefits

1) Partnerships

2) As much as possible in country

3) Technology transfer

4) Participation open to local stakeholders

5) Benefit sharing in the whole process

If research needs to be develop in user country, it's to be conducted with PhD students from provider country: Not a simple access framework

Where to go from here

Finally, participants identified possible next steps after this meeting

<u>What</u>	<u>Who</u>	<u>When</u>
Reporting back to constituencies		- CGRFA meeting, Oct 09 Rome; meeting before the CGRFA meeting on ABS and AnGR - Meeting Jakarta (Dec 09- ABS day)
Reciprocal briefings		- Briefing sessions before Montreal (African Group and business)
Follow up meeting(s) of this type/dialogue	- Similar group as was here - plus some new people - Broader audience	- Early 2010 - Before Columbia a day before the meeting
African Group representatives participating at a trade show		