



## **COUNTRY STATUS REVIEW PAPER ON ACCESS AND BENEFIT SHARING AND LIABILITY AND REDRESS IN NAMIBIA**

Paper prepared for the Regional Agricultural and Environmental Initiatives Network  
Africa under the capacity building on new protocols under the Convention on  
Biological Diversity project

**Prepared by:**

**Kauna Schroder & Sarah Vranckx**

Access and Benefit Sharing (ABS) Focal Point in Namibia

**July 2012**



## **TABLE OF CONTENTS**

|   |            |
|---|------------|
| <b>Acronyms</b> .....   | <b>iii</b> |
| <b>1. INTRODUCTION</b> .....  | <b>1</b>   |
| 1.1 Status, importance and value of biological diversity and genetic resources in Namibia   | 1          |
| 1.2 Commitment to the Wise Management of Natural Resources .....  | 6          |
| <i>National Legislation</i> .....   | 7          |
| <b>2. ACCESS AND BENEFIT SHARING</b> .....  | <b>10</b>  |
| 2.1 Policy and legislative framework.....   | 10         |
| 2.2 Institutional arrangements.....   | 11         |
| 2.3 Status of implementation .....  | 13         |
| 2.4 ABS initiatives at national and community levels and the main players in those initiatives.....   | 13         |
| 2.4.1 <i>Commiphora Resin (Commiphora wildii)</i> .....   | 14         |
| 2.4.2 <i>Marula (Sclerocarya birrea)</i> .....  | 15         |
| 2.4.3 <i>Devil's Claw (Harpagophytum procumbens and Harpagophytum zeyheri)</i> .....  | 16         |
| 2.4.4 <i>Hoodia</i> .....   | 17         |
| <b>3. INDIGENOUS KNOWLEDGE IN CONSERVATION AND UTILIZATION OF GENETIC</b> .....   | <b>18</b>  |
| 3.1 Introduction.....   | 18         |
| 3.2 Policy and legislative framework.....   | 18         |
| 3.3 Institutional arrangements.....   | 20         |
| 3.4 Status of implementation .....  | 20         |
| 3.5 National and community-based IKS initiatives in place .....   | 22         |
| <b>4. INTELLECTUAL PROPERTY RIGHTS IN RELATION TO CONSERVATION AND</b> .....  | <b>22</b>  |
| 4.1 Introduction to IPR in Namibia .....  | 22         |
| 4.2 Policy and legislative framework.....   | 22         |
| 4.3 Institutional Arrangements.....   | 24         |
| 4.4 Status of implementation .....  | 24         |
| 4.5 National IPR initiatives in place and regional /international initiatives country is participating in.....  | 24         |
| <b>5. LIABILITY AND REDRESS AS IT RELATES TO BIOSAFETY</b> .....  | <b>26</b>  |
| <b>6. CHALLENGES, PROGRESS / STATUS OF RATIFICATION OF NAGOYA KUALA LUMPUR SUPPLEMENTARY PROTOCO ON LIABILITY AND REDRESS AND NAGOYA PROTOCOL ON ACCESS &amp; BENEFIT SHARING</b> ..... | <b>33</b>  |
| <b>6.2 CHALLENGES UNDER THE N-KLSPL &amp; R</b> .....   | <b>34</b>  |
| <b>7. REFERENCES</b> .....  | <b>34</b>  |
| <b>ANNEXURE 1</b> .....   | <b>36</b>  |

|                        |           |
|------------------------|-----------|
| <b>ANNEXURE 2.....</b> | <b>38</b> |
| <b>ANNEXURE 3.....</b> | <b>45</b> |
| <b>ANNEXURE 4.....</b> | <b>46</b> |

## **Acronyms**

ABS: Access and Benefit Sharing

CPB: Cartagena Protocol on Biosafety

CSIR: Council of Scientific and Industrial Research

EWC: Eudufano Women's Cooperative

GDP: Gross Domestic Product

GMO: Genetically Modified Organism

IBPC: Interim Bioprospecting Committee

IKS: Indigenous Knowledge Systems

IKST: Indigenous Knowledge Systems Technology

IPR: Intellectual Property Right

IPTT: Indigenous Plants Taskforce Team

LMO: Living Modified Organism

MEAs: Multilateral Environmental Agreements

MET: Ministry of Environment and Tourism

MTI: Ministry of Trade and Industry

NGO: Non-governmental Organisation

NP-ABS: Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising from their utilisation

N-KLSPL & S: Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress

TCE: Traditional Cultural Expression

TRIPS: Trade-Related Aspects of Intellectual Property Rights Agreement

UNCBD: United Nations Convention on Biological Diversity

UNEP: United Nations Environment Programme

UPOV: Union for the Protection of New Varieties of Plants

WIPO: World Intellectual Property Organisation

WTO: World Trade Organisation

## **1. INTRODUCTION**

### **1.1 Status, importance and value of biological diversity and genetic resources in Namibia**

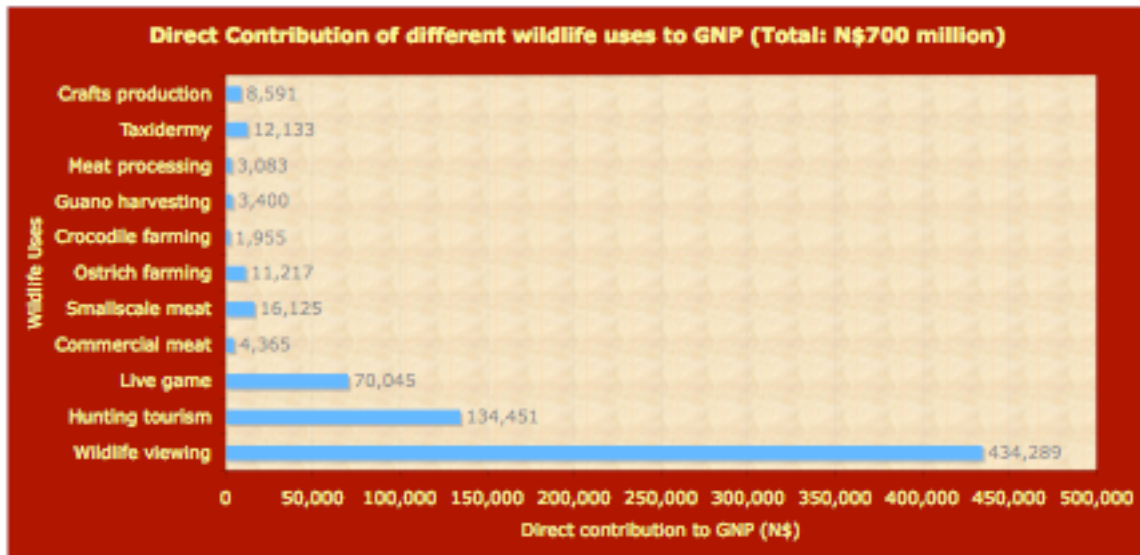
Although known as the driest country south of the Sahara, Namibia is blessed with exceptional natural resources and an impressive variety of species and habitats. Biodiversity and natural resources is of great importance to the country's development. Natural resources-based sectors form the backbone of Namibia's economy with mining, fisheries and agriculture alone accounting for around 30% of Gross Domestic Product (GDP) and 85% of exports (Ministry of Environment and Tourism (MET) 2012a).

A formal study on the value of biodiversity, although planned, has yet to be conducted. However a variety of studies and reports demonstrate the contribution of biodiversity to the social and economic development in Namibia.

A green economy sectoral study conducted by United Nations Environment Programme (UNEP) in 2012 on "Biotrade: A Catalyst for Transitioning to a Green Economy in Namibia" describes how biotrade currently accounts for around 4.5% of Namibia's GDP. This contribution breaks down as follows: Indigenous Natural Products (0.15%); Wildlife (1.08%); Agriculture: Indigenous Crops and Vegetables (0.97%) and Livestock Breeds (1.62%); Indigenous Fisheries and Marine Resources (0.21%); Timber, Non-Timber Forest Products and Other (0.49%). The same report indicates that the contribution of Biotrade to Namibia's economy could increase by 50% over the next 10 years - to 7% of GDP.

Wildlife populations have been particularly well maintained in Namibia due to prudent conservation policies and the country's low human population density. Wildlife resource accounts published in 2009 using data from 2004 estimates that wildlife assets are worth N\$10.5 billion in Namibia. Wildlife numbers were estimated at just over 2 million (Barnes *et al* 2009). Key high value species such as elephant, buffalo, lion and rhino are concentrated mainly in communal conservancies and state-protected areas. Considerable investment has been made in recent years into

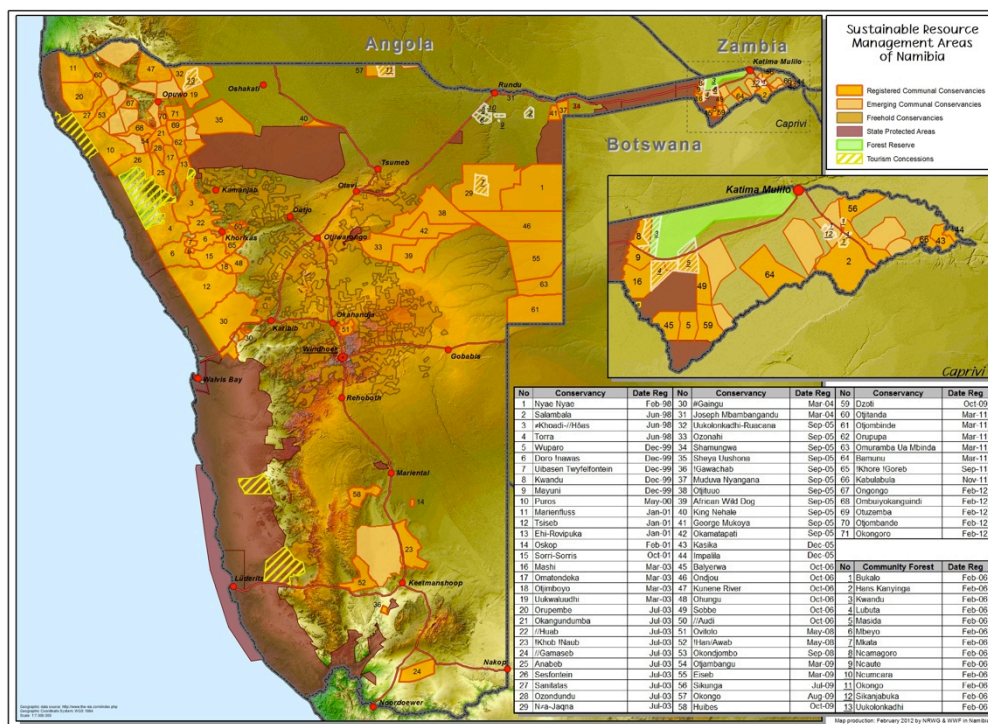
improving the management and infrastructure in protected areas so that these can serve as engines for economic growth in rural areas, while Namibia’s communal conservancy programme is recognized as an innovative approach linking the environmental, economic and social strands of sustainable development.



**Figure 1: Contribution of Different Wildlife Uses to GNP (Adapted from Barnes *et al* 2009).**

The graph above shows the different ways wildlife is used to generate income in Namibia. Wildlife viewing can clearly be seen as the most valuable contributor to the Namibian Economy. Indeed wildlife viewing is the main attraction driving Namibia’s rapidly growing tourism industry, which is recognized as the fastest growing sector in the Namibian economy. Some 17% of Namibia’s landmass is covered by state protected areas, while over 19% is now covered by communal conservancies. A first marine protected area was also proclaimed in 2009 covering some 12,000km<sup>2</sup> (MET 2012b).





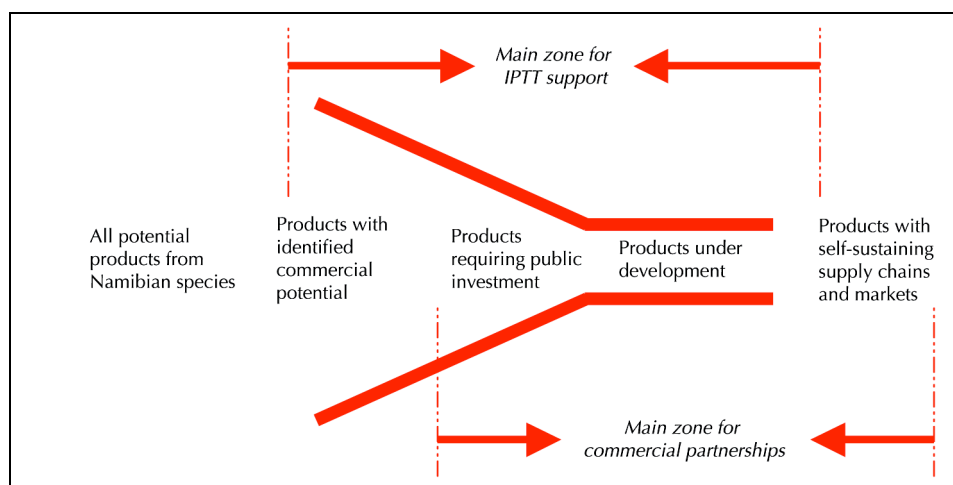
**Figure 2: Map of sustainably managed areas in Namibia as of February 2012 (Source: [www.nacso.org.na](http://www.nacso.org.na))**

Namibia has also been exploring innovative approaches to develop an industry around the sustainable supply and trade of indigenous natural plant products. The government-mandated multisectoral Indigenous Plant Products Task Team (IPTT) has been at the forefront of these attempts. The overall objective of the IPTT is to promote the sustainable utilization of Namibia’s indigenous plant resources for:

- greater household food security,
- agricultural diversification,
- income, employment and livelihood opportunities and
- agro-industrial development.

In order to facilitate and co-ordinate the selection of resources for development the IPTT adopts a “pipeline” approach in which resources with product development potential are prioritized. This approach is supporting the research and development of a number of products derived from indigenous plant resources involving resource owners, traditional use knowledge holders, academics and service providers amongst

others. The IPTT also identifies potential technical partners to support research and product development.



**Figure 3: The IPTT’s pipeline approach to indigenous plant product development.**

This approach has brought four indigenous Namibian plant oils to the international market (marula oil, Kalahari melon seed oil, ximenia oil and manketti oil, while several other products are at various stages of development (!nara oil; mopane essential oil; marula food oil, juice and fruit pulp; commiphora resin; devil’s claw; hoodia; terminalia root bark; manketti fruit; and makalani fruit). The table below offers some facts and figures on some of Namibia’s most important plant resources.

**Table 1: Summary of most valuable indigenous plant products in Namibia. Adapted from “Biotrade: A Catalyst for Transitioning to a Green Economy in Namibia” (UNEP 2012).**

| Name and illustration                 | Volumes and values |             |             |             | Region or areas                                  | Commercial and traditional uses,       |
|---------------------------------------|--------------------|-------------|-------------|-------------|--|--|
|                                       | 2008               |             | 2009        |             |  |  |
|                                       | Volume (kg)        | Value (NAD) | Volume (kg) | Value (NAD) |  |  |
| Devil’s claw ( <i>Harpagophytum</i> ) | 686 000            | 21 000      | 370 000     | 12 000      | Communal areas in Kavango, Caprivi, Otjozondjupa | Treatment for rheumatism and arthritis |



Image © CITES Secretariat

|  |     |  |     |
|--|-----|--|-----|
|  | 000 |  | 000 |
|--|-----|--|-----|

and Omaheke

It is exported as dried, unprocessed slices or in processed forms of capsules, tea and powders.

**Hoodia (*Hoodia gordonii*)**



Image © Winfried Bruenken

| 2008        |             | 2009        |             |
|-------------|-------------|-------------|-------------|
| Volume (kg) | Value (NAD) | Volume (kg) | Value (NAD) |
| 3 595       | NA          | 7 196       | NA          |

Southern (Karas and Hardap) and eastern (Caprivi and Kavango)

Used by Nama people to treat illnesses such as high blood pressure, diabetes, gout, and for suppressing hunger during times of hunting and hardship. This latter property has attracted the attention of international companies interested to develop dietary products.

**Kalahari Melon Seed**



(*Citrullus lanatus*)

Image © PhytoTrade Africa  
**Marula**

| 2008        |             | 2009        |             |
|-------------|-------------|-------------|-------------|
| Volume (kg) | Value (NAD) | Volume (kg) | Value (NAD) |
| 7 370       | 921 250     | 6 019       | 616 948     |

Northern communal regions, Kavango and Caprivi regions

Sun screen, skin care products, conditioning hair care products and soaps

|             |             |
|-------------|-------------|
| <b>2008</b> | <b>2009</b> |
|-------------|-------------|

North

Food and



(*Sclerocaryabirrea*)

Image © Rotational

**Ximenia**



Image ©

Phytotrade Africa

| Volume (kg) | Value (NAD) | Volume (kg) | Value (NAD) |
|-------------|-------------|-------------|-------------|
| 5 022       | 905 000     | 3 419       | 564 113     |

Central Regions (Oshana, Oshikoto, Omusati and Ohangwena)

cosmetic ingredient

| 2008        |             | 2009        |             |
|-------------|-------------|-------------|-------------|
| Volume (kg) | Value (NAD) | Volume (kg) | Value (NAD) |
| 5 805       | 863 800     | 0           | 0           |

Northern as well as Central regions of Namibia

Moisturiser, anti-ageing skin care products, eye-care, anti-acne products, dry, fragile and damaged hair products, soaps and lipsticks and lip balms. Women used Ximenia oil to soften their skin and condition their hair. Eaten raw, used to make jams, jellies and drinks.

**Commiphora**

| 2008        |             | 2009        |             |
|-------------|-------------|-------------|-------------|
| Volume (kg) | Value (NAD) | Volume (kg) | Value (NAD) |
| 6 094       | 304 270*    | 5 010       | 250 520*    |

Kunene region

The commiphora plant resin is used by local Ovahimba people as a perfume.

**1.2 Commitment to the Wise Management of Natural Resources**

Namibia's commitment to the wise management of natural resources is evident in an impressive framework of legislation and policies. This starts firstly with the Constitution from which all other laws are derived. Article 95 (l) obliges the

Government of the Republic of Namibia to adopt policies aimed at the “maintenance of ecosystems, essential ecological processes and biodiversity, and the utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both at present and in the future.”

### **National Legislation**

Some pertinent examples of legislation and policies with relevance to ABS include the:

- **Draft Bill on Access to Genetic Resources and Associated Traditional Knowledge (2006):** currently being fully revised and aligned with the Nagoya Protocol.
- **Environmental Management Act (Act 7 of 2007):** promotes community involvement in the management of natural resources and community sharing in the benefits from these resources. It also mandates the establishment of a Sustainable Development Advisory Council to advise the minister on how to conserve biological diversity, on the sustainable use of environmental resources, and on access to genetic resources.
- **Nature Conservation Amendment Act (Act No. 5 of 1996):** Grants rights of utilisation over wildlife and tourism to communal area residents through on the proviso that they form communal conservancies.
- **Devil’s Claw Policy (2010):** promotes value addition for Devil’s Claw in Namibia, to monitor closely its utilisation, and to ensure the use of sustainable harvesting methods. It also promotes a tighter control mechanism for the management and trade of Devil’s Claw products.

- **Forest Act (Act No. 12 of 2001):** grants rights of utilisation over forest resources and grasses to communal area residents on the proviso that they form community forests.
- **Communal Land Reform Act (Act No. 5 of 2002):** Sets out procedures for the allocation of customary land rights and establishes communal land boards to oversee customary land rights allocations.
- **Traditional Authorities Act (Act No. 17 of 1995 (fully revised in 2000)):** Requires traditional authorities to ensure that members of their community use natural resources sustainably and in a manner that conserves the environment.
- **Research, Science, and Technology Act (Act No. 23 of 2004):**  
Establishes a National Commission of Research, Science, and Technology.
- **National Policy on Enabling the Safe Use of Biotechnology (1999):** seeks to guide the wise utilization of modern day biotechnology in Namibia towards sustainable development in a manner that does not put at risk human health as well as biodiversity and genetic resources, and; to ensure the effective control of cross border movements of genetically modified organisms or products thereof resulting from modern biotechnology through the exchange of information.
- **Biosafety Act (Act 7 of 2006):** provide for measures to regulate activities involving the research, development, production, marketing, transport, application and other uses of genetically modified organisms and specified products derived from genetically modified organisms. It also mandates the establishment of a Biosafety Council.<sup>1</sup>

---

<sup>1</sup> All acts of parliament are available from <http://www.parliament.gov.na/> while environment-related legislation can be downloaded from <http://www.met.gov.na/Pages/Documents.aspx>

## **International Agreements**

Namibia has also committed itself to a number of multi-lateral agreements (MEAs). Article 144 of the Namibian Constitution states that *"Unless otherwise provided by this Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia"*. The implication of this provision is that rules of public international law, as well as the provisions of international agreements ratified by Namibia, should be directly enforceable under Namibia law. Examples of some key MEAs relating to ABS that Namibia is a party to include:

- United Nations Convention on Biological Diversity (UNCBD) and the Cartagena Protocol on Biosafety,
- Convention on International Trade in Endangered Species of Wild Fauna and Flora,
- International Treaty on Plant Genetic Resources for Food and Agriculture and
- World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights<sup>2</sup>

---

<sup>2</sup> Namibia is also a member of the World Intellectual Property Organisation

## **2. ACCESS AND BENEFIT SHARING**

### **2.1 Policy and legislative framework**

Namibia has sought to develop dedicated national legislation to regulate ABS and the protection of associated traditional knowledge since 1998. This culminated in a 2006 draft bill on Access to Genetic Resources and Associated Traditional Knowledge, which received inputs from high level ministerial meetings as well as from a countrywide consultation process.

Namibia has also been actively involved in international negotiations on ABS and served as Chief Spokesperson of the African Group during the Nagoya Protocol consultations process. Namibia decided to put on hold its domestic ABS legislation in 2006 until the international regime on ABS was finalized.

A Cabinet directive was issued in 2007 to establish an Interim Bioprospecting Committee (IBPC) to cover the interim period. The IBPC serves to:

- receive bio-prospecting applications and scrutinise applications to assure that they are in the national interest;
- facilitate and ensure the granting of prior informed consent by indigenous and local communities when applicable;
- grant and issue a bio-prospecting permit and set the conditions for such a permit – including benefit-sharing, local participation, capacity building, reporting and information-sharing arrangements;
- facilitate if appropriate the expedited granting of other permits (e.g. re-search collection permits);
- monitor compliance with agreements and permit conditions; and
- receive periodic reports and updates from permit holders and negotiate the terms of further collaboration.

The IBPC makes use of the law of contract to execute the role of Competent National Authority granting legitimate access to resources for bio-prospecting services. It comprises of members mainly from key government departments and



tertiary research institutions as well as Non-Governmental Organisations (NGOs). It also co-opts representatives from other institutions when required. The MET acts as secretariat to the Committee.

With the agreement of the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits arising from their utilisation (NP –ABS) at the tenth Conference Of Parties to the UNCBD at Nagoya in October 2010, Namibia has once again renewed its efforts to complete its domestic legislation. A countrywide consultation process was completed to revise and refine the bill of 2006. It is envisaged that the revised ABS bill will be gazetted in the second half of 2012.

The draft revised bill has the following stated objectives:

- To regulate access to genetic resources and associated traditional knowledge based upon prior informed consent;
- to protect local communities' rights over and traditional knowledge in respect thereof;
- to promote a fair and equitable mechanism for benefit sharing;
- to establish the necessary administrative structures and processes to implement and enforce such principles; and
- to provide for matters connected thereto.

## **2.2 Institutional arrangements**

As described above, the IBPC continues to be the institution at the forefront of dealing with ABS issues in Namibia. However with the gazetting of the revised ABS bill, it is envisaged that a dedicated Genetic Resources Unit, housed within the MET, will take over its functions on a permanent basis.

The explicit functions of the Unit, as laid out in the draft revised ABS bill, will be to:

- (a) Regulate access to genetic resources and associated traditional knowledge and technologies in terms of the procedures provided for in the Act;
- (b) Collect, analyse and disseminate information on access to genetic resources and traditional knowledge, and to educate users and local communities concerning their respective rights and obligations in terms of this Act;

- (c) Prepare model access and benefit sharing agreements for use by users and local communities, and to assist local communities to negotiate the final terms of the benefit sharing agreements with the users of the genetic resources and / or the associated traditional knowledge;
- (d) Act as a registrar for all applications for access to genetic resources, including the issuing of permits authorizing access thereto
- (e) Oversee the collection and fair sharing of benefits to be derived from access agreements;
- (f) Establish procedures for the recognition of community intellectual property rights relating to traditional knowledge and technologies associated with genetic resources;
- (g) Supervise the consultative process between the applicant and the local community to ensure that the prior informed consent in respect of access to genetic resources is obtained;
- (h) Refer matters to the Sustainable Development Advisory Council, where appropriate, and to establish such ad hoc expert committees as may be deemed necessary to carry out its functions;
- (i) Ensure that the provisions of access and benefit sharing agreements are complied with;
- (j) Ensure that the community intellectual property rights of local communities are protected, with due regard for gender equity, wherever access to genetic resources in local communities is granted;
- (k) Monitor and evaluate, at regular intervals, taxa threatened by deterioration and/or extinction and of places threatened by a serious loss of biological diversity or threats to sustainable development, and to develop procedures to identify and disseminate information regarding threats to genetic resources;
- (l) Maintain an up-to-date system of information about research and development activities on genetic resources and associated traditional knowledge;
- (m) Compile information on piracy of genetic resources and associated traditional knowledge and technologies, and disseminate this information to all relevant and concerned bodies; and

(n) Exercise such other functions as the Minister may from time to time determine.

The Unit will not become operational until the draft ABS bill is gazetted and regulations are in place.

### **2.3 Status of implementation**

As outlined above, the draft ABS bill is close to being finalized and gazetted. The regional and national consultations process, the most time-consuming and complicated element, has been finalized with excellent input from all stakeholders<sup>3</sup>. The consultative process incorporated approximately 170 participants representing government agencies, indigenous and local community members, traditional authorities, conservancies and the youth from the different regions of Namibia.

These inputs have been integrated into the bill of 2006 and at a technical level the legislation is considered sufficiently aligned to the provisions of the Nagoya Protocol.

The bill is now ready to be tabled to Parliament and will thereafter be gazetted as an act of parliament.

### **2.4 ABS initiatives at national and community levels and the main players in those initiatives**

Namibia has a variety of initiatives in place which are furthering the concept of ABS at the national and local level. These are being spearheaded by the MET, which is the custodian of natural resources in Namibia and focal point to the UNCBD.

The consultation process on the ABS bill offered the opportunity to raise awareness of the concept at local level, and this was actively pursued. The process revealed that resource managers at local level are unaware of the concept of ABS, as are regional organs responsible for environmental governance such as traditional authorities, as well as parliamentarians at the highest decision-making level.

---

<sup>3</sup> The key findings of the ABS consultations process are included in annex 1 to this document.

Resource users are particularly unaware of their rights when negotiating with commercial partners and research institutions, which is contributing to the unsustainable use of resources and the exploitation of our local communities.

In response to this situation, the MET, with support from UNEP, has developed a brochure, poster and factsheet aimed at informing our communities in particular. These will be disseminated as soon as the ABS Act is gazetted. A number of information sharing and capacity building workshops were also held with parliamentarians.

A project proposal to develop a research and development platform for ABS, located in Namibia but applying to the Southern African region, is also at an advanced stage. The object of the project is to make a contribution for an improved sustainable commercialization of biological and genetic resources in Southern Africa. The project proposal was drafted by the MET in collaboration with Phytotrade Africa. The German Ministry for Economic Cooperation and Development is the envisaged funding partner.

At the resource manager level, a number of promising initiatives with regard to indigenous plant products are also at various levels of development. These initiatives are generating valuable lessons on issues such as ABS; sustainable resource utilisation; partnerships between community-based producers and private sector companies; value addition and value chain development; and the use of patent protection.

#### **2.4.1 Commiphora Resin (*Commiphora wildii*)**

The commiphora plant is found mainly in remote parts of the Kunene region. Resin from the plant is traditionally used as a perfume ingredient by the local Ovahimba people. Commercial harvesting of commiphora began in 2007 and is conducted through the conservancies in the region. Harvesting methods are 100% sustainable

as the resin is naturally exuded from the branches in response to increasing temperatures during spring. It is then simply collected from the branches or from the ground. Over 6,000kg of commiphora was harvested in 2009, mostly by women.

A historic first-ever ABS agreement for *Commiphora wildii* was signed in April 2010 between the Kunene Commiphora Conservancies Association (involving 5 conservancies) and the South African company Afriplex Ltd. Support to the conservancies was provided by the NGO Integrated Rural Development and Nature Conservation, representatives of which received training through the ABS Capacity Development Initiative for Africa.

The agreement commits both parties to utilize the resource in a sustainable way for the economic and social benefit of members of the association. The agreement is binding for five years, and Afriplex has committed to pay out per kg for the resin including a fee of per kg for the traditional knowledge value and conservation efforts of the association. This represents a considerable source of income for the local community in an area where viable livelihood diversification options are at a premium<sup>4</sup>.

#### **2.4.2 Marula (*Sclerocarya birrea*)**

For generations, women in North central Namibia have been using Marula as a source of food and drink as well as a cosmetic agent. Inside the fruit is a large nut that reveals two to four locules. When each locule is broken open, it contains an oil-rich kernel. A skill handed from generation to generation allows rural women to remove these small kernels and squeeze out the oil. This they then use either as an ingredient to complement the taste and texture of traditional chicken and millet dishes, or as a skin moisturizer.

Support was given to local communities by the NGO, Centre for Research, Information, Action Africa – Southern Africa Development Consultants, in 1996 to

---

<sup>4</sup> For further information about Commiphora resin, please see [www.irndc.org.na](http://www.irndc.org.na) and <http://www.met.gov.na/Documents/Earthbound%20July%202010.pdf>

investigate the use of Marula oil as a potentially viable income-generating opportunity for rural women. The idea to produce marula oil of a higher quality and in larger volumes so that it could be sold as an export product for the cosmetic industry was central to this support, which involved the development of technology, looking at quality control issues, extensive analysis of the oil and negotiations with contacts in high value cosmetics and food supplement markets.

The Eudafano Women's Cooperative (EWC) (marula harvesting is carried out exclusively by women) was established, based on village associations in twelve areas of north-central Namibia and with a membership of more than 5,000 women., Oil and a variety of juices are now processed at a local factory in Ondangwa and sold to international partners such as the Body Shop, Marula Natural Products of South Africa and Distell (South African producer of wine and spirits).

In addition to the cosmetic oil, the EWC is now actively pursuing the commercialization of a marula oil for cooking. Their efforts to produce it for international markets took a big leap forward with the launch of a range of marula food oils at the Namibia Tourism Expo in Windhoek in June 2010. A project is also underway to promote the multiplication of genetically superior marula trees to have in place an optimum resource base<sup>5</sup>.

#### **2.4.3 Devil's Claw (*Harpagophytum procumbens* and *Harpagophytum zeyheri*)**

Devil's claw is one of the most well-known indigenous plants in Namibia. It has been harvested and exported from Namibia for over 50 years and has been a protected plant since 1977 with permits required to control its harvesting, purchasing and export. Over the past 15 years Namibia has typically supplied around 90% of the global demand for devil's claw. Most of Namibia's devil's claw is harvested in communal areas and exported as dried, unprocessed slices or in the form of capsules, tea and powder as a treatment for rheumatism and arthritis. It is exported mainly to Germany.

---

<sup>5</sup> For a detailed write-up of Namibia's experiences with Marula, please see <http://www.wipo.int/ipadvantage/en/details.jsp?id=2651>

The traditional knowledge about the medicinal properties and applications of devil's claw, held mainly by the San in the eastern parts of Namibia, has already been lost and some patents on extraction and processing methods have been granted to commercial companies in Germany and the United Kingdom.

Recent increases in demand for devil's claw products have led to fears about increasing practices of unsustainable harvesting. The MET has responded to this threat by revising its devil's claw policy in 2010 to tighten the control mechanism over the management and trade of devil's claw products. The promotion of value addition, close monitoring of its utilization and sustainable harvesting are other key aims of this policy.

#### **2.4.4 Hoodia**

*Hoodia* is a succulent plant that is found mostly in semi desert areas. An active compound within *hoodia*, P-57, was found to be a natural appetite suppressant by the Council for Scientific and Industrial Research (CSIR) in South Africa. The diet market is a fast-growing sector with many developed countries suffering from rising levels of obesity.

Marketing rights to the P-57 compound – patented for its appetite suppressant and anti-diabetic properties – were eventually licensed to Unilever. However Unilever dropped *hoodia* in 2008 from its portfolio citing disappointing trial results.

This has hit the industry hard and has cast doubt on future demand for *hoodia*-based products. Nevertheless *hoodia* does have other potential applications besides appetite suppression. It has been used traditionally by the San and Nama people as a treatment for high blood pressure, diabetes and gout. Production of *hoodia* in Namibia is well organized and some San growers of *hoodia* benefit from an ABS

agreement between the CSIR and various San *hoodia* growers associations in Southern Africa.<sup>6</sup>

### **3. INDIGENOUS KNOWLEDGE IN CONSERVATION AND UTILIZATION OF GENETIC RESOURCES**

#### **3.1 Introduction**

Traditional knowledge is defined in the revised ABS bill of 2012 as meaning knowledge, practices, innovations or technologies created or developed over generations by local communities on the conservation and utilization of genetic resources.

Namibia is home to a highly multi-cultural society with a high level of traditional knowledge about wild foods, medicinal plants and other resources. However the traditional knowledge of some of Namibia's indigenous groups is at risk of extinction because it has not been recorded and is no longer automatically transferred to the younger generations. Indeed it is commonly perceived that this knowledge is both primitive and of little value in today's world of increasing modernisation and commercialization.

ABS has the potential to confer a new importance and renewed respect to traditional knowledge. There is a clear need to maintain and revive elements of customary law which strengthen local systems of environmental management and biodiversity conservation to enhance local rural food security, primary health and livelihoods. Traditional knowledge can be one of the country's most valuable assets in this regard.

#### **3.2 Policy and legislative framework**

Traditional knowledge goes hand in hand with traditional ('customary') rules and regulations governing socio-cultural relationships between people as well as patterns of human resource access and use. Customary law, described in the Traditional

---

<sup>6</sup> or general information and updates on the indigenous natural products in Namibia, please see <http://www.mcanamibia.org/files/files/PDFs/INP%20Docs/INP%20Market%20Bulletin%20Issue%20III.pdf>



Authorities Act of 2000 as the “norms, rules, traditions and usages of a traditional community”, enjoys a special constitutional status in Namibia.

Article 66 (1) of the Constitution states that “both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law”. This is a marked contrast to pre-independent Namibia in which systems of customary law were undermined and degraded by the colonial administration.

The first Traditional Authorities Act was enacted in 1995 but was fully revised in 2000 to introduce a formal system for designating traditional leaders. It specifically provides for the establishment of traditional authorities and the designation, election, appointment and functions of traditional leaders. It also defines the powers, duties and functions of traditional authorities and leaders.

Section 3 (2) (c) of the Act stipulates that the members of the traditional authority shall ensure that the members of his or her traditional authority use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintain the ecosystem for the benefit of all persons in Namibia.

This stipulation is complemented by Article 8 (j) of the UNCBD on ‘Traditional Knowledge, Innovations and Practices’ which states that each contracting party shall, as far as possible and appropriate “Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge innovation and practices”.

Article 102 of the Constitution also requires government to establish a Council of Traditional Leaders, which was enacted through the Council of Traditional Leaders Act of 1997. This Council's main function is to advise the President on the control and use of communal land.

Any draft legislation that deals with communal land must be shown to the Council of Traditional Leaders for their consideration and recommendations before it is introduced to the National Assembly.

### **3.3 Institutional arrangements**

Traditional Authorities and The Council of Traditional Leaders are the foremost institutions concerned with regard to traditional knowledge in Namibia. There are currently 49 recognized Traditional Authorities operating in the communal areas of Namibia, while the Council of Traditional Leaders is also fully operational.

Communal conservancies and community forests are also now important institutions which engage traditional authorities and communities in the sustainable management of natural resources. Traditional Authorities are usually represented in the governance of these institutions and benefit from the income and other benefits that are being earned by these institutions.

As of February 2012, there were 71 communal conservancies and 13 community forests registered in the communal areas of Namibia covering over 19% of the country's landmass (MET 2012b).

### **3.4 Status of implementation**

Traditional authorities are important organs of environmental governance in Namibia, especially with regard to their role in conserving natural resources. They will have an increasingly important role to play with the implementation of the ABS legislation. However, they currently lack capacity and resources to carry out this role in an effective manner.

There is also a need for better integration of customary law with modern policy and legislation, as well as modern and traditional law enforcement and authority systems so that they reinforce, rather than undermine, each other. Conflict between the systems of contract and customary law were recorded during the ABS consultations process.

The establishment of a National Forum on Traditional Knowledge, a mechanism which could have served to document and protect traditional knowledge, was planned for in Namibia's National Biodiversity Strategy and Action Plan (2001-2010), but never materialized. A Traditional Knowledge working group had been in place but has not been operational since 2004.

The draft ABS bill seeks to put in place a number of means for the protection of traditional knowledge. These include:

- requests for the application of the mandatory prior informed consent and written permit by the user and for tripartite (State, provider, user) benefit-sharing agreements prior to the granting of access to biological resources by the appropriate authorities;
- Emphasis on the inclusion of women in decision-making around access to genetic resources and benefits arising from their use. Women are often the custodians of traditional knowledge and responsible for transferring it from generation to generation.
- Development of a system of registration of items protected by Community Intellectual Rights and farmers' rights according to their customary practices and law (Article 29 vi);
- Establishment of a Community Gene Fund to finance projects developed by farming communities and aimed at solving their problems (Article 37).

It is also stated that the proposed act shall not affect –

- (a) the traditional systems of access, use or exchange of genetic resources by and between local communities;
- (b) access, use and exchange of traditional knowledge and technologies associated with genetic resources by and between local communities;
- (c) the sharing of benefits based upon the customary practices of the concerned local communities;

### **3.5 National and community-based IKS initiatives in place**

Efforts to document and protect traditional knowledge in Namibia have not been coordinated and are scattered among different institutions. The tertiary institutions have been the most active in this regard.

The University of Namibia runs a research program on Indigenous Knowledge System Technology (IKST). The aims of the programme are to undertake scientific research in IKST for product development as well as to promote, protect, record and disseminate IKST and IKS knowledge for preservation and further development.

The regional NGO “Working Group on Indigenous Minorities in Southern Africa”) has also supported the development of ‘knowledge banks’ on the oral history and cultural heritage of different San cultures.

## **4. INTELLECTUAL PROPERTY RIGHTS IN RELATION TO CONSERVATION AND UTILIZATION OF GENETIC RESOURCES**

### **4.1 Introduction to IPR in Namibia**

The main Intellectual Property Rights (IPRs) relevant to ABS include patents, plant breeders’ rights, community and farmers’ rights, trademarks, geographic indications and trade secrets. Copyright does not currently apply to ABS but could arguably become relevant in future. These distinct types of IPRs have different legal status, rules, application and implications in Namibia.

### **4.2 Policy and legislative framework**

Namibia is a member of a number of international organisations dealing with IPR issues including the World Intellectual Property Organisation (WIPO), the African Regional Intellectual Property Organisation (ARIPO) and the World Trade

Organisation (WTO) and its Trade Related Intellectual Property (TRIPS) Agreement. Although there is some flexibility regarding national implementation of the patent system, Namibia also acceded to the Patent Cooperation Treaty in 2003 and consequently has certain obligations regarding international patent applications.

Namibia is not a member of the Union for the Protection of New Varieties of Plants (UPOV) as the rules of UPOV tend to favour the rights of plant breeders and companies over those of local farmers. African Model Law covers the rights of communities and farmers to protect their genetic resources, including agricultural genetic resources such as landraces and indigenous animal breeds.

In terms of relevant domestic IPR legislation, a number of out-dated laws from the colonial era still apply such as the Patents, Designs, Trademarks and Copyright Act of 1916. A bill on Intellectual Property Rights Act, under the auspices of Ministry of Trade and Industry, has been under development since 2002. However the protection of plants is not included in this bill which mainly deals with patents, trademarks, and traditional intellectual property.

The revised ABS bill has an important role to play here. A proposed function of the Genetic Resources Unit in the bill is to ensure that the community intellectual property rights of local communities are protected, with due regard for gender equity, wherever access to genetic resources in local communities is granted. Broadly speaking, the bill seeks to promote for local communities, who are genetic resources owners and associated traditional holders, the acquisition of power in the market through a judicious and nationally driven strategic approach to IPR creation and ownership.

Article 27 (3)(b) of the WTO TRIPS agreement allows members to “exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes”. However Article 27 (3)(b) also requires members to provide for protection of plant varieties either by patents or by an

effective *sui generis* system. In Namibia, the revised draft ABS bill is considered a *sui generis* system that ensures compatibility between TRIPS and Article 8j of the UNCBD at the national level.

#### **4.3 Institutional Arrangements**

The Ministry of Trade and Industry (MTI) administers most formal IPRs in Namibia through the Office of the Registrar of Companies. A process is underway in MTI to set up a separate intellectual property agency. The MTI is also the national focal point to the WTO. Other ministries such as the Ministry of Agriculture, Water and Forestry and MET are closely engaged with developments relating to the International Treaty on Plant Genetic Resources for Food and Agriculture Treaty and WIPO.

The Genetic Resources Unit, outlined in 4.1 above, will also be a key institution with regard to IPR and the conservation and utilization of genetic resources

#### **4.4 Status of implementation**

The status of implementation of the draft revised ABS bill has been covered in Chapter 2.3.

#### **4.5 National IPR initiatives in place and regional /international initiatives the country is participating in**

Namibia has been closely engaged with international developments on IPR and their relationship to natural resources. Negotiations are underway in the WIPO Intergovernmental Committee to develop legal instruments to protect genetic resources, traditional knowledge and traditional cultural expression (TCE).

In 2010 ARIPO adopted the Swakopmund Protocol that seeks to protect traditional knowledge and TCEs. Traditional knowledge associated with genetic resources is however only weakly protected under this instrument, which has not been ratified by Namibia and is yet to enter into force.

At the local level, the commercialisation of marula oil as a cosmetic ingredient (known as maruline) as described in section 2.4.2 has been Namibia's most significant case study with regard to IPR and the utilisation of genetic resources. Maruline is the first active botanical ingredient developed through scientific collaboration between traditional resource users (supported by Phytotrade Africa) and a specialized international research and development company – Aldivia.

In 2006, Aldivia filed a patent application for the process used to create Maruline with the international [Patent Cooperation Treaty](#) system. This patented process is co-owned by Aldivia and the primary African producers represented by the Southern African Natural Products Trade Association. This co-ownership represents a unique partnership that has set new standards for benefit-sharing between traditional knowledge holders and international companies.

As the popularity of marula oil increases, it is considered that IPR can be used to further popularize it, expand its usage, and ensure greater income generation for the Namibian producers using traditional knowledge. Current and future IPR strategies translate into economic benefits for cooperatives such as EWC, which increases access to education and healthcare, raises living standards and stimulates the development of rural communities.

## **5. LIABILITY AND REDRESS AS IT RELATES TO BIOSAFETY**

While biotechnology can have great benefits for improvements in human well being it can also have adverse effects on biological diversity and potential risk to human health. As a result biosafety becomes an important tool to reduce and eliminate the potential risks resulting from biotechnology and its products. The effectiveness of biosafety is heavily dependent on regulatory policy and legal national frameworks. Effective compliance and enforcement national regulatory frameworks are imperative for ensuring that optimal benefits are obtained from biotechnology and at the same time genetic resources are used sustainably and equitably sharing with the people. Insofar as liability and redress for biosafety is concerned Namibia adopts a mixture of control and command and administrative control regulatory system for compliance and enforcement of laws relating to biosafety. Command and control refers to a system where there is strict monitoring by authorities as to whether law is being followed and where offenders are prosecuted using the criminal law. Liability may arise from the Namibian Constitution, Statutory law or Common law.

### **5.1 Policy and legislation**

As already mentioned, Namibia is a party to the Cartagena Protocol on Biosafety, which Namibia ratified in May 2005. To domesticate the provisions of the CPB, Namibia has in place the National Policy on Safe Use of Biotechnology, 1999 and the Biosafety Act 2006 (Act No. 7 of 2007).

At the time of ratification of the CPB, the liability and redress as set out in Art. 27 was not yet elaborated as to guide parties on how to provide for liability and redress for damage resulting from transboundary movement of living modified organisms. Hence the provisions in the Biosafety Act on liability and redress focuses more on offences on non-compliance with the requirements for permit conditions. For example section 20(1)(a) of the Biosafety Act, a person who without a licence deals with a GMO or a GMO product commits an offence. In terms of section 20(1)(b) a person who fails to comply with a condition of licence fails to commit an offence. A (3) A person who contravenes Section 20(1)(a) or (b) is liable on conviction to a fine



not exceeding N\$100,000 or to imprisonment for a period not exceeding 5 years, or to both such fine and such imprisonment.

By critical analysis of the Biosafety Act, issues of liability and redress are not covered. If Namibia signed and ratified the N-KLSPL & R, then the Act has to be amended.

## **5.2 Liability under other statutory laws**

**Environmental Management Act 7 of 2007:** came into operation on 6 February 2012. The Act requires that an environmental clearance certificate be obtained from the Environmental Commissioner before activities listed in the Government Notice No. 29 of 6 February 2012., are carried out. Dealing in GMO's and release and introduction of GMO's is listed as an activity under that Notice. In terms of section 27(4) of the Act, a person who carries out an listed activity without having obtained an environmental clearance certificate is on conviction liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment. The Act only came into operation this year and there is no case law to prove the enforcement of section 27(4).

**Aquaculture Act 18 of 2002:** In terms of section 39(b) of the Aquaculture Act 18 of 2002 A person who without the written permission of the Permanent Secretary of the Ministry of Fisheries and Marine resources introduces or causes to be introduced into any Namibian waters any species of aquatic organisms or any genetically modified aquatic organism or transfers any species of aquatic organisms from one aquaculture facility to another commits an offence. In terms of Section such 40(1)(b) of that Act, such a persons is liable on conviction to a fine not exceeding N\$8 000 or imprisonment not exceeding two years or to both such fine and imprisonment.

**Plant Quarantine Act 7 of 2008:** has not commenced yet: In terms of section 14(1) of the Plant Quarantine Act, a person who without a permit import into Namibia any plant material, plant pest, beneficial organism, soil or packaging or any other object or material which has been specified by the Minister by notice in the Gazette commits an offence. In terms of section 14(2) of that Act, a person who imports a regulated article and does not must ensure that the article is brought into Namibia only through a designated point of entry or is declared and presented to a

plant quarantine officer for inspection on its arrival or is not accompanied by a phytosanitary certificate issued by the plant protection authority of the country from where it is exported, or by any other certificate or document of permission issued in that country as may be prescribed commits an offence. A person who commits an offence is in each case liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 2 years, or to both such fine and such imprisonment.

**Controlled Wildlife Products and Trade Act No. 7 of 2008:** In terms of section 4(1) of the Controlled Wildlife Products and Trade Act, a person who without a permit possesses, deals in, manufacture or imports or exports any controlled wildlife product commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 20 years or to both such fine and such imprisonment.

**Agronomic Industry Act No. 20 of 1992:** In terms of section 19(1) of the Agronomic Industry Act, the Minister may prohibit the sale of a controlled product or category or controlled products or prohibit such sale in a specified area or at a specified place or for a specified purpose. In terms of section 21 of that Act, 21 the Minister may after consultation with the Board, by notice in the Gazette prohibit the importation into or exportation from Namibia, of a controlled product except by the Board or a holder of a permit issued by the Board and in accordance with the conditions specified in the permit.

A person who contravenes the provisions of the Act commits an offence and is liable on conviction to a fine not exceeding N\$3 000 or to a term of imprisonment not exceeding six months or to both such fine and such imprisonment.

**Animal Health Act No.1 of 2011:** In terms of section 7(1) of the Animal Health Act, a person may not import for entry into Namibia any animals, animal products and restricted material without an import permit issued under this Act authorising the importation for entry into Namibia, and the importation is carried out in accordance with the conditions as prescribed and as specified in the permit. In terms of section 7(11) a person who contravenes or fails to comply with any provision of subsection (1), (2), (8) or (10) commits an offence and is liable to a fine not

exceeding N\$1 000 000 or to imprisonment for a term not exceeding 20 years or to both such fine and such imprisonment.

**Water Resources Management Act No. 24 of 2004:** In terms of section 56 of that Act a person may not discharge any effluent directly or indirectly to any water resource on or under the ground, including through a borehole or construct any effluent treatment facility or disposal site above any aquifer without a permit. In terms of section 58 of that Act, a person may not discharge effluent from a sewer directly to any water resource on or under the ground, including through a borehole, unless the discharge is in compliance with a permit issued under section 60. A person who contravenes provisions of that Act commits an offence and is liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment, and on second conviction, to a fine not exceeding N\$40 000 or imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment; or a person who commits an offence in terms of section 119(10) or (11) is liable to a fine not exceeding N\$2 000 or imprisonment for a period not exceeding six months, or to both such fine and such imprisonment.

**Forest Act No. 12 of 2001:** In terms of section 22(1) a person may not cut, destroy or remove vegetation which is on a sand dune or drifting sand or on a gully unless the cutting destruction or removal is done for the purpose of stabilising the sand or gully or any living tree, bush or shrub growing within 100 metres of a river, stream or watercourse without a licence. A person commits an offence, and is liable on conviction to be sentenced to a fine which does not exceed N\$8 000 or to imprisonment for a period which does not exceed two years or to both the fine and imprisonment.

**Research, Science and Technology Act No. 23 of 2003:** In terms of section 20(1) of that Act a research institute based in Namibia may not conduct any type of research in Namibia without being registered with the Commission in terms of subsection (3). In terms of section 34 a person commits an offence, if such person fails to give information, or gives false or misleading information to the Commission or hinders any commissioner or any employee of the Commission in the conducting

of any investigation under section 22(2). In terms of section 34 of that Act, a person who fails to give information, or gives false or misleading information to the Commission, hinders any commissioner or any employee of the Commission in the conducting of any investigation under section 22(2) or contravenes or fails to comply with section 20(1), 21(1), 22(3), 28 or 29 commits an offence and is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

**Medicines and Related Substances Control Act, 13 of 2003:** Sale of medicines used in humans and animals, which require registration under this Act and which are not registered is an offence. (Section 38) Breach of conditions of registration of medicines is an offence. Failure to obtain licence for premises where medicine is manufactured is offence. (Section 38) A person who is convicted of an offence is liable to a fine not exceeding N\$ 40 000.00 or imprisonment for a period not exceeding 10 years or to both the fine and imprisonment (Section 39). In addition to this penalty the court can declare medicines in respect of which the offence was committed to be forfeited to the State (Section 39).

**Fertilizers, farm feeds, agricultural remedies and stock remedies act 36 of 1947:** Manufacture and sale of fertilizers and farm feeds from animal carcass with sterilizer or without a permit (Section 18). A person convicted of offence is liable to a fine not exceeding N\$ 500 or 12 months imprisonment or both the fine and imprisonment (Section 18). The court can declare fertilisers, farm feeds and fertilizers used in the commission of an offence to be forfeited (Section 18).

**Nature Conservation Ordinance No. 4 of 1975:** In terms of section 23 of that Ordinance no person shall without the written approval of the Minister hunt any game or any other wild animal or bird in a private game park. In terms of section no person shall without the written approval of the Minister pick any indigenous plant, or any portion of an indigenous plant, in a private nature reserve: Provided that the owner of the land concerned may at any time pick any indigenous plant, other than a protected plant, on such land.

Any person who contravenes or fails to comply with any provision of this Ordinance or an instruction given thereunder or a requirement put thereunder or any condition, requirement or restriction of a permit, licence, registration, approval, permission or exemption issued or granted thereunder shall be guilty of an offence and is liable on conviction to a fine not exceeding two hundred and fifty rand or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment if such person has not previously been convicted of such offence or, in the opinion of the court, a similar offence in terms of the provisions of a repealed ordinance or to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment if such person has previously been convicted of an offence referred to in paragraph section 87(a).

### **Constitutional liability and remedies**

Rights relating to biosafety can be enforced in the High Court of Namibia. In terms of Article 18 of the Namibian Constitution persons whose rights are violated relating to biosafety and genetically modified organisms are aggrieved by administrative actions that fails to comply with the principles of natural justice and as a result infringes on recognized rights of persons relating to biosafety and genetically modified organisms, can be reviewed by the High Court of Namibia. The remedies the court can grant are to set aside the decision or action, directing the administrator to act in a manner the court directs, directing the administrator to provide reasons for the decision taken or an order declaring the rights of the parties or an order granting interdict or other temporary relief, a mandamus compelling the administrator to comply with a statutory duty.

In terms of Article 25 of the Namibian Constitution persons whose rights are aggrieved by executive action and laws which fails to comply with the limitations stated in Article 22, can approach the High Court for a remedy. The Court can declare the action as invalid or the law as unconstitutional and strike such law out. The Court may also order Parliament to amend an infringing law in a given time failing which the law become unconstitutional and cease to apply. The Court may award monetary damages to the aggrieved person.

### **5.3 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress (N-KLSPL &R)**

Namibia actively participated in the Ad hoc Open-ended Working Group on Legal and Technical Experts on Liability and Redress established in 2004 by the first meeting of the Conference of Parties. The Open-Ended Working Group elaborated on the international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs. CPB Parties negotiated for six year (2004 -2010). The negotiation resulted in the adoption of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress (N-KLSPL & R) to the Cartagena Protocol on Biosafety in 2010 at the COP-MOP5. Namibia has not signed the N-KLSPL & R. If Namibia acceded to the N-KLSPL & R, then there is a need to harmonise related legislation and to amend the Biosafety Act.

## **6. CHALLENGES, PROGRESS / STATUS OF RATIFICATION OF NAGOYA KUALA LUMPUR SUPPLEMENTARY PROTOCOL ON LIABILITY AND REDRESS AND NAGOYA PROTOCOL ON ACCESS AND BENEFIT SHARING**

### **6.1 Status of Ratification of NP-ABS and Challenges**

Namibia has taken the decision not to ratify the Nagoya Protocol on ABS until its own domestic legislation is finalized and in place. It is however in the process of finalizing its accession to the Protocol to cover the interim period.

The consultation process for revising the ABS bill made clear a number of key challenges that Namibia is facing with regard to the implementation of the provisions of the Nagoya Protocol.

1. Awareness of the concept of ABS is low apart from among a small group of technical experts. Communities from communal areas in Namibia suffer from extreme poverty are especially unaware of the value of their produce and knowledge which allows them to be easily manipulated and exploited by researchers and commercial traders. The regional consultations showed that there was very little awareness on the role of the IBPC among local level stakeholders.
2. Capacity at all levels. Given the low level of awareness of ABS, considerable capacity building will be necessary to allow Namibia to implement and benefit from the concept in an optimal fashion. This should target all levels including decision makers, technical level stakeholders (genetic resources unit), regional and local level stakeholders.
3. Establishment of an effective and competent genetic resources unit.
4. Defining and strengthening the role of traditional authorities and customary law as relates to ABS.
5. Design and implementation of a mechanism for the documentation and protection of traditional knowledge
6. Land tenure structures in communal areas and the identification of the definition of providers as relates to the distribution of benefits.

7. Lack of coordinated research and development into genetic resources with potential commercial applications.
8. Ensuring sustainable harvesting of resources in cases where demand for that resource is increasing

## **6.2 Challenges under the N-KLSPL & R**

Namibia had participated in the negotiations of the N-KLSPL& R is in the process of preparing briefing documents at policy level on the new protocol in order to pave the way towards acceding to the N-KLSPL&R. The following are some of the challenges that require immediate attention:

1. The Biosafety Act is not in force yet and therefore it is to challenge in the Court of law.
2. The Biosafety Act was finalized before the N-KLSPL& R. therefore the issues of liability and redress are not fully addressed.
3. The Biosafety Act is not explicit on damage on biodiversity. It must be amended.
4. There is a need to harmonise sectoral legislation that deals with Biosafety in order to ensure that we can fulfil our obligations as set out in the N-KLSPL & R

## **7. REFERENCES**

Barnes J.I., Nhuleipo O., Baker A.C., Muteyauli P.I., and Shigwedha V. (2009). Wildlife Resource Accounts for Namibia (2004) Directorate of Environmental Affairs Research Discussion Paper. Ministry of Environment and Tourism, Windhoek, Namibia.



Krugmann, H. (2001). Namibia's thematic report on Benefit-sharing mechanisms for the use of biological resources.

Ministry of Environment and Tourism (2010). Fourth National Report to the United Nations Convention on Biological Diversity.

Ministry of Environment and Tourism (2012a). Managing Natural Resources for Sustainable Development in Namibia: Moving towards a Greener Future.

Ministry of Environment and Tourism (2012b). National Report to the United Nations Commission on Sustainable Development.

Ministry of Environment and Tourism (2012c). Draft Bill on Access to Genetic Resources and Associated Traditional Knowledge (version last update July 2012).

United Nations Environment Programme (2012). Green Economy Sectoral Study: Biotrade - A Catalyst for transitioning to a Green Economy in Namibia.

\*\*\* *Electronic copies of each of these documents are available upon request.* \*\*\*

## **ANNEXURE 1**

### **Relevant Contact Details**

#### **1. Operational Focal Point to the UNCBD**

Teofilus Nghitila

Environmental Commissioner

Ministry of Environment and Tourism

Tel: +264-61-2842701

Fax: +264-61-240339

Email: [tnghitila@yahoo.com](mailto:tnghitila@yahoo.com)

#### **2. Access and Benefit Sharing National Focal Point**

Kauna Schroder

Project Coordinator Biodiversity and Sustainable Land Management Project  
(BSLM)

Ministry of Environment and Tourism (MET)

Tel: +264-61-2842704

Fax: +264-610240339

Email: [kauna@met.na](mailto:kauna@met.na)

#### **3. Cartagena Protocol National Focal Point**

Dr. Martha Kandawa Schulz

Chair of Namibian Biotechnology Alliance

University of Namibia

Tel.: +264-61-2063635

Fax: +264-61-2063791

E-Mail: [kschulz@unam.na](mailto:kschulz@unam.na)

**4. Contact on WTO/WIPO-related matters**

Mr. Tileinge Andima

Ministry of Trade and Industry

Tel: +264-61-2837242

Fax: +264-61-22576

Email: [andima@mti.gov.na](mailto:andima@mti.gov.na)

**5. Operational Focal Person on Biosafety**

Mr. Elmo Thomas

Ministry of Education: Directorate of Research, Science and Technology

P/Bag 13186

Windhoek

Tel: +264-61-270-6130/1

Fax: +264-61-270-6122

E-mail: [Elmo.Thomas@moe.gov.na](mailto:Elmo.Thomas@moe.gov.na)

## **ANNEXURE 2**

### **Summarized Findings of Namibia's Regional Consultative Process for Development of National Bill on Access and Benefit Sharing (ABS), June-August 2011**

This document provides a concise summary of the main findings from Namibia's regional consultative process for the development of a national bill on Access and Benefit Sharing (ABS). The consultative process included five regional workshops, which are to culminate in a national workshop on the 24<sup>th</sup> August 2011. During these workshops, participants were asked to give contributions to the bill, with particular focus on:

- Access and Benefit Sharing
- Genetic Resources, Traditional Knowledge and Intellectual Property Rights
- Capacity Building, Awareness Raising and Institutional Arrangements
- Compliance Measures

The resulting inputs into these thematic areas is presented below.

#### **1. Access and Benefit Sharing**

##### **1.1 Access:**

- Access to genetic resources and associated traditional knowledge must be subject to the prior informed consent (PIC), which must be in writing
- From whom should PIC be obtained? Competent National Authority (CNA), Traditional Authorities, Communities involved (TK owner), Regional Councils, Village Councils, Municipalities...(case by case basis but bodies to serve in the interest of communities)
- Any prospective resource user (researchers and commercial companies) must go through the Traditional Authority (Chief or local headman/woman),

conservancy or regional representative of the CAN to attain access to genetic resources or traditional knowledge

- The State should ensure by law/mandate that local communities have the right to exercise their inalienable right to access, use, change or share GR
- Granting of access must be predicated on commitment from both sides to conservation and sustainable use of the resource, the maintenance of our genetic diversity
- Community bio-cultural protocols, where communities themselves come together to provide terms and conditions to regulate access to their genetic resources and TK (perhaps a long term goal?)
- Recommended that access applications be placed in the newspaper for a period of 30 days for public accessibility and input (see article 8 of draft bill)

## **1.2 Benefit Sharing**

- All benefits accruing from the commercial and/or scientific use of genetic resources and TK systems must be shared equitably
- Benefit-sharing measures must be included in a Memorandum of Understanding (MoU) to be endorsed by the CNA and Traditional Authorities. These measures must include non-commercial benefits such as technology, employment, skills transfer as well as local level value addition as far as possible
- Ratio of monetary benefit-sharing between state and communities involved should be decided on a consultative case-by-case basis depending on many factors such as the type of resource, the nature of the TK, quantity and quality of resource supplied etc.
- Land Ownership and benefit sharing: owner of land in a communal area, on which a resource or TK is found, should get a fair percentage of any benefits. How to deal with benefit sharing for resources and TK on private land
- A "Trust" should be developed to promote and make benefit sharing sustainable
- Include periodical price increments for resource providers in MoU subject to the commercial performance of the processed product

- Benefit demands should be realistic and negotiated mutually, and should not set out to restrict investment

## **2. Genetic Resources, Traditional Knowledge and Intellectual Property Rights**

### **2.1 Genetic Resources**

- **Definition:** Genetic resources should not be restricted to plants only - but should include animals & microbes
- The role of customary law, in terms of the conservation and sustainable use of genetic resources, should be strengthened
- Allow Traditional Authorities to control and issue permits for usage of genetic resources
- Carry out mapping of our indigenous genetic resources (and associated TK) so that we know their location, their usage and their potential to satisfy possible market demands
- Engage MAWF to establish research stations dedicated solely to our indigenous plants and crops
- Use the outputs from these activities so that we know how best we can cultivate, process, use and sustain our rich resource base
- Place controls on industry including the amounts, sources for goods sold, percentage of price to go to traditional authorities

### **2.2 Traditional Knowledge**

- The Bill should have a mechanism to maintain, recognise, protect and document the TK in different communities (how should this mechanism operate? How best can we go about collecting TK? Desirable for it not to be in public domain and perhaps should be accessible only to NCA and Traditional Authorities)
- Register traditional practitioners with relevant authorities
- If traditional knowledge is registered, someone should not be able to use it for any purpose, unless with the written consent of the knowledge holder

- The TK holder and origin of knowledge should be acknowledged and registered to facilitate benefit sharing and the payment of royalties to that level
- In order for one to collect TK from any community member the law must require that they first go to the Traditional Authority or local chief
- TK should be viewed as a socio-economic asset unique to Namibia. How can we instil this mindset among our youth and facilitate the transfer of knowledge between our elders and the younger generations?

### **2.3 Intellectual Property Rights**

- The Bill must make provision to protect intellectual property rights (whether documented or not)
- There should be patent registration on TK and genetic resources, where appropriate
- Intellectual property rights must be enforceable on international researchers and companies (particularly unregistered knowledge).

## **3. Capacity-building, Awareness Raising and Institutional Arrangements**

### **3.1 Capacity Building**

- Main groups to benefit from ABS-related capacity building:
  - Indigenous community members including the youth and women
  - Regional Councils, Local Authorities and Traditional Authorities
  - Line Ministries and NGOs
  - Research Institutions
  - Community-Based Organizations
  - Youth Organizations and Environmental Clubs
- Capacity building should focus on empowering these groups in terms of training, finance, institutional strengthening and technology transfer
- Specific areas of focus could include:
  - Support to communities in negotiating ABS agreements, possible training of community negotiators

- Support to communities to develop their own bio-cultural protocols to regulate access
- Community training on sustainable harvesting practices and the promotion of practices linked to value addition
- Strengthening the ability of Traditional Authorities to promote the sustainable management of natural resources in their areas of jurisdiction, and to identify areas of conflict between customary and common law in terms of environmental governance

### **3.2 Awareness-Raising**

- Incorporate Article 21 of Nagoya Protocol on awareness raising into the domestic ABS bill
- Sensitize communities and traditional authorities on issues relating to ABS and traditional knowledge with particular focus on the value of our natural resources and the need for sustainable use
- Establish an ABS help desk accessible to indigenous and local communities. Can provide information such as advice on prices, standard conditions and industry standards
- Facilitation of international exchanges at community level to promote cross-cultural learning on ABS
- Development of a code of conduct for buyers and sellers of natural resources, which lays out guidelines relating to the roles and responsibilities of different institutions with provisions for the sustainable use of genetic resources
- Translation of bill into local languages including a lay man's version
- Make use of meetings, workshops, platforms for debate and the media as well as other communication materials such as pamphlets, posters and role plays
- Establish Clearing House Mechanism to inform international parties about Namibia's ABS framework

### **3.3 Institutional Arrangements**

- Establishment of Genetic Resources and Traditional Knowledge Unit within the MET as NCA on ABS



- **How should the Unit operate?**

- Should be decentralized and recognize regional and local structures
- Should consist of IBPC members but also Regional Councils, Traditional Authorities, Constituency Development Committees, Conservancies, Forestry and Farmers Associations, Communal Land Boards and community representatives

- **Functions of the Unit:**

- Integrate the activities of various institutions and strengthen existing structures, particularly the different permit-granting authorities
- Be a one-stop shop for applications and validation.
- Make resources available and create a mechanism for the collection, protection and preservation of TK. Engage Namibia academic institutions and youth groups into this process.
- Coordinate research into the usage of genetic resources and TK. Engage Namibia academic institutions and youth groups into this process.
- Facilitate effective communication with Traditional Authorities and TK holders
- Should coordinate the assistance of communities engaged in ABS negotiations and make legal practitioners available for such
- Lead national awareness raising campaign on ABS and communicate effectively with communities and local level stakeholders

#### **4. Compliance measures**

- The CNA should ensure the implementation of any compliance mechanism
- All researchers and commercial buyers, operating or wishing to operate in Namibia, should be registered with the CNA
- Compliance should be based on clear user measures and requirements outlined in PIC and Mutually Agreed Terms (MAT) between the community and the users
- In cases of non-compliance, negotiations between the parties should first be pursued. In case of their failure, the state should take appropriate, effective and proportionate legal measures to support the communities involved

- Buyers should only be able to sell or export if all permits are in place. A transport permit should be required if genetic resources are being taken out of the country
- Checkpoints should be administered but only to expatriates and not for cases of local consumption.
- Major results of any research should be shared with the community, and this should be stipulated in the contract
- Communities should be involved as far as possible in monitoring compliance.

### ANNEXURE 3

#### List of Main Actors in ABS, IKS, L&R, IPR issues in the Country and their Contact Details/websites

| <b>Main Actors</b>  | <b>Thematic Issue</b> | <b>Contact Details</b>  |
|---|-----------------------|---|
| Ministry of Environment and Tourism                                   | ABS, IKS              | Kauna Schroder<br>Tel: +264-61-2842704<br>Fax: +264-610240339<br>Email: <a href="mailto:kauna@met.na">kauna@met.na</a><br><a href="http://www.met.gov.na">www.met.gov.na</a>              |
| Ministry of Education – Directory of Research, Science and Technology | L&R                   | Elmo Thomas<br>Tel: +264-61-2706146<br>Fax: +264-61-2933509<br>Email:<br><a href="mailto:ethomas@mec.gov.na">ethomas@mec.gov.na</a><br><a href="http://www.moe.gov.na">www.moe.gov.na</a> |
| Eudafano Women’s Cooperative  |                       | Simeon Ndjelekeni<br>Email:<br><a href="mailto:ndjelekeni@yahoo.co.uk">ndjelekeni@yahoo.co.uk</a>   |

## **ANNEXURE 4**

### **Community cases & National cases**

For Marula case study in detail please see

<http://www.wipo.int/ipadvantage/en/details.jsp?id=2651>