Traditional Knowledge and Plant Genetic Resources Guidelines
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Traditional Knowledge and Plant Genetic Resources Guidelines
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Acronyms

ABNE  
African Biosafety Network of Expertise

ABS  
Access and Benefit Sharing

ACP  
African Caribbean Pacific

AMCOST  
Africa Ministerial Conference on Science and Technology

ARIPO  
The African Regional Intellectual Property Organization

AU  
African Union

BecANet  
Biosciences Eastern and Central Africa Network

BioFISA  
Finnish Southern Africa Partnership Programme to Strengthen NEPAD/SANBio Network

CBD  
Convention on Biological Diversity

CGIAR  
Consultative Group on International Agricultural Research

CPA  
Africa's Science and Technology Consolidated Plan of Action

CSIR  
Council for Scientific and Industrial Research, South Africa

EU  
European Union

FAO  
Food and Agriculture Organization of the United Nations Organization

GI  
Geographical Indications

GMO  
Genetically Modified Organism

IGC  
Inter-Governmental Committee

IGO  
Inter-Governmental Organization

IK  
Indigenous Knowledge (also referred to as Traditional Knowledge (TK) and used interchangeably in some cases)

IP  
Intellectual Property

IPM  
Intellectual Property Management

IPRs  
Intellectual Property Rights

ITPGRFA  
International Treaty on Plant Genetic Resources for Food and Agriculture

Mats  
Mutually Agreed Terms

MOU  
Memorandum of Understanding

MTA  
Material Transfer Agreement

NABNet  
North Africa Biosciences Network

NDA  
Non-Disclosure Agreement

NEPAD  
New Partnership for Africa’s Development

NGO  
Non-Governmental Organization

NPGRC  
National Plant Genetic Resources Centre
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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>OAPI</td>
<td>Organisation Africaine de la Propriété Intellectuelle</td>
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<td>PACRA</td>
<td>Patents &amp; Companies Registration Agency</td>
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<td>PAIPO</td>
<td>Pan-African Intellectual Property Organization</td>
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<td>PGR</td>
<td>Plant Genetic Resources</td>
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<td>POL-SABINA</td>
<td>Policy and Support Actions for Southern African Natural Product Network</td>
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<td>R&amp;D</td>
<td>Research and Development</td>
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<td>RISDP</td>
<td>Regional Indicative Strategic Development Plan</td>
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<td>RISE</td>
<td>Regional Initiative in Science and Education</td>
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<td>SABINA</td>
<td>Southern African Biochemistry and Informatics for Natural Products</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<td>SANBio</td>
<td>Southern Africa Network for Biosciences</td>
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<td>SMTA</td>
<td>Standard Material Transfer Agreement</td>
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<td>SPGRC</td>
<td>SADC Plant Genetic Resources Centre</td>
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<td>STI</td>
<td>Science Technology and Innovation</td>
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<td>STRC</td>
<td>Scientific Technical Research Commission</td>
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<td>TK</td>
<td>Traditional Knowledge</td>
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<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<td>TTO</td>
<td>Technology Transfer Office</td>
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<td>UPOV</td>
<td>International Union for the Protection of New Varieties of Plants (L’Union internationale pour la protection des obtentions végétales)</td>
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<tr>
<td>WABNet</td>
<td>West Africa Biosciences Network</td>
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<td>WG</td>
<td>Working Group</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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• The governments of South Africa and Finland for the funding that supported part of the work of the Working Group (WG) and the production of these guidelines;
• Members of the Working Group for their hard work, guidance, advice and commitment without whom these Guidelines would not have been possible;
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• The team of external reviewers comprising Prof. Mpaza Sinjela from the School of Law, University of Zambia; Mr Gracian Banda from the Centre for Environmental Policy and Advocacy, Malawi; and Mr Kabir Bavkatte from the Natural Justice, India; and
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Finally, my profound gratitude also goes to the publishers of the Guidelines for their acceptance of, and insight in, the publishing of this booklet.

Prof. Luke Evuta Mumba, PhD
DIRECTOR, SANBio
The Working Group

The Working Group (WG) was appointed by the Director of the NEPAD Office of Science and Technology (OST) in October 2010 with the objective of advising the NEPAD Southern Africa Network for Biosciences (SANBio) in the development of Guidelines on Intellectual Property Rights (IPRs), Traditional Knowledge (TK), Plant Genetic Resources (PGR) and Access and Benefit Sharing (ABS). The idea was for the WG to consist of members with relevant expertise, drawn from different disciplines on the continent and beyond. The terms of reference for the WG were:

- Develop guidelines on Intellectual Property (IP) and the use of biological resources, particularly as they relate to public sector research;
- Advise on strategies for building regional capacity to manage IP and biological resources in the countries of the region;
- Advise on appropriate processes for the protection of indigenous knowledge and benefit sharing;
- Develop a process of engaging communities and TK holders; and
- Advise on access to the use of indigenous resources.

The composition of the WG was as follows:

a) Mr Jethro Ndhlovu (Chair) – Patents & Companies Registration Agency (PACRA), Zambia;
b) Ms Tshidi Moroka (Vice-Chair) – Council for Scientific & Industrial Research (CSIR), South Africa;
c) Dr Mohammed Kyari – AU/Scientific Technical Research Commission (STRC), Nigeria;
d) Ms Betty Kiplagat – AU-NEPAD Agency/African Biosafety Network of Expertise, Burkina Faso;
e) Prof. Philip Iya – North West University, South Africa;
f) Ms Rosemary Wolson – CSIR, South Africa; and
Foreword

Since the Convention on Biological Diversity (CBD) came into effect in 1992, there has been increased awareness of the value of TK associated with biological resources; the role of Intellectual Property protection; and the need for developing mechanisms to ensure fair and equitable sharing of benefits resulting from the use of biological resources. In contrast, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement adopted by the World Trade Organization (WTO) in 1994, and which has widely been ratified, contains provisions for minimum standards of Intellectual Property protection, including the extension of patent protection to plant material or providing *sui generis* protection as is the case with the International Union for the Protection of New Varieties of Plants (UPOV) Convention. In addition, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) contains provisions for farmers’ rights and further emphasizes fair and equitable sharing of benefits resulting from the use of Plant Genetic Resources for Food and Agriculture. The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, which was adopted on 29 October 2010 in Nagoya, Japan, provides a legally binding framework regulating access to genetic resources and the fair and equitable sharing of their benefits. The protocol is yet to come into effect, but the principles contained therein have widely been accepted. If a country ratifies the Nagoya Protocol, its national policies and laws will have to be in harmony with the protocol. The protocol also gives states the necessary framework to guide the development of national legislation on access to genetic resources and the fair and equitable sharing of the utilization of their benefits.

African leaders, through the New Partnership for Africa’s Development (NEPAD), have recognized and stressed the importance of protecting and promoting TK and technologies to solve specific problems and improve the continent’s economies. To this end, the Southern Africa Network for Biosciences (SANBio) as a specialized regional biosciences research and development (R&D) network established under NEPAD, has been in the forefront in promoting discussion on the subject in order to develop common approaches to intellectual property rights, technology transfer and commercialization of innovations arising therefrom. A similar initiative was undertaken by the Southern Africa Biochemistry and Informatics for Natural Products (SABINA) Network aimed at developing policy guidelines in order to help address this limitation.

This SANBio and Policy and Support Actions for Southern African Natural Product Network (POL-SABINA) project therefore formed a good basis for collaboration between the two networks. Rather than duplicating efforts, a decision was made for the two networks, operating within the same region, to collaborate. It was also decided that SANBio, through its network of institutions in the region, will lead this process.
At the regional level, leaders in SADC have resolved to take a common approach to address issues pertaining to intellectual property management based on Article 2(m) of the SADC Protocol on Science and Technology. The objective of this provision is to foster co-operation and promote the development, transfer and mastery of science, technology and innovation in member states in order to enhance and strengthen the protection of intellectual property rights (IPRs). SADC member states are party to the CBD and WTO and most of them are signatories to the ITPGRFA. However, few member states have developed their domestic legislation to accommodate the provisions contained in these international agreements. In addition, few SADC member states are members of the UPOV Convention and do not have their own legislation protecting plant breeders’ rights. There is therefore a need for guidelines for use by member states in order to assist them in developing their domestic legislation. This is particularly important in the light of the harmonization processes already put in place in the region in order to achieve the ultimate objective of SADC which is “to build a region in which there will be a high degree of harmonization and rationalization to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region” (SADC Protocol on STI, 2008). These Guidelines will therefore assist member states in their attempt to develop their own legislation that is in harmony with regional aspirations. We hope by promoting the protection of IP and use of genetic resources and associated traditional knowledge, and by strengthening the opportunities for fair and equitable sharing of benefits arising from their use, biological diversity will be better conserved and sustainably used for development and human well-being.

The management of both IP and ABS requires people with knowledge and skills who are able to deal with the complex issues, particularly when the biological resources and associated traditional knowledge are shared by more than one member state. A regional approach towards developing this kind of capacity is highly desired.

These Guidelines are set in general terms since the subject is rapidly changing and, in some cases, issues are country-specific. This generality will allow member states to have country specific legislation which is in harmony with regional aspirations. It is our hope that the Guidelines will find use in various sectors particularly in the course of developing national legislation, in negotiation of access and drafting of contracts for benefit sharing and in the academic field where new ideas are continuously being developed and tested. These Guidelines will contribute to enhancing and strengthening intellectual property rights; fostering co-operation among member states in the area of harmonization of policies and regulatory framework. They will also help to build capacity in the region to handle the challenges of intellectual property, traditional knowledge and access and benefit sharing for purposes of accelerated and sustained development in southern Africa.
The Guidelines focus on the role of major players in the management of IPRs, TK and Plant Genetic Resources (PGRs) at different levels, including national and regional policy makers, legislators and institutions. Actions to be taken by institutions have been elaborated in detail since their day-to-day activities have a direct influence on access and use of traditional knowledge and plant genetic resources for generation of new technologies or products and IP protection.

On behalf of the NEPAD Planning and Coordinating Agency and on my own behalf, I have great pleasure in introducing these Guidelines to all the stakeholders in the SADC region specifically and in Africa generally. It is my hope that the Guidelines will be useful to policy makers, legislators, researchers and scientists grappling with developing an effective framework to protect and sustainably utilize biological resources in various fields of application.

H.E. Dr Ibrahim Assane Mayaki
CHIEF EXECUTIVE OFFICER,
NEPAD PLANNING AND COORDINATING AGENCY
Executive Summary

These Guidelines were developed as a result of growing concerns of a lack of policies and laws in several SADC countries that govern the use of TK, biological resources and benefit sharing, despite the fact that these countries have signed the CBD. As a result of these concerns, the African Ministerial Conference on Science and Technology in 2003 adopted an outline of a “plan of action” now known as Africa’s Science and Technology Consolidated Plan of Action (CPA). The CPA, as well as decisions by the SADC leaders, emphasized the need to develop a framework for strengthening the capacity to harness and protect biological resources, as well as those associated with traditional knowledge, by encouraging co-operation in science and technology through harmonized policies and regulatory frameworks.

Further, in an effort to contribute to the implementation of the programme of the CPA and subsequent national and regional decisions, the SANBio network envisages in its business plan to play a vital role in ensuring that IPRs, technology transfer and commercialization innovations are discussed and developed among network member institutions. The SANBio Steering Committee directed the Secretariat to develop a document to guide the network and the region on issues surrounding IP, TK and ABS associated with PGR. The SANBio Secretariat, in collaboration with POL-SABINA partners; South Africa’s CSIR and the University of Pretoria, has established a Working Group on regulatory issues relating to Intellectual Property Management (IPM), TK and ABS for the network and other stakeholders.

In addressing IP, TK, and ABS issues, a number of global and regional agreements and treaties come into play. The most important ones are: the CBD, Nagoya Protocol, the ITPGRFA and the agreement on TRIPS. SADC member states (which include SANBio network member countries) are signatories to the CBD, ITPGRFA and TRIPS, which are legally binding. These agreements are the basis for the formulation of national and regional regulatory frameworks. The CBD has provisions for the conservation of biological resources, farmers’ rights and access and sharing of benefits arising from the use of biological resources and the associated knowledge. The Nagoya Protocol is a supplementary agreement to the CBD that provides a comprehensive legal framework to achieve the fair and equitable sharing of benefits arising from the utilization of genetic resources. On the other hand, the TRIPS Agreement sets the minimum requirements on the protection of IP, including plant varieties. The ITPGRFA is in harmony with the CBD and legally binding; it addresses a sub-set of PGR that are important for global food and agricultural production.

The main organizations supporting IPRs, TK and ABS issues include the World Intellectual Property Organization (WIPO), the Pan-African Intellectual Property
Organization (PAIPO), Organisation Africaine de la Propriété Intellectuelle (OAPI) and the Africa Regional Intellectual Property Organization (ARIPO), which are involved in patent matters.

Genetic resources are increasingly being used commercially in the production of food, pharmaceuticals and other processed products. Without laws or policies governing the use of genetic resources, countries in possession of genetic resources become exposed to biopiracy and unsustainable use of these resources. The use of TK, access to biodiversity and benefits sharing are the basis of most SANBio programmes which involve the utilization of biodiversity to develop products which will be used for the manufacture of pharmaceutical products and for agricultural purposes.

These Guidelines include suggestions for actions related to policies, legislation at national and regional level and further action to be taken by institutions (both public and private). The actions suggested for implementation by national governments and regional bodies focus on harmonization and co-ordination, which includes domestication of appropriate international agreements, setting minimum standards, updating existing policies and legislation, fostering bilateral and multilateral agreements, developing cross-border biodiversity management plans, establishing monitoring and management structures, streamlining duties of established offices and setting up co-ordinated flow and exchange of information. The Guidelines also suggest actions to support links and collaboration, including promotion of networking and partnerships, collaborative research and sharing of resources. In order to ensure effective resource mobilization, firm budgetary commitments and creation of endowment funds are suggested to establish effective dispute resolution mechanisms. This is achieved through the use of personnel with specialized knowledge and skills, specialized courts or tribunals and by applying arbitration and alternative dispute resolution mechanisms while at the same time strengthening border points for enhanced movements.

The Guidelines provide action to be taken by institutions as well as researchers. Institutions should ensure they have coherent policies aligned to the national laws, policies and strategies; communicated clearly and applied consistently. The management should also ensure compliance and the development of partnerships with government, academics, donors, the private sector and civil society. Internally, management should mobilize resources and build capacity by facilitating the creation of the IP Offices and supporting IP and technology transfer through a Technology Transfer Office (TTO). Management should furthermore provide incentives to researchers and ensure that the rights of employees, including those relating to IP, are defined in employment contracts or institutional policies. Management should also encourage new and innovative ways of resource mobilization that are within the realms of national laws.
The IP Office should be involved in different stages of the value chain to ensure proper oversight of IP and TK issues such as contractual matters, invention disclosures, freedom to operate and publications. The units should also draft and negotiate relevant agreements of various types, while academic and research institutions should create awareness and implement policies on TK, IP and ABS, to ensure that research outputs are transferred or commercialized and protected to benefit the researchers and institutions.

Researchers, as innovators, possess key technical know-how essential to the process of IP protection and management. The chances of successful technology transfer diminish significantly without the participation of key inventors to champion their technologies. Good IP management, therefore, requires that all ownership rights are defined at the beginning of any engagement, taking into consideration employee responsibilities, liability and potential risks. Researchers should have a clear understanding of legal and ethical issues for interacting with government, communities and TK holders. They should keep a proper record of their research leading up to the development of new technologies and should disclose their inventions and technologies in a timely manner. They should refrain from publishing or discussing inventive subject matter with outside parties before an invention has been evaluated and a decision taken; and suggest or identify potential licensees and marketing leads for the technology.

Researchers should further observe and take into consideration appropriate steps when interacting with communities or traditional knowledge holders, including identifying community structures and interacting with the correct stakeholders to obtain Prior Informed Consent (PIC); documenting clearly where the resource is being collected; filing a material transfer agreement (MTA) before a competent authority where genetic resources are accessed or exchanged, and ensuring sustainable cultivation and harvesting of the genetic resources.

Researchers should try to win the confidence and participation of partners, especially TK holders or the community, by ensuring they are part of a consortium with defined roles. They should provide feedback on the knowledge and material obtained from them, maintain mutual respect and observe ethical issues. They should clearly explain, on a project-by-project basis, how materials and knowledge will be exploited. They should also explain issues of IP ownership, benefit sharing and the publication and recognition of knowledge, taking into consideration the intellectual, material, research effort, facilities, preparatory work and financial contribution of each partner. Researchers should be aware that materials and knowledge obtained could be owned or shared by several other communities in the country or across borders. In such a case, co-operation with such communities and countries on trans-boundary matters concerning benefit sharing and MTAs will be necessary. Researchers should ensure that third parties understand and consent to the signed agreements.
The private sector has a major role to play in the use of IP and TK and the realization of the value of IPRs and ABS for communities. The private sector is encouraged to fund research and development (R&D) and collaborate with universities and public institutions in innovation and commercialization and accepting a balance of competing interests, particularly by understanding that universities and public research institutions have an obligation to promote public interest and social good. The private sector should play an active role in bridging the gap between academic research and commercialization by negotiating fairly and ethically.

Implementation of IP related activities at national and regional level can only be successful if they are supported by appropriate programmes for human resources development, advocacy and awareness, as well as monitoring, evaluation and reporting. Capacity building should target the development of a national critical mass of experts through training and re-training staff based on specialized short- and long-term programmes, developing appropriate learning aids, introducing curriculum on IP at secondary and tertiary levels and at the same time integrating TK at all national levels of training.

Advocacy and awareness should be aimed at the sensitization of different levels of society and the dissemination of information to reach a wide range of communities by using local languages and appropriate media; the development of databases of IP information through brokerage, regional and national portals; and the development of mechanisms for interaction among trainers, trainees and stakeholders to exchange information, skills and experiences.

Evaluation, monitoring and reporting are key activities to ensure progress and keep track of the progress achieved. Appropriate local, national and regional machinery should, therefore, be established to allow continuous collecting of information for monitoring the implementation and development of IP-related activities, contracts and obligations in various regional and global agreements. Minimum reporting standards should be set at different levels to assist regular reporting to appropriate bodies.

The Guidelines also includes elements that may be included in various types of agreements to assist those faced with the task of making agreements with various stakeholders to create the necessary safeguards and conditions to pave the way for a smooth technology transfer process. A list of useful resources is presented at the end of the publication.
Use of Terms

“Benefit sharing” means a commitment to channel a fair and equitable share of monetary or non-monetary returns arising from the use of TK and PGR back to rights holders, including source communities or nations, in recognition of their role in conservation and as custodians of PGR and associated TK. Such benefit sharing shall be in accordance with domestic law and/or regulatory framework and rights recognized by relevant international instruments such as the CBD, the Nagoya Protocol and the ITPGRFA.

“Biopiracy” means the commercial and/or research utilization of PGR and/or associated TK, without complying with the ABS legal requirements of the country where such resources and/or knowledge were acquired and the customary laws, community level procedures and/or community protocols of the indigenous and local communities who are the custodians of such resources and/or knowledge.

“Biotechnology” means any technological application that uses biological systems, living organisms, or derivatives thereof to make or modify products or processes for specific use.

“Breeder” means the person who bred or discovered and developed a plant variety, or the employer of the person who bred or discovered and developed the plant variety, if that person was employed for the purpose of such activity or otherwise commissioned to perform such work.

“Community” or “local community” or “indigenous community” means any group of individuals, whether formal or informal, settled or unsettled, organized or disorganized, monolithic or reticulate, but has a common interest in the utilization, conservation and enhancement of genetic resource and the associated knowledge, intellectual practice and culture.

“Conservation” means controlled utilization, protection and development of the gene pool of natural and cultivated organisms to ensure variety and variability, and for current and potential value to human welfare.

“Farmers’ rights” consist of the customary rights of farmers, including the rights of farmers recognized by the ITPGRFA to save, use, exchange and sell farm-saved seed and propagating material. It also includes their rights to be recognized, rewarded and supported for their contribution to the global pool of genetic resources and to the development of commercial varieties of plants, as well as to participate in decision-making on issues related to crop genetic resources.

“Access to genetic resources” means the utilization of genetic resources for purpose of conducting any research and/or development on the genetic and/or biochemical composition of genetic resources, including through the application
of biotechnology. It also includes conducting any research and development on derivates of biological or genetic resources.

“Derivates” means naturally occurring biochemical compounds resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.

“Plant genetic resources” means any genetic material of plant origin of actual or potential value.

“Prior informed consent” means agreement to allow an action by an eligible person or authority upon clear appreciation and understanding of the facts, implications and future consequences of the action before implementation.

“Traditional Knowledge associated with biological resources” means the knowledge that an indigenous local community accumulates over generations of living in a particular environment. This definition encompasses all forms of knowledge – technologies, know-how skills, practices and beliefs – that enable the community to achieve stable livelihoods in their environment.

“Sustainable use” means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

“Utilization of genetic resources” means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the CBD.

“Variety” means a plant grouping, within a single botanical category (taxon) of the lowest known rank, defined by the reproducible expression of its distinguishing and other genetic characteristics.
1. Background and Rationale

One of the major limitations in the management and protection of IPRs, TK, ABS and PGR in the southern African region is the absence of national and regional policies. In addition, there are no mechanisms for integrating the contributions of different stakeholders such as the researchers, knowledge holders and practitioners, the private sector, government and development agencies in the development and implementation of such policies. As a response, an initiative was undertaken by SABINA Network, through its POL-SABINA Programme, to develop policy guidelines to help address this limitation. The SABINA Network partners are the CSIR, University of Dar-es-Salaam (UDSM), University of Malawi (UNIMA), University of Namibia (UNAM), University of Pretoria (UP), University of the Witwatersrand (WITS), and the Tea Research Foundation of Central Africa (TRFCA). The CSIR was identified as a partner with necessary capacity to develop this initiative through SANBio, which had also identified a similar need to develop such guidelines. This common project therefore formed a good basis for collaboration between SABINA and SANBio.

SANBio is one of the five continent-wide regional biosciences and specialized centres of research and development established under NEPAD. The main objective of SANBio is to build and strengthen capacity in biosciences through exchanging ideas, promoting scientific excellence and harnessing indigenous knowledge in order to utilize natural resources sustainably and create wealth for the people of southern Africa. The network operates with a multi-country approach since many development problems transcend national borders.

The fundamental cultural, intellectual and commercial enterprises of any nation increasingly intersect with the implementation of IPRs. This is especially true with respect to life sciences, specifically healthcare and agriculture, because the way intellectual property is governed and managed dramatically affects the pace of innovation, dissemination of knowledge and the delivery of new technologies. At the same time, the use of TK requires a sound management regime to ensure that the value is recognized and benefits are shared equitably. However, systems for managing IP and biological resources in the context of a research network, such as SANBio, with programmes involving the utilization of biodiversity for improvement of health and agriculture, are not well established. These Guidelines are intended to facilitate the process of filling the policy gap and will, therefore, be part of the process of implementation of the programme of the CPA and subsequent national and regional decisions with regards to identification, documentation, protection and utilization of IP, TK and ABS related to PGR. The overall objective is to provide guidance in the management and protection of IP, TK and ABS related to the use of PGR in the southern African region.
2. Scope of the Guidelines

These Guidelines shall apply to the application of IPRs, TK and ABS associated with PGR within the context of international agreements such as the CBD, the Nagoya Protocol, and the ITPGRFA to which SADC member states are party. By promoting the use of PGR and associated TK, IPRs and by strengthening the opportunities for fair and equitable sharing of benefits from their use, these international instruments create incentives to conserve biological diversity, sustainable use of its components and further enhance the contribution of biological diversity to sustainable development and human well-being.

The Guidelines focus on the role of major players in the management of IP, TK and ABS on the use of PGR at different levels, including national and regional policy makers, institutions, communities and TK holders. Action to be taken by institutions have been elaborated in detail since their day-to-day activities have a direct influence on the access and use of PGR for the generation of new technologies or products and IP protection, as well as the fair and equitable sharing of benefits arising from their utilization.

2.1 Objectives of the Guidelines

The Guidelines seek to facilitate the development and implementation of national policies and legislation for the protection and management of IPR, TK and ABS related to the use of PGR in southern Africa, thereby contributing to the sustainable utilization and management of biological diversity.

The specific objectives of the Guidelines are:

a) To facilitate the harmonization of national policies and legislation on IPRs, TK and ABS related to the use of PGR in southern Africa, thereby contributing to regional integration efforts within SADC;

b) To facilitate the standardization of procedures and processes for accessing PGR and the fair and equitable sharing of benefits arising from the utilization of TK and IPRs related to the use of PGR; and

c) To guide various stakeholders on the development of policy instruments for accessing PGR and the protection and management of IPRs and TK related to the use of PGR, as well as the fair and equitable sharing of benefits arising from the use of IPRs and TK.

2.2 General Guiding Principles

In order to ensure the harmonization of approaches and policy instruments related to PGR in southern Africa, the following general principles shall guide stakeholders:
a) Regulate access to PGR and associated TK and IPRs;
b) Achieve fair and equitable sharing of benefits from utilization of TK and IPRs related to use of PGR;
c) Focus on food security, human health and sustainable development;
d) Conserve, protect and commercialize indigenous crop varieties, knowledge, practices;
e) Promote diversity to address climate and other stresses within farming communities;
f) Focus on knowledge management, monitoring and evaluation; and
g) Collaborate and form partnerships in research and development.

3. Traditional Knowledge (TK)

WIPO currently uses the term “traditional knowledge” to refer to tradition-based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment. It should be emphasized, however, that a precise definition of traditional knowledge is not a crucial requisite for establishing a system for its protection. Actually, most patent laws do not define inventions. Likewise, most trademark laws do not define signs. The crucial element for the protection of any subject matter is the identification of some characteristics that it must meet as a condition for protection, such as novelty, inventiveness and susceptibility of industrial application, for the invention and distinctiveness of trademarks. The same criteria could be applied to TK as well (WIPO, 2002).

TK is community based-knowledge, which people have been using for years, and is mostly not documented or protected. The origin of TK should be recognized as lying foremost with the TK holders and their communities, and should be the basis of IP and ABS management frameworks. It is, therefore, necessary to identify, document and protect TK from indiscriminate exploitation. The application of these Guidelines should ensure effective access and profitable commercialization to the benefit of communities.

Member states will be responsible for initiating research in their respective countries to identify and document TK. This should clearly validate and/or affirm the source and ownership of TK for protection, access and benefit sharing.
3.1 TK Identification and Documentation Procedures

The identification and documentation of TK is important for the protection and management thereof. It is, however, a complex and sensitive process which demands the utmost care and foresight. The following key principles should be considered:

a) The community or group holds information collectively in the same way that an individual owns his/her personal information;

b) Indigenous and local communities are within their rights in seeking to control all aspects of research and information management that impact them;

c) Indigenous and local communities must have access to information and data about themselves and their communities, regardless of where it is actually held, and they have the right to manage and make decisions regarding access to their collective information; and

d) Indigenous and local communities should have possession or physical control of the data.

WIPO developed a toolkit to help design and plan a TK documentation process and understand some of its key IPRs dimensions as a means to assist in safeguarding the interests and protecting the rights of indigenous peoples and local communities. The toolkit provides a useful framework which may assist researchers and practitioners in handling TK. It provides that:

a) Before documenting TK and associated biological or genetic resources:
   i. Consult widely and set your collective IP objectives;
   ii. Consider the range of options available to meet those objectives;
   iii. Carefully assess the implications of each option, with expert advice if possible;
   iv. Develop your IPRs strategy, based on your objectives;
   v. Ensure full stakeholder involvement from an early planning stage;
   vi. Address prior informed consent (PIC) of TK holders, if documentation is undertaken by parties other than the TK holders;
   vii. Document everything you can in a precise and standardized manner;
   viii. Do not disclose any undisclosed TK;
   ix. Check and clarify the role and responsibilities of other partners such as researchers, government agencies and any commercial partners;

b) During the documentation process:
   i. Do not disclose your documentation data, unless a firm decision has been made by TK holders to publish it;
ii. Identify those who provided the information and who claim ownership, and record this information unless they prefer not to have it recorded;

iii. Prioritize defined types of TK and associated biological/genetic resources during the documentation (e.g. TK and biological/genetic resources at risk of disappearance, TK and biological/genetic resources susceptible to commercial use, TK involving the useful arts, etc.); and

iv. Manage relationships with other parties through confidentiality and other contractual agreements;

c) After documentation:

i. Do not disclose documented TK unless there has been a clear decision, based on the agreed strategy, that those elements should be disclosed;

ii. Only disclose it for the agreed purposes;

iii. Only disclose it for the agreed purposes and protect confidentiality through confidentiality agreements if you need to stop it from being disclosed further; and

iv. Review the possibilities of positive IPRs protection of your documented TK, and do not forget that innovative TK developments can be eligible for IPRs protection.

4. Access and Benefit Sharing

An ABS regime seeks to balance the often competing interests of various contributions made by stakeholders towards certain PGR materials or products. These include local communities that have lived close to and can be considered custodians of PGR; the holders of TK who have specific knowledge for the utilization of PGR, but whose knowledge has been passed on from generation to generation; the researchers and practitioners who access and utilize TK related to the use of PGR and go on to improve and develop materials or products which may be granted IPRs; and the state which has the responsibility to provide policy guidance and regulate ABS activities. An effective ABS system must therefore:

a) Provide an appropriate framework to facilitate and protect PGR and related knowledge based upon PIC of the state and the communities under the state;

b) Promote appropriate mechanisms for a fair and equitable sharing of benefits arising out of the use of PGR;

c) Ensure full participation of the communities in making decisions regarding the distribution of benefits which may derive from the use of genetic resources;
d) Provide for more stringent requirements for PIC and MAT at the actualization phase of utilization as compared to the scoping phase of utilization;

e) Protect and support the rights, knowledge, innovations and practices of local communities with respect to the conservation, use and management of genetic resources; and

f) Ensure that the transfer and movement of genetic resources and related TK takes place in a transparent manner.

4.1 Prior Informed Consent

PIC refers to the consent obtained by the applicant from the local community, local authority or a National Competent Authority (NCA), after fully disclosing the intent and scope of the intended activity before that activity is carried out. It is the basis upon which access to TK and PGR can be considered legitimate and must therefore be properly regulated. PIC can be enforced through the issuance of permits or licences by the NCA by requiring proof of PIC before issuing these permits or licences. In the area of scientific research, the TK holder or the community in which the research is going to be carried out must be consulted before any research takes place.

For the PIC concept to be effective, clear and adequate information on the full range of potential benefits and forms of compensation on foreseeable harm must be available, as well as the conditions under which access to biodiversity was granted. There must also be strong institutions in place at local level. It is important to highlight that PIC procedures should be simplified for it not to deter potential partners. Once PIC procedures are simplified, the local community will be able to effectively exercise their rights, either to give consent or to refuse access to biodiversity.

4.1.1 How PIC may be obtained

a) Submission of an application to the NCA that in turn consults with the local communities and other relevant parties.

b) Advertising, such as in newspapers, radio, etc., is carried out by the applicant.

c) Community consultations to be carried out where members of the community participate and become acquainted with the activities involved. In order to ensure that the PIC is indeed informed, applicants must seek to build understanding and trust within the community. It is particularly important to allow the community to go through a process of internal debate and consultation.

d) If an agreement is envisaged, the applicant may need to start with a less
binding agreement such as an MoU, which may be followed by a contract with specific terms once all parties are satisfied. Ideally, a three-step process should be considered in order to foster trust building and mutual understanding:

i. Firstly, provide support to the community to develop a community protocol. This will help with the internal consolidation of the community, thereby providing the research/commercial institution a clear process of how to engage the community;

ii. Secondly, based on the protocol, enter into a dialogue with the community, work towards a convergence of views, a mutual understanding and finally a memorandum of understanding; and

iii. Thirdly, prepare a contract based on the protocol and the MoU and finally sign the contract.

d) The local community communicates its consent or refusal to the NCA. The NCA will have the final say on the granting or refusal of consent, which should be communicated to the applicant.

e) Certain activities, like academic research, may not go through the same procedure. The NCA may design an easier procedure for academic research.

4.2 Mutually Agreed Terms (MATs)

Once an effective NCA is put in place, it must play an active role in ensuring that local communities are given appropriate advice on how they should negotiate on issues of granting access. In particular, MATs must address issues like technology transfer, capacity building and collaboration in research, leading to the granting of joint patents with TK holders, where appropriate.

Where the issues involve shared resources (trans-boundary natural resources), there may be need for formal protocols on how the resources are going to be exploited so as to avoid a situation of over exploitation and how local communities are going to benefit through accessed natural resources. A fund may be created which terms may elaborate how the moneys obtained as a result of granting access are going to be utilized. The fund will also be used to address the issues of conservation and sustainable use.

The following are some of the key terms that may be incorporated in MATs:

a) Use of resources to be regulated so as to take into consideration customary use of genetic resources and related knowledge;

b) Make provision of joint research, joint ownership;

c) Provisions on limitation on possible use of the material;

d) Types of benefits and mechanism for benefit sharing and distribution;
e) Provision whether the terms of the agreement may change and could be renegotiated;

f) Issue of transfer of the genetic resource to third parties;

g) How confidential information can be handled; and

h) Termination of the MAT.

4.3 Equitable Benefit Sharing Arrangements

The commercial or industrial use of TK should be subject to fair and equitable remuneration for the benefit of TK holders. Should TK be used beyond its traditional context, the user should indicate the source and origin of the knowledge to acknowledge its holders and to use and refer to the knowledge in a manner that respects and acknowledges the cultural values of its holders. The benefits to be shared may be both monetary and non-monetary. Non-monetary may include sharing research results, participation in product development, institutional capacity building and food and livelihood security. The form and nature will however depend on the specific stakeholder to benefit.

The benefit sharing mechanism should clearly state the timing of the benefits, whether they are near-term, medium-term or long-term benefits, and this should be decided on case-by-case basis.

4.4 Protection Against Unlawful Acts

Any acquisition or appropriation of TK by unfair or illicit means should be prohibited in legislation. Unlawful acts may include deriving commercial benefits from the appropriation of TK when the person using that knowledge knows, or ought to know, that it was acquired or appropriated by unfair or unlawful means. Unlawful acts include the following:

a) Making false claim or assertion of TK ownership;

b) Commercially or industrially using TK without just compensation to the TK holders;

c) Acquiring TK or exercising control over it in violation of legal measures that require PIC as a condition of access; and

d) Acquiring TK by theft.

While it is the primary duty of the state to protect TK and PGR from unlawful exploitation, the local community has obligation to guard and protect these resources as it is the custodian and primary beneficiary of the benefits. The local community can take class action to enforce their rights where they feel that their rights have been violated.
5. Recognition and Protection of Farmers’ Rights

5.1 Nature of Farmers’ Rights

Both the CBD and the ITPGRFA have recognized and made provision for the protection of farmers’ rights as a distinct and important component of the conservation and sustainable utilization of PGR, especially as related to food and agriculture. Farmers’ rights are recognized as stemming from the enormous contributions that local farming communities, especially their female members, of all regions of the world, particularly those in the centres of origin or diversity of crops and other agro-biodiversity, have made in the conservation, development and suitable use of PGR that constitute the basis of breeding for food and agriculture production. For farmers to continue making these achievements, therefore, farmers’ rights have to be recognized and protected.

Farmers’ varieties are recognized and shall be protected under the rules of practice as found in, and recognized by, the customary practices and laws of the concerned local farming communities, whether such laws are written or not. The ITPGRFA, however, specifically places the responsibility for actualizing farmers’ rights on national governments which must develop relevant policies and legislation.

An important consideration for the development of farmers’ rights policy and legislation pertains to the nature of these rights in comparison with the established and conventional IPRs regimes. As community assets they are not individually owned; hence the framework of protection beneficiation for utilizing them has not been fully grasped in most countries. Farmers’ rights are considered as *sui generis*; hence different forms of protection from the conventional IPRs framework are acceptable, even under the TRIPS Agreement. In developing policy and legislation, the following are some of the considerations to be taken into account:

a) Farmers have the right to select, save, reuse, sell or exchange farm saved seed or propagating materials;

b) The right to be recognized, rewarded and supported for their contribution to the global pool of genetic resources, as well as to the development of commercial varieties of plants;

c) The right to use breeders and materials from gene banks and PGR centres to develop farmers’ varieties;

d) The right to a fair and equitable share of benefits arising from use of farmers varieties; and

e) The right to participate in decision making, which includes the right to form farmers’ organizations, participate in local and national decision making bodies and to be consulted in matters affecting farming communities.
5.2 Protecting Farmers Rights

The institutional framework for protecting farmers’ rights does not exist within the IPRs registries in the region; hence they will need to be developed to ensure they deal with the unique character of rights that seek to protect social economic rights at community level. In particular, the following need to be considered:

a) Farmers’ rights derive their legitimacy from the historical contribution of an entire farming community; hence the beneficiaries are more diffuse and the benefits go to the wider farming community;

b) Farmers’ rights essentially seek to recognize the efforts of small-scale farmers; hence their benefits must be geared towards facilitating sustainable agricultural livelihoods;

c) The requirements for registering farmers’ varieties should not be as strict as those for breeders’ rights since the processes of development are different. The registry for farmers’ rights needs to be developed to address the unique nature of the rights being recognized and protected.

6. Intellectual Property Rights (IPRs)

The role of IPRs systems in relation to TK and how to acknowledge, protect and responsibly and equitably make use of TK, has been receiving increasing attention in a number of international policy discussions. These address issues as diverse as food and agriculture, the environment, conservation of biological diversity, health (including traditional medicines), human rights, the concerns of indigenous communities and aspects of trade and economic development.

In many instances, TK and PGR have been exploited and commercialized with no benefit to the respective local communities. There is, therefore, need for the communities to be made aware of their IPRs. Member countries should develop relevant and effective legal framework to protect TK and PGR, so that TK holders and practitioners can benefit from the commercialization of products emanating from TK and PGR. These should involve the following:

i. Development of strategies for sensitization, advocacy and dissemination of information at different levels of society;

ii. Encouragement of wider outreach of information by using local languages and different modes of communication;

iii. Development of TK and IP databases through brokerage and national and regional portals to facilitate access to information;

iv. Development of mechanisms for mobility and the exchange of trainers and trainees at different levels of society to interact with TK holders and other stakeholders.
7. Stakeholders

7.1 Community Institutions (Knowledge Holders and Practitioners)

The empowerment of TK holders and practitioners within communities as the custodians of TK is imperative for the management of PGR in these communities. The community structures providing or supporting traditional leadership and control in these aspects (such as the chiefs) should be strengthened and acknowledged as the first point of contact with the communities and TK holders. Such an approach would facilitate the process of obtaining PIC to the use of genetic resources and associated TK. Communities and TK holders should take cognizance of the value of the knowledge and PGR they possess and which could be used to improve the lives of the people. Furthermore, as custodians of that knowledge, they have the responsibility to protect it. Community structures should facilitate access to and the protection of TK, by:

a) Identifying, as accurately as possible, the TK holders and ensuring the recording of their TK in protected databases;
b) Ensuring continuity of the traditional methods of passing down TK;
c) Having visible structures that the researcher or any other interested party on TK and PGR can interact with;
d) Requesting the appropriate introduction of the institutions and the researcher they are interacting with;
e) Reaching agreement on the terms of benefit sharing and use of TK and, when satisfied, sign the PIC and MAT;
f) Ensuring that the MTA is signed before access to any material can be granted; and
g) Ensuring participation in the process of research, where appropriate, to be a member of a research consortium or by requiring reports and/or feedback from the researchers.

7.2 Private Sector

The private sector is the main investor in the commercialization of PGR innovations. Therefore, the private sector has a major role to play in the use of IPRs and TK and the realization of the value of IPRs and ABS for different stakeholders. It is thus important for the private sector to build relationships with government, universities and researchers to understand the policies impacting on IP, TK, ABS and the use of PGR. The private sector is encouraged to:

a) Play an active role in bridging the gap between researchers, academic institutions and commercialization;
b) Support public R&D, collaborate with research and academic institutions and participate in staff exchanges;
c) Accept the need to balance competing interests in relation to commercial gains versus the importance of sharing knowledge and publication in research and academic institutions, communities and among TK holders;

d) Acknowledge that universities and public research institutions have an obligation to promote public interest and social good; and

e) Promote social responsibility towards the use of TK, negotiate fairly and ethically and give due recognition to the use of TK and/or PGR in the development of innovations and the need for ABS.

7.3 Research Institutions

Institutions, both public and private, have major roles to play in the realization of IPRs and the implementation of appropriate ABS procedures. Good IPRs management requires that all ownership rights are defined at the beginning of any engagement, taking into consideration employee responsibilities, liability and potential risks. Both management and individual researchers have specific actions as discussed below.

7.3.1 Institutional Management

a) Developing effective and coherent policies and ensuring compliance with relevant legal instruments for the protection of IPRs, TK, ABS and the use of PGR;

b) Communicating the policies clearly and applying them consistently;

c) Cultivating appropriate partnerships with government, development partners, the private sector, civil society, communities and TK holders;

d) Ensuring adequate capacity and availability of resources to implement the policies;

e) Providing visible, high-level support for IP and TK management, technology transfer and ABS activities;

f) Providing visible and continuous support for existing Technology Transfer Offices (TTO); and partnering with other institutions to provide services where an institutional TTO has not been established or is not viable;

g) Establishing a management or advisory committee of internal and external experts to strengthen decision-making and governance;

h) Providing incentives to researchers through appropriate schemes such as, but not limited to, sharing of benefits arising from commercialization of IP and TK;

i) Ensuring that the rights and obligations of employees are defined in employment contracts and institutional policies; stipulating, among
other things, in whom any rights, intellectual or tangible property, in research products, publications and other works created or contributed by employees in the course of their normal and assigned professional duties will be vested; and

j) Encouraging new and innovative ways of resource mobilization, as appropriate.

### 7.3.2 Technology Transfer, IP and Legal Management Office

The unit should be involved in different stages of the value chain, as appropriate, to ensure proper oversight of IP and TK issues such as contractual matters, invention disclosures, freedom to operate, marketing and licensing of IPRs, TK, regulatory approvals, permits and publications among others. This office should have capacity to draft and negotiate relevant agreements, including MoUs, Non-Disclosure Agreements (NDAs), sponsored research, research collaboration, consortiums, MTAs, TK holder benefit sharing, sub-contracting, evaluation of MATs and PIC.

Offices in academic and research institutions need to promote appropriate practices by:

a) Implementing TK, IP and ABS policies;

b) Creating awareness and providing advocacy on policies by communicating the benefits of compliance;

c) Encouraging technology transfer or the commercialization of research outputs for the benefit of the researchers, the institution, TK holders and communities; and

d) Providing a clear explanation of IPRs and TK ownership, ABS, publications and the recognition of the knowledge on a project-by-project basis or programmes, taking into consideration the contribution of IP, TK, materials, facilities, finance, research efforts, the preparatory work of each partner and other relevant considerations.

### 7.4 Researchers

As the agents responsible for developing IPR, researchers play an essential role in the process of IPRs and TK management and protection. Researchers at both national and regional level need to have a clear understanding of the legal requirements when interacting with communities and TK holders, as well as the use of genetic resources. Researchers therefore must ensure that they:

a) Observe and take into consideration appropriate steps with regard to issues of TK when interacting with communities or TK holders, including:
i. Identifying the community structures to work with and, where relevant, customary laws, community level procedures or community protocols. If customary laws/community level procedures for PIC are not available, require the community to develop a protocol for granting PIC;

ii. Obtaining PIC from the TK holder(s) or communities, including ensuring that the TK holder(s) or communities understand and accept the terms of the agreement. The PIC should have the name of the provider of knowledge, purpose of the project and other terms that the parties agree on;

iii. Documenting clearly where the resource is being collected;

iv. Fulfilling relevant regulatory requirements;

v. Ensuring the sustainable harvesting, conservation and cultivation of PGR;

b) Have a clear understanding of and comply with legal and ethical requirements for interacting with communities, TK holders and the private sector in the use of PGR and TK, including:

i. Clarifying to the TK holder how the knowledge would be exploited;

ii. Being aware that the PGR and the knowledge could also be found in other communities or countries in which case co-operation with such countries on trans-boundary matters concerning ABS and administering MTAs will be necessary;

iii. Engaging in a dialogue based on the community protocol that leads to a convergence of views and MoU before engaging in contractual negotiations. Contracts should be negotiated only after an in-depth dialogue which understands the expectations and limitations of each party;

c) Continuously adhere to good research practices, including proper R&D record keeping and the documentation of information provided to them by:

i. Disclosing their inventions and technologies timely for it to be evaluated, and a strategy formulated for its protection and/or transfer;

ii. Refraining from publishing or discussing inventive subject matter with outside parties before an invention has been evaluated and a decision taken about how it ought to be protected;

iii. Suggesting or identifying potential licensees and marketing leads for the technology;

iv. Assisting the technology transfer office in the licensing and implementation of their technologies; and

v. Maintaining the trust of the TK holders or community by giving
regular feedback on R&D and commercialization progress associated with the knowledge and the material obtained from the IK holders or community.

7.5 NGOs, Development Agencies and Civil Society

Taking into consideration that the activities of the above institutions involve working directly with communities, these organizations need to be aware of the IPRs, TK and PGR of their respective communities. They have an obligation to empower communities to effectively negotiate for the benefits arising from their IPRs and should assist in resource mobilization for the exploitation of their IPRs and TK.

7.6 Governments

The distribution of biological resources and TK in the region is not limited to or by territorial boundaries. In addition, best practices in the conservation, management and protection of such resources take considerable time and financial as well as human resources to develop. Thus, sharing best practices and resources among member states is an effective way to better co-operation, avoid mistakes made by others and for efficiently utilizing resources to achieve the fair sharing of benefits arising from use of PGR and associated IPRs and TK. Moreover, considering the variability and different developmental stages of all the member states in the area of IPRs protection, the need arises for the harmonization of policies, legislation and practices. Governments of member states have an important role to play in the development and implementation of these guidelines. To achieve the intended objectives, the aspects below need to be taken into consideration at both national and regional levels.

7.6.1 Regional

a) Harmonization and co-ordination

i. Promoting harmonizing and co-ordinating policies by encouraging the domestication of appropriate international and regional agreements, treaties and conventions to which SADC member states are signatories;

ii. Adopting minimum standards under SADC;

iii. Encouraging bilateral and multilateral agreements for activities involving cross-border biological resources and associated TK to ease implementation processes in harmony with the regional systems;

iv. Defining clearly the responsibilities assigned to different offices to avoid overlap or duplication of duties and bureaucratic processes that
unnecessarily delays the implementation of programmes, projects and the enforcement of rights. This could be achieved through the establishment and use of appropriate multi-sectoral steering committees;

v. Creating platforms for the co-ordinated flow and exchange of information through national portals and other means, for efficient management and service delivery;

vi. Developing effective mechanisms for linkages with R&D institutions involved in IPRs and TK, both within and outside the region, to ensure collaboration and exchange of information and knowledge;

vii. Developing robust strategy and mechanisms for sustainable funding for IPRs institutions within the SADC region, including providing and adhering to firm member state budgetary commitments by:
   a. Establishing an endowment fund for IPRs, TK, ABS and PGR or an alternative funding mechanism within the SADC region to supplement funding gaps; and
   b. Providing substantive contributions from the national budget to support IPRs, TK and ABS for PGR organizations and their activities.

b) Linkages and collaboration

Establishing programmes to enhance and promote networking and partnership among stakeholders, including TK holders. Maximizing the contribution of TK to a sustained knowledge economy by encouraging collaborative research, the sharing of resources and developing MoUs and exchange programmes.

c) Dispute resolution mechanism

i. Developing capacity to resolve disputes, including engaging personnel with specialized knowledge and skills to handle technical and legal issues associated with IP, TK, ABS and PGR within the SADC region;

ii. Developing and strengthening IP judicial systems or institutions by establishing specialized courts or tribunals to deal with IP, TK and ABS related to the use of PGR;

iii. Developing and promoting the use of arbitration and alternative dispute resolution mechanisms, including the use of “bio-diplomacy” and the involvement of traditional leaders and/or other traditional structures; and

iv. Developing efficient mechanisms for enhanced border movements by using trained customs personnel, equipped with the appropriate tools.
7.6.2 National

a) Acknowledging and strengthening community structures such as traditional leadership as the first point of contact with communities and TK holders;

b) Empowering TK holders and communities as the custodians of TK for the management of biodiversity in these communities (through the recognition and formalization of structures, capacity building and public awareness);

c) Ensuring sustainable harvesting, conservation and cultivation of PGRs;

d) Developing documentation systems to protect TK;

e) Developing relevant policies and legislation that encourage the protection of TK, IP and ABS where none exist;

f) Reviewing existing policies and legislation with the aim of updating and harmonizing it, including the domestication of relevant regional and international instruments;

g) Implementing cross-border biodiversity management plans for PGR and law enforcement in cases of illegally utilized biological resources and/or associated TK;

h) Establishing monitoring and managing structures for implementation purposes, including appointing, facilitating and empowering national focal points as stipulated in international conventions and treaties;

i) Defining clearly the responsibilities assigned to different offices to avoid overlap or duplication of duties and bureaucratic processes, which bring unnecessary delays in implementation of programmes, projects and the enforcement of rights, through the establishment and use of appropriate multi-sectoral steering committees; and

j) Creating platforms for co-ordinated flow and exchange of information through national portals and other means for efficient management and service delivery.

8. Cross-Cutting Issues

The implementation of IPRs-, TK- and ABS-related activities at national and regional level can only be successful if supported by appropriate programmes for human resources development, advocacy and awareness, as well as monitoring, evaluation and reporting. The key actions of member states and institutions at national and regional levels are discussed below.
8.1 Capacity Building

a) Training and re-training staff to develop a national critical mass of experts to handle issues on IP, TK and ABS related to the use of PGR.

b) Training programmes for community institutions and TK holders on IPRs, TK and ABS issues, and developing community protocols. Development of institutional capacity with specialized short-, medium- and long-term programmes. These programmes should cover different educational levels, including the development of curriculums on IPR, TK and ABS at secondary and tertiary levels.

c) Developing and improving learning aids to facilitate the acquisition of skills and knowledge transfer.

d) Integration of IPR, TK and ABS into national curriculums at all levels of education.

8.2 Advocacy and Awareness

a) Developing strategies for sensitization, advocacy and the dissemination of information at different levels of society;

b) Encouraging of wider outreach of information by using local languages and different modes of communication;

c) Popularizing of TK utilization by all stakeholders;

d) Developing databases on IPR, TK an ABS through dissemination through regional and national portals to facilitate access to information; and

e) Developing mechanisms for mobility and exchange of trainers and trainees at different levels of society, in order to interact with TK holders, communities and other stakeholders.

8.3 Evaluation, Monitoring and Reporting

a) Establishing appropriate local, national and regional mechanisms for continuously collecting information on progress and new developments in relation to IPRs, TK and ABS related to PGR use;

b) Monitoring the implementation of IPRs-, TK- and ABS- related contracts and obligations in various regional and global agreements, and regularly reporting on measures of progress to appropriate bodies; and

c) Setting minimum reporting standards at local, national and regional levels.
9. Appendices

Annex 1: Additional Background Information

The SANBio Network

The SANBio network was launched by the Africa Ministerial Conference on Science and Technology (AMCOST) in 2005 and has a hub and a Secretariat at the CSIR Pretoria Campus in South Africa. The network covers 12 countries in the sub-region, namely Angola, Botswana, Malawi, Mauritius, Mozambique, Namibia, Lesotho, Swaziland, Seychelles, South Africa, Zambia and Zimbabwe. Recognising the importance of IPR, the 4th SANBio Steering Committee Meeting held on 18th November 2008 directed the Secretariat to produce a document which will guide the network and the region on issues surrounding IPRs, TK, ABS and PGR. The Steering Committee further directed that, in doing so, the Secretariat should tap into expertise and resources available at WIPO, ARIPO and other relevant organizations.

Subsequent to the above, the SANBio Secretariat, in collaboration with the CSIR and University of Pretoria, developed a proposal for funding to establish a SANBio Working Group on regulatory issues relating to IPM, IK and Benefit Sharing for the SANBio network and other stakeholders. A grant was secured from the ACP/European Union (EU) Partnership Programme to facilitate the work of the WG to develop the Guidelines. Invitations were extended to a wide range of stakeholder organizations. Additional funding came from within the Finnish Southern Africa Partnership Programme to Strengthen NEPAD/SANBio Network (BioFISA) grant to SANBio which was provided by the South African Department of Science & Technology and the Government of Finland to support activities on IPR, technology transfer and commercialization.

The WG comprises representatives from the African Union (AU)/Scientific Technical Research Commission (STRC), AU-NEPAD Agency/African Biosafety Network of Expertise, Patents & Companies Registration Agency (PACRA), Zambia; CSIR and North West University, South Africa, and the SANBIO secretariat.

These Guidelines should therefore be viewed as part of the process of implementing the CPA Programme and subsequent national and regional decisions with regard to the protection and utilization of IPRs, TK and ABS.

Political Decisions

NEPAD

African leaders have recognized and stressed the importance of protecting and promoting indigenous knowledge and technologies to solve specific problems
and improve the continent’s economies. Paragraph 140 and 141 of the NEPAD framework document are devoted to the protection and promotion of indigenous knowledge and related technological innovations.

**CPA**

In 2003, the African Ministerial Conference on Science and Technology adopted an outline of a “plan of action” containing twelve flagship programme areas and specific policy issues. This plan of action has become known as Africa’s Science and Technology Consolidated Plan of Action (CPA). The CPA acknowledges that Africa has a rich indigenous knowledge base and related technologies embodied in cultural and ecological diversities, used to solve specific developmental and environmental problems over thousands of years. Therefore the CPA has a specific programme of work aimed at implementing paragraph 140 of the NEPAD Framework Document with an overall objective of strengthening Africa’s capacity to harness and apply as well as protect, IK and technologies. Similarly, the CPA complements a series of other AU and NEPAD programmes for areas such as agriculture, environment, health, infrastructure, industrialization and education.

**SADC**

SADC regional leaders resolved to take a common approach to address issues pertaining to IPR management. Article 2(m) of the SADC Protocol on Science and Technology has the objective of fostering co-operation and promoting the development, transfer and mastery of science, technology and innovation in member states in order to enhance and strengthen the protection of IPR. Article 4(i) commits member states to co-operate in science, technology and innovation in the area of harmonizing policies and regulatory frameworks in Science Technology and Innovation (STI), including emerging new technologies. The SANBio Business Plan envisages that the SANBio network should play a vital role in ensuring that issues related to IPR, technology transfer and commercialization are discussed and developed among network member institutions.

The exchange of knowledge and genetic resources within the SANBio network is of great importance in addressing the needs of SADC countries. The public sector operates in an environment where ABS and IPR are important in determining the country’s outputs in science and technology and the level of development. The management of both IPR and ABS requires people with skills who are able to understand these issues. Capacity building thus becomes an imperative in the region, from the level of scientists and researchers, to IPR and ABS offices. Achieving a better understanding of these aspects will increase the commercialization and impact of the network.
Role of SABINA/POL-SABINA

SABINA and POL-SABINA – Complementary Partnership in Natural Product Science that enhances human capital development and better application of science in development.

SABINA is funded by the Carnegie Corporation as a Regional Initiative in Science and Education (RISE). The programme aims to grow human capacity in natural products research through the training of PhD and MSc students in the partner institutions. The students are trained through research in the biochemistry and chemistry of natural products, including bio-informatics, as an essential tool for data management and structure function elucidation. Its common focus areas are linking biology and chemistry to wealth creation and better human health, molecular biology/functional genomics, natural product chemistry, biochemistry and food science. The SABINA Network partners are the University of Malawi, University of Namibia, University of Dar-es-Salaam, University of Pretoria, University of the Witwatersrand, CSIR and the TRFCA.

POL-SABINA is an ACP programme funded by the EU and co-funded by the Carnegie Corporation of New York and the Department of Science & Technology, South Africa. The POL-SABINA programme will create an environment for natural product R&D in the SADC region. It is hoped that this will result in better networking and sharing of information among scientists in the SABINA network, and higher quality and more relevant R&D to support the translation of R&D into products for sustainable development and economic growth. This will involve the development of an advanced web-based knowledge management system for sharing natural product research information among project participants; the support of exchange visits between them; the provision of training in a variety of topics that will enhance research effectiveness and translation into meaningful outputs and support for the development of necessary policies and legislation.

International treaties and conventions

Most of the SADC member countries are signatories to international treaties and conventions that address IP, TK, ABS and PGR. The following international treaties are deemed to be particularly relevant for the purposes of the Guidelines: CBD, TRIPS, ITPGRFA and UPOV, summaries of which are provided below:

a) Convention on Biological Diversity (CBD)

The CBD has three main goals aimed at maintaining the world’s ecological resources, namely the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits from the use of genetic resources. The CBD reaffirms that the conservation of biological diversity is a common concern of humankind and explicitly recognizes the sovereign
rights of states over their own biodiversity resources, pursuant to their own environmental policies. Thus, the CBD puts in place responsibilities to control access to biological resources through the enactment of appropriate national legislation. At the same time, the CBD emphasizes the need to co-operate with other contracting parties through competent international organizations, in areas beyond national jurisdiction, and where there is a matter of mutual interest to conserve and sustainably use biodiversity. Each contracting party is obliged to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity. They are also obliged to promote wider application of such knowledge, innovations and practices with the approval and involvement of its holders, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. Access to biological resources must be based on MAT and PIC. Furthermore, the CBD also calls for the promotion of the wider application of this knowledge with the approval and involvement of the holders of such knowledge and for their benefit.

The main focus of these Guidelines is ABS, as provided for by the CBD and associated protocols. The SADC region has rich and diverse biological resources along with TK gained and practised for centuries. This knowledge reflects the cumulative body of knowledge and beliefs handed down through generations by cultural transmission and the relationship between local people and their environment. Both the biological resources and the TK of the local communities require proper management and protection. All SADC member states have ratified the CBD and recognize:

i. That activities involving access to genetic resources and the associated TK should be consistent with the CBD;

ii. The importance of the fair and equitable sharing of benefits arising from the use of genetic resources and TK;

iii. That the state is responsible for conserving its genetic resources in a sustainable manner; and

iv. That genetic resources are increasingly being used commercially in the production of food, pharmaceuticals and other processed products. Without laws or policies governing the use of genetic resources, countries are exposed to biopiracy and the unsustainable use of these resources.

b) Nagoya Protocol

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization* is a supplementary agreement to the CBD. It provides a transparent legal framework for the effective implementation of one of
the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources. The Nagoya Protocol also covers TK associated with genetic resources and the benefits arising from its utilization. It sets out core obligations for the contracting parties to take measures with relation to access to genetic resources, benefit sharing and compliance. It also addresses genetic resources where indigenous and local communities have the established right to grant access to them. Parties are required to take into consideration indigenous and local communities’ customary laws, community protocols and procedures, as applicable, with respect to TK associated with genetic resources. They are also obliged to establish mechanisms to inform potential users of TK associated with genetic resources about their obligations.

c) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

The TRIPS Agreement was negotiated under the WTO multilateral trade negotiations known as the Uruguay Round and sets out minimum standards for the protection of trademarks, geographical indications, industrial designs, patents and layout designs of integrated circuits and trade secrets, with the exception of utility models and breeders’ rights. The TRIPS Agreement provides that the protection and enforcement of IPR should contribute to the promotion of technological innovation and to the transfer and dissemination of technology to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. The IPR regime focuses on protecting and promoting inventions based on individual property ownership. The provisions of TRIPS are generally alien to communities and TK holders and can, in some cases, be detrimental to their development. The implementation of TRIPS is posing a challenge in SADC member states in terms of how to deal with IPR and ABS issues on one hand, and issues relating to regional economic integration, IPR enforcement and Foreign Direct Investment (FDI) on the other.

d) Plant Breeders’ Rights (PBRs)

PBRs are rights granted to the breeder of a new variety of plant that give exclusive control over propagated and harvested material of the new variety for a fixed period of time. PBRs are granted on making an application to the appropriate authority, only if a variety is new, distinct, uniform and stable. Once PBRs are granted, the breeder can choose to become the exclusive marketer of the variety, or to license the variety to others. Most PBRs legislation, however, include a clause for compulsory licensing for the purpose of ensuring fairness and availability of food. PBRs laws are applicable only in countries where protection has been sought and granted. However, a multilateral system has been applied under the International Union for the Protection of New Varieties of Plants (UPOV Convention) under which members have national laws with similar
basic conditions. The UPOV Convention was adopted in 1961 and came into force on 10 August 1968. It was revised in 1972, 1978 and 1991 in order to address technological developments in plant breeding and experience acquired with its application. Currently, states and inter-governmental organizations interested in becoming members of UPOV must have laws on plant variety protection in line with the 1991 Act of the Convention.

Only a few SADC member states are party to the UPOV Convention, but most are, and have, no specific legislation on PBR; however, being members of the WTO, they are obliged to have some form of plant variety protection under the TRIPS Agreement.

e) **International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)**

ITPGRFA was negotiated on the premises that plant genetic resources for food and agriculture are special and a common concern, and that nations operate interdependently. The ITPGRFA has comprehensive provisions providing guidance to countries regarding the measures and activities to be undertaken at national level for the conservation and the sustainable use of crop diversity; provisions on farmers’ rights which aim at supporting farmers and local and indigenous people in conserving crop diversity on their farms; a multilateral system that facilitates access to a global gene pool of crop genetic resources for agricultural research and the breeding of new crop varieties that may achieve higher yields and nutritional values and that are adapted to new climate conditions; and a benefit sharing fund that supports initiatives for the conservation and sustainable use of crop diversity in developing countries.

Most SADC member states are party to the ITPGRFA, therefore, SANBio can benefit by adopting the key features of the treaty, including the Standard Material Transfer Agreement (SMTA) which provides a useful mechanism for ABS.

**Global and continental organizations**

a) **World Intellectual Property Organization (WIPO)**

WIPO is a specialized agency of the United Nations. WIPO was established by the WIPO Convention in 1967 with a mandate from its member states to promote the protection of IPR throughout the world through co-operation among states and in collaboration with other international organizations. It is dedicated to developing a balanced and accessible IPRs system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding public interest.

An Inter-Governmental Committee (IGC) deals with IP issues relating to genetic resources, TK and folklore/traditional cultural expressions. The committee is made up
of delegates from the governments of member countries, with representatives from Inter-Governmental Organizations (IGOs) and Non-Governmental Organizations (NGOs) participating as accredited observers. WIPO is currently examining the role IPR principles can play in promoting community-led economic development and benefit-sharing in ways that respect indigenous cultural heritage as both a cultural and economic asset.

WIPO has a wide membership including all SADC member states.

b) Pan-African Intellectual Property Organization (PAIPO)

For many years, many African countries have been served by two main intellectual property organizations, namely the ARIPO and OAPI. The two organizations serve part of the continent and are largely divided along ethno-linguistic lines (English and French). However, nearly half of the remaining countries in Africa are not members of any regional IPR body. This limitation has compromised Africa’s capacity to forge a common IPR system, capable of articulating Africa’s inventive and innovative aspirations. A resolution to form PAIPO was adopted at the 2007 AU Heads of State Summit and is currently in the process of being established. PAIPO is mandated to address policy issues and thus provide more prominence to the activities on IPR continent-wide, including those addressed by the two regional organizations, ARIPO and OAPI. The thrust of PAIPO is to, inter alia, organize and co-ordinate a stock of specialized IPR policies at continental level; setting IPR standards reflecting the needs of member states; setting benchmarks for best practices; promoting the growth of knowledge-based economies in Africa; facilitating the rationalization and harmonization of IPR standards; facilitating the use of relevant IPR information; and assisting in training and capacity building at the continental level.

Regional organizations

a) Organisation Africaine de la Propriété Intellectuelle (OAPI)

OAPI was established in 1977 under the Bangui Agreement to promote the development of its member states, particularly through the effective protection of IPR and related rights and providing training on the protection of new objects (plant varieties, layout designs of integrated circuits, etc.). The agreement was revised in 1999 in accordance with the TRIPS Agreement. OAPI was created to cater specifically to the needs of French-speaking African countries and presently has a total of 16 member states.

b) African Regional Intellectual Property Organization (ARIPO)

ARIPO was established in 1976 under the Lusaka Agreement to pool together the resources of its member states in IPR matters in order to avoid the duplication of financial and human resources for the effective and continuous exchange of
information and the harmonization and co-ordination of their laws and activities relating to IPR. ARIPO caters specifically to the needs of English-speaking African countries and presently has 17 member states. It was transformed from the African Industrial Property Organization into African Intellectual Property Organization in 2006 upon taking on the administration of copyright as well. ARIPO has developed many protocols and agreements, including the *Protocol on the Protection of Traditional Knowledge and Expression of Folklore* (Swakopmund Protocol).
Annex 2: Relevant Contracts and Key Elements

While license agreements are the instruments for the actual transfer of technology, several other types of agreements might be required before this, at different stages of the R&D process, to create the necessary safeguards and conditions to pave the way for a smooth technology transfer process down the line. The following are examples of agreements that may be required:

<table>
<thead>
<tr>
<th>Type of agreement</th>
<th>When it is needed</th>
<th>Key terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>MoU</td>
<td>Usually signed at an early stage of discussions to set out a common understanding between parties for future collaboration, with detail to be agreed in subsequent agreements</td>
<td>Depends on the envisaged collaboration</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Terms are often not binding, with the exception of confidentiality provisions</td>
</tr>
<tr>
<td>Funding/sponsored research agreements</td>
<td>When R&amp;D funding is received from an outside party</td>
<td>How much money will be provided, when it will be paid and what conditions must be met in exchange for the funding, including contract milestones and deliverables</td>
</tr>
<tr>
<td>Collaboration agreements/consortium agreements</td>
<td>Collaboration between two or more parties on an agreed project or programme</td>
<td>Roles and responsibilities, governance and decision-making (typically via a steering committee made up of representatives of the collaborating parties), IP ownership, management and benefit sharing</td>
</tr>
<tr>
<td>Inter-institutional agreements</td>
<td>Management of jointly-owned IP</td>
<td>Roles and responsibilities in respect of IP protection actions and decisions, technology transfer, sharing benefits and dealing with litigation</td>
</tr>
<tr>
<td>Type of agreement</td>
<td>When it is needed</td>
<td>Key terms</td>
</tr>
<tr>
<td>-------------------</td>
<td>-------------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Non-disclosure agreements (also called confidentiality or secrecy agreements)</td>
<td>To facilitate discussions with potential collaborators, investors or licensees</td>
<td>May involve unilateral or mutual exchange of information Undertaking to maintain the confidentiality of information received from the other party and to use it only for the specified purpose Standard exclusions for information in the public domain, information received legitimately from other sources and information which must be disclosed by law</td>
</tr>
<tr>
<td>MTAs</td>
<td>For the transfer of proprietary material (most commonly, biological material)</td>
<td>May involve incoming or outgoing material Who may use the material, for what purpose, who owns modifications</td>
</tr>
<tr>
<td>PIC</td>
<td>To facilitate access to and the use of TK and PGR from TK holders and the community by researchers</td>
<td>The purpose of the activity Who is conducting and funding the activity The benefits and alternatives for the people whose consent are requested Potential risks and discoveries that might affect their willingness to co-operate Destination and ownership status of the material acquired Declaration of commercial interests Legal options for the community to enforce their rights Authenticity for use by third parties</td>
</tr>
<tr>
<td>Type of agreement</td>
<td>When it is needed</td>
<td>Key terms</td>
</tr>
<tr>
<td>-------------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>TK and community benefit sharing agreement</td>
<td>To facilitate the sharing of TK and/or genetic materials</td>
<td>Must identify the TK and/or materials and R&amp;D to be carried out, ownership of TK, background IP and foreground IP, obligation to report regularly, share benefits equitably</td>
</tr>
<tr>
<td>Evaluation agreements</td>
<td>To allow a party with an interest in licensing a technology to access the technology for evaluation purposes</td>
<td>How the technology may be used and for how long. May involve the payment of a fee or option terms</td>
</tr>
<tr>
<td>Optional agreements</td>
<td>When a potential licensee has an interest in a particular technology and wants to secure rights in the technology concerned, but is not ready to take up the technology immediately (e.g. if they wish to evaluate the technology, obtain finance, do feasibility studies, etc.)</td>
<td>A potential licensee is given the right, but not the obligation, to take up a particular technology on specified terms up to an agreed date, usually in exchange for a fee or other consideration License terms specified upfront, which become binding if the option is exercised Fee, option period</td>
</tr>
</tbody>
</table>

*NB: It is important for users of these guidelines to be aware that using the models provided herein will not eliminate the need for them to follow the agreement formats already provided in national laws/regulations.*
Annex 3: Sample Agreements

Sample 1: Individual Level Confidentiality Agreement

The parties hereto are:

_Insert names and full addresses as appropriate_

___________________________________ (the “Disclosing Party”)

___________________________________ (the “Receiving Party”)

I, the Receiving Party, hereby agree that any confidential scientific, technical, marketing or business information received by myself from any member of, or party associated with the

_______________________________________________, will not, unless subject to further written agreement, be disclosed or used by myself or the institution I represent, but that it is provided solely so that I may perform my duties. I agree hereto with respect to any confidential information disclosed to myself and which it is obvious to the Disclosing Party or claimed by the Disclosing Party as confidential (“Confidential Information”). Confidential Information may equally well be written information or information transmitted verbally, visually, electronically or by any other means.

I guarantee therefore that I shall:

a) Use said Confidential Information only for the purpose of furthering the activities of the

_____________________________________________________________________

b) Disclose the Confidential Information only to those other employees, colleagues or

_____________________________________________________________________

(who shall have similarly committed in writing to the terms of this Agreement) necessary for the evaluation of the information, and shall in no instance disclose the same to any other party for any purpose without the prior written consent of the party providing the information.

c) Agree to protect the confidentiality of the information in the same manner I would protect the confidentiality of my own or my institution’s own proprietary and confidential information of TK kind, but in any case using reasonable care.

d) Agree that Confidential Information disclosed under this Agreement shall at all times remain the exclusive property of the Disclosing Party. No license or other rights in or to the material disclosed, is granted by this Agreement, nor is any disclosure of Confidential Information under this Agreement, except as provided herein. All Confidential Information made available under this


Agreement, including copies thereof, shall be returned to the Disclosing Party (or, upon such party’s request or consent, destroyed) forthwith upon the first to occur of:

i. Completion of the purpose(s) set forth in this Agreement;

ii. The reasonable request of the Disclosing Party; or

iii. The cancellation of this Agreement.

e) Not to copy or reproduce Confidential Information of the other party without first obtaining their written permission. Should authorized copies of the Confidential Information be made, each party undertakes to reproduce in complete and identical form and wording the right of ownership of the Disclosing Party.

f) Have no obligation of confidentiality with respect to information that:

i. Is in the public domain by use and/or publication at the time of its receipt or enters the public domain thereafter through no fault of myself;

ii. Was already in my possession prior to receipt as shown by written documentation to be delivered to the Disclosing party within thirty (30) days;

iii. Was properly obtained from a third party not under a confidentiality obligation to the Disclosing Party; or

iv. Was previously developed, independently, by myself or my institution, as shown by written documentation to be delivered to the Disclosing Party within thirty (30) days.

g) Recognize that the disclosure of Confidential Information under this Agreement can in no way be interpreted as endowing the Receiving Party with any right whatsoever to intellectual or industrial property, patent or any other right relating to Confidential Information.

The obligations of confidentiality under this Agreement shall be limited to a period of five (5) years from delivery of information.

This Agreement shall be governed and construed in accordance with ________________________________ (insert name of country) law.

This Agreement contains my entire understanding with respect to the matters herein contained, and supersedes any previous agreements and undertakings with respect thereto.
IN WITNESS WHEREOF, this Agreement is hereby executed by:

Name: _____________________________________________________________

Signed: ______________________________ Date: _________________________

For and on behalf of __________________________________________________
and duly authorized in his/her personal capacity:

Name: ______________________________ Position: ______________________

Signed: _____________________________ Date: _________________________
Sample 2: Institutional Level Mutual Non-disclosure Agreement

Between (ensure all relevant institutions are included):

________________________________________ (insert profession) residing at __________________________
________________________________________ in his/her capacity as ____________________________
(hereinafter referred to as _________________)

AND

a statutory body duly established under ___________ (state the relevant legislation and the appropriate programme/unit) herein represented by ________________
in his/her capacity as ___________________________ and he/she being duly
authorized thereto (hereinafter referred to as _________________)

WHEREAS:

The parties have capabilities and expertise in using scientific knowledge and
technological application to ___________________________________________.

The parties possess proprietary information, technical knowledge, experience,
specimens and data of a secret and confidential nature relating to the field as
specified below, all of which are regarded by them as valuable commercial assets
of a highly confidential nature.

During the course of business discussions, negotiations, meetings and activities
including, without limitation, any on-site premises visits or demonstrations,
between the parties, each party may receive, observe or otherwise have access to
information, whether inside or outside the field, that (a) relates to the Disclosing
Party’s past, present or future research, development, business activities,
products, services and technical knowledge and (b) either has been identified in
writing as confidential or is of such a nature (or has been disclosed in such a way)
that it is obvious to the other party that it is claimed as confidential (“Confidential
Information”). Confidential Information may equally well be written information
or information transmitted verbally, visually, electronically or by any other means.

As used herein, the party disclosing Confidential Information is referred to as the
“Disclosing Party” and the party receiving the Confidential Information is referred
to as the “Recipient”.

The nature of the discussions, meetings or activities prompting this Agreement
is to share information, research results, background intellectual property and the wish to exchange more information, including Confidential Information and material in this regard.

For the purposes of __________________________________________________
__________________________________________________________________
__________________________________________________________________
__________________________________________________________________

Now, therefore, the parties hereby agree as follows regarding Confidential Information:

1. USE OF CONFIDENTIAL INFORMATION

1.1 The Confidential Information of the Disclosing Party may be used by the Recipient only in connection with the purpose(s) set forth in this Agreement. The Parties agree to protect the confidentiality of each other’s Confidential Information in the same manner they protect the confidentiality of their own proprietary and Confidential Information of TK kind, but in any case using reasonable care.

1.2 Except as necessary for the purpose(s) set forth in this Agreement, the Confidential Information of the Disclosing Party may not be copied or reproduced by the Recipient without the Disclosing Party’s prior written consent. Should authorized copies of the Confidential Information be made, each party undertakes to reproduce in complete and identical form and wording the right of ownership of the Disclosing Party.

1.3 Each party shall in all events remain free to use, in the course of its business, its general knowledge, skills and experience incurred before, during or after the activities hereunder. (To this end, it is also recorded that nothing in this Agreement shall be construed as constituting an exclusive arrangement between the parties and both parties shall remain free to explore market opportunities in the field, unless otherwise agreed to in writing in a subsequent agreement.)

1.4 With respect to the purpose(s) set forth in this Agreement, neither party is authorized to use the name, logo or trademarks of the other in connection with any advertising, publicity or marketing or promotional materials or activities without the prior written consent of the other party. The Disclosing Party provides the Confidential Information “as is”.

1.5 The parties shall:

1.5.1 Treat as strictly confidential any and all Confidential Information given or made known to them arising from this association;
1.5.2 Keep all such Confidential Information obtained secret to third parties and only use it in co-operation with each other for the purpose expressly agreed upon by the Parties and to disclose same to their employees only on a need-to-know basis;

1.5.3 Accept responsibility for the observance of the secrecy agreement by their employees; and

1.5.4 If required, cause all of their employees who are directly or indirectly given access to the said proprietary and Confidential Information to execute secrecy undertakings in a form acceptable to the parties in order to protect the parties against the unauthorized disclosure of such Confidential Information to any third party, and to fully co-operate in the enforcement of such secrecy undertakings.

2. OWNERSHIP OF CONFIDENTIAL INFORMATION

2.1 All documents or other material objects containing and/or representing Confidential Information disclosed under this Agreement shall at all times remain the exclusive property of the Disclosing Party. No license or other rights in or to the material disclosed is granted by this Agreement, nor is any disclosure of Confidential Information under this Agreement, except as provided herein. All Confidential Information made available under this Agreement, including copies thereof, shall be returned to the Disclosing Party (or, upon such party’s request or consent, destroyed) forthwith with no further formality upon the first to occur of:

2.1.1 Completion of the purpose(s) set forth in this Agreement;

2.1.2 The reasonable request of the Disclosing Party; or

2.1.3 The cancellation of this Agreement.

2.2 Disclosure of Confidential Information shall not constitute any representation, warranty, assurance, guarantee or inducement by the Disclosing Party with respect to infringement of patents or other rights of third parties. No warranty or representation as to the accuracy, completeness, or technical or scientific quality of any Confidential Information is provided herein. Without restricting the generality of the foregoing, neither party makes any representation or warranty as to the merchantability or fitness for a particular purpose of any Confidential Information disclosed hereunder.

3. EXCLUSIONS

Nothing in this Agreement shall prohibit or limit either party’s use of information
(including, but not limited to, ideas, concepts, know-how, techniques and methodologies):

3.1 Which at the time of disclosure is published or otherwise generally available to the public;

3.2 Which, after disclosure by the Disclosing Party, is published or becomes generally available to the public, otherwise than through any act or omission on the part of the Recipient;

3.3 Which the parties can show was in their possession at the time of disclosure and which was not acquired directly or indirectly from each other;

3.4 Rightfully acquired from others who did not obtain it under pledge of secrecy to either of the parties;

3.5 Which the Recipient is obliged to disclose in terms of an order of court, subpoena or other legal process.

3.6 In the event of either party receiving a subpoena or other validly issued administrative or judicial process requesting Confidential Information of the other party, the Recipient shall promptly notify the Disclosing Party thereof.

4. BREACH

It is acknowledged that the breach of this Agreement by the Recipient would cause the Disclosing Party irreparable injury not compensable in monetary damages alone. Accordingly, in the event of a breach, or a threat of a breach, the Disclosing Party, in addition to its other remedies, is entitled to a restraining order, preliminary injunction or similar relief so as to specifically enforce the terms of this Agreement or prevent, cure or reduce the adverse effects of the breach.

5. ABSENCE OF LICENCE

It is expressly agreed between the parties that the disclosure of Confidential Information under this Agreement can in no way be interpreted as endowing the Recipient with any right whatsoever to intellectual or industrial property, patent or any other right relating to Confidential Information.

6. COMMENCEMENT AND DURATION

6.1 This Agreement shall operate as from the date of signature hereof and shall remain binding for a period of ____ (________________) years, unless terminated prior thereto by mutual written consent between the parties or superseded by another written agreement between the parties in the field.
6.2 In the event of the cancellation or termination of this Agreement for whatever reason, either prior to or at the time of expiry of the period mentioned in clause 6.1 above, the parties agree that after ____ (________________) years from the date of such cancellation, termination or expiry, they shall each be relieved from all obligations under this Agreement and that after such time has expired, they will rely on such patents or other intellectual property as they may then own for the protection of any Confidential Information disclosed to each other pursuant to this Agreement.

7. GOVERNING LAW
This Agreement shall be governed by and construed in accordance with the laws of ____________________________ (insert full name of country) and any dispute arising therefrom shall be adjudicated by a competent court in ____________________________ (insert full name of country) and for these purposes the parties agree to the exclusive jurisdiction of the ____________________________ courts for the adjudication of such disputes.

8. ENTIRE AGREEMENT
This Agreement is the only and exclusive agreement between the parties with respect to the subject matter of this Agreement, and it supersedes all prior or contemporaneous representations, promises, inducements, proposals, discussions and other communications.

9. GENERAL PROVISIONS
No furnishing of Confidential Information and no obligation hereunder shall be construed to obligate either party to:

9.1.1 Enter into any further agreement or negotiation with or make any further disclosure to the other party; nor shall it
9.1.2 Prevent either party from entering into any agreement or negotiation with any other third party regarding the same subject matter or any other subject matter; nor shall it
9.1.3 Prevent either party from pursuing its business in whatever manner it elects, even if this involves competing with the other party. Any Confidential Information containing estimates or
forecasts shall not constitute binding commitments. Neither party shall directly or indirectly use, in an identical or modified form, any Confidential Information obtained from the other to its or a third party’s competitive advantage.

9.2 No public announcement or disclosure beyond those disclosures authorized for Confidential Information hereunder may be made by either party concerning this Agreement without the prior written approval of the other party.

9.3 If any clause or term of this Agreement should be invalid, unenforceable or illegal, then the remaining terms and provisions of this Agreement shall be deemed to be severable therefrom; and

9.4 Shall continue in full force and effect unless such invalidity, unenforceability or illegality goes to the root of this Agreement.

SIGNED at _______________________ this ______ day of __________________.

AS WITNESSES (as appropriate):

1. _____________________________________
   For ____________________________________
   _____________________________________
   Full names

2. _____________________________________
   Capacity (duly authorized)
Sample 3: Project Information
(Note: Care must be taken to avoid the indiscriminate use of technical jargon and, where appropriate, the document should be translated into local languages)

Title of Project:

__________________________________________________________________

Synopsis of the Project
Clear summary of what the project is about, the objectives, the partners, the outcome, benefits etc.)

Contribution of the Provider
Explain what the Recipient / Researcher expects from the Provider, including any targets that may be envisaged and assurance of authenticity.

Rights of Project Partners
Include explanations on:

a) Withdrawal;
b) Amendment; and
c) Renegotiation.

Additional Information
Invite the Provider to feel free to ask any questions about the project.

Contacts:
Include contact details of key project personnel.
Sample 4: Informed Consent

Project

__________________________________________________________________

I, ____________________________, as a legally nominated representative of ____________________________________________, have been fully informed of the project (insert the objectives of the project; the partners and nature of partnership, funding, outcomes and benefits; what the recipient / researcher expects from the provider, including any targets that may be envisaged; assurance of authenticity; etc.).

__________________________________________________________________

__________________________________________________________________

__________________________________________________________________

____________________________________________________________

Commitment of the Recipient

Include the following information:

1. The research process emphasizing what the recipient will do in and/or for the community

2. Key principles that will be observed such as:
   a) Confidentiality;
   b) Respect and cultural sensitivity;
   c) Communication;
   d) Empowerment;
   e) Equity; and
   f) Indigenous guardianship.

Conditions Associated with the Project

Include explanations of all conditions that may affect the Provider such as:

   a) Life of the agreement;
   b) Withdrawal;
   c) Amendment; and
   d) Renegotiation.
Commitment of Representative of the Provider

The representative of the Provider must be made aware of his / her role and rights in the project. Commitment should be obtained on:

a) Willingness to represent provider (community);
b) Legal nomination of the representative;
c) Freedom to withdraw from the project (in person) at any time without affecting the project; and
d) Freedom to withdraw the community participation from the project, without jeopardizing future projects.

Signatures

Signature of TK holder / practitioner: _______________________________
Date: _____/_____/20____

Signature of TK recorder who obtained informed consent: _______________
Date: _____/_____/20____

Signature of witness: _____________________________________________
Date: _____/_____/20____

Annexures

Append documents mentioned in the agreement as appropriate.
Sample 5: Benefit Sharing Agreement

Application for permit if applicant is a juristic body

Name of institution or body: _____________________________________________

Registration number of institution or body: ________________________________

Contact details of institution or body (including postal/physical address, phone, fax and e-mail address):
__________________________________________________________________
__________________________________________________________________

Name of contact person in the institution or body: _________________________
Capacity of contact person: ____________________________________________

Application for a permit if applicant is a natural person

Name of applicant: _____________________________________________________

Identity number of applicant: ____________________________________________

Contact details of applicant (including postal/physical address, phone, fax and e-mail address):
__________________________________________________________________
__________________________________________________________________

Provider of access to indigenous biological resources (if applicable)

Name: __________________________________________________________________
Capacity: __________________________________________________________________

If entering into agreement in a representative capacity, state name of principal:
__________________________________________________________________
__________________________________________________________________

Contact details (includes physical/postal address, telephone, fax and e-mail address):
__________________________________________________________________
__________________________________________________________________
Indigenous community (if applicable)
Description of indigenous community:
__________________________________________________________________
__________________________________________________________________

Name of indigenous community representative who will sign this agreement on behalf of the indigenous community:
__________________________________________________________________
Capacity: __________________________________________________________
Contact details (includes physical/postal address, telephone, fax and e-mail address) of the indigenous community representative:
__________________________________________________________________
__________________________________________________________________

A resolution adopted by the indigenous community must be attached to this form. The resolution must confirm that the indigenous community representative indicated above has been authorized to enter into this agreement on behalf of the indigenous community; that the indigenous community has full knowledge of the bioprospecting project; and that it consents to entering into this Benefit Sharing Agreement.

Type and Quantity of Indigenous Biological Resources
This Agreement concerns the following indigenous biological resources (specify below type of resources, quantity of resources and area or source from which the resources are to be collected or obtained)

<table>
<thead>
<tr>
<th>Type of organism</th>
<th>Scientific and common names (family, genus or species if possible)</th>
<th>Part of organism to be collected</th>
<th>Quantity (Limitation on the quantity of samples)</th>
<th>Full locality data (GIS readings if possible)</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>
Current uses of indigenous biological resources

The present potential uses of the indigenous biological resources to be collected are the following:

__________________________________________________________________  
__________________________________________________________________

Intended use of indigenous biological resources

The manner in which, and the extent to which, the indigenous biological resources are to be used or exploited for purposes of the bioprospecting are *(insert details)*:

__________________________________________________________________  
__________________________________________________________________

Traditional use or knowledge *(if applicable)*

The indigenous community that is a party to this Agreement has the following traditional knowledge of the indigenous biological resources or has traditionally used the indigenous biological resources in the following way:

__________________________________________________________________  
__________________________________________________________________  
__________________________________________________________________  
__________________________________________________________________

Sharing in Benefits

Benefits will vary considerably from case to case and in particular, benefits will vary depending on whether the stakeholder is providing access to the indigenous biological resources, or is an indigenous community. The lists below provide examples of monetary and non-monetary benefits that may arise from bioprospecting projects. This first list is more relevant if the stakeholder to this Agreement is providing or giving access to the indigenous biological resources, while the second list is more relevant if the stakeholder to this Agreement is an indigenous community. Tick each block that applies to this agreement and identify below who will be the beneficiary of each benefit and the extent of the
benefit (*provide supporting documentation where necessary*).

**To be completed if stakeholder is providing or giving access to the indigenous biological resources**

<table>
<thead>
<tr>
<th>Non-monetary, monetary and “in kind” benefits</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgement of parties giving access to resources</td>
<td>Voucher specimens with national institutions</td>
</tr>
<tr>
<td>Research results and copies of papers</td>
<td>Participation of South Africans in research</td>
</tr>
<tr>
<td>Support for conservation</td>
<td>Access to international collections by South Africans</td>
</tr>
<tr>
<td>Species inventories</td>
<td>Recognition and promotion of traditional knowledge / use</td>
</tr>
<tr>
<td>Student training and support</td>
<td>Community development projects</td>
</tr>
<tr>
<td>Scientific capacity development</td>
<td>Environmental education</td>
</tr>
<tr>
<td>Technology transfer</td>
<td>Fees</td>
</tr>
<tr>
<td>Joint research</td>
<td>Royalties</td>
</tr>
<tr>
<td>Information</td>
<td>Upfront payments</td>
</tr>
<tr>
<td>Equipment and infrastructure</td>
<td>Milestone payments</td>
</tr>
<tr>
<td>Other (specify)</td>
<td>Other financial benefits (specify)</td>
</tr>
</tbody>
</table>

**To be completed if stakeholder is an indigenous community**

<table>
<thead>
<tr>
<th>Non-monetary, monetary and “in kind” benefits</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ongoing communication of bioprospecting objectives, methods and findings, translated into local languages</td>
<td>Copies of proposals, reports and publications</td>
</tr>
<tr>
<td>Simplified and popularized posters, manuals, pamphlets and other documents translated into local languages</td>
<td>Recognition and promotion of traditional knowledge / use</td>
</tr>
<tr>
<td>Co-authorship of publications</td>
<td>Lodging of specimens</td>
</tr>
<tr>
<td>Access to research data</td>
<td>Grants for development and environmental education projects</td>
</tr>
<tr>
<td>Copies of photographs and slides</td>
<td>Fees (e.g. for consultation, assistants, guides, use of facilities and infrastructure)</td>
</tr>
</tbody>
</table>
Inclusion in the research of local collaborators, assistants, guides and informants | Royalties
---|---
Training of local people as appropriate in relevant scientific, legal and management issues | Upfront payments
Equipment and infrastructure support | Milestone payments
Co-ownership of any intellectual property rights | Other financial benefits (specify)
Other (specify) | Other (specify)

Payment of Benefits

All money arising out of this Agreement and due to any party to this Agreement must be paid into the Bioprospecting Trust Fund. The Trust Fund will in turn provide details in terms who benefits from the fund, how payments will be calculated and made to the beneficiaries. This information may form part of the Annexure to this Agreement. Please note that implementation of this Clause will vary from country to country and will be guided by the relevant legislation, where it exists.

Duration of the Agreement

This Agreement shall operate as from the date of signature hereof and shall remain binding for a period of ____ (________________) years, unless terminated prior thereto by mutual written consent between the parties or superseded by another written agreement between the parties in the field.

Review of the Agreement

This Agreement will be reviewed every ____________ (insert agreed time frame), with a view to amending the Agreement if necessary. ______________(insert period in days or months) prior to every review, the permit holder must disclose any new material information with regard to the bioprospecting to all stakeholders to enable stakeholders to participate in the review from an informed basis.

Other Matters

Any other matters or conditions which the parties to this Agreement wish to record may be attached to this Agreement as an annexure.

A copy of this Agreement must be lodged with ______________________(insert authority responsible) within ______________ (insert period in days or months) of the Agreement being concluded.
This Agreement constitutes the entire agreement between the parties with regard to the subject matter of this Agreement and no addition to, variation or cancellation of this Agreement or waiver of any rights under this Agreement will be of any force or effect, unless reduced to writing and signed by the parties to this Agreement.

Signature of applicant for permit: _______________________________________
Date: _________________________________
Capacity of signatory: __________________________________
On behalf of: ___________________________________________

Endorsement of a juristic body, (if applicable)
Name of juristic body: _____________________________________________
Signature of duly authorized officer from the juristic body: _______________
Date: _________________________________
Signature of access provider of indigenous biological resource: _______________
Date: _________________________________
Capacity of signatory: ______________________________________________
On behalf of: ____________________________________________________

Signature of indigenous community representative: _____________________
Date: _________________________________
Capacity of signatory: ______________________________________________
On behalf of: _____________________________________________________
Approved by: _____________________________________________________
Signature: _____________________________
Date: _________________________________
Sample 6: Material and Information Transfer Agreement

Between __________________________________________________________
and _______________________________________________________________

(insert name of provider community or institution)

led by ______________________________ and duly represented by ______________________________

with identity number: ______________________________

(the duly nominated ______________________________ Representative
and hereinafter referred to as ______________________________ (insert short name of provider)

RECORDAL

WHEREAS __________________________ (insert name of provider) made claims that certain materials can be used ________________________ (insert uses) and
WHEREAS the _________________________________________________ wants

_________________________ (insert name of provider)
to provide it with such materials and/or information to source such materials to evaluate the claims and/or to perform the necessary analysis to establish whether such materials can be used for

_________________________ (insert uses)

within the framework of the prescribed national legislative requirements alongside with the principles articulated in the United Nations Convention on Biodiversity; and

WHEREAS ____________________________________________ (insert name of provider)

is willing to provide such material and/or information to ________________ and

________________________________________ (insert name of receiver) is willing to accept such materials and/or information in accordance with the terms and conditions as set out in this Agreement.
The Parties now therefore agree as follows:

1. **Definitions and Interpretation**
   
   1.1 **Definitions:**
   
   - “**Agreement**” means this agreement together with its annexures.
   
   - “**Material**” means any genetic material of plant origin, together with any progeny or unmodified derivatives, including reproductive and vegetative propagating material, seeds, extracts thereof, plant exudates, gums or any other substances of the material with details as set out in Annexure A of this Agreement, which annexure will be supplemented in writing from time-to-time and will form an integral part of this Agreement.
   
   - “**Information**” means the information provided by ____________________________ (insert name of provider) to ____________________________ (insert name of recipient) to enable ____________________________ (insert name of recipient) to source the necessary plant material or to perform the necessary analysis as to whether certain plant materials can be used to cure certain diseases.
   
   - “**Confidential Information**” means (without limitation) all knowledge, know-how, specifications, trade secrets, plans, processes and procedures, financial information, systems, strategies and any other information of a sensitive, confidential and/or proprietary nature (including extracts thereof or any documentation containing such information) relating to this Agreement, or relating to the parties’ businesses, which a party sharing the information has indicated to be of a confidential nature or is of such a nature or has been disclosed in such a way that it is obvious to the other party that it is claimed as confidential. Confidential Information may equally well be written information or information transmitted verbally, visually, electronically or by any other means. For the purpose of this Agreement, Information as defined in clause 1.2 above will be regarded as Confidential Information belonging to ____________________________ (insert name of provider); and all Information (excluding information as defined in clause 1.2 above), know-how, secrets, processes and procedures used or generated by ____________________________ (insert name of recipient) as a result of this Agreement will be regarded as Confidential Information belonging to the ____________________________ (insert name of recipient).
1.2 Interpretation:

Unless expressed to the contrary, in this Agreement:
- Words in the singular include the plural and vice versa;
- Any gender includes the other gender;
- No rule of construction will apply to a clause to the disadvantage of a party, merely because that party put forward the clause or would otherwise benefit from it;
- Reference to day in this Agreement will be reference to any day, however, if the date on or by which any act must be done in this Agreement is not a business day, the act must be done on or by the next business day; and
- Where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.

2. Relationship

The parties shall remain all the time independent contractors or entities for all purposes in terms of this Agreement, and nothing in this Agreement shall be construed as to create a legal partnership, an agency or a joint venture between the parties or that the one party being the agent of the other party on a permanent basis.

3. Evaluation of information

3.1 _________________________ (insert name of provider) undertakes to provide the ____________________________ (insert name of recipient) with all necessary Information as set out below to enable the ____________________________ (insert name of recipient) to evaluate its claim whether certain Information and/or Material can be used to treat and/or to cure certain diseases.

3.2 __________________________ (insert name of provider) will furnish the ____________________________ (insert name of recipient) with all the Information at its disposal which is relevant to ____________________________ (insert name of provider) claims for evaluation purposes by ____________________________ (insert name of recipient)

3.3 ___________________________ (insert name of provider) undertakes to provide the ____________________________ (insert name of recipient) with true and honest Information to the best of its knowledge and undertakes not to change the Information provided to the ____________________________ (insert name of recipient)
such as the composition, the process or method of preparation and dosages at any time during the evaluation process.

3.4 The _____________________ (insert name of recipient) will analyse the Information provided by _____________________ (insert name of provider) to the ________________________________ (insert name of recipient) by using criteria developed in order to make a decision whether to approve or to decline the application by ____________________ (insert name of provider) for the scientific testing of its claim by the ______________________ (insert name of recipient).

3.5 Should the application by ____________________ (insert name of provider) for scientific testing be successful, then clause 4 below will apply and the ________________________________ (insert name of recipient) may consider in its own discretion whether as to compensate ___________________________ (insert name of provider) for any costs incurred and may also insist on proof of such costs incurred before reimbursing ________________________________ (insert name of provider).

3.6 _____________________________ (insert name of provider) shall be at liberty to continue to apply and utilize the products derived from the Material which they have prepared and/or may continue to prepare in future by their own technique, notwithstanding that the material used has been referred to _______________________________ (insert name of recipient) for scientific research, unless the parties agreed otherwise in writing.

4. **The transfer of material and/or information**

4.1 The transferring of Material and/or Information by ___________________________________ (insert name of provider) to the ___________________________________ (insert name of recipient) to enable it to do the necessary analysis under this Agreement is subject to the evaluation of Information as set out in clause 3 above.

4.2 The parties will, from time to time, mutually agree on the date and method of the provision of Material and/or Information by ___________________________________ (insert name of provider) to the ___________________________________ (insert name of recipient) or the gathering of Material by the ___________________________________ (insert name of recipient).

4.3 Each sample of Material will be numbered according to the date of delivery or gathering thereof and quantified as set out in Annexure A.
of this Agreement, which annexure will form an integral part of this Agreement and be supplemented in writing from time to time as and when the Material is received or gathered by

______________________________________ (insert name of recipient).

4.4 The __________________________________ (insert name of recipient) will use the Material and/or Information for analysis purposes to investigate whether such Materials can be used to cure certain diseases and will inform __________________________ (insert name of provider) of the results thereof.

4.5 ________________________________________ (insert name of provider) may continue with its own research in respect of the Material, which activities will not form part of this Agreement and which activities will not interfere with the obligations undertaken by ________________________________________ (insert name of provider) in terms of this Agreement. __________________________________________ (insert name of provider) however undertakes to be available and to assist the ______________ (insert name of recipient) for the duration of this Agreement as to enable it to achieve its aims under this Agreement.

4.6 Should ________________________________________ (insert name of provider) indicate that it is not desirous to pursue the bioassay of any specific sample Material and/or Information or should __________________________ (insert name of provider) terminate the Agreement in terms of clause 10 below, then __________________________ (insert name of provider) will inform the __________________________ (insert name of recipient) accordingly and may consider assigning all the rights in respect of the Material and/or Confidential Information belonging to it to the __________________________ (insert name of recipient) should the __________________________ (insert name of recipient) be keen to pursue the research further. The __________________________ (insert name of recipient) undertakes, to the best of its knowledge, to make the implications thereof clear to __________________________ (insert name of provider). Clause 6.4 below will then apply in respect of Confidential Information.

4.7 Should the ________________________________________ (insert name of recipient) indicate at any stage that it is not desirous to pursue the bioassay of a specific sample Material or should the __________________________ (insert name of recipient) terminate
the Agreement in terms of clause 10 below, then the _______________________________ (insert name of recipient) will inform _______________________________ (insert name of provider) accordingly and the _______________________________ (insert name of recipient) will then return immediately to ______________________ (insert name of provider) the Material (or part thereof which is left), in which case _______________________________ (insert name of provider) may continue with its own researches in respect of such Material. Clause 6.4 below will apply in respect of Confidential Information.

4.8 The parties agree that they will obtain the necessary permits to gather the Material and will take every reasonable precaution as to prevent any unauthorized possession by third parties of the Material.

5. **Intellectual Property**

5.1 Ownership of any intellectual property owned by either party in respect of the Material or Information prior to the effective date of this Agreement, or developed in the future outside the scope of this Agreement (“Background Intellectual Property”), shall be and remain vested in the party who initially owned and/or developed the same and as set out in Annexure B of this Agreement.

5.2 In the event that any intellectual property is created as a result of this Agreement in respect of the Material or Information (“Foreground Intellectual Property”), the ownership thereof will jointly vest with the parties and should any party decide upon further exploitation of the proceeds under this Agreement, then the parties undertake to embark in good faith negotiations with each other around the commercial use (which may include without limitation the filing of intellectual property applications; obtaining or transferring of intellectual property rights by sale, license or by any other means; product development; market research and seeking market approval; or any other activities which may have commercial value) and/or exploitation (which may include without limitation the improvement of a party’s competitive position; the generation of revenue; and the maker of a discovery, invention or other original work which may be the subject of Intellectual Property Rights and which may have commercial value) of such Foreground Intellectual Property, taking into account the contributions to such Foreground Intellectual Property as made by the respective parties so as to ensure that any share in the proceeds of exploitation will be proportioned to a party taking into account the effective contribution by each party.
in respect of the Material and/or Information. (To this end, relevant contributions to take into account include, but are not limited to, intellectual and financial contributions and contributions in kind e.g. use of land, equipment or facilities).

5.3 Subject to clause 5.2 above and unless otherwise agreed between the parties, each party will have the right to file, in its own name and at its own expense, worldwide intellectual property rights (which shall include, but not be limited to, patent applications and patents or utility models) relating to inventions made by it.

5.4 The parties undertake not to infringe the existing rights of each other and of any third party in respect of intellectual property in terms of this Agreement and undertake to disclose full details of any third party who may have rights in this regard.

5.5 The parties undertake to obtain the prior written consent to use any intellectual property belonging to each other, including (without limitation) the use of logos and any trademarks.

6. **Confidentiality**

6.1 The parties may, during the course of its dealings with each other, gain access to each other’s Confidential Information. The parties undertake, during the validity of this Agreement and thereafter, to ensure the confidentiality and secrecy of such Confidential Information, to use the Confidential Information solely for the purpose necessary in terms of this Agreement and not to disclose it to any other party, without the prior written approval being obtained from the party whose Confidential Information it is.

6.2 The ___________________________________ (insert name of recipient) shall be considered to have provided adequate consideration by either of the following actions, unless expressly stated to the contrary in this Agreement or any annexures hereto:

   (i) Providing __________________________ (insert name of provider) with rights to or rights of access to the results of any research involving the Material and/or related Information undertaken by the __________________________ (insert name of recipient), hereto; or

   (ii) Placing the results of any research involving the material and/or related Information undertaken by the __________________________ (insert name of recipient), subject to the above provision and any annexures hereto into the public domain to the satisfaction and with the written consent of __________________________ (insert name of provider).
6.3 The above secrecy obligation shall not apply in respect of information which became public or was commonly known at the time of the disclosure other than as a result of breach by any party of the provisions of clause 6; or the disclosure of Confidential Information required to satisfy the order of a court of competent jurisdiction; or to comply with the provisions of any law or regulation in force from time to time.

6.4 ______________________________________ (insert name of provider) shall keep confidential all dealings with the ______________________________________ (insert name of recipient) and shall refrain from referring to the ______________________________________ (insert name of recipient) for any marketing purposes.

6.5 The parties shall be committed to take all reasonable steps to maintain the secrecy and confidentiality of each other’s Confidential Information and that such efforts to be no less than the degree of care employed by a party as to preserve and safeguard its own Confidential Information.

6.6 Should a party indicate at any stage that it does not desire to pursue the bioassay of the Material, Information and/or Confidential Information (to the extend applicable in this instance) received under this Agreement, then the party receiving such Material, Information and/or Confidential Information will inform the other party accordingly and the parties will then immediately retain, return or destroy all Confidential Information as per the instruction received from the party to whom the Confidential Information belongs.

6.7 This clause 6 is severable from this Agreement and shall survive the termination of this Agreement.

7. Publications

7.1 The ______________________________________ (insert name of recipient) will be entitled, from time to time, to make publications under this Agreement (including without limitation the publication of results, intellectual property in respect of the Material and/or Information and/or any activities undertaken by the ______________________________________ (insert name of recipient) under this Agreement). The ______________________________________ (insert name of recipient) undertakes to inform ______________________________________ (insert name of provider) of such publications and to make the appropriate acknowledgement of the source of the Material and/or Information to the best of its knowledge, including making the necessary reference to ______________________________________ (insert name of provider) contributions in this regard.
7.2 The ______________________________________ (insert name of recipient) shall not make any public announcement regarding this Agreement and the object or the results of the Research without the prior written consent of Provider. In case the Provider gives such consent with relation to scientific publications, the ______________________________________ (insert name of recipient) shall acknowledge, in any such publication, the source of the Materials.

8. **Suspensive Conditions**

8.1 Each party undertakes, at its own costs and effort, to obtain the necessary permit/s required by law on/or before the collecting of any Materials in respect of this Agreement.

___________________________ (insert name of provider) undertakes to provide the ____________________________ (insert name of recipient) timeously with the necessary proof that the required permit/s was obtained on/or before delivery of such Material to the ____________________________ (insert name of recipient).

8.2 Should the ____________________________ (insert name of recipient) in its discretion decide upon further exploitation of the proceeds under this Agreement, then clauses 5.2 and 5.3 will apply and the parties will further undertake to enter into a Benefit Sharing Agreement to properly address all interests and any share in proceeds in respect of such exploitation.

9. **Duration**

This Agreement shall commence on the date of last signature hereto and shall, subject to clause 10 below, remain in force until all analyses under this Agreement have been completed by the ____________________________ (insert name of recipient) upon written confirmation thereof by the ____________________________ (insert name of recipient) to ____________________________ (insert name of provider).

10. **Termination**

10.1 Any party may terminate this Agreement by means of ____________________________ months prior written notice to the other party.

10.2 Should the Agreement be terminated by either party, then clauses 4.7 and 4.8 will apply in respect of the Material and/or Confidential Information.
10.3 Notwithstanding the above-mentioned, the _________________ (insert name of recipient) may terminate the Agreement with immediate effect upon prior written notice to _________________ (insert name of provider) if:

10.3.1 _________________ (insert name of provider) commits a deliberate breach of any of the terms of this Agreement which it refuses to rectify, even upon demand; and/or

10.3.2 When the Material and/or Information is or becomes generally available from third parties, has already been documented for the same disease or traditional use for which _________________ (insert name of provider) uses it or where _________________ (insert name of recipient) has already obtained Information from other sources on the same Material, for example, though public depositories. In the event that any of the Material has already been documented for the same disease for which _________________ (insert name of provider) uses it or where the _________________ (insert name of recipient) has already obtained Information from other community’s on the same Material and/or Information, the _________________ (insert name of recipient) will duly inform _________________ (insert name of provider) as such, giving the relevant literature references within ________ days of the discovery.

10.3.3 If, from any cause, _________________ (insert name of provider), in the reasonable opinion of the _________________ (insert name of recipient), is prevented from performing its duties hereunder for a continuous period of ____________________________.

10.3.4 If _________________ (insert name of provider) is guilty of any conduct which in the reasonable opinion of the _________________ (insert name of recipient) prejudicial to the interest of _________________ (insert name of recipient).

10.4 Notwithstanding the above-mentioned, _________________ (insert name of provider) may terminate the Agreement with immediate effect upon prior written notice to the _________________ (insert name of recipient) if
ceases to carry out research and development or deal in __________________ as were previously mentioned, this Agreement shall forthwith terminate.

11 Warranties

11.1 The parties acknowledge the fact that the Material received from ______________________________________ (insert name of provider) is of experimental nature and, although ______________________________________ (insert name of provider) undertakes to inform the ______________________________________ (insert name of recipient) of any negative effects it is aware of, it does not warrant that such Material will be free from any unforeseen negative effects.

11.2 Although ______________________________________ (insert name of provider) does not guarantee the safety, purity and quality or standard of Information and/or Material provided to the ______________________________________ (insert name of recipient) by it, it however warrants that it will ensure itself to the best of its knowledge and efforts of the truth and correctness of its claims and of any Information and/or Material provided to the ______________________________________ (insert name of recipient).

11.3 ______________________________________ (insert name of provider) warrants that it will not approach any third parties to evaluate the claims already referred to the ______________________________________ (insert name of recipient) under this Agreement.

11.4 Each party warrants that it will refrain from doing anything which may interfere with its obligations under this Agreement and with the aims of this Agreement.

11.5 Neither party gives any warranty regarding the fitness of the Material and/or the Information for any purpose, nor does it give any warranty in respect of the merchantability or commercial viability thereof.

12. Breach

In the event that either of the parties (the “Defaulting Party”) committing a breach of any of the terms and conditions of this Agreement and failing to remedy such breach within ____________ (insert period) of receipt by the Defaulting Party of a written notice to remedy such breach, then the other party (the “Aggrieved Party”) will be entitled to cancel this Agreement forthwith by means of written
notice to the Defaulting Party and/or to claim such damages and/or losses it may have suffered in this regard. The provisions of this clause 12 will not affect or prejudice any other rights or remedies which the parties may have by law.

13. Costs
Each party will carry its own costs relating to the gathering of the Material, the analysis to be conducted and the permits to be obtained under this Agreement.

14. Claims and Disputes
In the event of any claim or dispute arising from this Agreement, the parties shall make every effort to settle such dispute or claim amicably. Should the claim or dispute remain unresolved for a period of ___________ days of such claim or dispute arising, then either party may refer the claim or dispute to arbitration in accordance with the rules of the Arbitration Federation of South Africa. The provisions of this clause shall not preclude any party from obtaining urgent interim relief in a competent court of law.

15. Notices
Any notices or communications by the parties in terms of this Agreement shall be in writing and shall either be hand delivered, sent by registered post or sent by facsimile message and addressed as follows:

If addressed to ________________________________ (insert name of recipient), to the contact person as set out in Annexure C of this Agreement:

Street address: ______________________________________________________
Postal address: ______________________________________________________
Telephone number: __________________________________________________
Facsimile number: __________________________________________________
E-mail address: _____________________________________________________

If addressed to __________________________________ (insert name of provider), to the community duly nominated representative / contract as set out in Annexure C of this Agreement:

Street address: ______________________________________________________
Postal address: ______________________________________________________
Telephone number: _________________________________________________
Facsimile number: _________________________________________________
E-mail address: _________________________________________________

The street addresses specified above shall be regarded as the *domicilium citandi et executandi* of the respective parties.

Unless the contrary is proved, notices or communications:

- Sent by registered post will be deemed to have been received _____ days after date of posting;
- Delivered by hand will be deemed to have been received on the date of delivery;
- Sent by facsimile message will be deemed to have been received on the date reflecting on the transmission slip; and
- Sent by e-mail message will be deemed to be received on the date reflected on the electronic confirmation slip received by the sender from the addressee’s information system indicating that the e-mail has been received by the addressee.

16. *General*

16.1 This Agreement constitutes the sole record of the Agreement between the parties with regard to the subject matter thereof.

16.2 No consensual cancellation or amendment of this Agreement (or this clause 16.2) shall be valid unless reduced to writing and signed by or on behalf of both parties.

16.3 No indulgence which any party may grant the other shall constitute a waiver of, or prejudice the rights of the party granting the indulgence.

16.4 If any part of this Agreement is found to be invalid or unenforceable, it shall be severed from the remainder of the Agreement which shall remain valid and enforceable.

16.5 Neither party may cede its rights or delegate its obligations in terms of this Agreement without the prior written consent of the other party.

16.6 This Agreement may be signed in counterparts, in which case the counterparts jointly shall constitute the Agreement.

16.7 This Agreement shall be governed and construed in accordance with ____________________________ (insert country) law.

Signed at ______________________ this ________ day of ______________________
For and on behalf of the __________________________ (insert name of recipient) and
duly authorized thereto: ________________________________

Full names and surname: ________________________________
Identity number: ________________________________
Capacity: ________________________________

As witnesses:

1. __________________________________
2. __________________________________

Signed at __________________________ this ________ day of __________________________
_________________________________ (insert name of provider) or for and on behalf of
_________________________________ (insert name of provider) and duly authorized
thereto: ________________________________

Full names and surname: ________________________________
Identity number: ________________________________

As witnesses:

1. __________________________________
2. __________________________________
Annexure A

Description of Material

Details in respect of each sample Material: ________________________________
Name of permit: ________________________________
Issuing authority: ________________________________
Date of permit: ________________________________
Permit no.: ________________________________
Name of permit holder: ________________________________ (insert name of recipient)
Date of collection: ________________________________
Name of area from which material was collected: ________________________________
Description of habitat from which material was collected: ________________________________

Sample no.: ________________________________
Taxonomic description (to lowest known level): ________________________________
Description of material collected (e.g. twigs, leaves) and manner in which the material is fixed or preserved: ________________________________

Quantity collected (also state unit of measurement and accuracy level): _______ ________

Source: ________________________________
Type of Material: ________________________________
Part of Material: ________________________________
Scientific or common name (Family, genus and species if possible): ________________________________

Quantity allowed (Limitation on the quantity of samples): ________________________________

Full locality data (GIS readings if possible): ________________________________
Current use/s: ________________________________
Purpose of export (if applicable): ________________________________
Annexure B

(Insert full details of Background Intellectual Property associated with the material)

Annexure C

Contact person

_______________________________________________ (insert name of recipient)

Contact person:

Full name and surname: __________________________________________________________

Identity number: _______________________________________________________________

Capacity: ________________________________________________________________

A certified copy of the identity document of ____________________________ (insert name of recipient), contact person is attached hereto as Annexure _________________________________________________________________(insert name of provider)

Full name and surname: __________________________________________________________

Identity number: _______________________________________________________________

A certified copy of the identity document of ____________________________ (insert name of provider)

is attached hereto as Annexure __________.
Annex 4: Key Resources

### Best practices, discussions and news

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<td>Bioversity International</td>
<td><a href="http://www.bioversityinternational.org/policy_law/access_benefit_sharing.html">http://www.bioversityinternational.org/policy_law/access_benefit_sharing.html</a></td>
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<tr>
<td>ICTSD</td>
<td><a href="http://www.iprsonline.org/">http://www.iprsonline.org/</a></td>
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<td></td>
<td><a href="http://ictsd.org/i/publications/11531/">http://ictsd.org/i/publications/11531/</a></td>
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<td>KMAfrica</td>
<td><a href="http://www.kmafrica.com/resources">http://www.kmafrica.com/resources</a></td>
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<td></td>
<td><a href="http://www.indilinga.org.za">http://www.indilinga.org.za</a></td>
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### International agreements

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<td>ITPGRFA</td>
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<td>UPOV</td>
<td><a href="http://www.upov.int/en/about/upov_system.htm">http://www.upov.int/en/about/upov_system.htm</a></td>
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<td>WIPO</td>
<td><a href="http://www.wipo.int/treaties/">http://www.wipo.int/treaties/</a></td>
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<td>ILO Conventions</td>
<td>The Indigenous and Tribal Populations Convention, No. 107 of 1957.</td>
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<td><strong>Institutions</strong></td>
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<td>OAPI</td>
<td><a href="http://www.oapi.int">http://www.oapi.int</a></td>
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<td>ARIPO</td>
<td><a href="http://www.aripo.org">http://www.aripo.org</a></td>
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<td>WIPO</td>
<td><a href="http://www.wipo.int">http://www.wipo.int</a></td>
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<tr>
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<td><a href="http://www.wipo.int/wipogold/">http://www.wipo.int/wipogold/</a></td>
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<th><strong>Academic and training programmes</strong></th>
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<td>Wageningen University</td>
<td><a href="http://www.wageningenuniversity.nl/">http://www.wageningenuniversity.nl/</a></td>
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<tr>
<td>Bioversity International</td>
<td><a href="http://www.bioversityinternational.org/training/">http://www.bioversityinternational.org/training/</a> (Self-training modules)</td>
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