

Briefing Paper

Responsibilities of user countries regarding the sale of biopirated resources or traditional knowledge

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Recent discussions about the responsibilities of user countries have focused almost exclusively on the question of the *disclosure of origins* in patent applications. While this is an important and efficient instrument for CBD implementation, the responsibilities of user countries do not end at this stage. The Bonn Guidelines state that user countries should also consider "measures aimed at preventing the use of genetic resources obtained without the prior informed consent of the contracting Party providing such resources" (Paragraph 2.C.d.iii). To our knowledge, and to date, not a single user country (including developed and developing countries) has taken actual steps to implement this recommendation of the Bonn Guidelines, i.e. no effort has yet been made to ban from the marketplace products that violate CBD-rules. The Bonn Guidelines have been ineffective in changing the behaviour of players on this issue. It is therefore important that an international regime, yet to be developed, defines such measures as a clear and binding responsibility. In the terms of reference for establishing an international regime on access to genetic resources and benefit-sharing such measures have already been included (elements, xi:...measures to prevent the unauthorized access and use of genetic resources...). The following example underlines the need to take action.

Hoodia, a leaf succulent from Southern Africa and the knowledge of the San concerning its properties has been a staple of biopiracy discussions for many years. Criticism has become more muted since the conclusion of a benefit sharing agreement between the patent owner (CSIR, South Africa) and the holder of the traditional knowledge (the San) but the case continues to generate a certain amount of controversy.¹ Hoodia is a highly effective anorectic (appetite suppressant) and promises to be a great success on the markets of industrialized countries. CSIR has negotiated a contract for the exploitation of the patent with Phytopharm (UK). Phytopharm then looked for a partner in the industry. Pfizer was a first partner, but has withdrawn from the agreement. Now it appears that Unilever is trying to sell Hoodia snacks, drinks or other foodstuff as a weight loss product. These products are still in development.

As a (spagyric) essence for appetite suppression, Hoodia drops are already for sale e.g. in pharmacies and drugstores in Switzerland. At least two Swiss manufacturers sell the product to retailers. Switzerland is not a singular case, either. There are some 30 known producers of Hoodia products, mostly in the US and the UK.² There is also a brisk Hoodia trade on the internet. According to Roger Chennels, the lawyer for the San, all Hoodia products currently on the market are not part of the benefit sharing agreement. The San have not negotiated ABS-agreements with anyone except CSIR.

¹ For a comprehensive discussion of the Hoodia controversy see: Wynberg, R. 2004. Rhetoric, Realism and Benefit-Sharing—Use of Traditional Knowledge of *Hoodia* Species in the Development of an Appetite Suppressant, *Journal of World Intellectual Property* 7(6), November 2004, pp. 851-876

² An anonymous and thus less than trustworthy website even compares the performance of various Hoodia products (<http://www.thehoodiafactor.com>).

It seems safe to conclude therefore, that all commercially traded Hoodia products today contain illegally acquired resources and traditional knowledge according to the CBD³. But so far no user country has made any move to stop the sale of these Hoodia products.

Do all currently marketed Hoodia products involve biopiracy? – Yes!

- Since the owners of the traditional knowledge have no benefit sharing agreement with anyone except CSIR all distributors of Hoodia products violate, at least in spirit, article 8j CBD and article 48 of the Bonn Guidelines (benefit sharing with local communities).
- Since moreover, to our best knowledge, no other ABS-agreement exists for the use of the genetic resources involved, the products on the market today also violate art. 15 CBD

How and when must a user country take action if "illegal" Hoodia products are offered for sale?

- CBD member states are bound to prevent the sale of biopiracy products on their territory. Just how this will be done has not been discussed at any length. There are several possibilities: regulatory controls in the case of drugs, food additives, etc. that require approval; market controls (in pharmacies, drugstores, other points of sale, the internet); ...
- Once discovered, products of biopiracy should not be approved or should be taken off the market until a valid ABS-agreement with the country of origin and/or the owners of the traditional knowledge is in place (of course both stakeholders have the right to refuse such negotiations).
- The seller of the product will be fined. A part of the fine corresponding to the amount lost through absence of benefit sharing shall be paid to the stakeholders.

The Hoodia case is only one of many examples. For the majority of the products on the market (e.g. the whole herbal market), there have been no ABS negotiations at all. It is clear, that also in these cases the user countries have to take action now. Whatever national actions may be taken and the country experiences on it, should be taken as part of the national measures that will constitute the international regime.

Necessary elements related to the legal use under an international ABS regime

- Clear and binding rules committing user countries to either deny approval to or remove from the marketplace any products based on resources acquired in violation of CBD-provisions.
- Member states must establish conditions and mechanisms that allow them to effectively punish purveyors of biopiracy products (fines, revoking sales licenses, etc...)

³ There have apparently been several approaches to the San by other companies to negotiate some sort of agreement. But the CSIR agreement actually prevents the San from commercialising their knowledge outside of the agreement. Therefore the San were reluctant to negotiate with other partners. In these instances the ethical stance of the company should be to not commercialise.