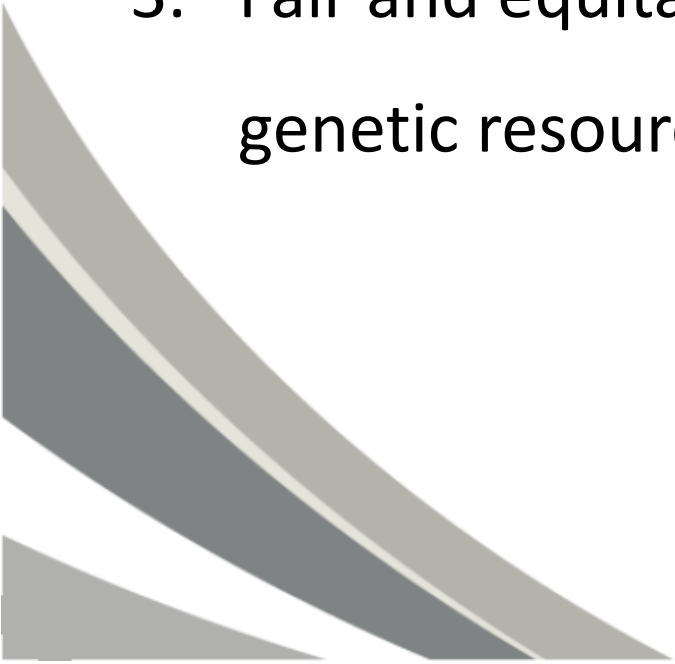


CONVENTION ON BIOLOGICAL DIVERSITY (CBD)

- Signed 5 June 1992 Rio de Janeiro
- In force 29 December 1993

CBD OBJECTIVES

1. Conservation of Biological Diversity
 2. Sustainable use of its components
 3. Fair and equitable sharing of benefits arising from genetic resources
- 

NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION

- Signed 29 October 2010 in Nagoya, Japan

NAGOYA PROTOCOL


- Supplementary agreement to CBD
- Ratified by South Africa 10 January 2013
- In force 12 October 2014

NAGOYA PROTOCOL

Objective

- To implement one of the 3 core objectives of the CBD
- “Fair and equitable benefit sharing”
- Support for indigenous communities that hold Traditional Knowledge (TK) associated with genetic resources

NAGOYA PROTOCOL

- Seeks to create legal certainty and transparency
 - Establish predictable conditions for access to genetic resources
 - Ensure benefit sharing when resources leave the country
 - Aims to create incentives to conserve and sustainably use genetic resources
- 

NAGOYA PROTOCOL

Obligations on signatories:

- Legal certainty, clarity and transparency
- Provide fair and non-arbitrary rules and procedures
- Arrange to obtain prior consent
- Provide for issuing of permits
- Promote and encourage research

NATIONAL ENVIRONMENTAL BIODIVERSITY ACT 10 OF 2004 (NEMBA)

- Regulates Bioprospecting, access and benefit sharing
- Balances rights of owners of IK and TK with those who access these resources for commercial use

BIOPROSPECTING ACCESS AND BENEFIT SHARING AMENDMENT REGULATIONS PROMULGATED IN 2015

- Prior informed consent to be obtained
- Mutually agreed terms and sharing of benefits
- Permits to be issued

SOUTH AFRICA - A UNIQUE OPPORTUNITY

1. 3rd Richest Biosphere on Earth
2. Unique indigenous and genetic flora
3. Could provide significant international competitive advantage
4. Could create new industries and thousands of new jobs
5. Great opportunity to generate substantial forex
6. Government role is to facilitate the opportunity

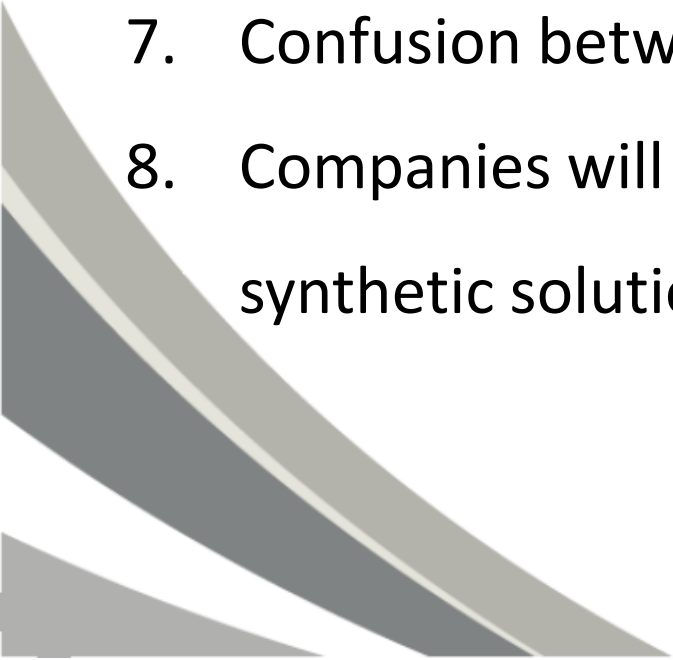
NEMBA – CURRENT POSITION

1. It's in force!
2. Everyone without a permit is illegal
3. Permits must be applied for:
 - Expensive – R5 000
 - Complex
 - Time consuming
 - Slow Government response in approving permits
(120 + Days)

NEMBA – CURRENT POSITION

4. Benefit Sharing Agreements with holders of TK a prerequisite prior to permits being issued
5. Holders of TK and IK are difficult to identify
 - Multiple claimants
 - TK holders must be identified and registered
 - BSA's are difficult to negotiate

NEMBA – CURRENT POSITION

6. Permits required at every level in the value chain
 - Too complex and impossible to implement
 - Too expensive to implement
 7. Confusion between Biotrade and Bioprospecting
 8. Companies will stop using local plants in favour of synthetic solutions
- 

NEMBA – CURRENT POSITION

9. Penalties for contravention are onerous
 - R5 million or 5 years
 - R10 million or 10 years
10. These challenges will lead to:
 - Low utilisation of local flora
 - Company closures
 - Job losses
 - Export losses
 - Damage to local communities
11. International compliance documents required
12. Agreements are multi-lateral

NEMBA – PROPOSED SOLUTIONS

1. Provide an Amnesty for at least 2 years or until new legislation is promulgated / change Chapter 6
2. Government to identify TK and IK holders and facilitate BSA's
3. Simple one level permit system to be implemented
4. All other players in the value chain to register only – under the same permit

NEMBA – PROPOSED SOLUTIONS

5. Application to be free or at nominal cost
6. Approval to be given within 30 days
7. Applications to be managed online
8. Agreements to continue indefinitely
9. TK / IK and permit applications to be produced on standard templates
10. A list of registered TK / IK holders to be published
11. Opportunity to object to appointment of TK / IK holders to be facilitated

NEMBA – PROPOSED SOLUTIONS

12. Value of levy to be agreed per industry
13. Separate Biotrade and Bioprospecting requirements to be defined
14. A Trust fund to be set up by Government
15. Trust fund transparency will be crucial considering:
 - Practical, on the ground support in local communities by industry
 - Trust administration costs and payments to be transparent

THE TRADITIONAL KNOWLEDGE SYSTEM'S BILL (TKS)

- 1st Draft published in 2015
- Revised draft tabled in 2016
- Protection, Promotion, Development and Management of Traditional Knowledge System's Bill

INDIGENOUS KNOWLEDGE (IK)

- Developed within an Indigenous Community
- Assimilated into the Cultural make-up or essential character of that community
- Includes knowledge of a scientific or technical nature
- Knowledge of natural resources and Indigenous cultural expressions
- Definition wide and vague

AIM OF IKS Bill

- To protect Indigenous Knowledge (IK)
- To provide redress to indigenous communities
- The Act will apply to all persons in SA in all matters pertaining to IK systems

IKS Bill

- Section 2 refers to registered Indigenous Knowledge
- Chapter 4 refers to IK that includes medical, agricultural and scientific practices whether cultural or functional in nature

IKS Bill DEFINES:

- Must be passed from generation to generation
- Been developed in an indigenous community
- Is associated with the cultural make-up and social identity of that community

Not Defined:

- Indigenous community
- Difficult to protect such IK as no claims are required to be verified

IKS Bill

- IK prior to commencement of IKS Bill must be registered within 12 months from commencement of the TKS Act
- No provision for retrospective applications
- Later claims cannot be registered

IKS Bill

- Requirements are vague and subjective
- Requirement untested with high emotional component
- No provision made to challenge registered IK
- Protection of IK could be perpetual
- Courts will on balance of probabilities find in favour of communities

THE NATIONAL INDIGENOUS KNOWLEDGE SYSTEMS OFFICE (NIKSO)

- Non-juristic entity
- Responsible for implementing IKS Bill
- Protecting and recognising IK as property owned by indigenous communities
- Facilitating redress of rights and benefits for communities

NIKSO

- Establishing and managing the registration of IK
- Determining criteria for issuing of licences for use of IK
- Assisting indigenous communities in negotiations on Benefit Sharing Agreements (BSA's)
- If holder of IK cannot be identified, NIKSO will be appointed custodian
- Ownership of IK will vest in NIKSO

NIKSO

- No specification on allocation and utilisation of IK levy
- Communities may apply for registration of IK, but no process or mechanism has been specified to access or record such IK
- Provision is not made to challenge IK registration, only amendments or deletions
- Amendment process unclear as to challenge regarding legitimacy of a claim or to rectify administrative errors

NIKSO

- Challenges may have to be brought through administrative law remedies
- Including an application in terms of the Promotions of Administrative Justice Act
- IKS Bill provides little oversight over a Trustee
- Does little to ensure a Trustee acts in the best interests of an Indigenous Community
- Confers exclusive economic benefit to the holders of IK.

IKS Bill REQUIRES:

- Parties to apply to NIKSO for a licence
- Licence must indicate:
 - Identity of IK holder
 - Place of origin of indigenous knowledge
 - Evidence of prior informed consent of IK holder and signed BSA

IKS Bill

- Chapter 7:
 - Requires licence application in a prescribed form
 - Enter into a “non-exclusive” standard Benefit Sharing Agreement with NIKSO
 - NIKSO must consult with Trustees re intended use and benefits payable by licence holder
 - If IK is scientific or technical in nature, obligation to pay royalties expires in 20 years
 - NIKSO has absolute discretion in granting licences

TKS vs NEMBA

- Similar provisions must be negotiated by industry for IKS Bill as for NEMBA
- Clear division of authority, responsibility and jurisdiction must be created between DST and NEMBA
- Dr Tom Suchanandan of DST indicates NEMBA will manage Bioprospecting and DST will manage Biotrade
- Industry to ensure that there are not duplicated levies for both NEMBA and TKS

TKS ADVISORY PANEL AND DISPUTE RESOLUTION COMMITTEE

- Advisory Panel (AP) – max 10 members
- Dispute Resolution Committee (DRC) – appointed by Minister
- Advisory Panel represented by state, IK practitioners and specialists in the discipline of practise
- No provision is made for private sector participation

IKS Bill

- Committee has far reaching powers:
 - Prohibit unauthorised use of IK
 - Cancel, suspend or revoke a licence
 - A party guilty of an offense is liable to any sanction determined by DRC – (probably unconstitutional)
 - Inconsistent with maximum penalties of R30 000 or 3 years imprisonment

IKS Bill

- No provision for how committees make decisions
- Minister will determine the procedures
- No clarity on majority or consensus decisions
- No mechanism for internal appeals
- The DRC can determine the outcome of any matter referred to it
- Disputes with the committee can be taken to the High Court

IKS Bill

- High Court referral will happen if DRC are unable to make a decision, or if their decision is disputed
- No timeframe has been determined to resolve a dispute
- No clarity on IKS Bill impact on Intellectual property rights:
 - designs
 - patents
 - copyrights
 - trademarks

IKS Bill

- The IKS Bill will be available for public comment on the 6 & 7th of September 2016
- The DST will respond to the public on the 13 & 14th of September 2016
- Many matters are flawed, contradictory and contentious
- Some matters may have to be resolved by the Courts
- In the media, a lack of support by industry will be seen as a strategy to deny local communities their traditional rights (Negative implications)
- Industry must make representation and raise objections at the meetings with the Parliamentary Portfolio Committee on the 6 & 7th of September 2016