



“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”

**Geneva
16-17 July 2012**

Organized by the Office of the United Nations High Commissioner for Human Rights

The Hoodia case

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The views expressed in this paper do not necessarily reflect those of the OHCHR.

1 Introduction

The story of *Hoodia* has been told many times. The involvement of the San, the oldest human inhabitants of Africa, and the intrigue of a plant that may simultaneously tackle the Western affliction of obesity and the developmental challenges of the San have triggered the public's imagination at a time when disparities between rich and poor have never been greater. The case illustrates the possibilities of bioprospecting – the search for biological material with commercially valuable genetic and biochemical properties – and final delivery on the long-standing promises of equitable benefit-sharing in the Convention on Biological Diversity (CBD). For some, the case typifies the problems of biopiracy, where traditional knowledge has been appropriated without the consent of holders of that knowledge. This is a brief overview of the story to date. It introduces the San, touches on the traditional use and knowledge of *Hoodia* which was followed by commercial development of the plant and a benefit sharing agreement between the San and the Council for Scientific and Industrial Research (CSIR). Finally key aspects of the agreement, reflecting relationship between the San and the South African Government are discussed.

2 The San

The San peoples of southern Africa, also known as the 'Bushmen',¹ are generally regarded as having lived longer continuously in one location than any other population in history and to be the progenitors of the rest of humankind. They have lived in small nomadic groups of hunters and gatherers for thousands of years as sole occupants of the Kalahari region. Unequivocal remains of their ancestors excavated just outside Cape Town date back approximately 120,000 years. The San are an icon of popular culture, and, more recently, a subject of anthropological and political controversy. To some they represent pristine hunter-gatherers, to others apartheid's² most oppressed and marginalized victims, but neither of these polarities captures the present realities.

When settlers landed at the Cape in 1652, the San occupied an area stretching from the Congo-Zambezi watershed in Central Africa to the Cape in South Africa and numbered about 300,000 people. Today the San comprise approximately 100,000 people, 55,000 of whom live in Botswana, 35,000 in Namibia, 8500 in South Africa and 4500 in Angola, with scattered populations in Zimbabwe and Zambia. After centuries of genocide and marginalization, leading to loss of land and consequently loss of culture and identity, they occupy an unchallenged niche as the poorest of the poor in these countries, living in conditions of relative powerlessness.

The burden of the relatively recent genocidal predations on the San deserves mention. The collective trauma inflicted upon indigenous populations by colonial invasions has been remarkably similar, from the Americas to Australasia to Africa. Superior weaponry devastated entire populations, and the convenient *terra nullius*⁵ doctrine gave comfort to governments responsible for atrocities committed in their name. Genocide of San peoples was rationalized as rightful retaliation against their theft of cattle, as imposing law and order on a 'lawless land' and clearing farming land of 'vagrant and treacherous savages'.

Penn's (1996) description of the systematic destruction of the Cape San by the authorities is breathtaking in its horror. The Cape colonial government was driven by a conviction that the San, being incompatible with the creation of a 'civilized society', needed to be eradicated. During the 18th century thousands of San were systematically exterminated by hunting parties, and their women and children taken into servitude. The San population today bears the scars of this devastating history. A number of dedicated non-governmental organizations (NGOs), collectively known as the Kuru Family of Organisations, that have evolved over the past two decades are grappling with the challenge of bringing appropriate development for the San. In 1996, taking a leaf from the book of the Sami indigenous peoples of the Scandinavian north, the San formed their own advocacy organization, the Working Group of Indigenous Minorities in Southern Africa (WIMSA), charged with uniting and representing San communities from Botswana, Namibia and South Africa. San leaders in WIMSA ensured that their cultural and linguistic diversity was celebrated under a collective San cultural umbrella, which proved decisive in their aim to achieve San unity across national boundaries. As these organizations have developed, the capacity of the associated San employees and leaders to determine their own future, by claiming land, heritage and intellectual property rights, has steadily risen.

3 Traditional use and knowledge of *Hoodia* species

Use of *Hoodia* by the San probably dates back centuries, but the first recorded use of the plant was in all likelihood by the botanist Francis Masson who visited the Cape from 1772 to 1774 and 1786 to 1795. Later the naturalist Marloth (1855–1931) described how the plant was used by San as a substitute for food and water. The San presumably used *Hoodia* for millennia, although the ways in which they did so are open to interpretation. What is undisputed, however, is use by the San of *Hoodia* and related species as a food and, especially, as a drink substitute and appetite suppressant, as well as for other purposes recounted variously as to improve virility and other uses. (Van Wyk and Gericke, 2000).

4 Research and development of *Hoodia* for commercial application

The documented use of *Hoodia* species as a food and water substitute in colonial botanical accounts led directly to the CSIR, a South African research institution, including the plant for investigation in a 1963 project on edible wild plants of the region. In 1995, following years of confidential development, a patent application was filed in South Africa by the CSIR for the use of the active components of the plant which were responsible for suppressing appetite. In 1998, the CSIR signed a licensing agreement for the further development and commercialization of the product with a British company Phytopharm, applied for international patents, and concluded a licence and royalty agreement with Pfizer, the US pharmaceutical giant to develop the drug further.

In June 2001 the San challenged CSIR's patent on the basis of it having been based upon their traditional knowledge, and without their prior informed consent. Two years of negotiation ensued, followed by a benefit sharing agreement in March 2003 which

awarded the San six per cent of all royalties received by the CSIR from Phytopharm as a result of the successful exploitation of products. These monies would be payable into a trust set up jointly by the CSIR and the South African San Council to raise the standard of living and well-being of the San peoples of southern Africa.

Over the next decade the Hoodia development trajectory changed wildly. In 2003 Pfizer pulled out, and in 2004 Unilever was granted an exclusive global licence to develop and exploit Hoodia. Continuing the erratic progress of Hoodia development, Unilever pulled out of the agreement in 2009 due to its concern regarding some aspects of the efficacy and safety clinical trials, and in 2010 finally CSIR and Phytopharm agreed to cancel the original licence agreement, effectively placing the future of the Hoodia back in the hands of the CSIR as from 2011. The CSIR called the San for urgent discussions to regulate their relationship, which previously was based upon the formal benefit sharing agreement.

It was agreed and the current status is that the San are effectively a “partner” with the CSIR in the project to effectively exploit the commercial power of the Hoodia plant, and that their rights with regard to the project are “no less than their rights under the former agreement.”. These rights are captured in minutes of agreements rather than being formalised in legal documents, reflecting the consolidation of a relationship of trust between the San and the CSIR.

The CSIR is currently in the process of reviewing all scientific research results in order to plan a future strategy for the Hoodia, which is still regarded as a powerful natural appetite suppressant, and one with great commercial potential once the

5 Legal Arrangements: Benefit Sharing Agreements

The benefit sharing agreement between CSIR and San referred to above is based upon the provisions of the Convention for Biological Diversity, signed by South African and 192 other states in 1992, which requires benefit sharing to be paid as a compensating mechanism not only to states, but to indigenous peoples whose traditional knowledge contributes towards the value of the biological resource being exchanged. South Africa duly promulgated the Biodiversity Act of 1996 which requires “Bioprospectors” to sign a benefit sharing agreement with the indigenous population which is holder of traditional knowledge related to the resource in question. These regulations are currently being amended, in order to improve the challenges that face the Department of Environment in implementation of the complex provisions.

Some key principles contained in the agreement between San and State (CSIR)

- The CSIR acknowledged that the San were the ‘custodians of an ancient body of traditional knowledge and cultural values, related inter alia to human uses of the *Hoodia* plant’, and that such knowledge pre-dated scientific knowledge developed by Western civilization over the past century.

- The CSIR committed itself to recognizing the role of indigenous peoples as custodians of their own knowledge, innovations and practices, and to providing for fair and equitable benefit sharing.
- The San acknowledged and accepted the CSIR's explanation of the 'context' in which it first registered the P57 patent, without having first engaged the San in negotiations with respect to material transfer, information transfer and associated benefit-sharing.
- The CSIR is the lead organisation in the commercial development. Any intellectual property arising from the traditional use of Hoodia and related to the CSIR patents for P57 remained vested exclusively with the CSIR. The South African San Council had no right to claim any co-ownership of the patents or products derived from the patents.
- The CSIR and the San committed themselves to negotiating in good faith in order to arrive at a comprehensive benefit-sharing agreement and establishing trust.

Some key challenges implicit in the relationship between State and indigenous people

- The rights of other indigenous peoples who share traditional knowledge relating to plants such as the Hoodia are not clear
- The status of indigenous peoples within a country is not clear. Individuals have rights both as citizens of South Africa, and as members of the San group.

6 Conclusion

The *Hoodia* case study emphasises the need for indigenous peoples to stand up and assert their rights. If the San had not claimed their rights, the provisions of the CBD and of the local Biodiversity Act would not have come to their assistance. States should understand and support the need of indigenous peoples within their borders to raise their capacity to engage, to assert and to advocate sensibly for the advancement of their rights.

The negotiating process between the CSIR and the San also demonstrated the importance of building trust between State and indigenous role players, and of having in place a political climate conducive to fair deliberations. It also affirmed the importance of community-based institutions as well as NGOs through which holders of traditional knowledge can be represented in negotiations and benefits can be channelled.

A final and major impact of the *Hoodia* case is the huge interest it has aroused within the San and other indigenous peoples regarding their need to protect their traditional knowledge, and to ensure that they as knowledge holders receive fair compensation

Box 1 *What is Hoodia?*



Figure 5 Flowering *Hoodia gordonii*, Ceres (Karoo), Western Cape, South Africa.
Photo: Rachel Wynberg