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**ACCESS AND BENEFIT SHARING:  
a valid instrument for compensation?  
A Minor Field Study in India**

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Bachelor Thesis: UTKVO3, 15 hp

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## **ABSTRACT**

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Patents on traditional knowledge and the issue of biopiracy has been a debated issue since the Uruguay Round in the early 1990s. In order to handle this problem, the United Nations established the Convention on Biological Diversity and a subsidiary working group on Access and Benefit Sharing. This is supposed to help traditional knowledge holders claim their rights to benefit sharing when commercialization of the knowledge, that they are prime innovators of, is to occur. This paper seeks to give insight into the process of the implementation of Access and Benefit Sharing in the Kani-tribe and Tropical Botanical Garden Research Institute case. In more detail, what is discussed is the process of the agreement making and the outcome of the Access and Benefit Sharing. The analysis is drawn from a qualitative case study in Kerala, India. A theoretical framework based on theories regarding a rights based approach, institutional frameworks and preliminary studies on Access and Benefit Sharing is used together with the collected data. Ideas and conclusions derived from the discussion and the analysis are portraying a rather unequal playing field. In this case, Access and Benefit Sharing appears to be viewed more like an instrument for charity rather than a prerequisite for the use of traditional knowledge.

Keywords: Traditional Knowledge, Institutions, Judicial Literacy, Inequality, Misallocations

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## **1. ABBREVIATIONS & ACCRONYMS**

ABS - Access and Benefit Sharing

AICRPE - All India Coordinated Research Project on Ethno-biology

AVP - Arya Veda Pharmacy

CBD - Convention on Biological Diversity

HDR - Human Development Report

KKSS - Kerala Kani Samudaya Kshema Trust

KIRTADS - Kerala Institute for Research, Training and Development Studies of  
Scheduled Castes and Tribes

TKHs - Traditional Knowledge Holders

TBGRI - Tropical Botanical Garden Research Institute

GATT - General Agreements on Tariffs and Trade

WTO - World Trade Organization

TRIPS - Trade-Related Aspects of Intellectual Property Rights

UNEP - United Nations Environment Program

## 2. INTRODUCTION

Between 1989 and 1994 the 8<sup>th</sup> round of Multilateral Trade Negotiations, known as the Uruguay Round, within the General Agreement on Tariffs and Trade (GATT) took place. During these negotiations the GATT was transformed into the World Trade Organization (WTO) and - among many other agreements - the Trade-Related Aspects of Intellectual Property Rights (TRIPS) was established (WTO, 2012). The agreement is based on European and U.S. patent laws and advocates claim that it protects and promotes innovations and property rights for everyone across national borders (McMichael, 2008:174). However the agreement has raised a lot of criticism as well. Within the WTO, Jagdish Bhagwati has questioned the whole existence of the TRIPS agreement on the basis of the damage it has caused for poor nations (Bhagwati, 2004:182-183). Furthermore there is a contradiction between the number of patents held in the south and the location of resources. According to McMichael (2008:175) 90 % of the global biological wealth belongs to the global south while 97% of the patents are held by the north.

In parallel with the Uruguay round the United Nations Environment Programme (UNEP) assembled a working group of experts to investigate the need for an international convention on biological diversity. During the United Nations Rio “Earth Summit” in 1992 the convention opened for signature and was installed in 1993 with 168 signatures rising to 192 today. The main targets of the convention are without any order of priority the following; I. the conservation of biological diversity, II. the sustainable use of the components of biological diversity, III. the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (CBD, 2012). The emphasis in this paper will be on the third objective: *The fair and equitable sharing of the benefits arising out of the utilization of genetic resources*. This target is dealt with more explicitly in the 8<sup>th</sup> article of the convention and is referring to patents in particular.

*“Article 8 states: Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the*

*equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.” (CBD, 2012).*

Furthermore 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* is an international protocol stemming from the convention and article 8. It is currently open for signature and aims to enhance the rights to Access and Benefit Sharing (ABS) (CBD, 2012). Whereas the TRIPS agreement emphasizes the ability to hold patents on a global scale and the freedom of the individual, Article 8 of the CBD reflects the reality of many traditional cultures and communities in the non-industrialized global south where collective ownership of intellectual property is more common (Bijoy, 2007:8, 19).

Presently there is a multitude of research concerning the area of intellectual property rights and the rights of people with traditional knowledge, especially regarding the companies' treatment of the traditional knowledge holders (TKHs). Nevertheless what seems to be inadequate throughout this discourse is the view on what actually happens when ABS is implemented. As the intended beneficiaries of the ABS are the people who possess traditional knowledge, for it to be seen as valid it must deliver on this condition. Since ABS is a relatively new phenomenon, and patenting of genetic resources based on traditional knowledge is a process that is presently ongoing, there is an urgent need for further research concerning their impact according to Wynberg and Laird, (2008:5). Without further knowledge it will be difficult to continue to use ABS as a legitimized and adequate solution to the problem of biopiracy.

## **2.1 Specific aim and research questions**

One of the earliest and internationally acclaimed cases of ABS is the Tropical Botanical Garden Research Institute (TBGRI) and Kani-tribe case (Bijoy, 2007:3-6). Therefore this case was selected as the prime source of data for this paper. The aim of the current study is to get an insight into the process of the agreement making between the two key actors in the case; representatives for the Kani tribe and TBGRI and to develop an understanding of the outcome of ABS in this case. Furthermore one of the key points of this research is to view ABS from the TKHs point of view. The specific aim of the study will therefore be to answer the following research questions:

- In what regard has the Access and Benefit-Sharing agreement on the commercial development of Arogyapaacha affected the people of the Kani tribe in Kerala?

### Process

- I. Who has been involved in the agreement making and how has the agreement making process been perceived among the key actors in the case?
- II. Can the process of the agreement making in this case be a model for further development of the ABS-model?

### Outcome

- III. How has the commercialization affected internal relationships and structures among the Kani? Are there any external conflicts with other tribes claiming right to benefits from the commercialization?

## **2.2 Boundaries of the study**

One of the key points of this research is to view ABS from the TKHs point of view. By answering the research questions more light will be shed over areas where problems have been noticed or where problems seem likely to occur (Wynberg & Laird, 2008:95). This is of course only a small part of the factors that can be affected; nonetheless they are all factors that will affect a wide range of the population within the Kani tribe.

The main expected result of this research is a broader understanding of the impact of the ABS agreement on the people receiving benefit sharing, in this case, members of the Kani-tribe. However it is essential to point out that this study in no way will hold material for a generalization of the concept of ABS, it will rather shed some light on ABS in the TBGRI-Kani case. Since the specific aim and research question is focused on the process of the agreement making and concepts such as internal and external conflict, the expected broader understanding will be within these areas.

Another potential limitation of this study could be that within the research question there is a tendency to already expect conflict and problems in the ABS

implementation. Awareness of this tendency will be taken into consideration during the analysis to minimize the risk of subjectivity.

### **2.3 Overview of the study**

This study begins with a brief introduction to the background of the case. The context of the case, Kerala, is discussed from a developmental perspective with a focus on the situation for people belonging to scheduled tribes. Furthermore the key-actors of the case; the Kani-tribe and TBGRI are presented shortly. Following this introductory section is a literature review. Earlier studies, concerning the topic of ABS, are put forward as a platform for the current study. Continuingly a theoretical framework is provided in order to function as a foundation for the forthcoming analysis. Moreover three different streams of theories are presented to match the three themes selected for the analysis. Regarding the outline of the selected methods this section is divided into three different parts; data collection, sampling and mode of analysis. The aim of this section is to clarify how the study has been carried out and also to discuss the potential limitations and strengths of the chosen methods. This section is followed by the main body of this study, which is the data presentation and the empirical analysis. This section is as mentioned above divided into three different themes. These themes are Judicial literacy, Institutional Hierarchies and the San-Hoodia case. These three themes are in turn divided, according to the division of the research question, into the process and the outcome of the ABS-agreement. Finally then the study is completed with conclusions and suggestions for further research.

## **3. BACKGROUND**

In this section a brief overview of the social developmental context of the case, Kerala, will be made. The two key actors in the case, TBGRI and the Kani-tribe, will also be presented shortly. Finally a background of the case per se will be summarized.

### **3.1 Context of the Case: Kerala**

The Kerala state is one of the smallest states in India. The achievements concerning basic human development indicators are well beyond what has been attained in most other parts of India (HDR, 2005:1). However poverty in the state is concentrated among more vulnerable groups such as scheduled tribes (adivasis) and scheduled castes. Poverty among the adivasis in Kerala is still more than two and a half times

larger in proportion to the overall population. Moreover, as a group, the adivasis together with scheduled castes are a clear majority among the population living below the poverty line in Kerala (HDR, 2005:64-65). One of the reasons for this could be the fact that a majority of the population still remain dependent on subsistence agriculture. Over 50% of the adivasis in Kerala still work as labourers or are self-employed in agriculture. This lower diversification in economic activities could have an impact on the level of wages, hence this dependency gets translated into lower material living conditions which in turn affect and constrain the access to basic necessities such as housing, sanitation and clean water. Furthermore the historical practices of land encroachment and land acquisitions of forestland driven by the government led to displacement of many adivasi communities. This has naturally had an impact on the current situation as well. Regarding education among the adivasis it has been estimated that over a quarter of the population is illiterate as compared to the overall population where the illiterate part of the population is only slightly above 10%. Furthermore, higher levels of education show poor numbers as well where the disparity is even higher between the general population and the adivasi population (HDR, 2005:65-67).

### **3.2 Key Actors**

The Kani-tribe inhabits both the Kerala and the Tamil Nadu state in India, their total population is around 25.000. For this study the population within the Thiruvananthapuram district has been in focus. These settlements have been acknowledged as the Neyyar Wildlife Sanctuary and a Biosphere Reserve. This has led to restriction of the area and many families have been evicted (Bijoy, 2007:7). With the experiences obtained during the fieldtrip in Kerala (January 8 until March 4 – 2012) the overall impression is that the majority of the members of the Kani-tribe in the Thiruvananthapuram district still are marginalized from the overall society. Based on the experience of the visit to the settlement and of individual interviews, there seem to be three different main areas where the marginalization is most visible. These areas are economic, political and geographic marginalization. These different issues are all interlinked and there seems to be a vicious circle of poverty mainly due to a lack of opportunities that in turn lead to a lack of incentives.

Beginning with the geographical setting, this is the most visible one. The remote location of the settlement of the Kanikar community is best described as a settlement

not only distant due to its location but also distant due to political bureaucracy. In order to enter the area of the forest where the Amboori-settled Kanikar tribe lives, permission from the forest department is needed. The travels in and out of the area are under strict scrutiny and a protocol of every vehicle that enters the area is kept. This two-dimensional distance to other parts of the society will probably have an impact on economic and political activities. Transportation and transaction costs could most likely be affected when situated this isolated from the market (North, 1990:28, 30). The economic and political marginalization are most vivid in the fact that the majority of the tribal members are kept outside of the overall Keralan society, within the informal sector, where lack of information about judicial or social rights seem wide spread.

Continuing with the Tropical Botanical Garden Research Institute this is an autonomous research organization that describes their aim as working for inventory, conservation and sustainable utilization of plant wealth in Kerala and India as a whole. They are situated in the Thiruvananthapuram district in Kerala (TBGRI, 2012).

### **3.3 The TBGRI-Kani Case**

As mentioned above one of the most well known cases of ABS is the TBGRI - Kani case. As described by Bijoy (2007:3-6) in 1987 a research team from All India Coordinated Research Project on Ethno-biology (AICRPE) was conducting a survey of the ethno-botanical knowledge of the Kani community in the state of Kerala, India. During the long treks the scientists noticed that the Kani guides did not seem tired at all and understood that it was connected to the fruits the Kani guides were eating. When the scientists wanted to know more about the fruits the Kani guides were resistant to share the knowledge about them since that knowledge was sacred and not to be revealed to outsiders. Nonetheless after a promise not to misuse the knowledge and to provide an equal share in the rewards if the plant became commercialized, the Kani Guides identified the plant as Arogyapacha. After detailed scientific investigation a confirmation of the anti-fatigue characteristics of Arogyapacha could be made. The scientists moved to the TBGRI who created the novel immuno-enhancing anti-fatigue, anti-stress and hepato-protective herbal drug Jeevani. In 1995 TBGRI transferred the technology for production of Jeevani to Arya Vaidya Pharmacy (AVP). To receive the 50 % of the license fee and royalty received by

TBGRI from AVP, Kerala Kani Samudaya Kshema Trust (KKSS) was registered in 1997, hence this would count as an ABS agreement (Bijoy, 2007:3-6).

## **4. LITERATURE REVIEW**

Below a sample of the most recent and relevant literature will be presented. Following this presentation a comment on the importance of this study will be made.

### **4.1 Dr R. A. Mashelkar**

Dr R.A. Mashelkar conducted research regarding intellectual property rights that was presented in the article *Intellectual property rights and the third world* in 2002. In this article he is explaining the increasing need for developing countries to protect their innovations evolved over generations from the exploitation of the international property regime. He is discussing the TBGRI and Kani case and mentions the Kerala Kani Samudaya Kshema Trust (KKSS) as a successful way to handle the influx of money to the community. However Mashelkar is not reflecting over the possible problems that could occur when implementing ABS.

### **4.2 Wynberg & Laird**

In 2004 the Conference of the Parties of the Convention on Biological Diversity mandated the subsidiary body – *the Ad Hoc Open ended Working Group on Access and Benefit-sharing*. On behalf of this working group Sarah Laird and Rachel Wynberg were commissioned to conduct research on ABS. The completed work *Access and benefit sharing in Practise: Trends in Partnerships Across Sectors* (2008) is based on a year-long mixed methods study that involved a secondary analysis of recent literature together with the data collection and analysis of different ABS agreements. In this study the commercial development of Hoodia in South Africa is brought up as an example concerning the difficulties of implementing benefit sharing in marginalized communities that lack institutional capacity. In this case-overview the TBGRI-Kani case is also brought up as an example where some conflicts might have arisen due to the implementation of ABS. However, no further explanation to the reason for this is discussed. In conclusion Wynberg and Laird (2008:5) state that current understanding regarding the implementation and status of ABS is somewhat unknown. They furthermore emphasize that to ensure that ongoing negotiations are

informed by best practice, further research on ABS is needed.

### **4.3 C. R. Bijoy**

C.R. Bijoy has conducted the third and last preliminary study that will be reviewed. The study *Accesses and benefit sharing from the indigenous peoples' perspective: The TBGRI – Kani 'Model'* was published in the LEAD Journal (Law, Environment and Development Journal) in 2007. Bijoy confirms the need for further research in the area of ABS. The paper begins with a detailed description of the development of the ABS agreement between TBGRI and the Kani tribe. According to Bijoy (2007:7) neither the Kani elders, the Plathis (Kani healers or medicine men) nor the Moottukanis (Kani Chiefs) were consulted about the sharing of the traditional knowledge. Bijoy furthermore describes the situation in which the Kani tribe and other Adivasi people in India are trapped. The importance of viewing the TBGRI-Kani case in this context is emphasized.

### **4.4 Reflections**

The research overviewed above is relevant and needed to continue the development of ABS agreements. The approach of this study could be important for a more complete picture of the subject matter. The traditional knowledge holders' idea about the notion of ABS is probably needed for further successful development of ABS. Some of the authors, Bijoy in particular, touches upon the subject. Moreover there seems to be an understanding among the parties of the CBD that further research in this area is needed as acknowledged by Wynberg & Laird (2008:5). Nonetheless, overall, current literature seem to focus on the need for a benefit sharing instrument. This study aims to focus on the consequences and the implementation of this particular instrument.

## **5. THERETICAL FRAMEWORK**

The theoretical framework for this paper is divided into three streams of theories. The first section of the research question, concerning the process of the agreement making, will be analyzed based on two streams of theories concerning two different themes; Judicial Literacy and Institutional Hierarchies. The second part of the research question regarding the outcome of the commercialization will have a theoretical framework built on a report regarding another well-known case of ABS, namely the San Hoodia Case. Hence the three streams of theories will basically be

divided as follows; Judicial Literacy where a rights based approach based on Cornwall (2000) will be discussed, Institutional Hierarchy where theories by McMichael (2008), Searle (2005, 2004) and De Soto (2000) will be used and then finally the San Hoodia case where theories by Wynberg & Chennells (2008) will be in focus.

### **5.1 Judicial literacy; a rights based approach**

According to Wynberg & Laird (2008:37) there exist a great need for capacity building amongst TKHs and intermediary institutions in order to have a functional apparatus within the ABS-model. With knowledge of business, law and a further understanding of science and technology, inequality at the negotiation stage of the process of ABS would be reduced. The prospects for a mutually beneficial relationship are most probably enhanced when the partners as such are negotiating on more equal terms. As stated above in article 8 of the CBD; the approval and involvement of the TKHs in the ABS-model is a vital part of the notion of ABS (CBD, 2012). If one would put these two aspects together, it would seem like the first idea is a prerequisite for the second idea. Hence in order for the TKHs to be involved and to approve of the agreement of the benefit sharing they must be knowledgeable of the technicalities of the agreement.

In Cornwall's paper *Beneficiary, Consumer, Citizen: Perspectives on Participation for Poverty Reduction* (2000) the rights based approach as a tool for development is discussed. For this paper the notion of participation as a right is put in focus. Cornwall is using the theories by Hausermann (1998), where the idea that participation as a basic human right in itself can become a prerequisite and a starting point for other claims, is central. Furthermore Cornwall (2000:67) states that the rights-based approach is opening up for a new focus on the relations of power that sustain inequality. With participation as a right, exclusion becomes a denial of that right. This approach can also shift the focus from invited participation towards a focus on the enhancement of people's capabilities to claim their entitlements from those responsible for the provision of services etc.

Putting these two sections together the assumption would be that with a rights based approach to participation one could claim that not only participation for TKHs as an invited guest would be sufficient, but also the right to knowledge concerning the

technicalities surrounding the agreement would be necessary if following the CBD. These ideas will be applied and discussed further down in this paper.

## **5.2 Institutional Hierarchies**

In McMichael's publication *Development and social change, a global perspective* (2008:243-244) he is analyzing the situation of indigenous people in the development process. In general terms the situation is described as beyond marginalization. Furthermore it is claimed that international organizations such as the World Bank are sustaining a discourse where indigenous people are described as in need of guidance due to cultural barriers. This viewpoint is in turn enhancing the belief that as a group, indigenous people are subordinated to national development strategies, according to McMichael. The concept of cultural barriers becomes very interesting for this paper. The concept could be linked to the issue of institutional hierarchies in the way that culture, as a set of norms and institutions, is described as a barrier for the overall development. In order to have a closer look at institutional theory Searle (2005, 2004) and De Soto (2000) will be reviewed below.

In Searle's papers *What is an institution?* (2005) and *Social Ontology: Some basic principles* (2004) the ontology of institutions and institutional facts are discussed. Searle derives from the idea that social reality only exists because we believe it exists, hence social reality is constructed (2004:2). The differentiation between observer independent and observer relative facts is pointed out as the main divide between social reality and reality concerning the natural sciences. Generally speaking Searle makes the distinction that social sciences are based on observer relative facts whilst natural sciences are based on observer independent facts (2004:2). Institutional facts then are a subclass of these observer relative social facts (2004:7). However the key to the ontology of institutions is according to Searle (2005:9, 2004:9) a matter of status functions. It is these functions that make human societies different from the social behaviors and structures of other animals. Status functions are described as the idea that makes it possible for institutions to carry out a certain set of functions in a certain context; X counts as Y in context C. Furthermore, based on this theory, Searle states that once an institution is established a structure with institutional facts is created (2005:10). The term "institutional facts" is described by Searle as a fact that can only exist in a framework of certain human institutions (2005:1-3). Moreover, essentially

human institutions are used to create power relationships. According to Searle (2005:10-11) this power is so called deontic power, which creates for example rights, obligations and authorizations. In this created institutional reality human power is increased enormously, nonetheless without the recognition of the deontic relationships this power is useless.

Additionally as a complement to Searle's (2005, 2004) theory De Soto (2000) is used. De Soto is examining the fact that in numerous developing countries the owning of land is merely a symbolic ownership since property deeds or other legal instruments for assigning ownership does not exist. This would make the owners of the property squatters, acknowledging that they do not legally own the property. However Searle (2005:15) point to the fact that living in a society with a shared institutional reality they are recognized as owners due to generated deontic power. Nevertheless, most importantly though this deontic power, that could recognize people as owners, cease to exist when put in a larger context or society with requirements of official proof of ownership.

McMichael's (2008) descriptive analysis together with the theories based on Searle (2005, 2004) and De Soto (2000) will work together as a theoretical framework for the discussion regarding Institutional Hierarchies further down in this paper. What will be discussed in more detail is whether or not the theories on institutions can be related to the situation McMichael is discussing and furthermore how that framework can be applied on the Kani-TBGRI case.

### **5.3 The San Hoodia Case**

In Wynberg & Chennells paper "*Green Diamonds of the South: A Review of the San-Hoodia Case*" (2008) one of the most famous ABS initiatives are described and discussed. Similarly to the Kani-TBGRI case the San Hoodia case is a case of the use of indigenous people's traditional knowledge in the development of a commercial product. In Wynberg & Chennells's (2008:101,114-116) paper two major issues are discussed and put forward as probable current and future complications in the San Hoodia case. These issues are; *How the benefits should be distributed, who is entitled? And what will happen when the benefits are distributed?* Regarding the first issue - who is entitled? - the discussion is very much based on the difficulty to identify the real owners of traditional knowledge. Furthermore if the San-people

where to receive benefit sharing, expected problems would be to determine how the benefits as such should be allocated within the communities. The second issue related to the effects of the introduction of benefit sharing is according to Wynberg & Chennells (2008:115) problematic in terms of the risk for intra-communal conflicts that might occur. To minimize negative economic and social effects, that can follow large sums of money in an impoverished community, can be one of the major challenges regarding the ABS-agreement in the San Hoodia case (2008:119-121). These issues are very much relevant for this paper, especially concerning research question 3 where the focus is on relationships and structures within the tribe and external and internal conflicts.

## **6. METHODS**

In order to reach the specific aim of this study a qualitative case study of the ABS-agreement between TBGRI and the Kani tribe was chosen as the research method. An instrumental case study was utilized since the aim of the field study was to give an insight into the issue of ABS agreements (Punch, 2005:144). However, as discussed above the chosen method will not hold for a generalization about ABS-agreements. Rather it will hold material for giving insight into the particular case of the TBGRI-Kani agreement (Bryman, 2008:55-56). Furthermore, the boundaries of the case study are closely tied to the research questions; this could probably count as one of the major difficulties of the study. Since the subject of ABS agreements and its consequences is relatively un-explored a great amount of data to be analyzed existed. Even so the boundaries was of essence for the implementation of the study (Punch, 2005:145).

An awareness of a possible gender bias or other types of vertical relationships within the community was held throughout the study. Hence the possible limitations of women or other social groups to actively take part in the case study was taken into consideration during the sampling process, this will be discussed in more detail below. The issue of positionality (Cornet, 2010:135) and its effects on the relationships and the milieu as such during the fieldwork was kept in mind throughout the process. Furthermore eliminating potential hierarchical relationships between the

interviewer and the interviewee was a clear aim during all interview situations (Chambers, 2008:93).

## 6.1 Data collection

Semi-structured individual interviews were used as the main method for data collection in the current study. This method was chosen since the aim of the study was to understand the TKHs view of the agreement. The interviewees own perspective on the case was most important therefore a structured interview would be problematic since it could leave important information out (Bryman, 2008: 437-438). Observations<sup>1</sup> were also used, although this method was merely a complement to the interviews. If using Gold's classification, the aim was to be an *observer as participant*, however due to time limitations *complete observer* would be a more accurate description of the method used (Bryman, 2008:410-411). Whilst the interviews could contribute with more in depth material, the observations helped in understanding the broader perspective of the case and the situation of the Kani-tribe (Bryman, 2008:465-469).

A total of fourteen interviews and three observations were conducted. All interviews were recorded and transcribed at place in Kerala<sup>2</sup>. This was done in order to examine the responses more thoroughly straight away. It also helped in understanding and develop questions for later interviews (Bryman, 2008:451). Furthermore all the interviewees were promised anonymity; consequently allonyms will be used in the data presentation below.

Throughout the field study co-operation with an interpreter was necessary. However when using an interpreter there is always a part of the process that must be left outside the interviewer's control. The interviewer is never the complete "owner" of the interview situation. Therefore questions regarding validity (Bryman, 2008:376-377) of the study are probably most urgent regarding the interview situation with the use of an interpreter. Questions such as; *Am I studying what I believe I am studying? Are the interviewees answering the questions I as an interviewer pose or the somewhat re-*

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<sup>1</sup> The observations mainly served as a source for understanding the background of the case and will therefore not be presented in the data presentation or the empirical analysis.

<sup>2</sup> The interview with the TBGRI-representative was not recorded since the interviewee did not approve of this.

*shaped question my interpreter might have posed?* were dealt with throughout the process of the field study in order to secure the validity of the study.

## **6.2 Sampling**

The sampling that was used was purposive and maximum variation sampling (Punch, 2005:187). Diversity regarding age, gender (see below), power structures and income was desirable for a more valid study. The importance of bearing in mind that vulnerable people often are the least visible people was taken into consideration during the sampling process (Chambers, 2008:41).

The interviewees were divided into three different groups;

1. Academics knowledgeable about the case (Will be quoted as A1-3)
2. Members of the Kani-tribe (Will be quoted as K 1-10)
3. Representatives from TBGRI (Will be quoted as T1)

Clearly the groups are not equally balanced in number, however this is related to the aim of the study, which is to understand ABS from the TKHs point of view. Therefore the members of the Kani-tribe were seen as the most important group, this was also the largest group whilst the two other groups were rather small. Within the group of members of the Kani-tribe, effort was made to gather a sample with an even ratio from the different settlements in the Thiruvananthapuram district. This was made rather successfully. Nonetheless in order to acquire a complex understanding of the case the view point of TBGRI as well as the view point from outside actors, such as academics with insight in the case seemed valuable.

Concerning the gender aspect of the interviews it was a clear aim from the beginning to interview as many women as men. However men make up a majority. This is probably not a coincidence. The female Kani-members do not seem to move as freely outside the settlements as the men and they also seem to be less informed about economic and political matters. This will be taken into consideration within the analysis.

## **6.3 Mode of analysis**

The notion of a thematic approach to presenting and analysing the data will be used within this study (Holliday, 2007:94-98). Hence extracts of the collected data will be incorporated in the text and linked to the different theories and arguments (Holliday,

2007:113). The choice of a thematic take on the analysis became an obvious choice due to a natural division of the data into different themes already in the field.

## **7. EMPIRICAL DATA AND ANALYSIS**

Within this section the data obtained in Kerala, during January and February - 2012, will be presented. Following this presentation there will be an analysis based on the data and the theory presented above. As the research question is divided into two different sub-streams of questions, one regarding the process of the commercialization and the other regarding the outcome of the commercialization, the data will be presented accordingly.

### **7.1 The process of the agreement-making**

As discussed above, in article 8 of the CBD the approval and involvement of the TKHs in the ABS-model is a vital part of the notion of ABS (CBD, 2012). Regarding the approval and involvement of the TKHs in the TBGRI-Kani case there seem to be two major themes related to this issue. These are *Judicial literacy* and *Institutional Hierarchies*. Concerning the first concept, judicial literacy, it aims to describe to what extent the agreement-making has been fair to the TKHs in terms of making sure that there exist a thorough understanding of what they as TKHs are entitled to. This will be considered both regarding the extent of information that have been put forward as well as the scope of TKHs that have been informed. The second concept, institutional hierarchies, aims to describe how certain sets of institutional frameworks tend to be viewed as having a higher value than other institutional frameworks. In this case, what will be discussed is whether or not institutional hierarchies have had an impact on how the approval and involvement of the TKHs have been perceived and implemented.

#### **7.1.1 Judicial Illiteracy**

The data obtained concerning the judicial literacy of the members of the Kani-tribe within the process presents a picture with two rather different viewpoints on the case and the surrounding events. Different aspects of the process of the agreement making are highlighted by the different actors. Generally what seems to be the main issue is

the question whether or not the Kani-tribe has been informed and included in the agreement-making and in that case what has been their statement in the question.

Among the interviewees in group number one the opinion is, generally, that the majority of the members of the Kani-tribe are unaware of the agreement with TBGRI and in general the agreement have not been accepted by the Kani-community (A1, A2, A3, 2012).

*“Only a few persons have agreed with TBGRI, generally the Kanis have not accepted”*

(A3, 2012 -01-13)

This view is supported by the data acquired from the largest interviewee-group, group number two consisting of Kani-members. The interview material confirms the picture of unawareness of the case in general and the technicalities concerning the agreement in particular (K 1-10, 2012).

*“The community is generally not aware of the technicalities involved in benefit sharing”*

*“When I am invited to TBGRI I never understand the percentages or the international laws, similarly they never understand my point of view”*

(K1, 2012-01-21)

*“...we don't know the language, we don't know what is actually happening”*

(K7, 2012-01-28)

Moreover in such cases where awareness about the case does exist it has been mixed with a great deal of discontent about the situation as such, especially in regards to the decision-making (K1 - K4, 2012).

*“It was not an agreement, TBGRI decided and did it”*

(K2, 2012-01-27)

Furthermore even in the cases where there is no outspoken discontent about the case there seems to be a clear gap in the knowledge about the case and about what they as TKHs could demand in a case like this. (K5, K6, 2012).

*“They (TBGRI) have helped in the dealing with Arogyapaacha, now they are not helping us much”*

(K5, 2012-01-28)

One of the most striking examples of this knowledge gap was portrait by interviewee K6:

**Interviewer:** *What do you know about the TBGRI?*

**Interviewee K6:** *They were allowing us to plant this kind of Arogyapaacha in our area and we could cut and sell it there and make money, but I was alone so I was not doing it. We had planted it but they were not going to collect it because I was alone, but all the neighbourhood people were doing that.*

**Interviewer:** *Why couldn't you collect it because you were alone?*

**Interviewee K6:** *There should be some applications to do this work to get the contract to plant this thing and get the money, but I didn't now how to write and read and all so that is the reason why I did not participate.*

(Excerpt from interview with Interviewee K6, 2012-01-28)

The knowledge gap is two-dimensional in this case. The fact that the interviewee sees no problem in the fact that the Kani-members needed permission from TBGRI to plant their own herbs in their own land is very interesting. Furthermore due to the interviewee's lack of reading and writing skills the interviewee was excluded from the project.

Paradoxically there appears to exist awareness about the unawareness. This was expressed by interviewee K10 when asked about whether or not ABS could be a model that could be considered in the future.

*“If we understand and learn about that (ABS) and if we feel that it is useful and good then it can be good, in the future”*

(K10 2012-01-28)

Continuing with the third and last group of interviewees, the representative from TBGRI, the situation is described rather differently. Here it is highlighted that it was an agreement and that oral prior informed consent actually existed.

*“They agreed on the amount”*

*“We had an oral prior informed consent”*

(T1, 2012-01-25)

As exemplified by these two extracts from the interview with the TBGRI-representative the situation and the agreement has been experienced rather differently by TBGRI. This different take upon the agreement is furthermore strengthened by how the benefit sharing per se is looked upon.

*“You can say that it is a gift to them (Kani-tribe), for sharing the information”*

(T1, 2012-01-25)

As can be understood from the data presented above, among the Kani-members there exist a huge gap in the knowledge about the case and about their rights as TKHs. Capacity building as mentioned by Wynberg & Laird (2008:37) is probably something that could have been useful within this case. It would be an understatement to claim that the approval and involvement of the members of the Kani-tribe in this case have been unsatisfactory if using the model put forward by the CBD (CBD, 2012). The viewpoint held by the TBGRI is furthermore strengthening the urgency of a need for capacity building. Their current attitude towards benefit sharing and their understanding of the Kani-tribe are creating a situation where a fair negotiation is extremely hard to undertake. In a situation where the benefit sharing is seen as a gift rather than a prerequisite, the notion of participation as a right rather than an invitation as discussed by Cornwall (2000) would probably be valuable. Additionally there exist a huge gap between how the agreement-making per se has been experienced. This gap can be seen both regarding the extent of information that have been put forward as well as the number of TKHs that have been informed. Whilst TBGRI claims that there existed a prior informed consent and that an agreement was made, a majority of the data obtained from the interviews with the Kani-members show the opposite. When a majority of the TKHs are excluded and unaware about the

case, the claim by TBGRI that they have made an agreement with the “Kani-tribe” is hard to accept. Rather what has happen seems to be that an agreement has been made with a few members of the Kani-tribe, without the acknowledgement or approval of the majority of the Kani-tribe.

As the tribe is politically and economically inferior a rights based approach would therefore strengthen their claims. Using Hausermann’s (1998) theory, participation in itself could change the picture radically and become a starting point for other claims concerning the development of the commercialization. Furthermore, participation in the agreement-making would probably put new focus on the relations of power that is currently sustaining inequality within the case as described by Cornwall (2000:67). Nonetheless the right to participation cannot only be a physical right. First and foremost it has to be a right to be a participant in the sense that one is participating in the exchange of information.

The TBGRI-Kani case does present an example of the importance of capacity building in order to claim ones right within the process of agreement-making. The knowledge and information needed for a legitimate approval and involvement in the case by the Kani-tribe has simply not been there. Most importantly is probably the information about the right to participate, not only as a bystander but also as an active agent.

### **7.1.2 Institutional Hierarchies**

This section will continue where the other one ended by focusing on the issue discussed above. Namely that in general the members of the Kani-tribe have not accepted the agreement with TBGRI. This issue has been addressed in many of the interviews. There appear to exist a frustration with the fact that the knowledge of Arrogyapacha is a community-based knowledge whilst the decision making as well as the benefit sharing have not been community based (K2, K4, 2012).

*“All the Kanis should get benefits since it is community knowledge”*

(K2, 2012-01-27)

*“Every member of the Kani-tribe should be benefited, even the people in Tamil Nadu”*

(K4, 2012-01-27)

Another issue connected to the theme of Institutional Hierarchies is the issue concerning whether or not the knowledge should have been shared at all. Here the interviewees do not have a coherent opinion. However there definitely exists despondency with the way the knowledge was spread and a problematic framework where the knowledge is deemed sacred for some members of the tribe and perhaps not as sacred for other members (K1-4, 2012).

*“It is good to share the knowledge of medicines, it is not for hiding. It has to be useful for everyone...”*

(K4, 2012-01-27)

*“The plants and our knowledge is sacred, you should not demand money for it”*

(K3, 2012-01-26)

Another set of opinions that have been expressed is the mutual lack of understanding between the two key players, TBGRI and the Kani –tribe. There is the issue discussed above regarding the Kani-members lack of knowledge concerning the technicalities of the agreement. Nevertheless just as often the issue of the TBGRIs lack of knowledge concerning the Kani-tribe and their culture has been brought up. Related to this is also an expressed anger of the lack of an incentive on the behalf of TBGRI in trying to understand the Kani-tribe and their traditions. This is accompanied with an ignorance of the Kani-members wishes when implementing the benefit-sharing (K1,2,3,4,6,9,10, 2012).

*“They (TBGRI) are just deciding it! Not thinking about how effective it is for us”*

*“The people (Kani-guides) who told them (TBGRI) did not have any voice in deciding what to do with that (benefit-sharing). So that is not a good thing”*

(K2, 2012-01-27)

*“TBGRI decided about the money, what it should be used for”*

(K6, 2012-01-28)

*“When I am invited to TBGRI I never understand the percentages or the international laws, similarly they never understand my point of view”*

(K1, 2012-01-21)

Furthermore a recurrent theme within the data that is not related to the technicalities of the agreement or the benefit sharing per se, but rather connected to the moral aspects of the case, is how the members of the Kani-tribe have been viewed and treated by the TBGRI. Anger about the feeling of being overlooked in the process of the agreement making was voiced with a great deal of concern.

*“The way they (TBGRI) behaved to us tribals, looking down towards us, that’s the big problem, the officials”*

*“It is good to share the knowledge of medicines, it is not for hiding. It has to be useful for everyone. But we should not be outside of this story. We should give and we should be sharing everything but we must be part of it (the decision-making), then only it is good”*

(K4, 2012-01-27)

So far the data has presented a rather two-dimensional picture. On the one hand TBGRI seems to understand the situation and the agreement as a success where they have managed to engage and share with the Kani-tribe in a beneficial way. This picture is supported by a handful of papers and reports (Mashelkar 2002, Sahai 2002, WIPO 2010). However taking into consideration the data presented above, obtained

from members of the Kani-tribe, there appear to exist another reality regarding the case. As McMichael discussed above (2008:243-244), the reality for many indigenous people is lined by inequality and a discourse where they as a group are described as subordinate to national development strategies and portrayed as in need of guidance. Based on the observations and the interviews conducted in January-February, 2012, presumably McMichael's description is rather suitable for describing the situation of the Kani-tribe. This picture is furthermore supported by the data presented above regarding the frustration of being overlooked in the decision-making as well as in the experienced neglect of the institutional framework and culture of the Kani-tribe. Within a case like this, inequality and power structures are perhaps in themselves generating the power to define reality. As Searle (2005:11) pointed out, human power is increased enormously by creating institutional reality. However in this system people without power or a lower amount of power is presumably created as well. It seems to matter radically who establish the institutional facts and what institutions that are valued as valid by whom. One could come to the conclusion that the situation described by McMichael (2008:243.244) is an outcome of the creation of institutional reality as discussed by Searle (2005:11). The power to create institutional reality, even a reality that is observer relative, could probably be one of the most power enhancing tools for key-actors in the development field, let alone this case. A reality, where the Kani-tribe as a group is seen as a group in need of guidance and help, could perhaps rather cynically, be described as a beneficial milieu for TBGRI to negotiate an agreement.

With the ideas emerging from the combination of Searle (2005, 2004) and De Soto (2000) one could relate the discussion regarding the ownership of property with the ownership of traditional knowledge. As pointed out earlier the fact that no legal framework exists does not per se hinder ownership according to Searle (2005:15), as long as one is living in a shared institutional reality where deontic powers are acknowledging the ownership. However in addition to this argument Searle (2005:15) is also pointing to the central fact that outside of this institutional reality these powers cannot hold as official proof of ownership. This theory could be applied on the TBGRI-Kani case in the sense that as long as the knowledge of Arogyapaacha only existed within the tribe, it was sustained and protected by the deontic powers within that institutional reality. However when confronted with outside actors such as the

TBGRI, without any legal instruments claiming their rights to the knowledge, full deontic power over the resource was lost.

The created power structure where the Kani-tribe and their interests repeatedly were neglected in addition to the absence of an accepted legal framework, claiming the property rights of the Kani-tribe, shaped a paradoxical situation. Whereas the agreement making was experienced as rather successful by the TBGRI it was hardly experienced as an agreement at all by the interviewed Kani-members. The situation as such created an environment where issues important to the Kani-members often were ignored. This could be exemplified by the issues emphasized in the data presentation above. With a more responsive agreement making process problems with issues concerning the sanctity of the knowledge could perhaps have been dealt with in a more respectful way. Similarly it might also have solved problems with the issues concerning community based ownership and benefit sharing. In summary one could point to the fact that there appear to exist a power structure where the institutional framework of TBGRI had the upper hand in the process of the agreement making.

## **7.2 The Outcome of the benefit sharing**

The following section will focus on the outcome of the benefit sharing. In detail, what will be reviewed is whether or not the benefit sharing actually happened, and if so how the benefits were allocated. Furthermore the consequences of the assumed benefits will be discussed.

### **7.2.1 Benefit sharing defaulted**

As described above within 2.3 *The TBGRI-Kani Case*, in 1995 TBGRI transferred the technology for production of Jeevani to Arya Vaidya Pharmacy. The 50% license fee received from TBGRI was put into the Kerala Kani Samudaya Kshema Trust (Bijoy, 2007:3). However this is where it ended. Arya Vaidya Pharmacy did not succeed in manufacturing Jeevani as a product (Gupta, 2002:117-119). Hence what can be analyzed is what the received 50% license fee resulted in. Technically speaking, with the means received from the benefit sharing, a community hall was built and a jeep was bought for transport to and forth the nearest market place. It was also decided that the three Kani-guides that had made the actual transfer of the information were to receive compensation (Sachin, 2007:4, 16). This occurrence took place in the Chonompara settlement in the Thiruvananthapuram district where most of the data collection was undertaken. Although the project and the benefit sharing did not last or

develop in the way any of the actors involved hoped for, the consequences of the benefit sharing is still visible within the community. Below these consequences will be discussed and analyzed with the support by the theories put forward by Wynberg & Chennells (2008).

### **7.2.2 Misallocations as a reason for potential conflicts**

According to Wynberg & Chennells (2008:101,114-16) the major concern within the San Hoodia case has been related to the redistribution of the benefits arising from the commercialization of Hoodia products. This problem has furthermore caused a milieu where both internal and external conflicts have been a persistent problem. The first issue regarding the redistribution has, based on the collected data, been problematic in the TBGRI-Kani case as well.

*“This (benefits) benefitted only two people and their immediate surroundings”*

(A1, 2012 -01- 12)

*“Only four settlements are getting benefits from Arogyapaacha”*

(K4, 2012-01-27)

*“Only the members in the society (KKST Fund) is getting the money, not the common people”*

(K3, 2012-01-26)

Even though the accuracy of these statements can be questioned, they do show how the re-distribution of the benefits has been a process where not everything has been un-problematic. This confusion about the benefit sharing has created a situation where not only a conflict with TBGRI has been created; it has also led to a conflict within the Kani-tribe. This has probably been most noticeable for the people in the Chonompara settlement, which is the settlement that has had most contact with TBGRI. This is also the settlement that two of the guides belong to.

*“Mallan Kani (guide) was a tribal healer but now his license is taken away because he misused his knowledge and all that”*

(K4, 2012-01-27)

*“Only a few persons have agreed with TBGRI”*

(A1, 2012-01-12)

*“I am not much accepted in the community, I protested against the arrangement with TBGRI”*

(K1, 2012-01-21)

The data presented above is showing a picture that resembles the situation within the San Hoodia case as described by Wynberg & Chennells (2008:101). As highlighted by Wynberg & Chennells (2008:114-116) the inflow of money into an impoverished community is extremely problematic and one of the major difficulties with ABS. This study would most probably support this theory. The central question *Who is entitled?* seems to easily create conflicts between the different actors within an ABS-agreement. As can be seen above, interviews with representatives from the key-player in this case, the Kani-tribe, do acknowledge this problem.

### **7.3 Concluding Analysis**

*Who has been involved in the agreement making and how has the agreement making process been perceived among the key actors in the case?* To answer this question was one of the main aims of this study. Based on the collected data and the analysis above one can draw the conclusion that only a small minority of the Kani-members have been involved in the agreement making process. This has, according to many of the key actors, been a major problem within this case. The reason for this exclusion appears to be related to two different issues, judicial illiteracy and institutional hierarchies. Beginning with the first one, judicial illiteracy of the Kani-tribe can most probably count as one of the reasons for their exclusion from the process of the agreement. Moreover, in order to be able to call something an *agreement* at least a majority has to *agree*. The major problem in this case is related to the question; How can you agree to something you do not understand? For someone to leave their prior informed consent they must have the capacity and information to leave that consent. Furthermore, the notion of judicial illiteracy is connected to the second issue, institutional hierarchies. To make sure that judicial literacy exist could be one of the first steps in reducing the institutional hierarchies that could be found in this case.

Hence, with capacity building and awareness rising about the right to participate, the Kani-tribe would probably have had a more solid foundation in claiming a fair process as equal actors in the case. This is related to the second question that was to be answered; *Can the process of the agreement making in this case be a model for further development of the ABS-model?* The answer to this question could perhaps be that, this case could not function as a model per se, however this case can be used as an example to learn from. The technicalities surrounding an ABS-agreement are of course complicated in itself, however, a starting point and probably one of the most vital aspect to change is the mind set of the involved parties. In order to have a functional model of ABS the TKHs cannot be seen as a charity object, they must rather be seen and treated as an equal business partner.

Regarding the second part of the research question, the outcome of the commercialization, the main aim was to answer the questions; *How has the commercialization affected internal relationships and structures among the Kani? Are there any external conflicts with other tribes claiming right to benefits from the commercialization?* The first question is quite easily answered, the commercialization has affected internal relationships in the sense that conflicts concerning re-distribution of the benefits have occurred and are currently a reality within the Kani-tribe. Furthermore the internal structures have also been affected in the sense that members of the Kani-tribe that were most involved in the commercialization, the guides, has lost social status as well as professional status. This outcome is most vivid in the fact that one of the guides no longer gets to practice as a traditional healer. The second question is perhaps more complicated. The collected data is too small in scope to answer this question. However what the data does show is that there exist a will among the Kani-members, in the Chonompara settlement, to share the benefits with distant members of the Kani-tribe, even members settled in Tamil Nadu. An anxiety about the fact that not all members of the tribe had benefited existed within the settlement that had received benefit sharing. Hence there existed a problem with the allocation of the benefit sharing as such.

Continuing with the main research question; *In what regard has the Access and Benefit-Sharing agreement on the commercial development of Arogyapaacha affected the people of the Kani tribe in Kerala?* what can be said is that the above described

issue has not only created a harmful situation. The process of the agreement making, as well as the outcome of the commercialization, have created awareness about the inequality of the current situation of the Kani-tribe. Not only among outside actors, but also among the Kani-members themselves. Most importantly though, it has not only created awareness about their neglected rights. It has also created a will to change the unequal structures that was the main reason for the defaulted benefit sharing in this case. Citizenship participation (Cornwall, 2000:76), with a growing awareness among the younger members of the Kani-tribe of their rights, could be a proper description of some of the development that is taking place within some segments of the Kani-tribe. It could probably be these tendencies within the community that will be the strongest machinery for change and not the outside, imposed arrangements.

## **8. CONCLUSIONS**

The aim of this study was to develop an understanding of the ABS-agreement between the TBGRI and the Kani-tribe. In particular the research questions have concentrated on the issues related to the process of the agreement making and the outcome of the commercialization. In order to reach the specific aim a case study based on semi-structured interviews and minor observations was implemented. The collected data was analyzed using theories related to a rights based approach (Cornwall, 2000), institutional structures (Searle, 2005, 2004) and the San-Hoodia case (Wynberg & Chennels, 2008).

The findings portray a case where the two key-actors, TBGRI and the Kani-tribe, have two rather different perceptions regarding the case. Inequality, concerning the process of the agreement making was also illustrated by the data. Judicial illiteracy and institutional hierarchies could, according to the presented data, be two of the explanations for this inequality. Moreover the similarity with the San-Hoodia case with regard to misallocations and internal conflicts could be distinguished.

However this study has only scratched the surface of the TBGRI-Kani case, let alone the issue of ABS. Further research is needed in order to evaluate ABS as put forward by the CBD. Nonetheless what this paper could contribute with to the current

discourse is to underline the fact that ABS, as an instrument for compensation regarding traditional knowledge, needs further research. In particular the focus must not only be on the outcome of the benefit sharing, but the process of the agreement making and possible structures of inequality already at that stage, should also be reviewed.

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## **10. INTERVIEWEE APPENDIX**

### **Academics knowledgeable about the case:**

Interviewee A1 – Male, Former employee at the Kerala Institute for Research Training and Development of Scheduled Castes and Scheduled Tribes, Kerala, India.

Interviewee A2 – Male, Former employee at the Kerala Institute for Research Training and Development of Scheduled Castes and Scheduled Tribes, Kerala India.

Interviewee A3 – Male, Employee at the Centre for Research and Education for Social Transformation, Kerala, India

### **Members of the Kani tribe:**

Interviewee K1 - Male, Plathi Healer (Physician)

Interviewee K2 - Male, Plathi Healer (Physician)

Interviewee K3 - Male, Tribal extension officer

Interviewee K4 - Male, Plathi Healer (Physician)

Interviewee K5 - Male, Former secretary board member in the Kerala Kani Samudaya Kshema Trust (KKSS).

Interviewee K6 - Female, working with road maintenance for the Forest Office.

Interviewee K7 - Female, domestic worker

Interviewee K8 - Female, domestic worker

Interviewee K9 - Female, Panjayat ward member

Interviewee K10 - Male, Former board member in the Kerala Kani Samudaya Kshema Trust (KKSS).

### **TBGRI Representative:**

Interviewee T1 - Male, Holding key position at the TBGRI with great insight into the case.